GRENADA

IN THE COURT OF APPEAL

HCVAP 2006/026

BETWEEN:

MICHAEL BAPTISTE

Appellant

and

YOLAND BAIN - JOSEPH

Respondent

Before:

The Hon. Mde. Ola-Mae Edwards — Justice of Appeal [Ag.]

On Written Submissions of:

Mr. Alban John for the Appellant/Respondent
Mr. Anselm B. Clouden with Mr. Henry Paryag Respondent/Applicant

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2008: February 7.

Civil Appeal – Application to Strike out the Notice of Appeal – Claim for Libel and Slander – Failure to file skeleton arguments within required time – Civil Procedure Rules 62.9(b) and 62.11 – The jurisdiction of the Court – CPR 62.20, 26.3(1) (a) - The overriding objective – CPR 1.1(1), (2)

The appellant failed to file his skeleton argument within the time required. Notice was given by the Registrar of the Supreme Court on the 17th July 2007 that the transcript of the notes of evidence was ready. From November 2006 the respondent's counsel impressed upon Mr. Clouden who is the appellant's counsel to take the necessary steps for the prosecution of the appeal. There was no response from the appellant. On the 20th November 2007 the appellant was served with a copy of the Notice of Application to Strike Out the Appeal. Only then did the appellant respond.

Held: allowing the Application to strike out notice of appeal which was filed on the 27th September 2006, that:

1. There is no explanation for the neglect to file the skeleton argument within the time limit computed under the rules from the date of receipt of the notes of evidence.

2. Though striking out a notice of appeal for failure to file a skeleton argument may 'at first blush' seem draconian and disproportionate, it is fair and reasonable in the circumstances presented in the instant case. Slight or no explanations must be accorded slight or no effect.

Distinguished

Vinos v Marks and Spencer [2001] 3 ALL E.R., 784

Considered

Ratnam v Cumarasamy and another [1964] 3 ALL E.R. 933

JUDGMENT

[1] EDWARDS J.A. [AG.]: This is an Application dated 6th November 2007, to strike out the Notice of Appeal filed on the 27th September 2006 against the judgment of Benjamin J. in the claim for libel and slander. The Application is premised on the appellant's failure to file his skeleton argument within the required time, upon receiving notice from the Registrar of the Supreme Court on the 17th July 2007, that the transcript of the notes of evidence was ready. The judgment was delivered on the 21st July 2006, when general damages in the sum of $40,000.00, aggravated damages in the sum of $10,000.000, and costs of $14,000.00 were awarded against the appellant. The record does not reflect that execution of this judgment has been stayed.

[2] Rule 62.9(b) of the Civil Procedure Rules 2000 requires that upon the filing of the Notice of Appeal the Supreme Court in Grenada would prepare a transcript of the notes of evidence and the judgment, and give notice to all parties that the copies of the transcript are available on payment of the prescribed fee. According to the supporting affidavit for the Application, the Registrar of the Supreme Court served the required notice and a copy of the transcript of the notes of evidence on the legal practitioners for the appellant and respondent on the 16th July 2007. Though learned Counsel Mr. Paryag submitted that the appellant was placing reliance on CPR 62.9, particularly 62.9 (b) (i) to oppose the application, in my respectful view this rule can only assist in establishing the reason for the

delay between the 27th September 2006 and the 17th July 2007.

[3] CPR 62.11 (1) requires the appellant to file and serve his skeleton argument on the respondent within 42 days of receipt of the notice that the transcript of the notes of evidence was ready CPR 62.11 (2) requires that within 28 days of service of the appellant's skeleton argument, the respondent should file and serve her skeleton argument on the appellant. CPR 62.11 (3) provides for the appellant to file and serve a skeleton argument in reply within 14 days of the service of respondent's skeleton argument.

[4] The time limit under CPR 62.11(1) expired without any compliance by the appellant's legal practitioner. From as far back as 6th November 2006 the respondent's counsel Mr. John had been pressing Mr. Clouden to do what was necessary for the appellant to proceed with the prosecution of the appeal. Mr. John wrote the following letter dated 6th November 2006 to Mr. Clouden :

> "Re Civil Appeal Mo. 26 of 2006 – Michael Baptiste v Yolande Bain-Joseph. We would be grateful if you would procure the notes of evidence in respect of the captioned Appeal to be produced so that the Record of Appeal may be filed and the appeal prosecuted."

[5] There was no response to this letter. No further steps were apparently taken by Counsel Mr. Clouden for the prosecution of the appeal, after he was served on the 9th November 2007 with a copy of the Notice of Application to Strike out the Appeal, and supporting affidavit. He apparently awoke from his slumber only after the court's case management directions ordered the appellant to respond. On the 20th November 2007 the following case management directions of Edwards J.A.(Ag) were made:

> "1. The appellant/respondent shall file and serve an affidavit in response and written submissions on or before 7th December 2007, showing cause why the appeal should not be struck out. 2. The respondent/applicant shall file and serve written submissions in response on or before 12th December 2007."

This order was sent by facsimile transmission to the legal practitioners for the parties on the 22nd November 2007 at 11:23 am.

[6] The appellant's response came by way of an affidavit made by Keron Regis, sworn to on

the 7th December 2007, which was filed out of time on the 10th December 2007, along with the written submissions of learned counsel Mr. Paryag. The appellant's response was as follows:

> "3. I am a clerk/secretary in the office of Anselm B Clouden and depose as hereinafter follows under the supervision of my Principal Anselm B Clouden. 4…. 5. The transcript of the notes of evidence was made available and a copy of the transcript was served on the appellant on the 16th July 2007. 6. The appellant's failure to comply with rule 62.11 (1) of CPR 2000, for the filing of the record and skeleton arguments was not primarily due to his default, rather it was due to the delay in the receipt of the notes of evidence. 7. In the circumstances, I am advised and verily believe by Anselm B Clouden that the respondent's application for the striking out of this appeal ought not to be granted and that the appellant be granted an extension of time in which to file the record and skeleton arguments notwithstanding that rule 62.11 (1) has not been complied with."

[7] Before reviewing the jurisdiction of the court and applicable rules under the CPR 2000, I note that although the respondent's application states that it has been made pursuant to CPR 62.11(1), 62.20, and 26.3 (1) (a), the submissions of respondent contain substantial arguments about the appellant's non compliance with filing the record of appeal under CPR 62.12. I consider the matters for my determination circumscribed by the respondent's application. Consequently I will not consider the respondent's submissions relating to the appellant's default under CPR 62.12.

The Jurisdiction of the Court and Applicable Rules

[8] Though CPR 62.11 (1) or any other rule under Part 62 does not expressly state the consequences of failing to file skeleton arguments in a timely manner or at all, neglect to comply with the requirements of CPR 62.11(1) may have as one of the consequences, the striking out of the Notice of Appeal. This is obvious from the combination effect of CPR 62.20 (1), 62.14 (1) and 26. 3 (1) (a).

[9] CPR 62.20 states:

> "In relation to an appeal the Court of Appeal has all the powers and duties of the High Court including in particular the powers set out in Part 26."

CPR 62.14) states:

> "Parts 25 to 27 so far as relevant apply to management of an appeal case as they do to case management of a trial."

CPR 26.3 (1) provides that:

> "In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that - (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;"

Having regard to the definition of "statement of case" under CPR 2.4, and the contents of a statement of case as prescribed by the relevant rules, the contents of the Notice of Appeal and Grounds of Appeal as prescribed by CPR 62.4, are obviously comparable to the statement of case for the purposes of CPR 26.3 (1)(a). No matters are referred to specifically under Part 26 of the Rules which may assist litigants who are making an application under CPR 26.3 (1) (a), to focus their evidence and their arguments on relevant aspects of their particular case when seeking to invoke the exercise of the court's discretion.

[10] The only expressed statutory criteria for the court's exercise of the discretion under CPR 26.3(1)(a) are provided by CPR 1.1 and 1.2 as follows:

> "1.1(1) The overriding objective of these Rules is to enable the court to deal with cases justly.
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> (2) Dealing justly with the case includes -
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> (a) ensuring, so far as is practicable, that the parties are on an equal footing;
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> (b) saving expense;
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> (c) dealing with cases in ways which are proportionate to the -
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> (i) amount of money involved;
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> (ii) importance of the case;
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> (iii) complexity of the issues; and
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> (iv) financial position of each party;
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> (d) ensuring that it is dealt with expeditiously; and
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> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."
>
> 1.2 The Court must seek to give effect to the overriding objective when it - (a) exercises any discretion given to it by the Rules; or (b) interprets any rule."

[11] The Rules give no guidance as to the way in which the overriding objective is to be applied, and in the absence of practice directions, appellate guidance and principles of general application governing the exercise of discretion, which have been enunciated in previously decided cases may be useful. Learned Counsel Mr. John referred to the all embracing criterion in the English CPR 52.9 (2) which governs the power to strike out notices of appeal under their 52.9 (1) (a). The English CPR 52.9 (2) states that:

> "The appeal court will only exercise its powers under paragraph (1) where there is compelling reason for doing so."

This provision is absent in our CPR 2000.

[12] The statutory provision in our CPR 1.1 permits relevant common law principles to be considered and applied by a judge when exercising any discretion or interpreting the rules in my view, since in this provision, by the existence of the word "includes" in rule 1.1 (2), it contemplates that the considerations listed in CPR 1.1 (2) (a) to (e) are not exhaustive of the matters to be taken into account, when the court strives to deal justly with cases. However in applying any such principles the court's discretion by its very nature should be guided and not fettered by the principles. It must also be borne in mind that the CPR 2000 has significantly changed the practice in relation to appeals, and the court must be cautious in applying the common law principles under the old rules, which may not necessarily reflect the transformation under the new regime.

Comment [sg1]: not bold

[13] In Vinos v Marks and Spencer[1] Lord Justice May opined that:

> "The Civil Procedure Rules are a new procedural code, and [in considering whether the court has the power to extend time for service of a claim form where the claimant applied after the expiration of the period provided for in Rule 7.6(2) of the English CPR] the question for this court in this case concerns the interpretation and application of the relevant provisions of the new procedural code as they stand untrammeled by the weight of authority that accumulated under the former rules. The court is not in the first instance concerned with the exercise of discretion. Decisions about the exercise of the court's discretion to strike out cases for delay are not in point. There is, in my judgment, no basis for supposing that rule 7.6 in particular was intended to replicate, or for that matter not to replicate , the provisions of former rules as they had been interpreted."

[1] [2001] 3 All E.R., 784 at para. 26

[14] Unlike the circumstances in Vinos, I am concerned with the exercise of the discretion to strike out the notice of appeal for delay in filing the skeleton argument. In my view, relevant principles from decisions about the exercise of the court's discretion in comparable circumstances, under the provisions of former rules, may be useful in applying the overriding objective in this case. I must therefore endeavour to steer a course which is fair and reasonable to the parties, having regard to the circumstances of this case, the matters set out in CPR 1.1(2), and any relevant principles which may provide additional bases for giving effect to the overriding objective. In balancing the relevant considerations for and against the respondent and the appellant I must also recognise the need to insist in adherence to the rules regulating appeals.

[15] Mr. John submitted that CPR 62.11 (1) is in imperative terms and failure to comply with this rule is a sufficiently compelling reason to strike out the appeal. Mr. John referred to and relied on the old Privy Council decision in Ratnam v Cumarasamy and another[2]. Under our old rules there was no provision for the filing and serving of skeleton arguments in appeals; and an appeal could normally only be dismissed for want of prosecution where an appellant has defaulted or delayed in filing the appeal record. Rule 26 (2) of the Court of Appeal Rules 1968 provided that if an appellant has failed to comply with the requirements for filing the appeal record "the respondent may apply to the Court to dismiss the appeal for want of prosecution and the Court, if satisfied that the appellant has so failed, may dismiss the appeal or make such other order as the justice of the case may require." Rule 9 of the 1968 Rules provided that "the Court may enlarge or abridge the time appointed by these Rules, or fixed by an order enlargening time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, or the Court may direct a departure from these Rules in any other way where this is required in the interests of justice". A comparable provision exists under our new Rules. CPR 26. 1 (2) (k) provides:

"Except where these rules provide otherwise, the Court may -

(a) to (j)…(k) extend or shorten the time for compliance with any rule, practice

[2] [1946] 3 ALL E. R., 933

direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed."

This rule and CPR 27.8 which prescribes the steps that must be taken to vary a case management timetable specified by a rule are relevant in my view, since the respondent in the instant case has purportedly applied for an extension of time at paragraph 7 of Keron Regis' affidavit. However I will deal with this after completing the facts in Ratnam.

[16] Ratnam was a case dealing with the failure to file an appeal record within the time scheduled by the Rules of the Court in Malaya. It is important to recite some analytical facts in this case. The time for filing the record of appeal expired on April 14, 1962, and on April 18, 1962 after a delay of only 4 days, the appellant's solicitors made an application for an extension of time to 14 days from the date of the court order sought. The Court in Ratnam had jurisdiction to extend time for filing the record despite the application being made after the time limit had passed.

[17] The granting of the application in Ratnam would not have been prejudicial to the respondents in any way which could not have been compensated by an award of costs. The time table had fixed the hearing of the appeal for August 20, 1962, which meant that the respondents would have had nearly 80 days to consider the record before the hearing date. The respondents did not allege that they had suffered any mischief, irreparable or at all. The appellant had also provided security for costs of the appeal. In the action the appellant had claimed half interest in property valuing between four hundred and twenty eight thousand to five hundred thousand pounds, and was entitled as of right and without leave, to appeal against the judgment of the trial judge. In his affidavit the appellant had explained that the reason for delay in filing the record was because he had hoped for a compromise, and so had instructed his new solicitors only the day before the deadline date for filing the record. The first respondent had filed an affidavit, the contents of which were not disclosed in the judgment of the Privy Council. Although it was urged that to grant the application would not involve a postponement of the date fixed for hearing the appeal, the Court of Appeal without stating any reason dismissed the application on the 15th May 1962. The appellant appealed to the Privy Council, who took the view that the appellant's

affidavit did not constitute material upon which the Court of Appeal could exercise their discretion in the appellant's favour. It was held that it was impossible to say that the Court of Appeal had acted upon any wrong principle.

[18] Lord Guest at page 934 declared:

> "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 is to be taken, there must be some material on 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 timetable for the conduct of litigation...."

The Purported Application for Extension of Time

[19] In Savill v Southend H.A.[3] acceptance of the principles enunciated in Ratnam was declared by the English Court of Appeal. In this case a notice of appeal against the decision of the Judge who had dismissed a claim for want of prosecution was issued 5 days out of time, and the Judge had refused to extend time under Order 3 rule 5 of the Rules of the Supreme Court (Revision 1965), because no explanation for the delay was given. Under Order 3 rule 5 there was a very general power in the court to extend the time whenever the court thinks it is just to do so. On appeal it was held that although the delay was short the judge had not acted contrary to principle; and where the Court is asked to exercise a discretion there must be some material before it upon which the discretion can be exercised. Balcombe L.J. at page 1256 regarded the Privy Council decision in Ratnam as a case of the highest importance, and observed that although Ratnam was an appeal from the Court of Appeal of the Supreme Court of the Federation of Malaya, "the principles which Lord Guest enunciated in reliance on English authorities show that the fact that this was a Privy Council case is irrelevant for present purposes." The Ratnam principles were also considered and applied in Revici v Prentice Hall Inc.[4] In considering whether a party who has exceeded to a substantial degree the time limit set by the Rules of the Supreme Court within which an interlocutory step has to be taken is

[3] [1995] 1 WLR 1254 (C.A. Div.)

entitled to have his time extended merely on undertaking to pay any costs occasioned by the delay, Edmund Davies L.J declared that " the Rules of the Supreme Court are there to be observed; and if there is non-compliance (other than a minimal kind), that is something which has to be explained away. Prima facie, if no excuse is offered, no indulgence should be granted: see Ratnam v Curasamy[5].

[20] The appellant must be presumed to have had knowledge of the respondent's application from the day of the service of this application on him, which has been proven to be the 9th November 2007. It is reasonable to conclude therefore that learned Counsel Mr. Clouden would have appreciated that it was necessary to file an application pursuant to CPR 27.8 (4), since such application would be asking the court to vary the case management timetable established by CPR 62. 11(1), which had set a date for the filing of the skeleton argument, ascertainable by computation prescribed by the rules. CPR 27.8 (3) requires that:

> "A party seeking to vary any...date in the timetable [other than one fixed by the court for specific reasons listed in CPR 27.8 91) (a) to (e)] without the agreement of the other parties must apply to the court, and the general rule is that the party must do so before that date."

Since the application for varying the timetable would have been contemplated after the 42 days time limit had passed, in fact more than 60 days after the expiration of the time limit (excluding the long vacation period), then CPR 27.8 (4) (a) would apply in my view. It states:

> " A party who applies after the date must apply for:
> (a) an extension of time; and (b) relief from any sanction to which the party has become subject to under these Rules or any Court order."

[21] This Court has held in Richard Fredrick and Owen Joseph and others[6] that CPR 26.8 which is the rule to be applied for relief from sanction is applicable where the court is exercising its discretion upon an application to extend the time for filing the record of appeal. It has also been held in Dominica Agricultural and Industrial Development

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[4] [1969] 1 WLR 157 (C.A. Div.)
[5] [1965] 1 WLR 8 P.C. per Lord Guest at p. 12
[6] Civil Appeal No. 32 of 2005 (St. Lucia) Per: Rawlins JA

Bank v Mavis Williams[7] that CPR 26.8 is applicable when determining an application for extension of time within which to appeal. Support for this approach is to be found in the judicial statement of Brooke L.J. in Sayers v Clarke Walker (a firm)[8] where an application for extension of time to appeal was treated as analogous to an application for relief from sanctions. This case involved allegations of professional negligence against a firm of accountants and was one of complexity. Brooke L.J. in giving the leading judgment observed:

> "19. In very many cases a judge will be able to decide whether to extend or shorten a period of time for complying with a rule, practice or direction without undue difficulty after considering the matters set out in CPR 52 PD, para 5.2. In more complex cases, of which this is undoubtedly one, a more sophisticated approach will be required.
> 20...
> 21. In my judgment, it is equally appropriate to have regard to the check-list in CPR r.3.9 [equivalent to CPR 2000 Rule 26.8.(3)] when a Court is considering an application for extension of time for appealing in a case of any complexity. The reason for this is that the applicant has not complied with CPR r. 52.4(2) [the equivalent of CPR 2000 Rule 62.5], and if the Court is unwilling to grant him relief from his failure to comply through the extension of time he is seeking, the consequence will be that the Order of the lower Court will stand and he cannot appeal it. Even though this may not be a sanction expressly "imposed" by the rule, the consequence will be exactly the same as if it had been, and it would be far better for the Courts to follow the check-list contained in CPR r 3.9 on this occasion, too, than for judges to make their own check-lists for cases where sanctions are implied and not expressly imposed."[9]

[22] A compelling interpretation of the Rules in my opinion, is that the absence of a check-list in CPR 26.1 (2)(k) and 26.3 (1)(a) reflects the draftsman's intentions that the discretion should be exercised by simply having regard to the overriding objective. Having read the judgment of Benjamin J and the grounds of appeal, I am of the view that the appeal does not involve complex issues or require legal arguments of any complexity. In the absence of any expressed sanction prescribed by any rule or order, or practice direction or other direction, which would upon default, take effect under CPR 26.7, there is no need to imply a sanction, since the case is not one of complexity requiring the "sophisticated approach"

[7] Civil Appeal; No. 20 of 2005 (Dominica) Per: Barrow JA
[8] [2002] 1 WLR 3095 paras 19 and 21
[9] The English Practice Direction states; "If an applicant requires an extension of time for filing his notice the application must be made in the appellant's notice. The notice should state the reason for the delay and the steps taken prior to the application being made."

advocated by Brooke L.J. The respondent has a right of appeal, and there is nothing in the language of the relevant statute or Rules which suggest that an appellant who has failed to file the skeleton argument in time is to be debarred from prosecuting the appeal. Such default appears to me to be an irregularity which may be cured by the court by simply having regard to the overriding objective on an application for extension of time.

[23] Not only has the appellant failed to comply with the order of this court which directed that an affidavit in response be filed by the appellant by the 7th December 2007, where it was filed on the 10th December 2007, but he has failed to comply with CPR 27.8 (3) and (4) (a). I do not consider paragraph 7 of Keron Regis' affidavit to be such an application because CPR 11.6 (1) states that "The general rule is that an application must be in writing in Form 6". Of course by the combination effect of CPR 26.2 (1) and CPR 26 .9 (1) and (3), the court has power to make orders of its own initiative without an application to put matters right, where there has been an error of procedure or failure to comply with a rule, court order or direction for which no specific sanction has taken effect. Whereas these powers can be invoked for the untimely filing of Keron Regis' affidavit and the appellant's submissions, the court's powers under these rules cannot avail the appellant in respect of his breach of CPR 62.11(1) in my view. This is because CPR 26.2 (1) forbids the court to make an order of its own initiative without an application where a rule provides otherwise; and in this case CPR 27.8 (3) and (4) (a) are the rules which provide otherwise, as they stipulate that the appellant MUST apply to the court.

[24] Turning now to the application to strike out the notice of appeal, in my opinion Ratnam is of value here, for illustrating the considerations that the court may legitimately take into account when seeking to give effect to the overriding objective, in the exercise of its discretion to extend time for filing skeleton arguments, or strike out an appeal for such default. The principles that I have extracted from Ratnam which in my view synchronise with the overriding objective are: that an order other than striking out the notice of appeal should be made if some satisfactory excuse is given for the neglect to file the skeleton argument, and the delay is not inordinate; in the absence of any evidence that the default has been intentional, or has prejudiced the respondent. These principles are in fact

reflected in CPR 26.8.

[25] I therefore understand the overriding objective to require in this case that I do not strike out the appeal if the Affidavit of Keron Regis contains material sufficient to warrant the favourable exercise of this court's discretion. The material ought to be regarded as sufficient where it contains a satisfactory excuse for the neglect to file the skeleton argument and the delay is not inordinate; in the absence of any evidence that the default has been intentional, or has prejudiced the respondent. The overriding objective also permits me to take into account the failure of both the appellant and the respondent to comply with CPR 62.12 concerning the filing of the record of appeal; and the fact that no timetable has been fixed for the hearing of the appeal.

[27] Looking at this affidavit, it merely accounts for the period of delay between the filing of the Notice of appeal and the receipt of the notes of evidence. There is no explanation for the neglect to file the skeleton argument within the time limit computed under the rules from the date of receipt of the notes of evidence. This compels the conclusion that the default was intentional. “Such intentional conduct is an abuse of the process of the court.” Though I do not regard the delay as inordinate, and there is no evidence of prejudice to the respondent, there has been no explanation for the default, or any evidence of a serious continuing intention to prosecute the appeal. Where the favourable discretion of this court is being invoked, the party seeking to do so must make full and frank disclosure in the affidavit supporting an application for extension of time. This court has complained from time to time about the obvious carelessness of some litigants and their legal practitioners in conducting their business under the CPR 2000, and in particular about the filing of skeleton arguments in a timely manner. Of course the court recognises that the new rules have placed a heavy burden on legal practitioners who must strive to meticulously comply with case management directions and timetables on time. The absence of the necessary factual foundation in this case to invoke the favourable discretion of this court is glaringly obvious, and so must be accorded more weight than the considerations favourable to the appellant. Though striking out a notice of appeal for failure to file skeleton argument may 'at first blush' seem draconian and disproportionate, in my judgment it is fair and

reasonable in the circumstances presented in the instant case. Slight or no explanations must be accorded slight or no effect. Consequently the Application of the respondent to strike out the Notice of appeal is granted. The Notice of Appeal filed on the 27th September 2006 is struck out with costs of $1500.00 awarded to the respondent.

Ola Mae Edwards
Justice of Appeal [Ag.]