ST. CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCVAP 2007/022

BETWEEN:

CRAIG REEVES

Appellant

and

PLATINUM TRADING MANAGEMENT LIMITED

Respondent

Before:

The Hon. Sir Brian Alleyne, SC	Chief Justice [Ag]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Errol Thomas	Justice of Appeal [Ag]

Appearances:

Mr. Mark Brantley and Ms. Dahlia Joseph for the Appellant
Mr. Frank Walwyn and Ms. Midge Morton for the Respondent

2008: January 14,
February 25.

Civil Procedure – interlocutory appeal - procedural appeal – whether direction of court required for a procedural appeal to proceed as such – whether leave required - time limits for filing notices of appeal – sanctions for non-compliance – rule 62 of the Civil Procedure Rules 2000 (CPR 2000) - section 31(3) of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act No. 17 of 1975

The appellant appealed against the decision in the court below to dismiss its forum challenge. The respondent applied to strike out the appellant's appeal on the ground that the appellant had not filed and served written submissions with the notice of appeal in accordance with the requirements of Part 62.10 of the CPR 2000 which governs procedural appeals. Counsel for the appellant argued that it was not intended by the rules to be automatic that such an appeal should proceed as a procedural appeal, that this appeal was not suited to proceed as such in that it raised important and complex issues, and that insofar as this was an interlocutory appeal requiring leave, Part 62.10 could not apply.

Held, refusing the application but awarding costs to the respondent:

(1) Once an appeal falls within the definition of a procedural appeal, the rules require that it should proceed as such and in accordance with the procedure laid down in the rules. There is no need to import into the rules any requirement that the court should first direct an appeal to proceed as a procedural appeal.

Oliver Mcdonna v Benjamin Wilson Richardson Saint Christopher and Nevis Civil Appeal No. 7 of 2005 followed. Dolitte's Limited v The Attorney General (of St. Lucia) St. Lucia Civil Appeal No. 5 of 2002 considered.

(2) Procedural appeals are a subset of interlocutory appeals, or in other words, a procedural appeal is both an interlocutory and a procedural appeal. There are two categories of procedural appeals – those which require leave and those which do not. Rule 62.10 of the CPR 2000 regulates such appeals whether or not leave is required.

(3) In the case of a procedural appeal which may be brought without leave, the notice of appeal must be filed in 7 days. In the case of a procedural appeal for which leave is required, the notice of appeal must be filed within 14 days of the grant of leave. The present case falls within the latter category. Leave having been obtained and the notice of appeal having been filed, rule 62.10(1) operated to mandate the appellant to file and serve written submissions in support of the appeal with the notice of appeal.

Maria Hughes v The Attorney General of Antigua and Barbuda Antigua and Barbuda Civil Appeal No. 33 of 2003 considered and not followed. Nevis Island Administration v La Coppropretе Du Navire J31 St. Christopher and Nevis Civil Appeal No. 7 of 2005 (judgment of Rawlins JA delivered on 29th December, 2005) explained and followed.

(4) Notwithstanding the failure by the appellant to file written submissions in support with the notice of appeal, the appeal is a live appeal. The notice of appeal does not depend for effect on being accompanied by written submissions.

(5) It is not every instance of non-compliance that will result in sanctions, express or implied. And where there is a sanction it will not usually be dismissal of the appeal, which must be an exceptional course, because the object of the rules is to bring cases to trial rather than to deny them a trial. It will sometimes be the case that non-compliance is so trifling that the court is justified in rectifying the error in a summary manner, as rule 26.9 permits, without resorting to the provisions and criteria in rule 26.8. Non-compliance in this case does not attract a sanction and in accordance with rule 26.9(3) the court should make an order to put matters right.

Dominica Agricultural and Industrial Development Bank v Mavis Williams Dominica Civil Appeal No. 20 of 2005, Ferdinand Frampton v Ian Pinard Dominica Civil Appeal No. 15 of 2005, Richard Frederick v Owen Joseph Saint Lucia Civil Appeal No. 32 of 2005 and Nevis Island Administration v La Copropriete Du Navire J31 St. Christopher and Nevis Civil Appeal No. 7 of 2005 (judgment of Barrow JA delivered on 3rd April, 2006) distinguished.

JUDGMENT

[1] BARROW, J.A.: The respondent applied to strike out the appellant's appeal against the decision of Leigertwood – Octave J dismissing the appellant's application for an order that the court in St. Christopher and Nevis should decline to exercise jurisdiction because it was not the *forum conveniens* for the determination of the respondent's claim against the appellant. The ground of the respondent's strike-out application was that an appeal against such a decision is a procedural appeal and the appellant did not comply with the requirement of Part 62.10 (1) of the Civil Procedure Rules 2000 (CPR 2000) that he must file and serve written submissions in support of the appeal with the notice of appeal. It was common ground that the appellant did not file and serve written submissions with his notice of appeal but did so some 14 days later; after the respondent had filed the present application.

[2] In their skeleton argument, counsel for the respondent argued that the judge's order on the forum decision was an interlocutory order, that the appellant needed leave to appeal such an order, and that an appeal from such an order was a procedural appeal. In their written and oral arguments counsel for the appellant agreed that the order appealed was an interlocutory order and that the appellant needed leave to appeal, which he had obtained, but Mr. Brantley, lead counsel for the appellant, argued that it was not intended by the rules to be automatic that an appeal should proceed as a procedural appeal, because some appeals that fall within the definition of a procedural appeal may not be suited to proceed as such.

[3] Counsel also argued that three previous single-judge decisions of this court, in Maria Hughes v The Attorney General of Antigua and Barbuda,[1] Nevis Island Administration v La Coppropreté Du Navire J31[2] and Oliver Mcdonna v Benjamin Wilson Richardson[3], took different views on the relationship between procedural appeals and interlocutory appeals, and this left the law in a state of confusion that required

[1] Antigua and Barbuda Civil Appeal No. 33 of 2003 (judgment of Gordon J.A. re-issued 13 April 2004)
[2] Saint Christopher and Nevis Civil Appeal No. 07 of 2005 (judgment of Rawlins J.A. delivered 29 December 2005)
[3] Anguilla Civil Appeal No. 3 of 2005 (judgment of Barrow J.A. delivered 29 June 2007)

clarification. Counsel argued, in particular, that the different views taken in the first two of those cases as to the different time limits for filing a procedural appeal and an appeal for which leave was required marked the difference between these two categories of appeal, and "once an appeal falls to be treated as an interlocutory appeal requiring leave … then it cannot proceed thereafter to be dealt with in accordance with Part 62.10 which is specific to procedural appeals only." (Original emphasis).

Not suited to proceed as a procedural appeal

[4] Counsel submitted that the Oliver Mcdonna decision was correct in its exposition on the nature of a procedural appeal. That decision recognized that this category of appeal was new and was peculiar to CPR 2000, there being no parallel in the English Civil Procedure Rules (CPR), from which our rules derived. A procedural appeal is defined in rule 62.1 as follows:

> "procedural appeal" means an appeal from a decision of a judge, master or registrar which does not directly decide the substantive issues in a claim but excludes –
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> (a) any such decision made during the course of the trial or final hearing of the proceedings;
> (b) an order for committal or sequestration of assets under Part 53;
> (c) an order granting any relief made on an application for judicial review (including an application for leave to make the application) under the relevant Constitution;
> (d) an order granting or refusing an application for the appointment of a receiver; and
> (e) the following orders under Part 17 –
> (i) a freezing order;
> (ii) an interim declaration or injunction;
> (iii) an order to deliver up goods;
> (iv) any order made before proceedings are commenced or against a non-party; and
> (v) a search order."

[5] Mr. Brantley accepted and relied upon the determination in Oliver Mcdonna that a procedural appeal is a subset of an interlocutory appeal rather than its equivalent. In Oliver Mcdonna the matter was analyzed as follows:

> "[17] Decisions from which a procedural appeal lies include only interlocutory and not final orders. However, this still does not make the two categories equivalent, far less synonymous, as is seen from the fact that it is not all interlocutory orders that would be orders from which a procedural appeal lies. Thus, an interim injunction is a classical interlocutory order but an appeal from a decision granting an interim injunction under Part 17 is expressly stated to be excluded from the meaning of a "procedural appeal". Other examples of interlocutory orders from which interlocutory appeals but not procedural appeals lie are a freezing order (formerly a 'Mareva" injunction) and a search order (the former Anton Piller order). Therefore, even if all orders from which procedural appeals lie are interlocutory orders [Footnote: This is only a hypothesis since the matter has not been canvassed in the submissions of counsel.] not all appeals from interlocutory orders are procedural appeals. Expressed another way, procedural appeals are a subset of interlocutory appeals. This, because the number of orders comprehended in the category "procedural appeals" is not the same as the (greater) number of orders comprehended in the category "interlocutory appeals".

[6] The foundation for counsel's argument that the present appeal should not proceed as a procedural appeal were the following statements in Oliver Mcdonna as to the object of creating this sub-category of appeals:

> "[14] … The purpose of those provisions, it seems to me, is to create a category of appeals from decisions that do not directly decide the substantive issues in a claim and to provide for a very short time – a mere 7 days -- for filing a notice of appeal against such decisions. The key provision is that "forthwith" - meaning without delay or immediately - upon receipt of the notice of appeal the court office must set a date for the hearing of a procedural appeal and notify the parties. The reason for creating a category of procedural appeals, it seems to me, is to create a fast track for these appeals to be heard not later than 28 days after they are filed. The provision for such an appeal to be heard by a single judge greatly facilitates early hearing since it should be easier to deploy a single judge as opposed to three judges.
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> "[15] The short time within which these appeals are to be heard and the limited amount of preparation that is possible in that time make it appropriate to limit the type of matters that are to be given this speedy hearing. …
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> "[16] On that analysis the object of creating a category called procedural appeals is to channel certain matters on to a fast track for early disposal at the appellate level and not to create an equivalent category to interlocutory appeals. I can see in the rules no purpose for doing the latter. In contrast, a significant purpose is

> served by placing appeals that are likely to be uncomplicated on a fast track for early determination, on paper, by a single judge. Consistent with the overriding objective such a course is proportional and uses the court's principal resources of time and judicial personnel appropriately. The concept of fast track trials is fully developed in the English CPR [Footnote: See the English Part 28] although the term is used for lower court and not appellate proceedings. However, the same purpose is served in relation to appeals in the English practice by establishing an elaborate system that provides for the destination of appeals,[Footnote: Practice Direction 52, paragraph 2A.1 and Table 1] in many instances to a single judge and in some instances to two judges, rather than to a full, three-judge panel."

[7] Only uncomplicated appeals can be suitable for this fast track procedure, Mr. Brantley argued, therefore it should not be that an appeal must automatically proceed as a procedural appeal. Rather, counsel submitted, it should be only after the court gives a direction that an appeal should proceed as a procedural appeal that it should so proceed; otherwise an appeal should proceed in the ordinary way. Counsel buttressed this submission by reference to Dolittle's Limited v The Attorney General (of St. Lucia)[4] in which Sir Dennis Byron C.J. stated as part of the facts of the case that leave to appeal had been granted and directions made for the matter to proceed as a procedural appeal. The absence of any criticism of that direction as improper by the Chief Justice showed it was fit that such an order should be made, counsel submitted, and lent "support to the view that the fast track procedure set out for the hearing of procedural appeals is by no means automatic for cases which come within the definition of procedural appeals under the CPR." In further support of his argument that there should be no automatic categorization and treatment of an appeal as a procedural appeal counsel submitted that the Notice of Appeal in this case raised issues which were complex and important and it would not be just for the court to deal with this appeal in the summary manner provided in CPR 2000 for procedural appeals. Counsel developed the submission that the appeal was not a simple one.

[4] St. Lucia Civil Appeal No. 5 of 2002 (judgment delivered 14 October 2003).

No requirement for direction

[8] The difficulty in the way of Mr. Brantley's submission is that the rules in Part 62 are unambiguous that once an appeal falls into the category of a procedural appeal the appeal should proceed as such, not least because the rules impose no requirement or make no provision for a direction from the court that a procedural appeal should proceed as such. Counsel did not suggest that any rule supported his argument that what was by definition a procedural appeal should not proceed as such unless the court directed that it should so proceed. The Dolittle's case does not assist in this regard. The fact that Byron CJ did not remark on the fact that the judge who gave leave to appeal also directed that the appeal should proceed as a procedural appeal is entirely unremarkable. There was nothing to remark about what was simply a helpful direction and reminder as to the nature of the appeal. As the instant case illustrates, counsel are known to overlook the fact that the appeal they have filed is a procedural appeal. A judge giving leave to appeal may therefore find it prudent to give a direction that is really a reminder. The appeal in the Dolittle's case would not have been any the less a procedural appeal if the judge who gave leave had not directed that it should proceed as such.

[9] In the Oliver Mcdonna case, the examination of the rules relating to procedural appeals showed that considerable attention was paid to defining and therefore circumscribing what appeals should fall into this category of fast track appeals. Care was taken to exclude from the subset of procedural appeals those appeals that are likely to be complicated. In addition, Mr. Brantley's concern that the instant appeal is a complicated one, unsuited to an expedited determination – a contention with which Mr. Walwyn, lead counsel for the respondent, robustly disagrees – overlooks the power the rules give to the judge to whom a procedural appeal has been assigned, to direct that there should be a full rather than an expedited, single-judge determination of a procedural appeal.

[10] The general rule is that a procedural appeal is to be considered on paper by a single judge of the court and consideration of the appeal, in that event, must take place not less than 14

days or more than 28 days after filing of the notice of appeal.[5] However, rule 62.10 (5) states the judge may direct that the parties be entitled to make oral submissions and may direct that the appeal be heard by the court. Any oral hearing must take place within 42 days of the filing of the notice of appeal.[6] It is therefore the fact that the judge may decide -- and there is nothing to prevent counsel for the parties from seeking such a decision and a consequential direction – that a particular procedural appeal is complicated and unsuited for the normal mode of determination and, instead, should be heard by the court.

[11] The provisions that enable the judge to so direct simply provide for the direction to be given at a point after a procedural appeal has been assigned to a judge, rather than at some earlier, unspecified point (presumably immediately after the notice of appeal has been filed), as Mr. Brantley suggests should be the case. There is no need, therefore, to import into the rules any requirement that an appeal should first be directed to proceed as a procedural appeal before the obligations of the parties in relation to such an appeal, such as filing written submissions, become operative. Rather, once an appeal falls within the definition of a procedural appeal the rules require that it should proceed as such and in accordance with the procedure laid down in the rules.

The categories of appeals

[12] Counsel for the appellant gave much attention to the different time limits established in rule 62.5, which states:

> "Time for filing notice of appeal
>
> 62.5 The notice of appeal must be filed at the appropriate court office –
> (a) in the case of a procedural appeal – within 7 days of the date the decision appealed against was made;
> (b) if leave is required – within 14 days of the date when such leave was granted; or
> (c) in the case of any other appeal – within 42 days of the date when the order or judgment appealed against was served on the appellant.

[5] Rule 62.10 (3) and (4)
[6] Rule 62.10 (6)

These time limits were discussed in the three cases earlier referred to, Maria Hughes, Nevis Island Administration and Oliver Mcdonna, and based on the treatment in these cases counsel argued, in effect, that interlocutory appeals and procedural appeals were mutually exclusive.

[13] In the Maria Hughes case, counsel noted, Gordon JA ruled[7] that a procedural appeal was equivalent to an interlocutory appeal; that it was necessary to obtain leave to appeal before filing a procedural appeal; and, that an application for leave to appeal in a procedural appeal must be made in the same time as the notice of appeal must be filed, that is, within 7 days of the date of delivery of the decision.

[14] In the Nevis Island Administration case, counsel observed, Rawlins JA treated procedural appeals and interlocutory appeals as equivalent.[8] His Lordship stated that where an intended notice of appeal was in respect of a procedural appeal for which no leave was required rule 62.5(a) provides it must be filed within 7 days of the date of the giving of the decision being appealed and where the intended appeal was "a procedural appeal for which leave is required" the application for leave must be filed within 14 days and the notice of appeal within an additional 14 days after leave was granted.[9] "This contradicts entirely the finding in Maria Hughes by Gordon JA that the relevant time to seek leave is 7 days", counsel for the appellant submitted. When read as a whole, counsel continued, the Nevis Island case suggests there are now only 2 categories of appeals; "procedural or interlocutory appeals" on the one hand and "other appeals". Procedural appeals may require leave or they may not require leave.

[15] Counsel submitted that the analysis was confusing and that the better view may be that CPR 2000 ushered in a new specie of appeal (the "procedural appeal") which did nothing to remove the "interlocutory appeal" enshrined in the parent statute, the Supreme Court Act or the "other appeals" from a final decision. Counsel therefore contended "that Part 62.5 actually speaks to 3 different types of appeals: (1) the procedural appeal; (2) the

[7] Paragraph [6]
[8] Paragraphs [17] and [20]
[9] Paragraph [17]

interlocutory appeal for which leave to appeal is required; and (3) other appeals either from a final decision or from a decision in one of the exceptions set out in the Supreme Court Act or in the CPR."

[16] The latest of the three cases that counsel discussed was the Oliver Mcdonna case and this was the analysis that counsel submitted is to be preferred. Counsel referred to the recognition in paragraph [10] of that decision that rule 62.5 "creates three time limits for the three categories of appeal of which this particular rule speaks: procedural appeals, appeals for which leave is required, and other appeals." Counsel then referred to the opinion in paragraph [17] of that decision[10] that procedural and interlocutory appeals are not equivalent far less synonymous but that procedural appeals are a subset of interlocutory appeals.

[17] After advancing the argument that procedural appeals should encompass only uncomplicated appeals that are suitable for fast tracking, counsel argued that the category of procedural appeals is not a replacement for interlocutory appeals, as the different time limits recognized. Counsel concluded on this point by making the submission earlier reproduced, "that once an appeal falls to be treated as an interlocutory appeal requiring leave pursuant to the Supreme Court Act and Parts 62.2(1) and 62.5(b) of the CPR, then it cannot proceed thereafter to be dealt with in accordance with Part 62.10 which is specific to procedural appeals only."

Overlapping categories

[18] Both in that passage last quoted and in the quote appearing in paragraph [15] above, counsel misstate the wording and, therefore, the tenor of rule 62.5 (b), as referring to interlocutory appeals for which leave is required. The true position is as counsel quoted from the Oliver Mcdonna decision;[11] the rule creates three time limits for the three categories of appeal of which this particular rule speaks: procedural appeals, appeals for

[10] Reproduced below paragraph 5, above, of this judgment
[11] At paragraph 6, above

which leave is required, and other appeals. The rule contains no circumscription of the type of appeals for which leave is required. Specifically, there is no reference to "interlocutory appeals" as being the category of appeals for which leave is required, so as to support counsel's inference that the object of mentioning this category of appeals was to contradistinguish "procedural appeals" and to exclude them from the ambit of appeals for which leave is required. Counsel's misstatement of the rule to express what the rule does not state highlights the very fact -- that the rule does not say what counsel persuaded themselves it said. The rule does not draw a divide between a procedural appeal and an interlocutory appeal; the rule does not even mention interlocutory appeals.

[19] In any case, as was noted in the Oliver Mcdonna decision[12],

> "appeals are not consistently categorised even within Part 62 but are variably categorised according to the purpose for which the categorisation is made. Thus, for the purpose of stating time limits for filing notices of appeal, rule 62.5 refers to procedural, interlocutory[13] and other appeals. In contrast, for the purpose of stating what action the court office must take on receipt of notices of appeal, rule 62.9 refers to procedural appeals, appeals from High Court judgments and appeals from the Magistrate's Court. Other categorisations of appeals that appear in the rule are appeals from a tribunal, appeals by way of case stated, appeals for which other provision is made by the rules[14] and summary appeals[15]. It would be a mistake, in my view, to think that discrete rather than sometimes overlapping categories are created. Thus, procedural and interlocutory appeals may be overlapping categories in the same way that both these categories overlap the category of High Court appeals."

That overview shows the need for caution not to read too much into the categorizations that the rules make.

[20] Further, it emerges on close examination that counsel's argument goes counter to the fundamental opinion expressed in the Oliver Mcdonna decision, which counsel implicitly endorsed, that a procedural appeal is a subset of an interlocutory appeal. As that decision expressed it, all procedural appeals are interlocutory appeals. That being the case, it

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[12] Paragraph [12]

[13] In this quote the judge in the Oliver Mcdonna decision also misstates the wording of rule 62.5(b) by converting the reference to an appeal for which "leave is required" into "interlocutory" appeals.

[14] These three categories appear in rule 62.1 (1)

[15] rule 62.6

follows ineluctably that there can be no justification for the argument that once it is established that an appeal needs leave that makes it an interlocutory appeal, so that it "cannot" thereafter be subject to rule 62.10 which regulates only procedural appeals. An appeal can be both an interlocutory appeal and a procedural appeal – the latter is always both -- and nothing stands in the way of rule 62.10 regulating such an appeal.

Procedural appeals that do not need leave

[21] The confusion that counsel for the appellant thought attended the matter whether there exist two categories of appeal, as counsel thought Rawlins JA found in the Nevis Island Administration case, or three different types of appeal, as counsel suggested is the case, is dispelled by a full consideration of what Rawlins JA stated in the Nevis Island Administration decision. As earlier indicated,[16] Rawlins JA referred to the time limit of 7 days after the date of the decision that is being appealed to file a notice of appeal in the case of a procedural appeal for which no leave was required, and 14 days after leave was granted to file a notice of appeal in the case of a procedural appeal for which leave to appeal was required. This distinction between a procedural appeal that may be brought without leave and a procedural appeal that may be brought only with leave is crucial. In the case of the former the notice of appeal must be filed in 7 days. In the case of the latter the notice of appeal may only be filed after leave is granted but then it must be filed within 14 days.

[22] In the great majority of cases a procedural appeal will need leave to be brought just as, and because, in the great majority of cases an interlocutory appeal will need leave to be brought. Section 31(3) of the Supreme Court Act[17] (the Act) provides:

> "No appeal shall lie under this section –
> (a) – (f)…
> (g) without leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except –
> (i) where the liberty of the subject or the custody of infants is concerned;

[16] At paragraph 14, above
[17] The Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act No. 17 of 1975

(ii) where an injunction or the appointment of a receiver is granted or refused;
(iii) in the case of a decree nisi in a matrimonial cause or a judgement or order in an admiralty action determining liability;
(iv) in such other cases, to be prescribed, as are in the opinion of the authority having power to makes rules of court of the nature of final decisions."

[23] What the section does is to require leave to be obtained before appealing from any interlocutory order or judgment and then to create exceptions to the requirement for leave. Therefore, it is not every interlocutory appeal that requires leave. And similarly, it is not every procedural appeal (a subset of an interlocutory appeal) that requires leave because if the proposed appeal satisfies the definition of a procedural appeal, and also falls within any of the excepted cases of interlocutory appeals for which no leave is required, it does not require leave. Procedural appeals that do not require leave are even less commonplace than interlocutory appeals that do not require leave but they certainly exist.

[24] Section 31(3)(g) of the Act lists six specific cases of interlocutory appeals that do not require leave and makes provision for other cases, to be prescribed. The six cases are (1) where the liberty of the subject is concerned, (2) where custody of infants is concerned, (3) the grant or refusal of an injunction, (4) the grant or refusal of the appointment of a receiver, (5) a decree nisi in a matrimonial cause, and (6) a judgment or order in an admiralty action determining liability. (The other cases to be prescribed by rules of court are those that may be of the nature of final decisions, which will necessarily nonetheless be interlocutory orders since this section is providing for the exemption from the leave requirement in relation to interlocutory orders and, in any case, an appeal against a final order does not require leave.)

[25] Of the six cases of interlocutory appeals that do not need leave, according to the definition of a procedural appeal in rule 62.1 of CPR 2000 some are not but some are procedural appeals. An instance of the former, it would seem to me, would be an appeal against an order under Part 17 of CPR 2000 granting an interim injunction, which is excluded from being a procedural appeal by rule 62.1 (e) (i) and (ii). On the other hand, an instance of a procedural appeal which will get the benefit of the exception, it seems to me, is an appeal

against an interlocutory order in a case concerning the liberty of the subject. An appeal against an interlocutory order striking out an affidavit on a purely procedural ground, for example, would seem to me clearly to be a procedural appeal, and such an appeal is excepted from the need for leave. That example should suffice to make concrete the reference by Rawlins JA to procedural appeals that do not need leave to appeal and which, therefore, must be filed within 7 days of the date the decision appealed against was made.

Time limits for filing notices of appeal

[26] Mindful of the observation in the Oliver Mcdonna decision that categorisations of appeals within Part 62 vary according to the purpose for which the categorisation is made, rule 62.5 may now be better appreciated. Sub-paragraph (a) of that rule, which sets a 7 days time limit, addresses one category of appeal, a procedural appeal which does not require leave. Sub-paragraph (b), which sets a 14 days time limit, impliedly addresses in the category of appeals which require leave, two types of appeals: a procedural appeal which needs leave and an interlocutory appeal which needs leave. Sub-paragraph (c), which sets a 42 days time limit, impliedly addresses in the category of "other appeals", among others, two types of appeals: interlocutory appeals that do not need leave (because exempted by the Act) and appeals from final decisions of the High Court that do not need leave (because they lie as of right pursuant to the Act).

[27] On that exegesis I would reject counsel's thesis that rule 62.5 establishes three different time limits and therefore three distinct categories of appeals. As I have tried to show, the one does not follow the other. And to restate the point, categories are neither discrete nor exclusive. In this case the appeal fell within sub-paragraph (b); it was a procedural appeal that needed leave. Such leave having been obtained and the notice of appeal having been filed, rule 62.10 (1) operated to mandate that the appellant file and serve written submissions in support of the appeal with the notice of appeal, and this he failed to do.

Sanctions

[28] Counsel for the appellant submitted that no sanction is specified in the rules for non-compliance with rule 62.10 (1) and they therefore asked the court to rectify the matter pursuant to the power to do so in rule 26.9. Mr. Walwyn sought to argue that the notice of appeal was a nullity and thereby forestall any consideration of rectifying the matter, but rule 62.3 goes against that argument. It states that an appeal is made by filing a notice of appeal[18] and that a notice of appeal takes effect on the day it is received at the appropriate court office.[19] The notice of appeal does not depend for effect on being accompanied by written submissions in support. In this case, therefore, there is a live appeal.

[29] Rule 26.9, which counsel for the appellant prayed in aid, states:

> "(1) This rule applies only where the consequence of failure to comply with a rule, practice direction, court order or direction has not been specified by any rule, practice direction or court order.
> (2) An error of procedure or failure to comply with a rule, practice direction, court order or direction does not invalidate any step taken in the proceedings, unless the court so order.
> (3) If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.
> (4) The court may make such an order on or without an application by a party."

Counsel relied in particular on rule 26.9 (3), which he submits gives the court power in a case such as this to make an order to put matters right where there has been a failure to comply with a rule.

[30] It is by now established that the court does not treat non-compliance with CPR 2000 lightly and there is a number of decisions, on which Mr. Walwyn relied, in which the defaulting party paid the ultimate price of dismissal of his appeal for non-compliance. The decisions that Mr. Walwyn placed before the court or which were mentioned included Ferdinand

[18] Rule 62.3 (1)
[19] Rule 62.3 (3)

Frampton v Ian Pinard[20], Dominica Agricultural and Industrial Development Bank v Mavis Williams[21] and Richard Frederick v Owen Joseph.[22]

[31] In the Frampton case there was no appeal in existence because the intended appeal needed leave and no application had been made in time for leave. What was before me, as a single judge of the court, was an application for an extension of time and, if time was extended, an application for leave. Following an earlier decision to the effect, Nevis Island Administration v La Copropriete Du Navire J31,[23] I decided that although no sanction was expressly imposed for failure to apply for leave to appeal in time there was nonetheless a sanction that attached to non-compliance with the time limit, namely, the applicant was not permitted thereafter to apply for leave to appeal. Perhaps a clearer expression of the sanction is that an intending appellant in that position loses the opportunity to appeal.

[32] In view of such a sanction it was thought appropriate to consider whether to grant an application for relief from sanction by applying the provisions in that regard contained in rule 26.8. These provisions impose mandatory pre-conditions to the granting of relief including that an application for relief must be made promptly and must be supported by affidavit. A third pre-condition, contained in rule 26.8 (2), is that the applicant for relief must show that his non-compliance was not intentional, there is a good explanation for it and that he has generally been compliant with court orders, rules and directions. The applicant in the Frampton case utterly failed to satisfy the third pre-condition and relief was refused.

[33] In the Dominica Agricultural and Industrial Development Bank case the intending appellant had delayed for 9 months before applying for an extension of time for appealing. The applicant had deliberately decided not to appeal a liability judgment in time but to wait and see how the future damages judgment would go. The court approved the decision in Frampton that an application for an extension of time to appeal should be considered

[20] Dominica Civil Appeal No. 15 of 2005 (judgment delivered 3 April 2006)
[21] Dominica Civil Appeal No. 20 of 2005 (judgment delivered 20 June 2006)
[22] Saint Lucia Civil Appeal No. 32 of 2005 (judgment delivered 15 January 2007)
[23] St. Christopher and Nevis Civil Appeal No. 7 of 2005 (judgment of Barrow JA delivered 3 April 2006). For clarity it is noted that there is an earlier decision in this case on appeal delivered by Rawlins JA on 29th December 2005.

against the provisions of rule 26.8 concerning relief from sanction. In the Dominica Agricultural and Industrial Development Bank case the intentional non-compliance with the time limit was regarded as an abuse of process and fatal.

[34] In the Richard Frederick case, the notice of appeal having been duly filed and served, counsel for the appellant did not file the record of appeal by the specified date. Instead counsel applied to set aside the High Court judgment that he had already appealed. On a single judge hearing Rawlins JA held that was a wholly wrong application and dismissed it. Twenty-seven days out of time, counsel applied for an extension of time in which to file the record of appeal. When that application came on for hearing no one appeared and it was dismissed for want of prosecution. Now 92 days out of time, counsel filed a fresh application to extend time. Rawlins JA refused the application as "abusive of the process of the court on a compendium of grounds." He found there was no good explanation for the delay, the application was not made promptly and there had been a deliberate decision not to file the record of appeal but instead to apply to set aside the High Court judgment. There had been no mere technical non-compliance but deliberate conduct, His Lordship found. The matter came before the court on an application by the appellant to vary the decision of Rawlins JA and was dismissed.

[35] The first two decisions are readily distinguished given the facts of the present case. In those two cases, no appeal existed whereas an appeal exists in this case. The time limit for bringing an appeal has to be of greater significance than the time limit for filing a document in the course of an appeal and, consequently, failure to comply with the time limited for doing these different things has to be viewed differently and attract different sanctions. By way of example, the court has often rued the late filing of skeleton arguments in appeals, for which clear time lines are specified. Too often skeleton arguments are filed the Thursday or Friday of the week before the sitting of the court during which the appeal is scheduled to be heard and at times they are filed during the week of the sitting. In those instances there is no question of treating non-compliance with the time limit for filing a skeleton argument in the same way as failing to file a notice of appeal or an application for leave to appeal in time. In the latter cases there is no appeal

that can proceed. In the former there is the aggravation, inconvenience and disadvantage of late receipt but that cannot, in the normal case, stop the appeal proceeding.

[36] The third decision, the Richard Frederick decision, is also to be distinguished. At a fundamental level and in broad terms, an appeal cannot proceed without a record of appeal but it can proceed without written submissions. Non-compliance is therefore of different effect in these two situations and the sanction, again broadly speaking, cannot reasonably be the same. At a more particular level, delaying for 92 days in applying for an extension of time to file a record of appeal is, as a matter of degree, of a different order from delaying for 14 days in filing written submissions. In the former instance the judge found the delay to be inordinate both because there was no good explanation for it and it was intentional. In the latter instance the specific facts need to be considered so as to decide whether the delay was inordinate.

[37] The significance of the number of days for which there was delay will vary considerably according to the other material circumstances of the case; it is not an absolute proposition that the greater the number of days delay the closer the delay draws to being inordinate. I have already considered that delay in filing submissions has to be of less impact than delay in filing a notice of appeal or even a record of appeal. In this case, the respondent filed written submissions in response within about 14 days, so the appeal got back on track. (No issue is taken with the fact that rule 62.10(2), which permits but does not mandate the respondent to file submissions in response, provides for this to be done in 7 days.) Counsel for the respondent made the point that they had told counsel for the appellant, even before the notice of appeal was filed, that the intended appeal was a procedural appeal so counsel for the appellant could not excuse their non-compliance by claiming ignorance or inadvertence.

[38] In considering this fact I give due weight to the novelty of the concept in CPR 2000 of a procedural appeal and the uncertainty and, in Mr. Brantley's view, the confusion that attach to it. Mr. Brantley's observation that hitherto the apparently invariable practice before the court was for appeals from decisions on forum challenges to proceed as regular

interlocutory appeals and not as procedural appeals is confirmed by the experience of the court and that fact must certainly be considered in considering the reasonableness of counsel for the appellant initially resisting the guidance offered by the other side. Recognition of the practice that has previously prevailed in relation to forum appeals does not diminish the cogency of Mr. Walwyn's submission that universal persistence in a wrong practice does not make it right. I would think, though, that while the practice is no less wrong it makes the wrong less egregious. Coupled with that factor is the wise conduct of Mr. Brantley in not persisting in his initial resistance to complying with rule 62.10 (1) but instead in preparing and filing written submissions, not more than 2 weeks later, to guard against the possibility, while not conceding the fact, that he was wrong. This put his client in a far different position than the purported appellant in the Nevis Island Administration case[24] that persisted for over 6 months in refusing to apply for leave to appeal, despite having been told by counsel on the other side that the appeal needed leave.[25] It is appropriate that the court should consider, as part of the circumstances surrounding an instance of non-compliance, the conduct of a party in seeking to cure his default when alerted to it.

[39] I have spent some time considering the degree of non-compliance involved in this case because I wish to make the point that it is not every instance of non-compliance that will result in sanctions, express or implied. And where there is a sanction it will not usually be dismissal of the appeal, which must be an exceptional course, because the object of the rules is to bring cases to trial rather than to deny them a trial. It will sometimes be the case that non-compliance is so trifling that the court is justified in rectifying the error in a summary manner, as rule 26.9 permits, without resorting to the provisions and criteria in rule 26.8.

[40] In this case, for example, counsel for the respondent wrote to counsel for the appellant to point out the failure to file accompanying written submissions and to say they would accept the submissions a day late. Counsel for the appellant complain they were not given even a

[24] St. Christopher and Nevis Civil Appeal No. 7 of 2005 (judgment of Barrow JA delivered 3 April 2006)
[25] Paragraphs [1] and [11]

working day to respond before the application to strike out was filed. Counsel for the respondent take the stance that they had previously told counsel for the appellant that this was going to be a procedural appeal so they had already given to the appellant all the time that reasonableness required. There is no need to assess the merits of the respective positions; it is sufficient to highlight the initial disposition of counsel for the respondent to accept the written submissions late (even if only 1 or 2 days late), to make the point that it is not every instance of non-compliance that calls for the imposition of a sanction. But having made that point I hasten to disavow even the faintest suggestion of general tolerance for non-compliance, be it ever so slight.

Order

[41] It is my view that non-compliance in this case should not attract a sanction but that the court, in accordance with rule 26.9 (3), should make an order to put matters right. That order would be, in essence, that the written submissions the parties respectively filed should stand as properly filed and the procedural appeal should proceed. I would thereby leave it open to the judge to whom the appeal is assigned to direct how the appeal should proceed. I would refuse the application by the respondent to strike out the appeal but would award costs to the respondent, on the basis that it was the non-compliance of the appellant that fairly led to the making of this application. I would fix such costs at $1,500.00. Finally, I would commend all counsel for the quality of their written and oral presentations.

Denys Barrow, SC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag]

I concur.

Errol Thomas
Justice of Appeal [Ag]