

**CITATION:** James v. The Hongkong and Shanghai Banking Corporation Limited, 2025 ONSC  
3341

**DIVISIONAL COURT FILE NO.:** DC-22-525-0000

**DATE:** 20250604

**SUPERIOR COURT OF JUSTICE – ONTARIO  
DIVISIONAL COURT**

**RE:** KENNETH JAMES AND TITHE HOLDINGS S.A., Appellant

**AND:**

THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED,  
Respondent

**BEFORE:** Shore J.

**COUNSEL:** *Adam Huff*, for the Appellant

*Ara Basmadjian*, for the Respondent

**HEARD at Toronto:** March 4, 2025

**ENDORSEMENT**

[1] The respondent brings this motion to dismiss an appeal for delay, pursuant to r. 61.13(3.1) of the *Rules of Civil Procedure*, R.O. 1990, Reg. 194 (the "Rules"). The respondent submits that the appellants made no effort to advance the appeal in the last two years.

[2] For the reasons below, the motion is granted, and the appeal is dismissed.

**Background:**

[3] The appellant, Kenneth James, resides in Ontario. The appellant, Tithe Holdings, is a Panamanian corporation controlled by Mr. James.

[4] The respondent, Hongkong and Shanghai Banking Corporation Limited ("HSBC") is a bank incorporated pursuant to the laws of Hong Kong.

[5] In 2007, the appellants opened bank accounts in Hong Kong, with HSBC. They also had accounts with HSBC Canada.

[6] In the spring of 2012, the RCMP and the York Regional Police ("YRP") approached HSBC Canada in the context of an investigation. A few weeks later, HSBC informed the appellants that they were suspending their accounts, and the appellants could attend at any of the HSBC branches to provide instructions regarding the disposal of the funds. Subsequently, the accounts were suspended, and the funds were kept in a separate account with HSBC in Hong Kong.

[7] In June 2012, Mr. James was charged with fraud and money laundering.

[8] During the ensuing criminal proceedings in Canada, HSBC Canada also froze the appellants' accounts.

[9] In August 2012, the appellants commenced an action against HSBC Canada, seeking redress for freezing their Canadian accounts.

[10] Mr. James was acquitted of the criminal charges in January 2016.

[11] In February 2020, the appellants commenced this action against HSBC, alleging that the criminal proceedings had no connection to the Hong Kong accounts.

[12] On July 31, 2020, the respondent brought a motion to stay the action on grounds that Ontario courts lacked jurisdiction *simpliciter* and, in the alternative, that Ontario is *forum non conveniens*.

[13] The decision was released on August 4, 2022. Associate Judge Frank stayed the action on the basis that Ontario is *forum non conveniens*, and that the proper forum for the dispute is Hong Kong.

[14] On September 6, 2022, the appellants served a notice of appeal.

[15] By case management direction, dated October 5, 2022, the Divisional Court established a timetable that required the appellants to deliver their appeal book, compendium, exhibit book, and factum by October 31, 2022.

[16] The appellants failed or refused to perfect their appeal until November 11, 2024 - more than two years after the deadline set by the Divisional Court.

[17] The respondent now brings this motion to dismiss the appeal for delay.

**The Law and Analysis:**

[18] The respondent relies on r. 61.13(3.1) of the *Rules*, which provides that where an appellant has not perfected the appeal within the time prescribed by an order of the appellate court or a judge of that court, the Registrar "shall" make an order dismissing the appeal for delay.

[19] Although the *Rules* refer to the Registrar, a judge of this Court can dismiss an appeal for delay where, as here, the appellants failed to perfect their appeal in a timely manner and are otherwise in default of the court's directions. Another way of approaching this motion is whether the court should extend the time to perfect the appeal.

[20] Rule 3.02(1) of the *Rules* provides that the court may extend the time prescribed by the *Rules* on such terms that are just.

[21] Although this is a motion to dismiss an appeal for delay, the court must consider factors similar to those on a motion to extend the time for filing a notice of appeal: see for example, *Issai v. Rosensweig*, 2011 ONCA 112, 277 O.A.C. 391, at para 4.

[22] The test on a motion to extend time is well-settled: see for example, *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636, at para. 15. The overarching principle is whether the "justice of the case" requires that an extension be given. While each case depends on its own circumstances, in deciding whether the justice of the case warrants the extension of time, the court is to consider all relevant considerations, including:

- (a) whether the moving party formed a bona fide intention to appeal within the relevant time period;
- (b) the length of, and explanation for, the delay in filing;
- (c) any prejudice to the responding parties caused, perpetuated, or exacerbated by the delay;
- (d) the merits of the proposed appeal; and
- (e) whether the "justice of the case" requires it.

[23] The test is somewhat modified when the issue is a delay in perfecting an appeal, as opposed to extending the time for the service of a notice of appeal, as set out below.

#### **Intention and explanation of delay**

[24] The first part of the test is whether the appellant maintained the intention to appeal within the relevant time. Under the second part, I must consider whether the appellant provided a reasonable excuse for the delay and the length of the delay.

[25] The appellant submits that all times he had the requisite intention within the relevant time-period.

[26] Under the direction of this Court, the appellants' material was due October 31, 2022. On the day their material was due, their lawyer contacted the other side and requested a short indulgence. The respondent consented to a brief delay, but the appellants failed to serve their

material. The respondent's counsel followed up several times, including on November 12, November 21, and November 29, 2022, requesting the material.

[27] On November 29, 2022, the appellants advised through counsel that they would serve their material by December 9, 2022. They missed that deadline.

[28] On December 16, the appellants' counsel wrote to advise that they would serve their material by December 23, 2022. They missed that deadline as well.

[29] There was no further communication from the appellants until they served their appeal material, almost 2 years later, on November 11, 2024. The appellants did not request a direction from the court for an extension of time to perfect the appeal. They did not communicate with the other side.

[30] Despite suggesting that they always intended to appeal and followed up with their lawyer, they did not file any evidence demonstrating any attempts to perfect their appeal or follow up with their lawyer in the ensuing two years.

[31] Further, Mr. James is a former lawyer and an experienced litigant (there are at least 50 reported cases on CanLII involving the appellant, including some addressing the issue of dismissal for delay). He is well versed in the importance of deadlines, as is his lawyer.

[32] The appellants may have intended to perfect the appeal up to December 23, 2022, the last deadline to serve their material, but other than a recent affidavit, there is nothing to suggest that they maintained that intention in the ensuing two years. The fact that counsel suggests she was too busy with her other professional and personal obligations is not a reasonable excuse for counsel or the appellants for a two-year delay.

[33] I am not satisfied that the appellants have provided a reasonable excuse for the two-year delay, or that they had the requisite intention throughout the two years, which weigh against granting the extension.

### **Prejudice**

[34] The longer the delay, the stronger the inference of prejudice from the delay. On the issue of prejudice, having not heard from the appellants in two years, it was reasonable for the respondent to conclude that the appellants would not be proceeding with the appeal.

[35] The events in question occurred in 2012. The initial action was commenced in 2020. The appeal was commenced in 2022. I find that there is a strong presumption of prejudice that arises from this length of delay and the appellants have failed to displace this presumption.

[36] I find that this factor weighs in favour of not granting the extension.

## Merits

[37] The fourth factor to consider is the merits of the appeal. There is a very low threshold for this test. The question is whether the appeal has so little merit that the court could reasonably deny the important right of appeal.

[38] The Supreme Court of Canada has confirmed that:

the discretion exercised by a motion judge in the *forum non conveniens* analysis "will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts" [...]. In the absence of such an error, it is not the role of this Court to interfere with the motion judge's exercise of his discretion.

See: *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666, at para. 37, and *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636, at para. 41.

[39] The ground advanced on appeal is that Associate Judge Frank erred in not allowing evidence from the HSBC Canada action, finding it was excluded under the deemed undertaking rule. The appellants submit that the excluded evidence identified a relevant and important witness located in Ontario, which may have affected the decision regarding the correct forum.

[40] The appellants submit that this witness' evidence will support their position that HSBC Canada allegedly disclosed confidential information to the police and RCMP to facilitate an investigation in Hong Kong. The emails excluded are between an employee of HSBC Canada and the RCMP and YRP. I find that admitting this evidence would have made no difference to the outcome of the motion.

[41] Even if the evidence is accepted in its entirety, the appellants have not shown how the communication between HSBC Canada and the RCMP and YRP have any bearing on the outcome of the litigation with HSBC. HSBC was not a recipient of these emails.

[42] Associate Judge Frank additionally excluded the transcript from the examination for discovery from this same employee in the HSBC Canada litigation. The appellants submit that the transcript will allegedly support the position that they directed HSBC to transfer the funds to an account in HSBC Canada. From this, the appellants submit that this employee is an important witness located in Canada.

[43] On this issue, it is clear from reading the appellants' factum that they are confusing the Associate Judge's failure to use these documents in determining the motion regarding jurisdiction with their ability to get this evidence before the court in Hong Kong. The appellants submit that

if the emails and transcript "are excluded from evidence, it will have a seriously negative effect upon the Plaintiffs in this action". However, this disregards the many ways in which they can get the evidence before the court, such as subpoenaing the employee as a witness in the Hong Kong proceedings. Even so, this does not make the employee an essential witness and it will not have made a difference in this motion's outcome.

[44] I find that the appeal lacks merit. This too weighs in favour of not granting an extension.

**Justice of the case**

[45] The last factor to consider is the justice of the case. The court is required to consider and weigh all the relevant factors to determine an order that is just in the circumstances. The overriding objective is to arrive at a result that balances the interest of deciding matters on their merits, rather than terminating rights on a procedural ground, and the public's interest in the timely resolution of disputes.

[46] The delay was almost two years, and the appellants have not adequately explained the lengthy delay. In my view, and in considering the factors above, the interests of justice in this case do not support extending the time to perfect the appeal.

**Disposition and Costs:**

[47] The parties agreed on costs of \$6,000 inclusive to the successful party.

[48] The motion is granted, and the appeal is dismissed for delay. The appellants shall pay the respondent costs in the sum of \$6,000 inclusive.

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Shore J.

**Date:** June 4, 2025