



two applicants be dismissed with costs.

The applicants desired appealing from the orders made by the Judge but found themselves out of time for so doing. They accordingly filed an application to us for an extension of time within which to appeal. At the commencement of the hearing of that application, Mr. Farara took the point that the subject of the proposed appeal was from an interlocutory order and as such leave to appeal was required. Having heard full arguments on the issue, we agreed with Mr. Farara. Mr. Neish, who was then out of time to apply for such leave, then orally applied to the Court to treat the instant application as an application for an extension of time within which to apply for leave to appeal. After due deliberations, and, because the issues relevant to the determination of the first application would have been the same issues that had to be considered in determining this new application, we thought justice would be better served if we acceded to the request of Mr. Neish. We accordingly decided to treat the filed application as an application for an extension of time to apply for leave to appeal and for leave to appeal.

Power to hear such an application is given to this Court by **03R5 of the Rules of the Supreme Court (Revision) 1970** and the Court may do so on such terms as it thinks fit. For the applicants to benefit from this power, they have to show by affidavit, substantial reasons for their application and grounds of appeal which prima facie show good cause therefor [See **064R 6(2)** of the said rules]. The application therefore calls for the exercise by this Court of a judicial discretion based on good cause. In exercising this discretion, the matters to be considered would be (1) the length of the delay (2) the reasons for the delay (3) the chances of the appeal succeeding if the application is granted and (4) the degree of prejudice to the respondents if the application is granted. The discretion to be exercised is unfettered and should be exercised flexibly with regard

to the facts of the particular case and with the main concern to ensure justice for both sides. If prima facie the proposed appeal appears hopeless, the application should be denied despite the fact that there may have been substantial reasons for the delay in bringing the application. On the other hand, if there were no substantial reasons to justify an inordinate delay, but prima facie there appeared to be some merit in the proposed appeal, the application should be granted. [See **Harold Simon - v - Carol Henry and Tracey Joseph, Civil Appeal Antigua No. 1 of 1995**].

### **1. Length of Delay**

Referring to the length of delay, the challenged order was made on July 23, 1998. The present application was made on January 12, 1999, some six months after the order was made. In accordance with **064R (1)** of the aforementioned rules, the application for leave to appeal ought to have been made within 14 days of the date of the order. I consider this delay inordinate unless the applicants can show substantial reasons therefor. I will therefore now address that issue.

### **2. Reasons for the Delay**

The main reason for the delay was the applicants= alleged failure to obtain legal representation to advise them, after they were Aabandoned@ by their then lawyer after the statement of claim was filed. I have perused the affidavits filed in support of the application and I am not convinced that this (if true), could have prevented the applicants (especially the first named applicant who undertook the representation of the others in the Court below and appears to be intelligent in the law) from filing their application within the prescribed time. The evidence shows that the first named applicant, when according to him, he was made aware of the relevant rule, and then had access to a lawyer, decided to go on holiday. For these reasons I would hold that

the applicants have not proved to this Court that there was a substantial reason for the delay in this matter. Returning therefore to the issue of the length of the delay, my conclusion is that the applicants have not proved substantial reason for the same and, I would now firmly hold that the delay was inordinate.

### **3. Chance of Success**

Addressing the issue of chance of success, I have had the opportunity of reading the pleadings and the judgment of the Trial Judge in this matter and I have seen the draft grounds of appeal. The issue before the Judge was one for the exercise of his judicial discretion, whether or not he should dismiss the applicant=s suit as it related to the tort of negligence, because the applicants failed, in breach of a rule of the Court, to file a reply specifically disputing the respondents= limitation plea. The applicants contend that their failure to file the reply was due to the abandonment of them by their legal representative and their ignorance of these legal procedures. They contend that they had an answer to the limitation plea based on concealment from them by the respondents of material facts relevant to the cause of action of negligence and that time should only begin to run from the date when they discovered the true position. In any event, they contend through Mr. Neish that despite the lack of the reply, because their statement of claim gave facts in its particulars of fraud and negligence, which would be the facts to be used in the proposed reply to negative the limitation plea, the Trial Judge ought to have exercised his discretion in their favour and allow them time to file the reply. They contend that no injustice would have been done to the respondents.

Having read paragraphs 16, 17 and 18 of the applicants= statement of claim, I am of the view that there appears prima facie to be some chance of success in this submission of Mr. Neish. I consider it an arguable ground of appeal.

**4. Degree of Prejudice**

On the issue of prejudice to the respondents if leave is granted, I can see none. The action still has to be proceeded with on the issue of fraud. From the pleadings, it appears that rolled up in the applicants= quest to prove the fraud would be their allegation of negligence.

**5. Conclusion**

Having so found, in the exercise of my unfettered judicial discretion and in pursuance of justice for both sides, under heads 3 and 4 above only, I would grant leave to appeal to the applicants. **064R 4(2) the Rules of the Supreme Court** prescribes their next move. They will pay the respondents= costs of this application to be taxed if not agreed.

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**Satrohan Singh**  
**Justice of Appeal**

**I concur**

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**C. M. Dennis Byron**  
**Chief Justice (Ag)**

**I concur**

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**Albert Redhead**  
**Justice of Appeal**