COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.20 OF2005

BETWEEN:

DOMINICA AGRICULTURAL AND INDUSTRIAL DEVELOPMENT BANK

Appellant

and

MAVIS WILLIAMS

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Kenneth Benjamin	Justice of Appeal [Ag.]

Appearances

Mr. Anthony Astaphan S.C. and Ms. Francine Baron Royer for the appellant
Mr. Reginald Armour and Ms. Vanessa Gopaul for the respondent

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2006: June 20;
September 18.

JUDGMENT

[1] BARROW, J.A.: Two applications by the appellant were heard by the court. One was for an extension of time for appealing against the judgment of the High Court (Hunte J. (Ag.)) in favour of the claimant (respondent) on liability (the liability judgment) and the other was for a stay of execution of the subsequent judgment of the Hunte J. awarding damages to the respondent (the damages judgment). In the course of the hearing counsel were able to agree upon the terms for a stay of execution. At the conclusion of the hearing the court pronounced its decision refusing to extend time. Because the matter was very fully argued and it was the first decision of the full court, as distinct from a single judge, marking the change in

the rules that it would apply in considering an application for an extension of time, counsel thought it would be helpful to have reasons reduced to writing.

Chronology

[2] On 13th April 2005 the judge decided, in the liability judgment, that the appellant had wrongfully dismissed the respondent from her employment and awarded her damages to be assessed, if not agreed.

[3] On 24th November 2005, in the damages judgment, the judge assessed damages at $1,216, 641.12 and awarded that sum and costs of $60,532.70 to the respondent, as well as compound interest of 11% from dismissal until payment.

[4] On 28 December 2005 the appellant filed a notice of appeal against the damages judgment and filed, as well, on the following day, an application for a stay of execution.

[5] On 6th January 2006 the appellant filed a notice of motion for an extension of time within which to appeal the liability judgment.

The facts

[6] The short version of the facts is distilled from the liability judgment.[1] The respondent had been employed by the appellant bank for some 21 years and was an Assistant Manager, Securities, when she was dismissed for gross misconduct on 9th August 2000. The respondent was dismissed for the part she took in a loan made by the appellant to her boyfriend. The respondent had persuaded her uncle to make available his certificate of title to a parcel of land as security for the loan. The boyfriend defaulted. When the appellant tried to enforce its security the uncle contended that the respondent had asked him to provide interim and not

[1] Civil Suit No. DOMHCV 0149 of 2001, judgment delivered April 13, 2005.

continuing security and that he had intended to secure a loan for the respondent and not the boyfriend. The uncle opposed the appellant's effort to enforce the security. The appellant's board of directors considered the respondent's role in the transaction and dismissed her.

[7] The judge found that the appellant relied upon three grounds for dismissing the respondent and held that none of them was a valid ground for dismissal. He therefore held that the respondent was wrongfully dismissed.

The quantum of damages

[8] In the damages judgment the judge made what he recognized were some unusual awards.[2] He found that the respondent had spared no effort to obtain alternative employment but that the appellant "has actively frustrated the attempts of the dismissed employee to obtain alternative employment."[3] The judge therefore awarded as damages the equivalent of the respondent's former salary from the date of dismissal until the date of judgment (approximately 5 years) and from the date of judgment until the date that the judge found that the respondent would have retired (approximately 9 years). From the total he subtracted the income that the respondent had earned in the period after dismissal leaving a net award under this head of $756,557.20. The judge awarded the respondent, as well, compensation for the bonus and gratuity that she would have received had the employment continued.

[9] Further, the judge found that the respondent owed three loans to the appellant at the date of her dismissal and that after the appellant dismissed the respondent the appellant compounded interest on the loans at a higher rate. As a result of this, the judge held, the respondent became indebted to the appellant, as at the date of

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[2] Thus, at paragraph [17] he stated that "nowhere in my own research have I found a case where a former employer has actively frustrated the attempts of the dismissed employee to obtain alternative employment." After making the award consequent upon that damage he stated at paragraph [20] "I would have found otherwise had not the Defendant actively prevented the Claimant from obtaining employment."

[3] Judgment delivered 24th November 2005, at paragraph [17].

judgment, for an additional sum of $185,818.36 and by the time the loan matures that sum would have increased by a further sum of $54,776.00. The judge therefore ordered this "excess interest" to be paid back by the appellant. The appellant has appealed the damages judgment as of right and seeks to stay its execution.

The reasons for failing to appeal in time

[10] In support of its application for an extension of time for appealing against the liability judgment the appellant relied on the affidavit of its Acting General Manager to explain why the appellant did not appeal in time. She deposed as follows:

> "The Appellant was dissatisfied with the judgment but considered that it would be better and in the interest of not wasting the Appellant's and the Court's time, that a decision on whether or not the judgment should be appealed should await the determination of the assessment of damages. The assessment of damages was made on the 24th day of November 2005 and having considered the overall position including both judgments – on liability and on quantum of damages – it was decided that both judgments should be appealed."

[11] In its Supplementary Submissions the lawyers for the appellant repeatedly contended that its failure to comply with the time limit for appealing was not intentional. The lawyers submitted that intentional must mean a deliberate disregard of the rules without regard to or in spite of the obvious consequences. Even on that definition the appellant has a difficulty in escaping the conclusion that the appellant's non-compliance with the time limit for appealing was intentional. It was deliberate. As the affidavit stated, the appellant *considered* whether to appeal, then, or to wait. The affidavit does not expressly say so but it says in effect – and the proposition is ineluctable - that the appellant *decided* not to appeal the liability judgment after it was delivered but to wait. The affidavit also clearly conveys that the appellant did *not* decide then that it *would* appeal after damages were assessed. Rather, the affidavit conveys that the appellant decided that it would decide *whether* to appeal after damages were assessed.

[12] There is no suggestion in the affidavit that the appellant did not know of the rule that prescribes a time limit for appealing. Indeed, the appellant relies heavily in a supplemental affidavit on the fact that it acted pursuant to legal advice. In the absence of evidence to the contrary I must proceed on the footing that the lawyers who advised the appellant knew that there was a time limit for appealing. That is something that it is reasonable to expect every lawyer to know. (The cases that one encounters in our law reports show that lawyers sometimes mistake time limits or when time starts running; not that lawyers do not know that there is a time limit for appealing.) Therefore, the only inference that I can draw from the fact that the appellant acted after taking legal advice is that the appellant deliberately disregarded the rule that imposed a time limit for appealing. Integral to that inference is the conclusion that the appellant also disregarded the consequence. Again there was no suggestion that the appellant did not know consequences would flow from deciding not to appeal within the time limited.

[13] As it appears from their written submissions, the lawyers for the appellant seem to think it helps the appellant that the appellant decided not to appeal after taking legal advice. In my view it makes no difference that the appellant acted upon legal advice. This is not a case of a legal adviser failing to take an appropriate step or taking an inappropriate step without the knowledge of the client. This was a case of the client taking the decision after taking legal advice. I have no clue as to the substance of the advice and will not speculate that any lawyer told the applicant that it was sensible to disregard the strict time limit of 42 days for appealing, wait to see which way the wind blew and if it then decided to appeal it could expect to be permitted to appeal – as it turned out, some 9 months later. Mr. Astaphan was deft in asserting the commercial sense of the decision of his client and its advisers to wait and see the size of the award without seeking to deny that they should have decided at the same time to lodge an appeal to preserve the right to appeal.

[14] In two recent judgments, Nevis Island Administration v La Copropriete du Navire J31[4] and Ferdinand Frampton v Ian Pinard,[5] I took the view, sitting as a single judge, that the principles which guide the court's exercise of discretion on whether to extend time for appealing are contained in the provisions of the Civil Procedure Rules 2000 (CPR 2000) dealing with relief from sanctions for non-compliance, in rule 26.8. On that view the pre-CPR 2000 decisions[6] and the criteria for the exercise of discretion that they established are no longer applicable. The relevant part of rule 26.8 reads as follows:

> "(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
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> (a) made promptly; and
>
> (b) supported by evidence on affidavit.
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> (2) The court may grant relief only if it is satisfied that –
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> (a) the failure to comply was not intentional;
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> (b) there is a good explanation for the failure; and
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> (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.
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> (3) In considering whether to grant relief, the court must have regard to –
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> (a) the effect which the granting of relief or not would have on each party;
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> (b) the interests of the administration of justice;
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> (c) whether the failure to comply has been or can be remedied within a reasonable time;
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> (d) whether the failure to comply was due to the party or the party's legal practitioner; and
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> (e) whether the trial date or any likely trial date can still be met if relief is granted."

[15] The appellant pointed to Rose v Rose[7], also a decision of a single judge of this court, given after CPR 2000 came into operation, as a case in which the criteria that prevailed before the new rules came into operation, were applied. The appellant did not submit that the decision in Rose v Rose is any longer to be followed or that it represents the present state of the law but counsel submitted that the court should grant a grace period before moving away from the pre-CPR

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[4] St. Christopher and Nevis Civil Appeal No 7 of 2005 delivered April 3, 2006
[5] Dominica Civil Appeal No 15 of 2005 delivered April 3, 2006
[6] Notably Quillen v Harney Westwood & Reigels (No. 2) (1999) 58 WIR 147
[7] St. Lucia Civil Appeal No. 19 of 2003

2000 criteria or should apply greater flexibility in considering the present application for an extension. The matters that the court considered in Rose v Rose were (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 respondent if the application is granted.

[16] In Quillen v Harney Westwood & Reigels (N0.1) (decided before CPR 2000 came into operation) the Court of Appeal had considered those 4 matters to inform the exercise of its discretion. It had also decided on the relative weight to be given to each of them. The headnote for Quillen reads in part:

> "The discretion should be exercised flexibly with regard to the facts of the particular case and with the main concern to ensure justice for both sides. If, prima facie, the proposed appeal appears hopeless, the application should be refused even though there may have been substantial reasons for the delay in bringing the application; but if there are no substantial reasons to justify an inordinate delay, and prima facie there appears to be some merit in the proposed appeal, the application should be granted."

[17] In its principal submissions (before the attention of counsel for the appellant was drawn to the Nevis Island and the Frampton decisions) the appellant relied heavily on that last proposition from Quillen – that merit in the proposed appeal trumps poor reasons for delay - and argued that its chances of success on appeal were good. In oral argument counsel did not maintain that position.

[18] Even if Quillen and Rose remain good law, and I am respectfully of the opinion that they do not, I do not see that they are applicable to the present case because, it seems to me, the facts of this case make it exceptional. As I have concluded, the appellant made a deliberate decision not to appeal: in fact the respondent contends that the appellant acquiesced in the liability judgment by participating on a 'without prejudice' basis in the respondent's attempt to agree on the quantum of damages. It was only after damages were assessed - and presumably the appellant was galvanized by the size of the award - that the appellant decided that it would appeal the liability judgment. Such conduct, to my mind, is an abuse of the process of the court because the appellant has chosen to disregard the imperative

created by the rules to appeal within a stated time[8] and instead to substitute its own decision as to the time within which it will appeal. Such conduct threatens the very foundation of the new ethos that CPR 2000 introduced, which includes the fundamental principles that the court must control the pace of litigation and no longer the parties, and that casual non-compliance with clear rules must not be tolerated.[9]

[19] It is precisely to safeguard those principles that the provisions that are contained in rule 26.8 were crafted, in striking contrast to the provisions contained in the English rules[10], in specifically non-discretionary terms: "the court may grant relief only if it is satisfied …"[11] Apart, therefore, from providing the criteria by which to determine the present application, rule 26.8 has a wider importance. Rule 26.8 demonstrates the paradigm shift in the culture of litigation that CPR 2000 is intended to accomplish by, along with other things, its emphasis on compliance with the rules. Rule 26.8 ordains that the sanctions imposed[12] for non-compliance shall not be relieved against unless the defaulter is able to satisfy the criteria for relief that the rule lays down. It bears repeating that the rule restricts the court from exercising its discretion if the applicant does not satisfy the criteria. The court is no longer able to exercise, as it did in the past, an "unfettered discretion"[13] and relieve against sanctions where the defaulter fails to satisfy a particular criterion.[14] The court has no power to overlook inordinate delay or intentional non-compliance.

[20] The thinking behind rule 26.8 is of the same order as the court's thinking about abuse of process. A deliberate decision not to comply is a significantly different thing from a simple mistake as to compliance or even plain slackness. In their

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[8] Rule 62.5 (c) states that an appeal shall be made within 42 days of the date when the order was made or judgment appealed against was served on the appellant.
[9] For an early pronouncement to a similar effect see the text to footnote 19, below
[10] The comparable provisions in the English CPR appear in rule 52 as follows:
[11] rule 26.8 (2).
[12] See for example rule 13 (default judgment) and rule 29 (witness statements)
[13] Per Singh JA in Quillen v Harney Westwood & Reigels (No.1) (1995) 58 WIR 143 at p. 145
[14] Which is the footing on which the court granted relief in Quillen v Harney Westwood & Reigels.

written submissions the lawyers for the appellant referred to the following passage from Bournemouth and Boscombe Athletic Football Club Ltd. v Lloyds TSB Bank Plc[15] and I consider it especially apposite to the present discussion:

> "A finding of an intentional failure to comply with the CPR in the sense of a deliberate decision not to comply is, inevitably, a highly significant finding in the context of CPR 3.9. Depending on the circumstances of the particular case, it may or may not be decisive of the question whether relief should be granted under that rule; but, to put it no higher, in deciding whether to do so the court will be likely to regard it as a factor of very considerable weight. By comparison, a finding that the failure to comply was due to a mistaken understanding of the effect of the CPR (albeit a mistake for which there may have been little or no excuse) is a much less serious finding, which will be likely to carry correspondingly less weight."

[21] It is worth repeating that under rule 26.8 (2) the court *may not* grant relief from sanction if the failure to comply was intentional. The passage just cited from the Bournemouth case shows that under the English rules intentional non-compliance may be a very weighty factor, indeed, it is likely to be a decisive factor, in deciding whether to grant relief. Under our rules the consequence of intentional non-compliance is more than a matter of likelihood; intentional non-compliance is fatal. That is the meaning of rule 26.8 (2); the court may grant relief only if it is satisfied that the failure to comply was not intentional. No doubt that is why the lawyers for the appellant tried so hard to characterise the appellant's non-compliance as other than intentional.

[22] Even, as I have said, if the criteria of rule 26.8 were not applied to the appellant's application or their severity were relaxed in this instance, because this is an early case being decided upon the basis of these criteria, the appellant could not benefit from the decisions in Quillen and in Rose because in neither case was there anything approaching a deliberate decision not to appeal within the time limited. In the one case there was delay by the applicants in obtaining legal advice and then in acting on that advice. In the other the applicant said he had difficulty in communicating with his attorney.

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[15] [2003] EWCA Civ. 1755 at paragraph [45].

[23] The present case, as I have said, is a case of abuse of process. The approach that a court will take to such conduct is well established and is demonstrated in the English Court of Appeal decision in Choraria v Sethia[16] in which the abuse of process consisted of a plaintiff failing to prosecute his case over a number of years. The court characterised his conduct as amounting to a wholesale disregard of the rules of the court coupled with an awareness of the consequence.[17] The ratio of the decision was that such conduct amounted to an abuse of process. On that basis the claim was struck out and it was expressly stated that there was no need to show either prejudice to the defendant by the delay or that a fair trial was no longer possible.[18] Indeed the court adopted the observation that a relevant factor in its decision whether to treat conduct as an abuse of process was the consequence to other litigants and to the courts of inordinate delay. It went on to quote[19] the following passage from Arbuthnot Latham Bank Ltd. v Trafalgar Holdings Ltd:

> "From now on it [the consequences to other litigants and to the courts] is going to be a consideration of increasing significance. Litigants and their legal advisers must therefore recognise that in the future any delay which occurs will be assessed not only from the point of view of the prejudice caused to the particular litigant whose case it is, but also in relation to other litigants and the prejudice which is caused to the due administration of civil justice. The existing rules do contain time limits which are designed to achieve disposal of litigation within a reasonable time scale. Those rules should be observed."

[24] In the Choraria case it was recognized that before the court takes a decision to strike out a case for abuse of process the court must be satisfied that it is fair to do so.[20] In the instant case, even if the appellant could have escaped the vigour of rule 26.8, I was satisfied that it was fair to refuse to grant an extension of time for appealing. Firstly, the appellant has had a trial. That is a significantly less

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[16] [1998] EWCA Civ 24
[17] per Thorpe LJ at paragraph 48
[18] Per Nourse LJ at paragraph 20 relying on the judgment of the English Court of Appeal in Arbuthnot Latham Bank Ltd. v Trafalgar Holdings Ltd.
[19] At paragraph 19
[20] At paragraph 22

draconian step than striking out the case of a party who has not had a trial. Secondly, the appellant chose not to appeal during the time when it had an unconditional right to do so, therefore its present situation is entirely of its own making. The appellant was in no position to blame anyone for not being now allowed to appeal. Thirdly, in considering what is fair I was guided by the premise of rule 26.8, which is that it is fair to deny relief from the consequence of non-compliance to a litigant who intentionally defaults. For the reasons that I have stated I considered it right to refuse the application for an extension of time to appeal the liability judgment.

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Kenneth Benjamin
Justice of Appeal [Ag.]