EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2013/0012

BETWEEN:

EASTERN CARIBBEAN COLLECTIVE ORGANISATION FOR MUSIC RIGHTS (ECCO) INC.
(FORMERLY HEWANORRA MUSICAL SOCIETY LIMITED HMS INC.)

Applicant

and

MEGA-PLEX ENTERTAINMENT CORPORATION

Respondent

Before:
The Hon. Mr. Mario Michel — Justice of Appeal

Appearances:
Mr. Thaddeus M. Antoine for the Applicant
Mr. Hilford Deterville, QC with him Mr. Gregory Delzin and Ms. Deborah Bowers for the Respondent

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2013: September 10.

Civil appeal – Interlocutory order – Application made in accordance with rule 62.5(3) of the Civil Procedure Rules 2000 – Application for extension of time within which to file notice of appeal – Whether Court should exercise its discretion to grant extension of time

Held: granting the application for an extension of time and ordering the applicant to pay the respondent's costs to be assessed if not agreed, that:

1. In determining applications for extension of time for filing appeals, unless the case is of a complex nature like **Sayers v Clarke Walker**, the Court is not required to apply the provisions of rule 26.8 of the CPR.

C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd Saint Lucia High Court Civil Appeal SLUHCVAP2011/0017 (delivered 19th March 2012, unreported) followed.

2. The exercise of the Court's discretion to grant or refuse an application for an extension of time to appeal is fettered by a consideration of the following factors: (1) the extent of the delay in filing the notice of appeal, (2) the reason(s) for the delay, (3) the chances of the appeal succeeding if the extension of time is granted and (4) the degree of prejudice to the respondent if the extension is granted. In the present case, the delay does not appear to be inordinate, there does appear to be a valid reason for the delay, the applicant appears to have more than a fanciful chance of succeeding in the appeal if granted an extension of time to file the notice of appeal, and there does not appear to be any particular prejudice which would be occasioned to the respondent if the extension is granted, and so this Court will exercise its discretion and grant an extension of time to the applicant to file its notice of appeal.

John Cecil Rose v Anne Marie Uralis Rose Saint Lucia High Court Civil Appeal SLUHCVAP2003/0019 (delivered on 22nd September 2003, unreported) followed.

JUDGMENT

[1] **MICHEL JA:** On 8th October 2010, the applicant filed a claim against the respondent concerning an alleged breach of copyright.

[2] On 14th February 2013, Justice Rosalyn Wilkinson struck out the applicant's claim for failing to disclose any reasonable grounds for bringing the claim against the respondent (the "strike out order").

[3] On 28th February 2013, the applicant filed an application seeking the leave of the High Court to appeal against the strike out order. The application for leave was granted by Wilkinson J on 15th March 2013, without a hearing (the "leave order").

[4] On 24th April 2013, the applicant filed an application, with affidavit in support, seeking the leave of the Court of Appeal to file a notice of appeal after the expiration of the period of time prescribed by the rules. In the application and affidavit, the applicant claimed that it only received notice of the leave order on

17th April 2013, which was a date beyond the last date for the filing of the notice of appeal against the strike out order.

[5] The application for leave to file the notice of appeal out of time was set down by this Court for consideration before a single judge of the Court of Appeal in Saint Lucia on 20th June 2013, and on 31st May 2013 counsel for the applicant and for the respondent were so notified.

[6] On 19th June 2013, counsel for the respondent filed and served notice of opposition by the respondent to the application for leave to appeal out of time. On that same date, written submissions with authorities were filed by the applicant and served on the respondent.

[7] On 20th June 2013, an affidavit in answer to the applicant's application and affidavit was filed and served on behalf of the respondent.

[8] A hearing of the application to receive oral submissions from counsel for the parties was fixed for 21st June 2013, on which date an affidavit in reply to the respondent's affidavit in answer was filed on behalf of the applicant.

[9] On 21st June aforesaid, there was a hearing in Chambers before me as a single judge of the Court of Appeal, at which hearing counsel for both parties made strong oral submissions and at the conclusion of which I gave leave to both parties to file written submissions on or before 31st July 2013. Submissions were filed on behalf of both parties on 31st July.

[10] The application under consideration is in fact an application for leave to file a notice of appeal against the strike out order after the expiration of the period of time prescribed by the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** (the "CPR").

[11] The strike out order is an interlocutory order, as defined by rule 62.1(3) of the CPR, because the order would not be determinative of the issues which arose on the claim whichever way the learned judge had ruled. It would certainly not have

been determinative of the issues which arose on the claim if the judge had denied the application to strike out the claim. The order does not, therefore, pass the application test set in rule 62.1(3)(b) of the CPR and the intended appeal is accordingly an interlocutory appeal as defined by rule 62.1(2).

[12] The intended appeal being interlocutory, the applicant sought and obtained the leave of the High Court to appeal against the strike out order.

[13] The next step in the appeal process would be the filing of the notice of appeal, which - in accordance with rule 62.5(1) – must be within 21 days of the date when leave was granted, and not within 14 days as erroneously sworn to by Mr. Daniel Francis in his affidavit of 24th April 2013. By the time that Mr. Francis was swearing to this affidavit, rule 62.5 of the CPR had been amended nearly 18 months previously. Leave having been granted in this case on 15th March 2013, the notice of appeal should have been filed by 8th April 2013, and not 30th March 2013 as per Mr. Francis's affidavit, which latter date would have been incorrect in any event considering that it fell on a Saturday.

[14] I pause to urge young attorneys like Mr. Daniel Francis to be a little more circumspect in dealing with such matters, especially where – as in the present case – you end up swearing on affidavit to matters which are factually incorrect and which could so easily have been averted by the dotting of your i(s) and crossing of your t(s) before affixing your signature.

[15] Since no notice of appeal was filed by 8th April, if the applicant wishes to proceed with its appeal it must obtain an extension of time within which to file the notice of appeal.

[16] Rule 62.5(3) of the CPR provides that the Court of Appeal may grant an extension of time on an application made under Part 11 of the CPR. Such an application was made on 24th April 2013, and the respondent was served with the notice of application on 7th June. Although rule 62.5(3) provides that the application may be determined without a hearing, by notice dated 29th May 2013 the parties were

notified that the application would come up for consideration before a single judge of the Court of Appeal on 20th June 2013. As previously stated, counsel for the parties were later invited by the Court to make and did make oral submissions to the Court on 21st June, followed by written submissions on 31st July.

[17] Both the oral and written submissions of the parties focussed primarily on rule 26.8 of the CPR and cases decided in accordance with this rule.

[18] Notwithstanding the erudite submissions of counsel, I do not regard the application before me to be an application for relief from sanctions to be determined in accordance with rule 26.8.

[19] I am aware that I am here diverting from a path previously taken by some of my distinguished predecessors in the Court of Appeal of the Eastern Caribbean Supreme Court who have used rule 26.8 to deal with similar applications before the Court, but I am confident that in so doing I will find myself in the company of others also distinguished. More specifically, I disagree with the approach taken by Barrow JA in the cases of **The Nevis Island Administration v La Corpropriete du Navire J31 et al**,[1] **Ferdinand Frampton et al v Ian Pinard et al**,[2] **Dominica Agricultural and Industrial Development Bank v Mavis Williams**[3] and **Beatrice Antoine v Edward Dewitt John**,[4] where he applied rule 26.8 in determining applications for extension of time for leave to appeal or to file notice of appeal. In the last of these four cases, Barrow JA stated his position thus - "The principles which guide the court's exercise of discretion on whether to extend time for appealing are contained in rule 26.8 of CPR 2000, which deals with relief from sanctions for non-compliance." While parting company with Barrow JA on this issue, I agree in substance with the position taken by Edwards JA in the case of

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[1] Saint Christopher and Nevis High Court Civil Appeal SKBHCVAP2005/0007 (delivered 3rd April 2006, unreported).
[2] Commonwealth of Dominica High Court Civil Appeal DOMHCVAP2005/0015 (delivered 3rd April 2006, unreported).
[3] Commonwealth of Dominica High Court Civil Appeal DOMHCVAP2005/0020 (delivered 18th September 2006, unreported).
[4] Saint Vincent and the Grenadines High Court Civil Appeal SVGHCVAP2008/0012 (delivered 14th October 2008, unreported).

C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.[5] to the effect that in determining applications for extension of time for filing appeals, unless the case is of a complex nature like **Sayers v Clarke Walker**,[6] the Court is not required to apply the provisions of rule 26.8 of the CPR.

[20] It should be noted that in **Sayers v Clarke Walker**, Lord Justice Brooke, in delivering the judgment of the English Court of Appeal, said - "when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider "all the circumstances of the case" including [the provisions of rule 3.9 of the English CPR]"[7]. Rule 3.9 of the English CPR is equivalent to our CPR 26.8.

[21] Before going on to deal specifically with the application before me, I should mention that there was a judgment delivered in October 2011 by Pereira JA sitting as a single judge of the Court of Appeal in the case of **Carleen Pemberton v Mark Brantley**[8] which also dealt with the issue of an extension of time to file a notice of appeal and which was referred to by Edwards JA in **C.O. Williams Construction (St. Lucia) Limited**. Pereira JA addressed the application in **Pemberton v Brantley** within the framework of the case management of the appeal and treated with it under the court's case management power in rule 26.1(2)(k) to extend the time for compliance with any rule. She then proceeded to consider whether to make an order putting matters right under rule 26.9(3), presumably by deeming the notice of appeal filed out of time to have been properly filed, but declined to do so after applying the guidelines for the exercise of discretion in applications for extension of time to appeal set out by Byron CJ in the case of **John Cecil Rose v Anne Marie Uralis Rose**.[9]

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[5] Saint Lucia High Court Civil Appeal SLUHCVAP2011/0017 (delivered 19th March 2012, unreported).
[6] [2002] EWCA Civ 645.
[7] At paragraph 22 of the judgment.
[8] Saint Christopher and Nevis High Court Civil Appeal SKBHCVAP2011/0009 (delivered 14th October 2011, unreported).
[9] Saint Lucia High Court Civil Appeal SLUHCVAP2003/0019 (delivered on 22nd September 2003, unreported).

[22] It is worth noting that the judgment in **Rose v Rose** was delivered by Byron CJ (as a single judge of the Court of Appeal) just over two years after he and two other judges of the Eastern Caribbean Supreme Court appointed by him had made the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000**. There can be no basis therefore for any suggestion that that the learned Chief Justice would not then have been very alive to the changed legal landscape ushered in by the CPR and guided by it in the preparation and delivery of his judgment on an application, such as in the present case, for an extension of time to file an appeal.

[23] The application in the present case is for an extension of time to file a notice of appeal, which application falls squarely under rule 62.5(3) of the CPR. The underlying case is not of a complex nature, such as the one in **Sayers v Clarke Walker**, inviting any excursion into the provisions of rule 26.8. The application is not made within the context of the case management of the appeal so as to justify recourse to rule 26.1(2)(k). Apart from an undated and unsigned draft, there is no notice of appeal filed out of time which the Court can put right by the making of an order to that effect under rule 26.9. What I must consider and determine in this case is an application for an extension of time to file a notice of appeal after the time for so doing has expired. In accordance with rule 62.5(3), the application is made under Part 11 and ought therefore to meet the requirements of this Part, which it does appear to do.

[24] Learned Queen's Counsel appearing for the respondent launched a pre-emptive strike on the application for the extension of time by advancing in his oral submissions that the respondent had never been served with the application for leave to appeal, which application was granted by Wilkinson J without a hearing. But the fact that the application for leave to appeal may not have been served on the respondent is not a consideration relevant to the application before me. If the respondent believes that the learned judge's order is somehow vitiated by the non-service of the application on the respondent, then it would be for the respondent to seek to set aside that order, but - as long as the order subsists - this Court's consideration of the application before it is unaffected by the non-service of the

application leading to the order of Wilkinson J. In any event, this Court ruled in **Cage St. Lucia Limited v Treasure Bay (St Lucia) Limited et al**[10] that an application for leave to appeal is essentially a "without notice" procedure which would not therefore necessitate service of the application on the respondent.

[25] Once having disposed of the pre-emptive strike and determined that the application is not a Part 26 application subject to all of the conditions limiting the exercise of judicial discretion, I must now address my mind to the factors to be taken into account in the exercise of my discretion as to whether or not to grant the application for an extension of time to file a notice of appeal. Even though I am not constrained by the provisions of Part 26, I do not however consider that the exercise of my discretion to grant or refuse the application for extension of time is uninhibited. Following from the judgment of Byron CJ sitting as a single judge of the Court of Appeal on an application for an extension of time to appeal in the **Rose v Rose** case referred to and applied by Pereira JA in **Pemberton v Brantley**, I will fetter the exercise of my discretion by the consideration of four factors – (1) the extent of the delay in filing the notice of appeal, (2) the reason(s) for the delay, (3) the chances of the appeal succeeding if the extension of time is granted and (4) the degree of prejudice to the respondent if the extension is granted.

[26] As to the first of the four factors, the notice of appeal in the present case ought to have been filed by 8th April 2013, and the application to extend the time for filing it was made on 24th April 2013 – a delay in effect of 16 days, not insignificant but hardly inordinate.

[27] As to the second of the four factors, the reason for the delay alleged by the maker of the affidavit on behalf of the applicant was that the applicant only received notice of the making of the leave order by Wilkinson J on 17th April 2013, which was after the time for filing the notice of appeal had already elapsed. It does appear to be a perfectly valid reason for not filing a notice of appeal by the

[10] Saint Lucia High Court Civil Appeal HCVAP2011/0045 (delivered 23rd January 2012, unreported).

stipulated date if the party required to file it only learnt that the notice was due for filing after the date for filing it had already elapsed. The only problem one can have with the applicant on this issue in the circumstances of this case arises from the applicant having made application for leave to appeal an adverse judgment since 28th February 2013 and yet allowed itself the luxury of waiting some 7 weeks before discovering that its application had been granted. This does not appear to be consistent with the posture of a litigant eager to get a judgment hindering the progress of his case overturned and no explanation was offered in the affidavit as to the reason for the apparent lack of urgency on the part of the applicant in moving its case forward.

[28] As to the third of the four factors for consideration, that is, the chances of the appeal succeeding if the extension of time is granted, all that is before me on the basis of which I can give some consideration to this factor is the draft notice of appeal attached to the affidavit of Mr. Francis. The eleven grounds of appeal contained in the draft notice of appeal appear to be legally sound, although I am not able to assess their strength against either the statement of case which was struck out by the learned judge or the reasoning of the learned judge in striking it out, because none of these have been put before me. On the other hand, there was no attack launched by the respondent on the merits of the applicant's grounds of appeal, but only a criticism of the lack of particularity by the applicant in setting out a basis upon which the Court could "form a prima facie view on the prospect of success" of the appeal.

[29] In terms of the fourth factor, there was no submission made to the Court as to any prejudice which might be occasioned to the respondent if the application for an extension of time is granted, and there is none that is discernible other than the obvious one of having to contest a case that would otherwise have been concluded in your favour.

[30] All things considered, it would appear that the delay of 16 days between the date by which notice of appeal ought to have been filed and the date by which the

application for the extension of time was filed was not inordinate. It would also appear that - although there ought to have been some urgency shown by the applicant in following up on its application for leave to appeal after having made the application on 28th February, rather than waiting for some 7 weeks to discover what was the result of its application – the applicant did in fact act with some expedition when once it was notified of the grant of leave to appeal, by filing its application for an extension of time within 4 clear days of receiving notification of the grant of leave. It would appear too that, notwithstanding the lack of particularity that would have enabled me to make a proper assessment of the chances of success of the appeal, on the face of the grounds of appeal contained in the draft notice of appeal, the applicant does have more than a fanciful chance of succeeding in the appeal if granted an extension of time to file his notice of appeal. Finally, I have not discerned any particular prejudice which would be occasioned to the respondent by the grant of an extension of time for the filing of notice of appeal in this case.

[31] In the circumstances, the application for an extension of time to file a notice of appeal is granted, which time is extended until 25th September 2013. The appeal will thereafter take its normal course in accordance with the rules.

[32] As to costs, this application was necessitated only by the failure of the applicant to file its notice of appeal within the stipulated time, and the respondent's opposition to the application was entirely reasonable in the circumstances. Bearing this in mind, and having regard in any event to rule 65.11(3)(b) of the CPR, the applicant is ordered to pay the respondent's costs on this application to be assessed if not agreed.

Mario Michel
Justice of Appeal