

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION**

**2006/PUB/jrv/FP/0006**

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**BETWEEN**

**THE QUEEN**

**AND**

- (1) THE ASSISTANT/DEPUTY CONTROLLER OF ROAD TRAFFIC  
(2) THE INSPECTOR OF ROAD TRAFFIC**

**EX PARTE  
G. B. JANIKI INVESTMENTS COMPANY LIMITED  
*Applicant***

**BEFORE:** The Honourable Mrs Justice Estelle Gray-Evans  
**APPEARANCES:** Kenra Parris-Whittaker and Jacy Whittaker for the applicant  
Melissa Wright along with Ingrid Brooks for the respondent  
2011: 18 July and 22 November

**REASONS FOR DECISION**

**(Refusal to set aside leave to apply for Judicial Review)**

Gray Evans, J.

1. By an originating Notice of Motion filed 28 August 2007 the applicant, a licensee of the Grand Bahama Port Authority, Limited, seeks the following relief against the respondents:
  - a. An Order of Certiorari to quash the said decision of the Inspector of Road Traffic not to inspect the Applicant's vehicles and the decision of the Assistant Deputy Controller of Road Traffic not to license and register the Applicant's vehicles and further or alternatively;
  - b. A Declaration that the said decisions were ultra vires or otherwise irrational or unreasonable.
  - c. An Order of Mandamus to require the Inspector of Road Traffic to inspect and the Assistant Deputy Controller to register the applicant's vehicles and to issue identification plates for the said vehicles.
  - d. Cost and damages.
2. Leave to apply for judicial review was granted, according to the judge's file notes, by Mohammed J, on 27 June 2007. However, the order therefor, although dated 27 June 2007, was actually initialed by Maynard J (Acting) on 15 August 2007 and the Originating Notice of Motion filed on 28 August 2007.
3. The matter progressed at a snail's pace through various interlocutory applications to trial which was set for 18 July 2011.
4. On that date, counsel for the respondent applied to have the aforesaid leave set aside and the application for Judicial Review dismissed pursuant to Order 32 rule 6 and Order 18 rule 19(1)(d) if the Rules of the Supreme Court ("RSC") as well as under the inherent jurisdiction of the Court on the ground that the applicant had not filed its Originating Notice of Motion within 14 days of the grant of the leave pursuant to the provisions of RSC Order 53 rule 3.
5. In response to the respondent's application, the applicant applied for an extension of the time within which to file the Originating Notice of Motion.
6. Although counsel for the respondent objected to the applicant's application for extension of time, it was common ground that the court has a discretion to extend the time for compliance with procedural steps, including extension of time, even

though the application for extension is not made until after the expiration of that period. See RSC Order 3 rule 4

7. After hearing the parties, I refused to set aside the leave, granted the extension of time sought by the applicant and proceeded with the trial of the substantive application.
8. I also promised to put in writing my reasons for refusing to set aside the leave and granting the extension of time.
9. This I now do.
10. The authorities are clear. Applications for judicial review must be brought promptly and failure to do so may result in the court refusing to grant leave for the making of the application, or any relief sought on the application.
11. Counsel on both sides cited a number of cases which for the most part deal with the issue of pre-leave delay.
12. In this case, there is no allegation of pre-leave delay. The complaint by the respondent is that the applicant failed to file the Originating Notice of Motion within fourteen days of the leave to commence these proceedings having been granted ex parte.
13. It appeared to me from the affidavit of Sheila Taylor filed herein on 28 July 2011 that the applicant's only reason for not filing the Notice of Motion within fourteen days of the date of the order was because the order, duly initialed by the judge was not returned to counsel for the applicant until six weeks after the same was granted. Nevertheless, the applicant said that the leave should not be set aside for the following reasons:
  - a. The court has already determined that there was sufficient merit to the applicant's case, having given the applicant leave to bring these proceedings.
  - b. The delay by the respondents in bringing this application is an abuse.
  - c. The respondents have waived the irregularity of the originating Notice of Motion having taken numerous fresh steps since the filing thereof.
  - d. No prejudice has been suffered by the respondents in the applicant's failure to file the originating Notice of Motion within the requisite time.
  - e. The applicant's claim is of great public importance to the city of Freeport.
  - f. The respondent's application to set aside leave is only being advanced as a way of gaining a tactical advantage over the applicant and the court should not look with favor

on a party who seeks only to take tactical advantage from the failure of another party to comply with time limits. See the Mortgage Corporation case.

- g. Applications to strike out for failure to comply with the rules ought to be made promptly before any fresh step is taken.
14. Each side made several submissions and cited a number of authorities, all of which I have considered, in support of their respective cases.
15. Counsel for the respondents relied on several cases including: *Sweeting v Elizabeth Darville et al* 2008 BHS J. No. 3; *Biwater and Thamboo Ratnam v Thamboo Cumarasamy* (1965) 1 WLR 8; *Bahamas General Communications Limited v Public Utilities Commission* (2002) BHS J No 678; *R v Dairy Produce Quota Tribunal ex parte Caswell*, (1990) 2 AC 738; and *R v Institute of chartered Accountants in England and Wales ex parte Andreou* (1996) COD 489; 8 *Administrative Law Review* 557.
16. Counsel for the applicant, in support of its application relied on the cases of the *Mortgage Corporation Limited v Sandoes Blinkhorn & Co and Gibson* (1996) *The Times* December 27 (Lord Justice Mustill's judgment) and the judgment of Isaacs, Sr J in the case of *Cheryl Grant-Bethel v Sir Michael Barnett and others* BHS J No. 41. In the latter case, Isaacs, Sr J allowed the applicant to re-file the Originating Notice of Motion although it was irregular and opined at paragraph 31 as follows:

"Nevertheless all that deficiency does is to make the motion subject to possible nullification. It is certainly not a certainty under Order 2 rule 1(2)....I consider the motion in this case although irregular ought not to cause me to nullify this application".
17. In the case *R v the Water and Sewerage ex parte Biwater Bahamas Ltd* relied on by the respondent, the applicant was given leave ex parte to commence judicial review proceedings on 17 March 2005. The order was perfected on 18 March 2005. At the hearing of an inter partes application for an injunction on 17 July 2005, it was brought to the court's attention that the Notice of Motion had not been entered and the time for doing so had expired with no application for an extension of the time having been made to enable compliance. The respondents objected to the grant of any extension of time and Watkins J set aside the leave due to the failure of the applicants to enter the Notice of Motion in time. She also noted that there was an unacceptable explanation for such failure. On appeal, Osadebay J, in upholding Watkins J's decision, referred to the Privy Council's decision in *Thamboo Ratnam v Thamboo Cumarasamy and Cumarasamy* [1965] 1 WLR 8 where their Lordships explained the rationale for compliance with the Rules as follows:

"The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion: see *Osenton (Charles) & Co. v. Johnston* [1942] A.C. 130, 148; 57 T.L.R. 515, 521; [1941] 2 All E.R. 245, 257, H.L.(E.). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice: see *Evans v. Bartlam* [1937] A.C.473, 53 T.L.R. 689; [1937] 2 All E.R. 646, H.L. (E.). Upon questions of procedure the Board is slow to interfere with the discretion exercised by a local court: see *Montreal Corpn. v. Brown and Springle* (1876) 2 App. Cas. 168, P.C.

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 upon 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. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged and that his reason for this delay was that he hoped for a compromise. Their Lordships are satisfied that the Court of Appeal was entitled to take the view that this did not constitute material upon which they could exercise their discretion in favour of the appellant. In these circumstances their Lordships find it impossible to say that the discretion of the Court of Appeal was exercised upon any wrong principle."

18. Then, in the *Sweeting v Darville* case, the applicant was given leave to apply for judicial review on 15 February 2008. The Notice of Motion ought to have been filed on or before 4 March 2008. It was not. In fact, at the date fixed for the substantive hearing no Notice of Motion had yet been filed and no application was made for an extension of time until that date when the respondent sought to have the leave set aside on the ground that no Notice of Motion had been filed.
19. So, in both of those cases (*Water and Sewerage* and *Sweeting v Darville*), no Notice of Motion had in fact been filed. I, therefore, agreed with counsel for the applicant that both of those cases are distinguishable from the present case as, in this case, the Notice of Motion had in fact been filed. Although it was not within fourteen days of the date the order was actually given (by Mohammed J) it was filed within fourteen (14) days of the date the order was initialed by another judge (Maynard J (Ag)).
20. Finally, counsel for the applicant submitted that the issue herein is one of public importance that needs to be determined and, in that regard, she pointed out that counsel for the respondent in their written submissions had also agreed with that point.
21. Further, I note here that the respondent's application to discharge the leave to apply on the ground of non-compliance with the rules, which precipitated the

applicant's application for an extension, was made on the date set for trial after more than five years since this action commenced. I accepted the submissions of counsel for the applicant that there were several occasions during the course of these proceedings that the respondent could have raised the issue, but did not and had, therefore, waived its right to do so.

22. Additionally, the parties were ready for trial, submissions having been exchanged as well as provided to the court so, in my view, there would be no prejudice to the respondents to proceed with the trial, and while the reason for the failure to file the Notice of Motion on or before 27 July 2007, is unimpressive, because of the issue to be determined which both sides seem to agree is of public importance, and the fact that the parties were ready for trial which could be commenced immediately, I determined that it would be a wrong exercise of my discretion to reject the application on ground of delay or failure to comply with a procedural requirement, thereby leaving the substantive issues unresolved. I, therefore, granted the extension of time sought by the applicant to allow the matter to proceed.

DATED 11<sup>th</sup> day of May A.D. 2012  
Estelle G. Gray Evans  
Justice