

COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp & CAIS No. 55 of 2023

CLEARVIEW MANAGEMENT LIMITED

(D/B/A SANDALS RESORTS (EMERALD BAY) EXUMA)

Applicant/ Intended Appellant

And

HILARENA NIXON

Intended Respondent

BEFORE: **The Honourable Sir Michael Barnett, President, Kt**
The Honourable Mr. Justice Isaacs, JA
The Honourable Madam Justice Crane-Scott, JA

APPEARANCES: **Mr. Raynard Rigby, KC, with Ms. Asha Lewis, Counsel for**
Applicant/ Intended Appellant
Mr. Joseph Moxey, Counsel for Intended Respondent

DATES: **13 February 2024; 22 February 2024**

Civil Appeal- Application for Extension of Time- Rule 9 of the Court of Appeal Rules- Rule 11 of the Court of Appeal Rules- Judicial Discretion- Prospects of Success

On January 20, 2023, the Supreme Court ruled in favor of Hilarena Nixon, the respondent, and awarded her damages against her employer, Clearview Management Limited, the appellant, for termination of employment and personal injuries. However, Clearview Management Limited is seeking to appeal the portion of the award that relates to damages for personal injuries. According to the Court of Appeal rules, the appeal should have been filed within six weeks of the judgment, but it was made 25 days late, on March 28, 2023. The appellant argues that delays in obtaining

transcripts and the retention of new attorneys contributed to the delay in filing the appeal. The appellant requests an extension of time within which to appeal the judgment.

Held: Application for extension of time is allowed. We extend the time for appealing to the 29th February, 2024. The costs of the application to extend shall abide the order of costs in the appeal itself.

Rule 9 of the Court of Appeal Rules grants the court discretion to extend the time for appealing in the interests of justice. The modern approach emphasizes flexibility and ensuring matters are decided on their merits rather than by default due to procedural rules. The prospects of success in the appeal are deemed realistic. In our judgment, this is a proper case to exercise our discretion to extend the time for appealing the judgment of January 20, 2023. We extend the time for appealing to February 29, 2024.

Flowers Development Co. Ltd v Bahamas Telecommunications Co. Ltd SCCivApp No 14 of 2022 considered

R (a child) [2019] EWCA Civ 895 considered

Rodriquez Jean Pierre v R [2023] UKPC 15 considered

JUDGMENT

Judgment delivered by the Honourable Sir Michael Barnett, P:

1. This is an application for the extension of time within which to appeal a judgment in a civil action.
2. On the 20th January, 2023 the trial judge delivered a judgment in a civil action. The judge awarded the plaintiff, Hilarena Nixon (“Nixon”), the sum of \$\$289,706.65 plus interest and costs against her employer Clearview Management Limited (“Clearview”) arising out of the termination of her employment and personal injuries suffered whilst on the job.
3. Clearview wishes to appeal that part of the award relating to damages for personal injuries. The basis of the proposed appeal is set out in the affidavit of Clearview’s insurers where Edward Albury says:

The Intended Appellant is firmly of the view that it has strong prospects of success at the hearing of the substantive appeal. The trial Judge appeared to not decide what was the precise nature of the injury sustained by the Intended Respondent and the damages that should flow therefrom. I am also advised that the Intended Respondent did not call any of the attending physicians to be a witness at the trial of the matter. The absence

of the transcripts also presents difficulty with confirmation of this fact.

The fact that no physician was called and none of the medical reports were agreed renders it difficult to appreciate how the trial Judge came to certain findings in the Ruling.

I am also informed that the claim for Special Damages was limited to the matters pleaded in the Writ of Summons. It appears that the trial Judge used the Amended Assessment of Damages filed by the Intended Respondent to justify an award for several items of special damages which were not particularized in the Writ of Summons. There are now produced and shown to me marked as “EA-3” true copies of the Writ of Summons filed on 1st March, 2018, the Defence filed on 12 April, 2018 and the Amended Assessment of Damages filed on 27t July, 2021.

9. The appeal in my view, if it is allowed to proceed to a substantive hearing, will also raise points of law of some general importance in determining how the Court should assess a claimant with pre-existing injury for future losses, especially future loss of income and future medical expenses. It would seem reasonable to expect, based on the decisions in this jurisdiction (see McCoy v. Williams &Anr.; Clarke v. Williams & Anr. [2014] 1 BHS]. No. 112), that the Court should take into account the pre-existent nature of the injury for all heads of damages claimed.

4. The proposed appeal ought to have been filed within six weeks of the judgment, i.e. by the 3rd March, 2023. The application for an extension of time was not made until 28th March, 2023. It is 25 days out of time.
5. One of the reasons for the delay is that Clearview retained new attorneys from those who represented it at the trial. They say there was a delay in obtaining transcripts of the evidence at the assessment of damages.
6. The power of the Court to extend the time for appealing is contained in Rule 9 of the Court of Appeal Rules. It says:

9. (1) The Court may, on such terms as it thinks just, by order:

(a) extend the period prescribed by these Rules for the doing of anything to which these Rules apply;

(b) extend the period specified in any judgment, order or direction of the court, or of the court below, for the doing of anything to which the judgment, order or direction relates; or
(c) direct a departure from these Rules in any other way where this is required in the interests of justice.

(2) The power of the court, under the provisions of paragraph (1), to extend any period so prescribed or specified, is exercisable notwithstanding the expiration of the period so prescribed or specified.

7. Rule 11 provides that:

11. (1) Every notice of appeal shall be filed and a copy thereof which to served by the appellant upon all parties to the proceedings in the court below who appeal. are directly affected by the appeal -

(a) in the case of an appeal from an interlocutory order, fourteen days;

(b) in any other case, six weeks, calculated from the date on which the judgment or order of the court below was pronounced or made

8. Rule 9 gives the court a wide discretion as to how to exercise its power to extend the time for appealing. The modern approach is perhaps best summarized in the judgment of this court in **Flowers Development Co. Ltd v Bahamas Telecommunications Co. Ltd SCCivApp No 14 of 2022** where Evans JA writing for the court said:

14. Despite the apparently differing views in these two cases as to which of the four factors is more persuasive, it is important to recognize that each application will turn on its own facts and circumstances; and more importantly, that the discretion conferred by rule 9 to extend time is unfettered and extremely wide.

15. To my mind the important take away is the provision of Rule 9 (1) (c) which gives this Court the power to direct a departure from these Rules in any other way where this is required in the interests of justice. The Court’s numerous authorities on extension of time applications in both civil and criminal matters in my view exhibit attempts by the Court to do justice according to the facts and circumstances of each particular case.

9. Those statements were cited with approval by the Privy Council in **Rodriquez Jean Pierre v R [2023] UKPC 15** at paragraph 30.

10. The modern approach is for the courts to be flexible. It looks to the interest of justice which seeks to have matters decided on its merits as opposed to being decided by default in not complying with procedural rules.
11. In this proposed appeal the delay is less than a month and the reason is lamentable, but not unusual. Delays in obtaining transcripts of evidence is a regrettable but not uncommon feature in our courts.
12. The prospects of success are not fanciful. It cannot be said that the appeal is bound to fail. The issue of whether a plaintiff can recover special damage not pleaded in a statement of claim but subsequently incurred after the statement of claim was issued is certainly one for consideration by the appellate court. The issue as to evaluating medical evidence in the absence of agreement is a matter for appellate consideration. Further, the issue as to how to the impact of pre- existing conditions is also one that should be reviewed by the court. As was said by the English Court of Appeal in **R (a child)** [2019] EWCA Civ 895

“Real prospect of success – There are two conflicting authorities on the meaning of a 'real prospect of success'. In *NLW v ARC* [2012] 2 FLR 129, FD, Mostyn J held that the 'real prospect of success' meant it was more likely than not that the appeal would be allowed at the substantive hearing: “anything less than a 50/50 threshold could only mean there was a real prospect of failure”. Moor J, however, has held that a 'real prospect of success' is one that is realistic rather than fanciful, and does not mean a greater than 50/50 chance of success. ... The weight of current first instance authority follows the approach of Moor J.”

31. Several years on, this divergence of approach continues to be referred to in applications for permission to appeal to this court and to the High Court. This appeal represents an opportunity to resolve any remaining doubt. The test for the grant of permission to appeal on an application to the Court of Appeal or to the High Court or Family Court under the first limb of the relevant sub-rule is that the appeal would have a real prospect of success. As stated in *Tanfern v Cameron-MacDonald* (Practice Note)[2001] 1 WLR 1311CA at [21], which itself follows *Swain v Hillman* [2001] 1 AER 91 CA, there must be a realistic, as opposed to fanciful, prospect of success. There is no requirement that success should be probable, or more likely than not. [Emphasis mine]

13. The application for an extension of time in a civil appeal is not the place to resolve the appeal itself. Unlike in criminal appeal where the court has the full transcript of the trial, all of the information before the trial judge is not presently before the court.
14. In our judgment, this is a proper case to exercise our discretion to extend the time for appealing the judgment of the 20th January, 2023. We extend the time for appealing to the 29th February, 2024.
15. The costs of the application to extend shall abide the order of costs in the appeal itself.

The Honourable Sir Michael Barnett, P

The Honourable Mr. Justice Isaacs, JA

The Honourable Madam Justice Crane-Scott, JA