ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 4 OF 2003

BETWEEN:

PAGET LAKE

Appellant/Applicant

and

LIAT [1974] LIMITED

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins — Justice of Appeal [Ag.]

Appearances:

The Appellant/Applicant in Person
Mr. Gerald Watt, QC, for the Respondent

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2004: May 25;
July 30

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JUDGMENT

[1] RAWLINS, J.A. [AG.]: Mr. Lake is a Pilot who was employed by LIAT. On 29th December 2003 he applied for an extension of time within which to file the Record of Appeal in this case. He filed the application. He deposed an Affidavit in support of the application that was filed on the same date. On 25th May 2004 I dismissed the application with no Order as to costs. This Judgment is given at Mr. Lake's request for written reasons for the decision.

[2] Mr. Lake's application arose out an Appeal that he instituted on 8th July 2003 against a decision that the Industrial Court gave on 26th May 2003. The Industrial Court

thereby discharged an injunction that it issued at the behest of Mr. Lake against LIAT on 6th April 1990. That injunction restrained LIAT from purporting to dismiss Mr. Lake pending the determination of Reference No. 9 of 1990 by which he instituted this present action against LIAT.

[3] There have been various turns of events since that injunction was granted. These include a decision that this Court made in February 1994 in Civil Appeal No 15 of 1992. In that Judgment this Court indicated that by virtue of the injunction, LIAT should have continued to pay Mr. Lake's salary. It ordered LIAT to pay $200,000.00 to Mr. Lake forthwith. Mr. Martin Camacho, LIAT's in-house Counsel deposed in an Affidavit dated 12th September 2003 that Mr. Lake was paid this sum. He also stated that Mr. Lake received his monthly salary following an Order that the Industrial Court made on 27th April 1994.

[4] On 8th July 2003, Mr. Lake also applied under the Appeal proceedings in this case for an Order staying the decision of the Industrial Court to discharge the injunction pending the outcome of his Appeal. Sir Dennis Byron, C.J. dismissed that application on 16th September 2003. He also issued a direction in the following terms:

> "Directions are hereby given for a speedy hearing of the appeal and the Applicant is directed to make such a request in writing of the Chief Registrar at the time the Record of Appeal is filed with a copy to the Registrar of the High Court, Antigua, and the Respondent.

[5] The reasons for my decision to dismiss Mr. Lake's application came against this direction, a consideration of the applicable legal principles and the reasons that Mr. Lake advanced to support his request for extension of time.

## The Legal Principles

[6] Mr. Gerald Watt, Q.C., Learned Counsel for LIAT, relied on the criteria for extension of time that were adumbrated in Quillen and Others v Harney, Westwood &

Riegels (No.1) (2003) 58 W.I.R. 142 and Harold Simon v Carol Henry and Tracey Joseph, Antigua and Barbuda Civil Appeal No. 1 of 1995, 3rd July 1995. These cases were based on our 1970 Supreme Court Rules that the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("the 2000 Rules") repealed and replaced. It is also noteworthy that these cases were concerned with the extension of time within which to file an appeal. Mr. Lake's present application is concerned with whether to grant an extension of time within which to file the Record of Appeal. However, the criteria that were stated in these cases are referable to extension of time, generally. To this extent, they are the same criteria that are applicable to extension of time to file the Record of Appeal.

[7] This Court confirmed the applicability of the same criteria for extension of time under the 2000 Rules in John Cecil Rose v Anne Marie Uralis Rose, St. Lucia Civil Appeal No.19 of 2003, September 2003. In John Cecil Rose, Sir Dennis Byron, C.J. stated them thus at paragraph 2 of the Judgment:

> "Granting the extension of time is a discretionary power of the Court, which will be exercised in favour of the applicant for good and substantial reasons. The matters which the Court will consider in the exercise of its discretion are: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if the extension is granted; and (4) the degree of prejudice to the Respondent if the Application is granted."

## Does Mr. Lake Satisfy the Criteria?

[8] First, I consider the evidence and the case that Mr. Lake made in support of his application. Second, his case will be analyzed in the light of the applicable principles.

### Mr. Lake's case

[9] The evidence that Mr. Lake gave is set out in the Affidavit that he deposed and filed on 29th December 2003. According to that evidence, the consequence of the

discharge of the injunction is that he has no source of income. He is unable to compile and file the Record within the stipulated time due to financial constraints. He further stated that his Airline Transport licence has expired and he would have to re-qualify. This would involve considerable expense. He is indebted to 2 Banks for considerable legal costs. He survives on loans from relatives and friends. Mr. Lake promised to substantiate these assertions at the hearing. He did not.

[10] Mr. Lake further deposed that he explained his difficulties during the course of his Examination in Chief before 2 members of the Industrial Court in October 1996. He said that the President of the Court was absent and therefore did not hear his explanation.

[11] Mr. Lake's further evidence is that it would be necessary for him to apply to the Industrial Court to obtain typed copies of the Notes of Evidence of the October 1996 hearings on Reference No. 9 of 1990 before that Court. The hand-written Notes of Evidence of one of the members of the Tribunal were provided, but these were not satisfactorily legible. The Notes were necessary to counter certain contentions by LIAT.

[12] Mr. Lake deposed, additionally, that he had grave concerns regarding certain omissions and/or inaccuracies in the Notes of Evidence to the hearings in April 2003. He said that he needed time to consult with his lead Counsel in London, Mr. James Goudie, Q.C., who would have to swear an Affidavit regarding the deficiencies in the Notes of Evidence.

[13] At the hearing, Mr. Lake re-iterated these assertions in his oral submissions. In addition, he asserted that he now has major health concerns, which, coupled with the fact that he is not now paid his wages by LIAT has made it financially burdensome for him to pursue the Appeal in a timely manner. He stated, additionally, that the death

of his brother made it difficult for him to concentrate on the matter.

The length of the delay

[14] In John Cecil Rose, the Court noted, at paragraph 3, that the delay in that case was more than 3 months. It stated that such a delay would be inordinate if there was no acceptable reason for it. Learned Counsel for LIAT submitted that the length of the delay in the present case is inordinate. I agree, particularly given the direction that the Chief Justice gave in his Order of 16th September 2003 for a speedy hearing of the Appeal.

[15] The Notice of Appeal in this case was filed on 8th July 2003. Mr. Lake's application to stay the Order that discharged the injunction was made on the same date. The Order of 16th September 2003 refused the application for the stay. Mr. Lake has given no indication of endeavours that he made to prepare and file the Record of Appeal between that time to the date when the application to extend time was heard in May 2004. The Record of Appeal should have been filed by the end of August 2003. Even if time is taken from the September 2003 Order, it should have been filed by the end of November 2003. At the hearing of the application, Mr. Lake indicated that he wished an extension that I considered to be too long. That request cannot be granted. The delay thus far is already too lengthy. The length of the delay would be inordinate if there is no acceptable reason for it.

The reason for the delay

[16] Mr. Lake advanced financial and health constraints, the death of his brother, and his inability to consult with his Counsel in England as the reasons for the delay. In John Cecil Rose, it was held that difficulty in communicating with Counsel in the absence of detailed evidence of failed efforts does not make this an acceptable reason for the

delay. No such details were provided by Mr. Lake. The evidence that he provided regarding his ill health does not indicate that this posed an impediment to the prosecution of his appeal. The evidence that he provided did not assist me to assess his present financial status definitively. In short, Mr. Lake provided no reasonable or acceptable reason for the delay, which is therefore inordinate.

The chances of success

[17] Mr. Lake provided no evidence that shows the merits of his appeal. He filed no skeleton arguments to support any ground on which the appeal would be argued. He referred to ineligible Notes of Evidence of the October 1996 hearings in the Industrial Court. He did not exhibit copies of those Notes. He made no attempt to show the relationship between those Notes and the decision of the Court that discharged the injunction. It does not appear that the Notes of Evidence for October 1996 are concerned with the injunction.

[18] Mr. Lake referred to inaccuracies and/or omissions in the Notes of Evidence of the April 2003 hearings. There was no attempt to intimate the purport of these inaccuracies or omissions. Very simply, it appears that as far as Mr. Lake is concerned, the process should await the pleasure of his consultation with his lead Counsel who is in London. The fact is, however, that the chances of success may be gleaned from the Judgment of the Industrial Court by which it discharged the injunction.

[19] It is trite principle that the jurisdiction to grant injunctive relief to discharge an injunction is discretionary. It must be determined, ultimately, whether it is just and convenient to grant or discharge an injunction on the basis of equitable principles that were elucidated in American Cyanamid Co. v Ethicon Limited [1975] A.C. 396.

[20] The Industrial Court correctly observed in its Judgment that an injunction might be discharged where a claimant fails to prosecute his substantive action expeditiously. Mr. Lake instituted his reference on 14th April 1990. In 2004, some 14 years subsequently, the matter has not advanced beyond his own examination in chief in October 1996. There have been interlocutory and appeal procedure hearings. There were numerous adjournments to facilitate these. There were also adjournments at the behest of both Parties and also for the convenience of the Court. However, a reading of the documents that were before me left little doubt that Mr. Lake has not been very enthusiastic in pursuing his substantive claim. It was reasonable for the Industrial Court to conclude, as it did in paragraph 21 of the Judgment, that Mr. Lake's enthusiasm waned because he was quite contented that LIAT paid him salary and allowances on the basis of the injunction and subsequent litigation, while he provided no services in return.

[21] Additionally, the pivotal issue that the initial Reference raised was concerned with the allocation of time for meals during scheduled flight operations. The terms of the injunction were referable to that contest. The Industrial Court observed that the matter evolved into a claim for unfair dismissal. The Court noted that if Mr. Lake succeeded on this claim he would be entitled to monetary compensation. The Court thought that the injunction could not be maintained because injunctive relief would not be granted where damages or monetary compensation is an adequate remedy. In the circumstances, it was reasonable for the Industrial Court to discharge the injunction on the ground that, in all of the circumstances, it was inappropriate and inequitable for it to continue.

[22] In conclusion, Mr. Lake has no chance of success in the appeal. It will be remiss of me to permit him to pursue an appeal, which would simply condemn him in the costs, further delay the hearing of the Reference on its merits and further prejudice LIAT.

The degree of prejudice

[23] During the hearing of this application, I found 2 things instructive. The first was that when the matter came before me on 24th May 2004, Mr. Lake indicated that he was minded to apply for an adjournment on health grounds. He brought a medical certificate that was not helpful. The hearing continued. The second matter was his indication that he wished to have an extension of some length. LIAT has already suffered substantial prejudice in this case. It has already paid out large sums of money to Mr. Lake. It did not receive any services in return for those payments. Mr. Lake has to be encouraged to prosecute his Reference.

[24] It is instructive that even the pursuit of this application was not timely. The Chief Registrar issued a Notice of Hearing to the Parties under Part 62.9 of the 2000 Rules on 22nd January 2004. It notified the Parties that this application was to be heard in February 2004. By way of faxed communication, the Chief Registrar enquired, on 22nd January 2004, whether LIAT opposed the application. This enquiry was to facilitate the case management process. Solicitors for LIAT responded to indicate that they had not been served. The application came for hearing some 3 months later.

[25] There is no closure after some 14 years and there will not be any soon. The passage of time has seen the exit of members of the tribunal before whom the hearing of the reference commenced. The Industrial Court is not now constituted as it was for the previous hearings of the Reference. There must now therefore be a new trial. The new members cannot simply continue to hear the Reference using the evidence that was adduced before the former members. If I were to make an Order that permits a procedure that is unmeritorious to continue, it would prolong the prejudice that LIAT is sustaining.

## Conclusion

[26] In the foregoing premises, the application to extend the time within which Mr. Lake is to file the Record of Appeal is dismissed because of inordinate delay, even in the face of the direction that this Court gave on 16th September 2003 for the Record of Appeal to be filed to facilitate the speedy hearing of the appeal. Mr. Lake applied more than 3 months after that direction was given for an extension of time. He has not provided any good and substantial or acceptable reasons for the delay. Moreover, he has no chance of success on the appeal. It would be remiss of this Court to encourage him to pursue it. LIAT has suffered substantial prejudice in this case.

[27] The Reference to the Industrial Court must now be tried de novo because the Industrial Court was reconstituted since the last hearings in 1996. Mr. Lake has not shown that he suffered any miscarriage of justice that the appeal could correct. This Court would not lend its aid to any further delay in the resolution of the substantive dispute in this case. It was for the foregoing reasons that I dismissed the application.

Hugh A. Rawlins
Justice of Appeal [Ag.]