SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.7 OF 2005

BETWEEN

THE NEVIS ISLAND ADMINISTRATION

Applicant

and

[1] LA COPROPRIETE DU NAVIRE J31
[2] AUXILIAIRE MARITIME J31 S.A.
[3] Saint Nicolas De Barry 1 S.A.S.
[4] SAINT NICOLAS DE BARRY 2 S.A.S.
[5] SAINT NICOLAS DE BARRY 3 S.A.S.
[6] SELNIC S.A.
[7] SAINT NICOLAS DU BARRY IV S.A.
(formerly known as Quirats + S.A.)
[8] EURIMOB S.A.

Respondents

Before:
The Hon. Mr. Denys Barrow, SC — Justice of Appeal

On written submissions
Browne and Associates for the Applicant
Daniel, Brantley & Associates for the Respondents

2006: April 3.

JUDGMENT

[1] BARROW, J.A.: For over six months the lawyers for the applicant persisted in the view that they did not need leave to appeal the decision of Baptiste J., given on 12th April 2005, striking out their claim against the defendants. It was only when Rawlins J.A., on 29th December 2005, struck out their purported Notice of Appeal as a nullity, for having been filed without first obtaining leave to appeal, that the lawyers for the applicant say they knew that they needed leave to appeal because it was an interlocutory order that they wished to appeal. They had, however, on

24th October 2005 filed an application for an extension of time within which to apply for leave to appeal as a "precautionary measure". Comes now for determination that application.

[2] The solicitors for the respondents say the application was made far too late; that the delay was inordinate. Counsel for the applicant says that whether the delay is inordinate is not solely a matter of the length of time elapsed but also a matter of the circumstances that led to that lapse. Counsel for the applicant submitted that the criteria against which to consider an application for extension of time are no longer those adumbrated in Quillen v Harney, Westwood & Reigels (No. 1)[1], which was decided before the introduction of Civil Procedure Rules 2000. In that case, on which the respondents based their submissions, four factors were identified for consideration in deciding whether to exercise the judicial discretion in favour of a dilatory applicant, namely (1) the length of the delay, (2) the reasons for the delay, (3) the chances of the appeal succeeding if the application is granted, and (4) the degree of prejudice to the respondents if the application is granted.

[3] Counsel for the applicant submits that in this jurisdiction we should be guided by the decision of the English Court of Appeal in Sayers v Clarke Walker[2], which is to the effect that the criteria relevant to an application for an extension of time for appealing are those contained in CPR 2000, at rule 26.8, which provides:

> "(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
>
> (a) made promptly; and
>
> (b) supported by evidence on affidavit.
>
> (2) The court may grant relief only if it is satisfied that –
>
> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the failure; and
>
> (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.
>
> (3) In considering whether to grant relief, the court must have regard to –

[1] [1999] ECLR 23

[2] [2002] EWCA Civ 645; [2002] 1 WLR 3095, at paragraph 21.

(a) the effect which the granting of relief or not would have on each party;
(b) the interests of the administration of justice;
(c) whether the failure to comply has been or can be remedied within a reasonable time;
(d) whether the failure to comply was due to the party or the party's legal practitioner; and
(e) whether the trial date or any likely trial date can still be met if relief is granted.

[4] The argument in favour of relying on the criteria laid down in rule 26.8 recognizes that there is no express sanction prescribed for failing to apply for leave to appeal in time, in the way, for example, that failure to file a witness statement is visited with the sanction that the witness shall not be called.[3] However, although not expressed as such, the consequence that an intending appellant who fails to apply in time for leave to appeal when leave is required may not thereafter apply for leave to appeal is nonetheless a sanction. It is because the application for relief against that consequence or sanction is in essence no different in nature from the standard application for relief from an express sanction that it is appropriate, in my judgment, that the criteria prescribed in rule 26.8 should be applied.

[5] An undoubted advantage that is to be gained from relying on the criteria for granting relief from sanction that CPR 2000 prescribes is certainty. There is no longer need to rely on judge made criteria with the uncertainties that attend varying judicial viewpoints as to what those criteria should be and what emphasis should be given to which of them. For example, in the Quillen case Singh JA stated that the appearance of "some chance of success"[4] of the proposed appeal trumped both inordinate delay (six months) and the clear absence of good reason for delay.[5] It was emphasized that the discretion to extend time was unfettered.[6] In contrast, certain of the criteria that are set out in rule 26.8 are made conditions precedent to the grant of relief and the court is expressly precluded from granting relief if certain of them are not satisfied. Therefore, the discretion to grant relief

[3] Rule 29.11
[4] At p. 26 A
[5] At p. 25 C and E to G
[6] See p. 25 A and 26 C

under CPR 2000 is distinctly fettered and, it may be noted, this is in sharp contrast to the open discretion that is found in the comparable English rule 3.9 (1).

[6] The starting point in applying the criteria set out in rule 26.8 is the promptitude of the application for relief from sanction. Counsel for the applicant conceded that "prima facie, the delay in bringing this application might be viewed as being less than prompt." However, counsel submitted, it is fundamental to any fair evaluation of delay that there be an evaluation of the reason the application was not made sooner. "Promptness" is not an absolute concept, it was submitted: whether an application has been made promptly can only be assessed by reference to the prevailing circumstances. Counsel submitted that it is of no assistance simply to cite the length of delay in other cases in which an extension was refused, because they were decided on their own particular facts.

[7] Counsel for the applicant thought the case of Sayers was particularly helpful to the instant application. In that case the appellant's solicitors were not familiar with the application of the then new provision of the English CPR as to the date from which the 14-day time limit for applying for leave to appeal ran. They stated that they had telephoned the court office to obtain clarification and were informed of the wrong date. It was only after later being corrected by that office that the solicitors were disabused of their mistaken belief. Brooke LJ considered the date of the solicitors' awareness to be highly significant. He said:

> "The application for relief … was not made promptly in the strict sense, in that the time for appealing the order made on 12 October expired on 26 October, and the application for the extension of time was not made until 20 December. However, in the peculiar circumstances of the present case it was made very soon after the defendant's solicitors received notice of the deputy master's direction on 17 December."[7]

[8] In the instant case the facts upon which the applicant relied to seek relief were stated to be:

(a) the applicant's lawyers did not consider that leave to appeal was required;

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[7] [2002] 1 WLR at p. 3101, paragraph 26

(b) the respondents argued that leave was required before Baptiste J on 23rd May 2005;

(c) the judge granted a stay of execution and the applicant says its lawyers reasonably concluded from that order that the respondents' contention as to leave was wrong and the applicant's contention was correct;

(d) the respondent did not make its application to strike out the applicant's notice of appeal until 23rd September 2005 and this further encouraged it in its view; and

(e) it was not until Rawlins JA gave his decision of 29th December 2005 that the applicant knew that the court considered leave was necessary.

[9] Proposition (c) appears in an earlier passage in the applicant's submissions as a statement that "Baptiste J heard argument on the point and agreed with the Applicant's position that his decision was a final one and accordingly no permission was necessary". Having examined the source for that statement, I see why counsel felt it appropriate to present a modified version of the proposition and to revise the statement to say that the applicant's lawyers drew the conclusion that the judge was upholding their contention that no leave was required, rather than that it was the judge who so pronounced. The respondents submit that the judge made no such pronouncement and expressly declined to rule on it, saying that it was a matter for this court. That seems to be so obviously and logically the way for the judge to have dealt with that contention that I would need to be convinced by compelling evidence that the judge did otherwise.

[10] In fact, the notes of the hearing before the judge taken by a lawyer employed in the legal department of the applicant, and exhibited to her affidavit filed on behalf of the applicant, show that the applicant objected to the judge considering the question whether they needed leave to appeal. Those notes record the judge's pronouncement as being solely that he granted a stay. There is, therefore, no evidence to even suggest that the judge's decision led the applicant into thinking

that it did not need leave. It is regretted that it was thought necessary to represent that the judge decided that the applicant did not need leave to appeal.

[11] The attempt to place responsibility on the judge for the applicant's persistence in its view that it did not need leave to appeal betrays the applicant's need to now shift blame for its failure to apply for leave to appeal. The fact is that the applicant was at all times assisted by legal advisers; it was possessed of a legal department. It was the duty of the applicant to comply with the requirement to obtain leave and no special consideration can arise, in these circumstances, in favour of this applicant. In the beginning the applicant either failed to advert to the question of leave or advised itself that it did not need leave. If not before, certainly at the conclusion of the hearing on 23rd May 2005 before Baptiste J the applicant knew that the respondents were contending that it was an interlocutory decision that the applicant was appealing and therefore it needed leave. Still the applicant did nothing to stop time from further running.

[12] Sayers' case is clearly distinguishable from the applicant's case because of two principal factors. Firstly, in that case it was supposedly the reliance on what the court office told the applicant's lawyers was the date from which time ran that made them delay. Secondly, three days after the applicant's lawyers were informed of the true position they filed their application. In the instant case, firstly, the applicant's lawyers had no one but themselves to blame for the view that they took as to the need for leave to appeal or for their failure to advert to the need for leave to appeal. Secondly, when the respondents took the point before the High Court on the application by the applicant for a stay, and the applicant's attention was thereby called to the need for leave to appeal, they did nothing for five months. They have given no credible explanation for this delay and it must be that they have none otherwise they would not have sought to blame the judge.

[13] It is apposite to observe that it will be an exceptional case where a party will be allowed to blame a judge or the court office for its failure to comply with an

obligation that is imposed on that party. The obligation is that of the party and the responsibility to inform himself remains throughout on the party. It is no part of the duties of a judge or court office official to provide legal advice to litigants and lawyers. It is even more farfetched for a party who has failed to take a necessary step to seek to shift responsibility for his persistence in that failure by blaming the opposite party for not immediately making an application that could bring home to the defaulting party the error of his ways.[8] A party must take responsibility for his own inadvertence or mistaken decision and not seek to excuse himself by blaming others for his failure. This is especially so in the case of a failure to obtain leave to appeal, because this is the subject of a significant body of decided cases from this jurisdiction that has settled the law on what is an interlocutory order and what is a final order. Some of these cases are referred to in the judgment of Rawlins JA[9] and are helpfully discussed and applied in that judgment; they include Othneil Sylvester v Satrohan Singh[10]; Pirate Cove Resorts Limited v Euphemia Stephens[11]; Maria Hughes v The Attorney General of Antigua and Barbuda[12]; and Astian Group limited v TNK Industrial Holdings Limited.[13]

[14] The matters on which the applicant relies to support its application for an extension of time do not satisfy the requirements of the relevant rule. Rule 26.8 (1) (a) stipulates that an application for relief must be made promptly. Further, rule 26.8 (2) (a) requires that an applicant must provide a good explanation for the failure to comply with a rule when he seeks relief. Each of these is a mandatory requirement. In the case of the latter it is ordained that the court may not grant relief unless it is satisfied that there is a good explanation for the failure. The applicant has failed to satisfy both of these requirements. The application for an extension of time within which to apply for leave to appeal must therefore be

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[8] See paragraph 8 (d) above in which the applicant blames the respondent for failing to sooner apply to strike out its purported notice of appeal for having been filed without obtaining leave to appeal.
[9] See paragraph [5] of the judgment of 29th December 2005.
[10] St. Vincent and the Grenadines Civil Appeal No. 10 of 1992 (18th September 1995)
[11] St. Vincent and the Grenadines Civil Appeal No. 11 of 2002 (2003)
[12] Antigua and Barbuda Civil Appeal No. 33 of 2003 (13th April 2004)
[13] British Virgin Islands Civil Appeal No. 22 of 2003 (7th June 2004)

refused. The applicant must pay the costs of the respondents, to be agreed or assessed by the Chief Registrar.

Denys Barrow, SC
Justice of Appeal