THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

SAINT LUCIA

CIVIL APPEAL NO. 9 OF 2001

BETWEEN:

[1] WILLIAM EDGECOMBE
[2] BONAIRE RESORTS LIMITED

Applicants

and

PETER FREUND
trading as P Freund & Partner

Respondent

Before:

His Lordship, The Hon. Sir Dennis Byron — Chief Justice
His Lordship, The Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]
His Lordship, The Hon. Mr. Ian D Mitchell, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Kenneth Foster, QC and Ms. Isabella Shillingford with him for the Applicants
Mr. Hilford Deterville and Ms. Jan Drysdale with him for the Respondent

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2002: February 29;
March 15.

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JUDGMENT

[1] MITCHELL, J.A. [Ag.]: This is an application filed on 28 December 2001 to discharge the order of Redhead JA of 16 November 2001 refusing the Applicants/Intended Appellants an extension of time within which to file their Notice of Appeal. It is supported by an affidavit of the 1st Applicant of the same date. In his affidavit, he complains that the trial Judge had failed to deliver a written judgment as she had promised when she had earlier on 30 January 2001

delivered an oral judgment in the case. He further complains that the decision of the trial Judge was not supported by the evidence before her. In his draft grounds of appeal he complains against the failure of the trial Judge to permit him to call as an expert witness one Mr Pettigrew instead of one Mr O'Shaughnessy who had earlier been appointed an expert witness by the court consequent on an application by the Applicant, but who had not been available to give evidence for the Defendants at the trial.

[2] The application before Redhead JA arose out of the oral judgment of Hariprashad-Charles J delivered on 30 January 2001 in Suit No. 226 of 1990. The Order in the suit had been entered and served on 19 March 2001. This case had been tried under the old Rules of Court, RSC 1970, now repealed and replaced by CPR 2000. Under RSC 1970, any Notice of Appeal would have been required to have been filed within 6 weeks of the delivery of the judgment, ie, by 14 March 2001. Even though Part 42.8 of CPR 2000 says that a judgment takes effect from the day it is given, any Notice of Appeal is required by Part 62.5, in a case such as this one of a final judgment after trial, to be filed within 42 days of service of the order. If this appeal had been filed under CPR 2000, the Notice of Appeal would have been required to be filed within 42 days of the service of the Order, ie, by 30 April 2001. The Notice of Appeal in this case had not been filed within the time prescribed either by RSC 1970 or by CPR 2000. The Intended Appellants were in consequence required to seek the leave of the Court of Appeal for an extension of time in which to file their Notice of Appeal. They filed such an application on 8 May 2001, or some 7 weeks late under the applicable rules, viz, RSC 1970. It was supported by two affidavits sworn by the 1st Applicant. This application was heard by Redhead JA on 16 November 2001.

[3] The record shows that the suit originally came up for trial before Matthew J, as he then was, on 26 November 1996, and that after a two-day hearing the Plaintiff's case had concluded and the Defendants' expert witness George Oliver O'Shaughnessy, an architect, had also given his testimony. The case was a claim

for payment of architect's fees. The Plaintiff at the trial was the Respondent in this application and the Defendants at the trial were the Applicants in this application. The statement of claim and defence in the suit had been filed since the year 1990. On 27 November 1996, further trial had been adjourned to the 2 December 1996. After various interlocutory applications the part-heard case had next come up for trial on 11 October 1999. By that time, Matthew J was sitting on the Court of Appeal and could not continue the trial that he had begun in the year 1996. The trial, therefore, commenced anew before Hariprashad-Charles J. She heard the evidence from the Plaintiff's witnesses, and on 12 October 1999 the matter was then adjourned, on the application of the Defendants, to 1 November 1999 to permit the Defendants time to call their expert witness Oliver O'Shaughnessy. They had wanted to call a Mr Pettigrew as an expert witness, but Hariprashad-Charles J had not permitted it as Mr O'Shaughnessy had been listed as the Defendant's expert and had earlier produced his expert report. Mr O'Shaughnessy had given evidence for the Defendants at the earlier trial before Matthew J. It is understandable that the trial Judge would have been concerned that the appointment of a new expert, possibly to produce a new report for the Defendants half way through the trial, would have resulted in further delay. The trial, however, did not resume on 1 November 1999. Instead, on 25 October, the Defendants issued a summons seeking leave to amend their defence, which had been filed since 19 October 1990. The application to amend was heard on 1 November 1999 and on 10 January 2000 Hariprashad-Charles J, in a 12 page written judgment, refused the application for leave to amend the defence. The Defendants thereupon appealed her decision. On 24 October 2000, the Court of Appeal dismissed the appeal. The matter was then set down for the trial to resume. After various adjournments it was eventually heard and concluded by Hariprashad-Charles J on 30 January 2001. The Plaintiff had closed his case since 12 October 1999. On the resumption of the trial on 30 January 2001, the Defendants were expected to call their witnesses. Instead, Counsel informed the learned trial Judge that, "The Defence does not wish or intend to call any witnesses, but the Defence wishes to address the Court very briefly." The

Defendants therefore led no evidence. Counsel instead closed the case and presented the Judge with a written address in which she made certain submissions. In these submissions, she suggested that the Plaintiff was claiming US$45,000.00 and Swiss Francs 16,257.35 for work done, materials supplied and expenses incurred under a contract between the Plaintiff and the Defendants. Counsel commented on the evidence for the Plaintiff and submitted, "Based on that, My Lady, I am suggesting that the Defendants owe on the incomplete plans 85% of US$70,000.00 less the US$20,000.00 paid on account which would be US$39,500.00." The trial Judge thereupon rendered an oral judgment in favour of the Plaintiff for the amount claimed plus interest and for costs to be taxed if not agreed. The order was filed in due course and judgment was entered for the Plaintiff/Respondent on 19 March 2001, whereupon the Defendants by summons filed on 8 May 2001 applied for leave to appeal the Judgment/Order of Justice Hariprashad-Charles.

[4] The application for an extension of time to file the Notice of Appeal was filed on 8 May 2001. It was supported by two affidavits of the Applicant, William Edgecombe. In the first affidavit filed on 8 May 2001 the Applicant deposed that the learned trial Judge had on delivering the oral judgment of 30 January 2001 promised to furnish a written judgment. He deposed that he believed that the two reasons why the promised written judgment had not been forthcoming were (1) that the Judge had been unwell, and (2) the pressure of work involved in the computerisation of the courthouse had prevented the preparation of the written judgment. He deposed that he believed that that the Applicants had a good appeal with a reasonable chance of success. He deposed that the failure of the trial Judge to permit the Defendants to call Mr Pettigroo [sic] as an expert witness had been a serious and grave miscarriage of justice. In the second affidavit filed on 7 November 2001, the Applicant deposed that the failure of the trial Judge to have delivered the promised written judgment had resulted in the period for filing the Notice of Appeal passing. Exhibited to that affidavit was a letter dated 26

March 2001 from Counsel for the Defendants to the Judge requesting written reasons for the decision "to enable us to properly advise our said clients."

[5] Redhead JA heard the application for an extension of time to file the Notice of Appeal on 16 November 2001. His notes of the arguments before him, his decision and his reasons for his decision form part of the record. Counsel for the Applicants, in support of the application for leave, argued before Redhead JA that the length of delay was not excessive and that there would be no prejudice to the Respondent. Counsel for the Respondent, in opposing the application, argued that the length of the delay between 30 January 2001 and the date of filing of the Summons for leave to appeal of 8 May 2001 was excessive. He submitted that the Applicants had not produced any evidence as to their chances of success on appeal. He argued that, as the Defendants had at the trial conceded judgment, their chances of success were minimal. He pointed out that the matter was over 10 years old. Counsel for the Applicants did not reply, whereupon Redhead JA dismissed the application, giving as his reasons, "In my judgment, there is no good and proper reason for the delay and, most importantly, the chances of success are less than minimal." In so doing, he exercised his discretion as to whether or not to give the Applicants an extension of time to file the Notice of Appeal.

[6] The principal reason given throughout by the Applicants for their failure to file their Notice of Appeal in time is the alleged promise by the trial Judge to deliver the requested and allegedly promised written judgment. In view of the way in which the Defence had conducted their case, in having failed to produce any witnesses or to lead any evidence at the trial, the delivery of an oral judgment immediately at the close of the case was by no means unreasonable or surprising given the circumstances. The trial Judge would doubtless at the time of giving judgment have expressed reasons therefor. One would have expected both counsel for the Plaintiff and for the Defendants to have taken notes of the reasons given by the Judge. No tape recording or stenographic facilities being available at that time in our courts, no other record of the Judge's reasons as expressed at the time of the

delivery of the oral judgment would normally be available to the parties or to the Court of Appeal. I find it difficult to believe that the trial Judge, in the absence of an appeal, ever promised to give written reasons for her oral judgment of 30 January 2001. I do not accept it as proper behaviour for Counsel to engage in correspondence with the trial Judge at any time during the course of a case, or at the conclusion of the case, requesting written reasons or any other act on the part of the trial Judge. The proper step for counsel to have taken was to have filed the Notice of Appeal if so instructed, complying strictly with the rules, and in due course to have written to the Registrar requesting a copy of the Judge's notes. The trial Judge would in an appropriate case give written reasons for the oral decision or judgment for the benefit of the parties and the Court of Appeal at the hearing of the appeal. The contents of Counsel's letter to the trial Judge requesting a written judgment, exhibited to the affidavit, do not support the Applicant's contention that the Judge had promised a written judgment. The letter was in any event out of order for the reason given.

[7] The factors that Redhead JA were required to take into consideration in this application for an extension of time within which to appeal are well known. They are conveniently set out in the decision of the Court of Appeal delivered by Satrohan Singh JA in the case of Quillen and others v Harney, Westwood & Riegels (No 1) [1999] 58 WIR 143:

> "Power to hear an application [for an extension of time within which to file an appeal] is given to this court by the Rules of the Supreme Court 1970, Ord 3, r 5, 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 therefore (see Ord 64, r 6(2)). 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."

[8] The law on the length of the delay as applicable in this case has been expressed by Satrohan Singh JA in the unreported Antigua and Barbuda decision in the Court of Appeal in Civil Appeal No 1 of 1995 in the case of Simon v Henry et al where the learned Judge declared that:

> "In deciding whether this can be described as being reasonable or inordinately long, the application will have to be considered in accordance with its own particular facts and a relevant factor for such consideration would be the reason for the delay. If there is no reason or the reason is unacceptable then there should have been no delay and delay of 8 weeks would be inordinately long."

[9] It is clear from a reading of the notes of Redhead JA that he misapprehended no fact, took no irrelevant factor into consideration, applied no wrong principle of law, and in coming to his decision acted in accordance with the proper principles that were applicable. The Applicants by their affidavits before him showed no valid reason for their delay, nor any proper estimate of their chances of succeeding on appeal. The learned Justice of Appeal expressly found that there had in fact been no good and proper reason for the delay and that the Applicants' chances of success on appeal if the application were granted were less than minimal. There is no reason why an appellate court should interfere with the decision he came to. I would dismiss the application with costs to the Respondent of $2,500.00.

Ian D. Mitchell, QC
Justice of Appeal [Ag]

[10] BYRON, C.J.: I have read the draft judgments of Mitchell, J.A. [Ag.] and Georges, J.A. [Ag.]. I am in agreement with the decision to dismiss the application with costs and the reasons that have been given. The omission to adduce any

evidence coupled with the concessions made by counsel for the appellant at the close of the case for the respondent [as pointed out in detail by Mitchell, J.A. [Ag.] provides a circumstance which minimises the prospect of success on appeal. There could be no benefit to anyone in granting leave to file the notice of appeal out of time.

Sir Dennis Byron
Chief Justice

[11] GEORGES, J.A. [Ag.]: I have had the advantage of reading the draft judgment of Mitchell JA (Ag) and I too agree that the Defendants/Intended Appellants' application to discharge the order of Redhead JA dated 16 November 2001 refusing them leave for an extension of time to appeal should be dismissed since no reasonable prospect of the appeal succeeding has been demonstrated. As Redhead JA found, the chances of success were less than minimal. The record shows that learned Counsel for the Defence having led no evidence on behalf of the Defendants/Intended Appellants, in a written address, a copy of which was provided to the trial Judge, virtually conceded judgment. Further, the delay in filing the Notice of Appeal cannot in my view be attributed to the absence of a written judgment since the grounds of appeal as set out in Appendix A of the Record (at page 22) turns on other factors of the case/trial, so that there are no reasonable and sufficient reasons for the delay as Redhead JA himself found for a fact. I would accordingly dismiss the application with costs to the Respondent in the sum of $2,500.00.

Ephraim Georges
Justice of Appeal [Ag.]