REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 132 of 2007

BETWEEN

THE NATIONAL LOTTERIES CONTROL BOARD APPELLANT

AND

MICHAEL DEOSARAN RESPONDENT

PANEL: I. ARCHIE, C.J.
S. JOHN, J.A.
P. JAMADAR, J.A.

APPEARANCES:
Mr. E. Prescott S.C. and Mr. M. Quamina for the Appellant.
Mr. K. Sagar and Mr. W. Smart for the Respondent.

DATE OF DELIVERY: 2nd June, 2009.

I have read the judgment of P. Jamadar, J.A. and I agree that the Respondent's application be allowed with costs as ordered. I also agree with the order he has made.

I. Archie
Chief Justice

I have read the judgment of P. Jamadar, J.A. and I also agree that the Respondent's application be allowed with costs as ordered. I too agree with the order he has made.

S. John
Justice of Appeal

Delivered by P. Jamadar, J.A.

JUDGMENT

INTRODUCTION

1. This case raises an issue for determination that has created some divergence of opinion in recent times among panels in the Court of Appeal and is therefore of importance.

2. The narrow issue is what is the proper approach to be taken on an application for an extension of time to issue a summons to settle a record of appeal pursuant to Order 59, rule 12 (1).[1]

3. In this case a single judge of the Court of Appeal (in Chambers) granted the extension sought, where the application to extend time was issued a little over **14 months** after the date on which the summons to settle the record should have been issued – which was within **14 days** of the filing of the notice of appeal.[2] That decision is the subject of this application.

CHRONOLOGY

4. The following chronology outlines the core events leading up to this application.

7th April, 1995	Writ and Statement of Claim filed.
3rd May, 1995	Defence and Counterclaim filed.
18th July, 2007	Judgment delivered by Deyalsingh J. (i) Appellant's claim dismissed. (ii) Judgment for the Respondent on his Counterclaim in the total sum of $5,870,500.00.
23rd August, 2007	Notice of Appeal filed.

[1] Of the Rules of the Supreme Court, 1975 (RSC).

[2] See, Order 59, rule 12 (1). The notice of appeal was filed on the 23rd August, 2007 and the summons to extend time was filed on the 11th November, 2008.

21st September, 2007	Application for a stay filed by the Appellant.
11th February, 2008	Stay granted.
28th May, 2008	Amended Notice of Appeal filed.
2nd October, 2008	Application to extend the time to issue a summons to settle the Record of Appeal filed by the Appellant before the Registrar.
30th October, 2008	Application to extend time before the Registrar adjourned.
11th November, 2008	Summons to extend the time to issue the summons to settle the Record of Appeal filed by the Appellant before a single judge (in chambers) of the Court of Appeal.
1st December, 2008	Summons to extend time to issue the summons to settle the Record of Appeal dealt with by a single judge (in chambers) of the Court of Appeal. Time extended.
12th December, 2008	Application by way of motion seeking an order to discharge the order of the 1st December, 2008 filed by the Respondent before the full court of the Court of Appeal.

CONTEXT

5. In July 2003, Kangaloo, J.A.[3] in dealing with a similar application (in Chambers) stated[4]:

> On its face the application is a simple one – an application by the appellant for an extension of time to issue the summons to settle the record of appeal. The application is out of time by some 16 weeks and **the issue of law for determination is whether the Court is mandated by the relevant rule to adopt, what may conveniently be described as the incremental approach of first determining whether good and substantial reasons have been advanced to adequately explain the appellant's delay before embarking upon any balancing exercise, taking into account matters such as prejudice to the respondents and merits of the appeal** or whether the Court is required to look at the matter holistically and exercise its discretion in accordance with the more nebulous concept of 'the interest of justice'.
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> After much deliberation in considering the very helpful arguments of all of the parties **I am of the view that certainly at this juncture of our jurisprudence the former approach is what is required.**

[3] **In I.M.H. Investments Limited v Knox and Ors**, Civ. App. No. 12 of 2003; judgment delivered on the 31st July 2003.

[4] **In I.M.H. Investments Limited;** at pages 2 and 4; emphasis added.

> Although it is not absolutely necessary it may be helpful to briefly give the factual background to the application before me. **I say it is not absolutely necessary because the reason advanced for the delay – misunderstanding of the relevant rule of procedure – has been held in this jurisdiction for just about 80 years not to be a good reason to explain delay** albeit in the more exacting context of an extension of time to appeal.
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> Order 59 Rule 21 of the Rules of the Supreme Court (1975) ('the rules') deals with applications made under this order. Such an application may be for an injunction, for a stay of execution of a judgment or order appealed from pending the determination of the appeal, for an order for security for costs, for an extension of time to file the record of appeal, for an extension of time to issue a summons to settle the record of appeal and for any other interlocutory order in an appeal. Rule 21 (2) provides how any particular application may be made, viz. by summons or motion with an affidavit "*which shall set forth good and substantial reasons for the application."* **The instant application is for an extension of time to issue the notice to settle to settle the record of appeal. There must be good and substantial reasons for the extension of time; in other words there must be a good and substantial explanation for non-compliance with the timetable set up in the rules for the conduct of an appeal.**

6. Earlier, in January 2003, Kangaloo, J.A. also had cause to deal with another similar application.[5] The appellant's notice of appeal had been filed on the 28th November, 2002. The respondent had issued a summons to have the appeal dismissed on the 15th January, 2003. On the 31st January, 2003, at the hearing of the respondent's summons before Kangaloo J.A., counsel for the appellant apparently made an application for an extension of time for the issuing of a summons to settle the record of appeal. The application was refused, the oral explanations of counsel having been found to be unmeritorious.

7. In refusing the application to extend time and in dismissing the appeal Kangaloo J.A. stated[6]:

> Although O. 59 R. 12(1) used the word 'shall' it is my view that because the rules themselves say that the time limited for doing anything authorized by the rules may be extended or abridged (see Order 3 R. 5), this court has the jurisdiction to grant to the appellant an extension of time for the issuing of summons to settle the record. However, the jurisdiction must be judicially exercised.
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> When I review the history of this matter, it appears that the appellant has not proceeded with the matter with the enthusiasm and dispatch called for under the present atmosphere of litigation in this country.

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[5] In **The Port Authority of Trinidad and Tobago v Elvis Marketing Ltd.,** Civ. App. No. 120 of 2002, extempore judgment delivered on the 31st January, 2003.

[6] At pages 5 and 7.

> There must always be a finality to litigation. For the appellant that time has come. It is not as if the appellant is without remedy. If the appellant is of the view that it has not had its proper day in court as a result of decisions made by its legal representative, then the appellant does have certain recourse authorized and sanctioned by the law.

8. Underlying this approach of the judge was a recognition that the civil litigation culture in Trinidad and Tobago was too plagued by a casual approach to the conduct of litigation to permit an overly idealistic judicial permissiveness. Indeed, I had cause to point out very recently[7] that one of the reasons for the introduction of the Civil Proceedings Rules, 1998 was "to bring about a fundamental shift in the way civil litigation is conducted in Trinidad and Tobago".

9. What I stated in **Trincan Oil Ltd**.[8] may be worth repeating here: "Simply put, in the context of compliance with rules, orders and directions, the *'laissez-faire'* approach of the past where non-compliance was normative and was fatal to the good administration of justice can no longer be tolerated".

10. In fact, in July 2003, the full court of the Court of Appeal emphatically denounced as a reason for seeking the indulgence of the courts, the lack of diligence, reasonableness or competence by attorneys[9]:

> 20. …Counsel for the Appellant has without specifically saying so contended that the Appellant ought not to be punished for the incompetence of his two previous attorneys. He has contended that the Appellant did all that he could do, which is to go to attorneys and place the matter in their hands so that he should not be penalized by having the matter dismissed as an abuse of process for their failing to act with diligence, reasonableness or competence.
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> 21. This Court is unable to accept that submission. Gone are the days when the litigant is allowed to pursue litigation dilatorily and use the incompetence of his attorneys as the excuse. The tide turned sometime ago with the decision of **The National Commercial Bank of Trinidad and Tobago Limited v Pouchet** Civ. App. No. 133 of 1995 (unreported) and has continued to flow with the decisions of **Ramkissoon v Ramkissoon** Civ. App. No. 161 of 1998 (unreported) **Laveau v Port Authority** Civ. App. No. 181 of 1996 (unreported) **Bassett v McKenzie** Civ. App. No. 41 of 1999 (unreported) **Port Authority of Trinidad and Tobago V Elvis Marketing** Civ. App. No. 120 of 2002 (unreported) and **Williams v The Attorney General** Civ. App. No. 73 of 2002 (unreported). It is bound to gather momentum and become torrential otherwise

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[7] In **Trincan Oil Ltd. and Ors. V Chris Martin**, Civ. App. No. 65 of 2009, at page 8, paragraphs 18 and 19.

[8] At paragraph 19.

[9] See, Kangaloo J.A. in **Deryck Mahabir v Courtnay Philips,** Civ. App. No. 30 of 2002, at pages 6 to 7, paragraphs 20, 21 and 22.

civil litigation in this country, deprived as it is of modern rules of procedure is bound to collapse under its sheer weight, made all the more burdensome by the casual and often cavalier approach to litigation by practitioners. The legal profession has a responsibility to police itself to ensure as far as possible that hapless litigants, as Counsel has made the Appellant out to be, are not made victims of incompetent and negligent attorneys. The Courts have the responsibility to ensure that its process is not abused, and that matters before it proceed with dispatch so that the public gets the quality of justice it deserves. As Lord Bingham said in **Johnson v Gore Wood and Co**. [2001] 2 W.L.R. 72 at 90B in the English context "the public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole". This Court eagerly looks forward to the day when a similar statement can be made in the Trinidad and Tobago context without a concomitant hollow ring to it.

22. All these authorities now speak with one voice and it is that unless there is a real prospect of a miscarriage of justice occurring from the Court's denial of a litigant to proceed further with a matter, when the reason for delay is solely a matter dealing with the competence, negligence, inadvertence or otherwise of his legal representatives, the matter will not be allowed to proceed.

11. Following the decision in **IMH Investments** Weekes J.A. (in chambers) refused an application to extend the time for the filing of a summons to settle a record of appeal. On a notice to the full court to review that order, the full court held that the judge had erred in refusing to extend time. The judgment of the full court was delivered by Hamel-Smith J.A. on the 31st March, 2006.

12. The relevant parts of that judgment were as follows[10]:

45. There is however, another stumbling block in the appellant's path. The outcome of this motion turns on whether the Judge in Chambers was correct in refusing to extend the time for filing the summons to settle the record. Counsel for Nicholas submitted that the motion should in any event be refused because the appellant had not shown good and substantial grounds for the delay or that there would be any miscarriage of justice.

46. The Judge appears to have not found it necessary to decide the matter in light of her decision on the preliminary point but she nonetheless expressed the view that she would have dismissed it. **The appellant had not satisfied her that (i) there were good and substantial grounds for extending the time; inadvertence on the part of attorney in filing the application on time was not a good ground and (ii) there was any miscarriage of justice. The judge was obviously relying on the judgment in IMH Investments v Knox & Ors.** (Cv. App. 12 of 2003) **where Kangaloo JA (in Chambers) refused a similar application for those reasons.**

47. Without affirming the correctness of that judgment, I think that the judge took too stringent an approach in applying what had been said by Kangaloo JA in IMH and overlooked the question of prejudice to Nicholas. **I hesitate to affirm the judgment because it seems that applications for extension of time** (except those for filing notices of appeal which are dealt with under Order 59 r.7 (7) **are governed by Order 3 r.5 and not by Order 59 r.21.** Order 3 r. 5(4) expressly provides that the rule for an extension of time applies to applications in the Court of Appeal or a single Judge thereof. **Implied in the rule is the exercise of a discretion and while**

[10] **Krishna Persad v George Nicholas and Ors.** Civ. App. No. 99 of 2005, at pages 11 to 12, paragraphs 45 to 50; emphasis added.

> **there must be some material before the judge upon which it can be exercised, there is no requirement to advance good and substantial grounds** as is required in Order 59 r7. **Unfortunately, in IMH Order 3 r.5 was not addressed by either side and therefore not considered by the judge**.
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> 48. Even if one follows the judgment in IMH, as the judge did, there seems to have been a marked absence of any prejudice against Nicholas. **The short delay could not per se amount to prejudice, as the Judge rightly observed. Kangaloo JA himself in IMH accepted that were the explanation for the delay (is) borderline or the delay itself not inordinate, he would have been inclined to allowed the application before him, and rightly so.**
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> 49. **I would think that in the absence of any requirement for good and substantial grounds, allowance should generally be given in cases where a rule in respect of time, particularly in an application of this nature, is overlooked marginally and it is nigh impossible to proffer any reason other than the inadvertence on the part of instructing attorney. I would think however, that in those circumstances the greater the time lapse the more reluctant a Court will be to exercise its discretion to extend the time, more so where the other side can show prejudice or a lack of bona fides in the application.** Neither has been demonstrated in the instant matter.
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> 50. Here, the time delay was considerably shorter than in IMH; there the delay was one of sixteen weeks. The appeal was afoot and no question of prejudice arose. The Judge herself recognized that the delay was not inordinate but nonetheless felt that it was but one factor to be considered. It seems to me that the Judge erred when she was persuaded to place too much emphasis on what was considered at the time the real issue i.e. the absence of good and substantial reasons for the delay. Rather, had her attention been drawn to the reservation expressed by Kangaloo JA, the question of good and substantial reasons would not have arisen. The delay was a mere seven days and while the excuse proffered might not have been considered a borderline one, the delay was not inordinate (as found by the judge herself) so the absence of prejudice should have been sufficient to allow the extension.

13. It is reasonably clear that the full court was of the view that in an application for an extension of time such as this, there was no requirement for 'good and substantial reasons' to be given to explain the delay in making the application. The reason given was that these applications "are governed by Order 3 r.5 and not by Order 59 r. 21".[11]

14. What is not as clear is whether the full court was simply rejecting the standard of proof articulated by Kangaloo J.A. or was also rejecting "the incremental approach" advocated by him and obviously followed by Weekes J.A.

15. From paragraph 49 of the judgment of Hamel-Smith J.A., it would appear that in cases where the only reason for non-compliance with the timetables in the rules for the

[11] I express no opinion on the correctness of this position since this specific issue was not raised or argued in this case, and bearing in mind the rule governing the binding nature of precedents set by one division of the court of appeal – See **Young v Bristol Aeroplane Co. Ltd**. [1946] A.C. 163 HL, per Viscount Simon.

conduct of an appeal is inadvertence on the part of attorneys having conduct of the appeal, that:

(i) where the default (in time) is marginal "allowance should generally be given";

(ii) however "the greater the time lapse the more reluctant a Court will be to exercise its discretion to extend the time, more so where the other side can show prejudice or a lack of bona fides in the application".

16. From this analysis it is fair to state that the full court had in its contemplation a weighted, if not an incremental, approach to the determination of whether in an application such as this an extension of time should be granted. Delay was important and inordinate delay of itself could be fatal to an application to extend the time to issue a summons to settle a record of appeal. Indeed, the ratio of the decision was that a "delay of a mere seven days … was not inordinate so in the absence of prejudice should have been sufficient to allow the extension"; the court noting that in **IMH Investments** the delay had been sixteen weeks.

17. On the 24th November, 2008, sitting as a single judge in chambers in **Alloy Wong and Anor. v Republic Finance and Merchant Bank Ltd. and Ors**.,[12] I observed that[13]:

> 10 Given that Order 3, rule 5 of the RSC, 1975 governs applications of this nature and given the opinions stated by Hamel-Smith J.A. at paragraphs 47 and 49 of his judgment in **Krishna Persad**, I think the following observations are pertinent. First, what is involved is the exercise of a judicial discretion. Second, for that discretion to be exercised favourably some material must be before the Court to justify it. Third, **as a general rule, where the sole reason is the inadvertence or error of attorneys, the greater the time lapse the more reluctant a Court will be to exercise its discretion favourably.**
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> 13 In my opinion the material that must be placed before a court in order to benefit from a favourable exercise of its discretion on an application for an extension of time such as this, **must be such as to give an acceptable explanation for the delay in issuing the summons to settle the Record of Appeal. If there is no such explanation a court is entitled to refuse the application.**

[12] Civ. App. No. 76 of 2008.

[13] At pages 4 and 5, paragraphs 10 and 13, emphasis added; relying also on the Privy Council decision in **Ratnam v Cumarasamy** [1965] 1 WLR 8, per Lord Guest, and the English Court of Appeal decision in **Regalbourne Ltd. v East Lindsey District Council** [1994] 158 L.G. Rev. 81.

18. In 1994, in **Regalbourne Ltd v East Lindsey District Council** the English court of appeal stated in relation to an application to extend the time for appealing:[14]

> In the absence of an agreement, before the court would consider exercising its discretion to extend time under Order 3, rule 5 it would **normally need to be satisfied that there was an acceptable explanation for the delay**. If there was none the question of prejudice was unlikely to arise.
>
> **If there was an acceptable explanation, the Court might still refuse to extend time, if the delay was substantial or if to do so would cause significant prejudice to the respondent.**

19. In **Alloy Wong** I also noted that requests for an extension of time under Order 3, rule 5 were to be treated differently in applications such as this one for two principal reasons:

(i) generally because an appellant has already had the benefit of a trial and lost;[15] and

(ii) specifically because the current Order 59, rule 12 (1) was introduced to place the responsibility upon appellants to ensure that their appeals are prosecuted diligently.[16]

20. In addition to these two reasons another consideration which has been influencing the approach of the courts to applications such as this one, is the seemingly pervasive culture of non-compliance with rules and orders in respect of time. In **Alloy Wong** I summarized the problem and response as follows[17]:

> In this jurisdiction the courts have adopted a strict approach to delay caused by reason of inadvertence, error or negligence on the part of attorneys. The need for this approach to continue is evident daily in the almost routine failure of attorneys to meet time-lines prescribed by the rules or set by court orders.

21. This then is the cultural, legislative and jurisprudential context in which the issue to be determined in this matter arises. Culturally, the courts have recognized the problem of a pervasive culture of non-compliance with rules and orders relating to time, all too often due to the inadvertence or negligence of attorneys; legislatively, the Rules of the Supreme Court have been amended to place the onus on appellants to prosecute appeals

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[14] Emphasis added**.** **Regalbourne Ltd**. was a case concerning the extension of time for appealing a decision of a statutory tribunal.

[15] See, Lord Guest in **Ratnam v Cumarasamy**; and Sir Thomas Bingham in **Regalbourne Ltd**.

[16] See, **Alloy Wong** at pages 5 and 6, paragraph 14.

[17] At page 8, paragraph 19.

diligently and to penalize them with dismissal of their appeals if they fail to do so;[18] and jurisprudentially, the courts have adopted a relatively strict attitude to delay as demonstrated above.

22. All of these interventions have arisen because of the particular circumstances that exist in this jurisdiction at this time and the specific intention to effect a change to a more effective and efficient civil justice system. In this regard attorneys have to take responsibility for their inadvertence and negligence and litigants have to be vigilant. What is at stake is not simply justice between parties to a single case, but the entire administration of the civil justice system.

ANALYSIS

23. It is undisputed that in this case the delay of 14 months was by any measure substantial and inordinate. For comparative purposes, in **IMH Investments** the delay was sixteen weeks, in **Krishna Persad** it was seven days and in **Alloy Wong** it was five months. In **IMH Investments** and **Alloy Wong** the applications for extensions of time were refused, in **Krishna Persad** it was allowed.

24. It is also undisputed that the only explanation for the delay in this case was the mistake and/or error and/or inadvertence of the attorneys for the Appellant, in allegedly being ignorant of the requirement under Order 59 rule 12 (1) that the summons to settle the record of appeal had to be issued within 14 days of the filing of a notice of appeal.

25. The judge found both of the above to be the case.[19] Indeed, the judge found that the delay was 'significant' and the explanation for the delay was 'obviously not a good reason'.

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[18] See, **Alloy Wong** at page 6, paragraph 14. Also see generally, the strict approach in this jurisdiction to the failure to prosecute civil claims expeditiously, e.g. Order 3, rules 6 and 6A of the Rules of the Supreme Court, 1975; and also Part 26.7 of the Civil Proceedings Rules, 1998 – where an incremental approach, including a strict threshold test, is prescribed for relief from sanctions (including sanctions for the failure to comply with rules and orders relating to time). In this latter regard see **Trincan Oil Ltd. and Ors v Chris Martin** Civ. App. No. 65 of 2009, judgment delivered on the 12th May, 2009. Finally, see also Part 64.13 of the CPR, 1998 – which provides for the striking out of an appeal for non-compliance with time limits.

26. Despite this the judge went ahead to grant the extension of time sought. He justified this by accepting and following the advice of Sir Thomas Bingham M.R. in **Costellow v Sonerset County Council,**[20] from which he quoted extensively, that in the exercise of a discretion under Order 3, rule 5 all the circumstances of the case must be considered and the case "viewed in the round". In his own summary of the position the judge stated[21]: "The Court of Appeal in England deprecated a rigid mechanistic approach to the applications. It stated that the Court must consider what justice requires and is concerned to do justice to both parties. In that setting the question of prejudice is a relevant consideration."

27. In so far as is relevant, what Sir Thomas Bingham M.R. stated in **Costellow** was[22]:

> A similar approach should govern applications made under Ords 19, 24, 25, 28 and 34. The approach to applications under Ord 3, r 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Ord 3, r 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed.

28. This general statement of Sir Thomas Bingham must itself be taken in context. Firstly, it was made subject to the reservation that "special cases or exceptional circumstances" may take a case outside of this general approach. Secondly, this approach was justified "where the denial will stifle (the) action", referring to the hearing of an action at trial. In **Regalbourne Ltd**. Sir Thomas Bingham M.R. accepted this latter limitation. In the report of the case in 1993 The Times Law Reports, it is stated: "The Master of the Rolls said that in giving guidance in Costellow's case he had not in mind or regarded his judgment as applicable to an application for leave to appeal out of time …" Of greater significance however, may be that in **Regalbourne Ltd**. the Master of Rolls did not disassociate himself from the following statements of Lord Justice Kennedy[23]:

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[19] See, pages 3, 8 and 9 of the judge's reasons.
[20] [1993] 1 All. E.R. 952 at pages 959 to 960; and see pages 6 and 7 of the judge's reasons.
[21] At page 6 of the judge's reasons.
[22] At page 959.
[23] Emphasis added.

> Mr. Lowe's acknowledged that the observations of Lord Guest in *Ratnam v Cumarasamy* ([1965] 1 WLR 8, 12) that **the court's approach was more likely to be restrictive after there had been a hearing**, presented difficulties for his argument.
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> **The position was therefore different from an application to dismiss for want of prosecution to strike out for failure to take some step in the action. In those situations the court was asked to intervene to deprive a party of an existing right to proceed to trial and to prevent any trial from taking place.**
>
> In the absence of agreement, before the court would consider exercising its discretion to extend time under Order 3, rule 5 it would normally need to be satisfied that there was an acceptable explanation for the delay. If there was none the question of prejudice was unlikely to arise.
>
> If there was an acceptable explanation, the court might still refuse to extend time, if the delay was substantial or if to do so would cause significant prejudice to the respondent.

29. These statements are clearly not inconsistent with those expressed by Hamel-Smith J.A. in **Krishna Persad** as cited above. Noteworthy is the weighting of the consideration of delay, both in relation to the length of the delay and the explanations for it.

30. The judge's reliance on **Costellow's Case** is therefore open to criticism in so far as the approach stated there is inconsistent with that of the full court in **Krishna Persad** and of the English court of appeal in **Regalbourne Ltd**.[24]

31. It is true that the judge acknowledged what was said by the Master of Rolls in **Regalbourne Ltd**, but having done so seemingly dismissed it in favour of the 'pure' **Costellow** position, stating that "**Costellow** however has been applied in applications to extend time under O. 3 r. 5 in ordinary civil appeals",[25] citing **Finnegan v Parkside Health Authority**[26] and **Woodhouse v Mc Donald Young and Ors**.[27]

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[24] See also the distinction made by Legalt L.J. in **Douglas v Royal Bank of Scotland** (1997) CA Transcript 895 (cited in **Finnegan v Parkside Health Authority** (1998) 1 All E.R. 595 at 603): "A distinction must be drawn between cases such as the present in which an extension of time is sought for delivery of a pleading and an application is made to strike out for want of prosecution, and cases in which the relief sought is an extension of time for service of a writ or for leave to appeal from a final order. In the latter cases the court takes a stricter attitude because a writ expires if it is not served in time, and if a party is intent on appealing he must have had the benefit of a trial. This in large measure explains the difference between *Costellow* and *Savill.* *Savill* falls into the stricter category, and with it fall *Ratnam v Cumarasamy* [1964] 3 All ER 933, 919650 1 WLR 8, *Revici v Prentice Hall Inc*, [1969] 1 All ER 772.

[25] At page 8 of his reasons.

[26] [1998] 1 All E.R. 595.

[27] [1994] P. I.Q.R. 446.

32. It is clear that in both **Finnegan** and **Woodhouse** the English court of appeal agreed with the **Costellow** principles. What needs to be made clear is that the approach in this jurisdiction is slightly different, that difference residing in the weighting given to the consideration of delay and the reasons for it. The 'pure' **Costellow** approach is apparently neutral in the consideration and balancing of all the relevant circumstances, although in **Woodhouse** the English court of appeal emphasized certain considerations.

33. Thus in **Woodhouse** Peter Gibson L.J., after quoting Sir Thomas Bingham's statements in **Costellow,** nevertheless went on to state:

> Whilst it is in the discretion of the Court to grant or refuse an extension of time in which to appeal, the factors which are usually taken into account in this Court in considering whether to give an extension of time for an appeal to it are: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if an extension of time for appealing were allowed; and (4) the degree of prejudice to the potential respondent if the application were granted (see C.M. Van Stillevoldt BV v E.L. Carriers [1983] 1 W.L.R. 207). Like considerations, in my judgment, are relevant for other courts considering a similar question.

34. Interestingly, in the application of these four considerations to the facts before him, Gibson L.J. observed that:

(i) A delay of three weeks "was a long period compared with the seven days prescribed by the rules, but nevertheless was nothing like that which occurred in the Revici case".[28]

(ii) Though the reason for the delay appeared to have been a genuine mistake by the attorney who misunderstood the time allowed for an appeal "he acted promptly as soon as he became aware of it".

(iii) On the question of prejudice "the short delay caused no prejudice whatsoever".

35. In this case the time allowed was 14 days and the delay 14 months. In this case the judge found that the reason for the delay was a "breach of duty" by the attorney for the Appellant who "was ignorant of the requirement that the summons to settle the record of appeal had to be issued within 14 days of the filing of the Notice of Appeal" and who "seemed set to be of the erroneous view that steps to settle the record of appeal need only

[28] In the **Revici** case the delay was one month.

be taken after the application for the stay was determined and the Notice of Appeal amended".[29]

36. Yet despite these conclusions, and even though the application for the stay was determined in February 2008 and the amended Notice of Appeal filed on the 28th May, 2008 (it was only served on the 7th July, 2008), the undisputed evidence was that no steps were taken to make an application to extend time until the 2nd October, 2008 when a misconceived application was made to the Assistant Registrar (brought to the Appellant's attorneys attention on the 30th October, 2008 when the Respondent's attorneys objected) and until the 11th November, 2008 when the summons that was determined by the judge was issued.

37. Thus between the 28th May, 2008 and the 2nd October, 2008 four months elapsed and between the 28th May, 2008 and the 11th November, 2008 over five months elapsed from the time when the Appellant's attorney contended that it was believed that the application had to be made to when it actually was. It is inconceivable that by any standard, least of which the 14 day requirement of Order 59, rule 12 (1), such action could be considered prompt. This period of the delay was clearly independently inordinate.

38. In my opinion, even if it is accepted that the Appellant did have a reasonably arguable case, about which more will be stated later, three of the four considerations identified in **Woodhouse** demonstrate upon a careful analysis that the judge's conclusions are open to challenge.

39. Whichever way one looks at it, the length of the delay was excessively inordinate. Also, the reasons for the delay provided no acceptable explanation and in fact were utterly unacceptable. These two factors constituted exceptional circumstances and made this case a special one.

[29] At pages 3 and 4 of his reasons.

40. Furthermore, on the question of prejudice the Judge expressed the view, and correctly so, that: "The prejudice caused to the other party by the delay … is an important consideration".[30] However, he concluded that the Respondent had "not demonstrated that he had suffered prejudice that cannot be compensated by an order as to costs".[31] The basis for this was that the Respondent's assertion on oath that his health had been adversely affected and his heart condition had deteriorated as a result of the Appellant's delay in the prosecution of this appeal was "not supported by medical opinion" and as a consequence the judge attached "no weight" to it.[32]

41. It seems to me that the judge's approach to the issue of prejudice in this case is also open to challenge. In this case the Respondent was the beneficiary of a money judgment in an action filed on the 7th April, 1995. The Respondent filed his counterclaim on the 3rd May, 1995 and had to wait approximately twelve years for a trial. On the 28th July, 2007 he obtained judgment on his counterclaim for $5,870,500.00. Within one month the Appellant appealed. Within a further month the Appellant sought a stay of the order, which was granted on the 11th February, 2008. The Respondent therefore had to wait for the determination of this appeal before he would know if he would benefit from the fruits of his judgment. He had everything to lose, including the expectation that at the end of a successful trial he would collect what was ordered due to him.

42. The simple fact is that upon obtaining the stay the Appellant failed to do what was mandated to have been done to advance the hearing of this appeal (which was to issue the summons to settle the record of appeal) until the 11th November, 2008; that is, some eight and one half months later.

43. In my opinion, given the delay in this matter in the overall circumstances of the case, it is reasonable and fair to presume that the Respondent would have suffered anxiety and distress in waiting for this appeal to be determined. The Respondent's affidavit evidence, though not supported by medical opinion, was unchallenged.

[30] At page 8 of his Reasons.
[31] At page 10 of his Reasons.
[32] At page 10 of his Reasons.

Moreover, in an affidavit in opposition to the application to extend the time before the Registrar filed on the 27th November, 2008, the Respondent asserted (at paragraph 10): "I have suffered and continue to suffer great prejudice at the hands of the Appellant since the 12th day of October, 1994 when it rendered inoperable the computer terminal at my place of business …" and (at paragraph 12): "On Tuesday 18th November, 2008 I had to visit my Cardiologist Dr. Feroze Omardeen for treatment of my heart condition which has deteriorated further as a result of the undue continuing stress caused by the Appellant's delay in the prosecution of this appeal".

44. I am of the view that given the lengths of delay in this matter, this Respondent must be presumed to have suffered some anxiety and distress as a result thereof. In the context of this matter the Respondent's assertion that his health had suffered should therefore properly have been given some weight by the judge.

45. The court of appeal in England has pointed out[33] that time requirements laid down by the rules of procedure are to be observed and litigants are entitled to have their cases resolved with reasonable expedition. Further, that "non-compliance with time limits can cause prejudice". The same is true in this jurisdiction. Indeed, as long ago as 1964 the Privy Council in **Ratnam v Cumarasamy** stated[34]:

> The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.

46. With respect to the merits of the appeal, I am of the view that the judge ought not to have relied entirely on the alleged pronouncements on them by Weekes J.A. In this case given the length of delay and the reasons for it, I am of the opinion that the burden on the Appellant to justify an extension of time should have included the requirement to show a higher standard than a good prospect of success. That is to say, because the delay

[33] In **The Mortgage Corporation Ltd. v Sandoes** (1997) P.N.L.R. 263 at 284.
[34] At page 935.

was so lengthy and unjustifiable, the Appellant ought to have been obliged to demonstrate a standard moving towards a substantial degree of merit in the appeal. If this was demonstrated then a court may have considered extending the time to allow the further prosecution of this appeal. This approach to the degree of merit in the appeal required to be demonstrated by the Appellant was not taken by the judge, and to that extent his reasoning is also open to challenge.

47. As I have explained the judge relied on the case of **Finnegan** to justify following **Costellow**. In that case it is worth noting that the relevant delay was 57 days in excess of a time limit of 5 days, and there had been no determination on the merits of the case.[35] In that case the English court of appeal acknowledged that Order 3, rule 5 conferred a wide discretion in applications for extensions of time and confirmed the rejection of any 'rigid mechanistic approach' which insisted that 'the absence of a good reason (for delay) is always and in itself sufficient to justify the court in refusing to exercise its discretion'.[36] The court also confirmed that the proper approach was "to look at all the circumstances, and to recognize the overriding principle that justice must be done".[37] It then went on, having allowed the appeal and decided to remit the case for reconsideration, to state[38]:

> But of course that is not the end of the case, since each application must be judged on its own facts, and where, as here, there is a very considerable delay, with no explanation of the critical period, the court will apply the guidelines laid down in the Mortgage Corp case [1996] TLR 751, including guideline 1 stressing that the rules are to be observed. Consequently Mrs Finnegan is by no means out of the wood, and even on an overall view, taking into account all relevant considerations including prejudice (if any), it by no means follows that she will succeed in gaining her extension.

48. Noteworthy is the observation of Hirst L.J. that 57 days (in relation to a 5 day time limit) was "a very considerable delay". In this case the delay is 14 months in relation to a 14 day time limit, for which there is also no acceptable explanation why nothing was done for the entire 14 month period or for the 5 month period after the filing of the amended Notice of Appeal from when it was allegedly believed the 14 day period should begin.

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[35] The action was struck out for want of prosecution.
[36] At page 605.
[37] At page 605.
[38] At page 605.

49. In this court's opinion, in light of all of the above, it is very difficult to see how the judge could reasonably have exercised his discretion to extend time in this case.

50. In **Costello** the plaintiff's action was dismissed for failure to serve a statement of claim within time, and so there was no determination on the merits. The delay was four and one half months. It was in this context, of a delay that was inexcusable but not inordinate and where there was no prejudice, that Sir Thomas Bingham M.R. made the statements quoted above.

51. In my opinion, viewed in the round, this case is a special one which raised exceptional circumstances by reason of the inexcusable, unjustifiable and excessively inordinate delay, and also because of the prejudice that followed as a result. In my opinion the judge fell into error in not adopting an approach that was sufficiently sensitive to this. If he had, he would not have taken the 'pure' **Costellow** approach that he did. On this basis alone and in light of the above stated conclusions this application should be allowed.

52. However, it is important to return to the particular approach of the local courts to this issue. In England a particular approach is now being adopted that has evolved over time and which is no doubt appropriate for that jurisdiction at this time. What is the appropriate approach for Trinidad and Tobago at this time?

53. I am of the opinion that in Trinidad and Tobago, even though Order 3, rule 5 does confer a wide discretion in applications for extensions of time which necessitates a consideration of all the circumstances of a case with the overriding objective that justice be done, in doing so the following factors must be particularly considered where there has already been a determination of a trial on the merits and judgment has been delivered.

(i) The length of the delay and whether it is inordinate. The longer the delay the less likely a court would find that there is reason to extend time.

(ii) The reasons for the delay and whether there is an acceptable explanation for it. The cogency of the explanation should be greater the longer the delay.

(iii) Whether the application for the extension of time was made promptly. This assessment should at least be made in relation to the default and the reasons for it, but could also include all other relevant circumstances.

(iv) The degree of prejudice to the respondent caused by the delay and that may result if an extension is granted. The greater the prejudice the less likely a court would find that there is reason to extend time.

(v) The merits of the appeal, which are to be evaluated in a comparative way relative to the length of delay, the reasons for the delay and the degree of prejudice to the respondent. The stronger the merits of an appeal the more likely a court would find that there is reason to extend time.

(vi) Special cases or exceptional circumstances.

(vii) The *bona fides* of the application and whether the party seeking the extension has generally complied with the rules and any orders and directions. A lack of *bona fides* is a matter of serious concern.

(viii) The interests of the administration of justice. Doing justice is not limited to justice between parties to particular litigation, but includes larger considerations of the administration of justice. One important aspect of this is the recognition that time requirements laid down in the rules of procedure or by orders of the court are to be observed if there is to be meaningful change and sustainability in the efficiency and effectiveness of the administration of justice and in public trust and confidence in it. Litigants are entitled to have their matters determined according to the rules and with reasonable expedition. Attorneys are obliged to know the relevant rules and conduct their matters in accordance with them. Doing justice includes doing it according to the established rules, and litigants who are in breach of the rules are not entitled to complain that justice has not been done.

54. In my opinion this approach is not inconsistent with that of the full court in **Krishna Persad** with one added qualification, which is that factors (i), (ii) and (iii) must at this time be specially weighted. Thus, if the delay is lengthy and/or there is no acceptable explanation for it and/or the application for an extension of time was not made

promptly, a court may refuse an application for an extension of time. The more of these that are present, the less likely a court would find that there is reason to extend time. It goes without saying that there must be material upon which the court is to exercise its discretion.

55. These considerations and this weighting are relevant at this time in the evolution of our civil justice system in Trinidad and Tobago. The overriding objective to do justice remains, as does the consideration of all the circumstances of the case, but with the emphases stated.

56. In light of this approach and giving due weight to the considerations stated, the following conclusions can be drawn.

(i) The delay in this case of 14 months is excessively inordinate.

(ii) The reasons for the delay do not offer any acceptable explanation for it. In fact the reasons given are questionable, without having to assert that they lack *bona fides*. For example, what led to the erroneous view that steps to settle the record of appeal only fell to be taken after the application for the stay was determined and any amended notice of appeal filed? What rule or authority informed that mistaken belief? Was Order 59 considered at all?[39] Why was it that even after the filing of the amended notice of appeal nothing was done for five months? All of these questions remained unanswered and disturbingly so.

(iii) Clearly the application was not made promptly, not even in relation to the filing of the amended notice of appeal.

(iv) The Respondent was prejudiced by the delay. I have already explained how, given the circumstances of this case and the length of delay and the undisputed evidence of the Respondent, it is reasonable to conclude that the Respondent suffered real prejudice as a result of the Appellant's delay in prosecuting this appeal.

[39] The rule dealing with amendments to a notice of appeal is Order 59, rule 10 and the one dealing with settling the record of appeal is Order 59, rule 12.

(v) There was no proper assessment of the merits of the appeal. I have also explained that the judge ought to have conducted an independent assessment of the merits of the appeal, and that in the special circumstances of this case the Appellant would have had to show at least a high likelihood of success. In my opinion, though the issue was not canvassed before the court, the Appellant does have a reasonably arguable case on appeal. For myself, admittedly not having had the benefit of arguments about it, I would however be more reluctant to place that chance at a high likelihood of success.

(vi) This is a special case in which there are exceptional circumstances. I have also already explained why it is a special case and its circumstances exceptional. The fact that this case started in 1995 and that the Respondent obtained judgment in his favour in 2007, after a twelve year wait, prima facie places this case in this category. The other compelling factor which does so independently is the almost unprecedented delay of 14 months. By no measure can this case be described as anything other than extraordinary.

(vii) Though there is no unequivocal evidence of a lack of *bona fides*, the absence of any proper explanation as to why it was believed that the fourteen day period prescribed by Order 59, rule 12 (1) commenced from the obtaining of a stay or the filing of an amended notice of appeal leaves unanswered questions with respect to the explanations given in this case.

(viii) The interests of justice, both of this case and of the general administration of justice, are best served in these exceptional circumstances if this flouting of Order 59, rule 12 (1) is not accommodated but rather penalized.

57. On the issue of the interests of justice, the judge had considered the issue of "the impact on the administration of justice".[40] However, he seemed to give it little import because of the fact that at the time of hearing before him the trial judge's notes of evidence were not available. As Kangaloo J.A. explained and seemed to accept in **IMH Investments**,[41] the absence of notes of evidence may in part be explained because until

[40] At page 9 of his Reasons.
[41] At page 9 of the judgment.

the summons to settle the record is issued and an order and demand for the notes of evidence made, a request to the judge for same may not necessarily have been made. Indeed, there is no evidence that before the filing of the application to extend the time for the issuing of the summons to settle the record a request was made for the notes of evidence and the same were not forthcoming.

58. In my opinion the judge took too narrow an approach to this issue. To permit this application would be to set a precedent that where delay is excessively inordinate and inexcusable, and even when there is some degree of prejudice caused to a respondent, as long as there is a good prospect of success on the merits of the appeal an extension of time should be granted (all other considerations being equal).

59. In my opinion, at this time, such a precedent would seriously undermine all the efforts that are being made to bring about a change in exactly this unacceptable culture of non-compliance with rules and orders that is plaguing the civil litigation system in Trinidad and Tobago. It is for this reason that for the last decade or so the Court of Appeal in Trinidad and Tobago has more or less consistently insisted that inordinate delay coupled with unacceptable explanations will be specially weighted among the factors that a court must consider in applications for extensions of time in cases such as this one.

60. Moreover, in this case and in all cases, the administration of justice is strengthened by compliance with the rules of procedure which are there to be observed, though not imposed in an inflexible or oppressive manner. In this case there can be no complaint about inflexibility or oppression. In this case no question of a miscarriage of justice arises.[42] No court readily moves to dispose of a matter before trial or appeal, but there are times when this must be done in the interest of justice. In my opinion this is such a case.

[42] See, Kangaloo J.A. in **I.M.H. Investments**, at pages 6 to 9.

61. Finally, in so far as the judge was concerned that the Appellant had at all times shown an intention to prosecute the appeal in applying for a stay and amending its notice of appeal, it seems to me that neither of these considerations explain the delay in issuing the summons to extend time after the filing of the amended notice of appeal. Indeed, it is equally arguable that the Appellant having once obtained the stay was dilatory in the prosecution of this appeal.

CONCLUSION

62. In my opinion the judge was plainly wrong[43] for the several reasons identified above. Such a conclusion is not easily arrived at when a court is exercising its discretion under the Rules. Clearly the judge was convinced that the 'pure' **Costellow** approach was the correct one to take in this case. In my opinion, in doing so the judge adopted what seems at this time to be the English approach to this issue and disregarded the approach recommended by the Court of Appeal in Trinidad and Tobago and the one that is appropriate at this time.

63. This court will therefore allow the Respondent's application and enter an order in terms of paragraphs 1 and 2 of the Respondents Notice filed on the 12th December, 2008. The order of the judge extending the time for the filing of the summons to settle the record of appeal is discharged. The Appellant's appeal is dismissed for want of prosecution. The Appellant will pay the Respondent's cost of this appeal.

Peter Jamadar
Justice of Appeal

[43] See, Nelson J.A. in **Fishermen and Friends of the Sea v EMA** Civ. App. No. 106 of 2002, at paras. 38 to 39.