COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

HCVAP2008/003

BETWEEN:

VENA MCDOUGAL

Defendant/Appellant

and

RENO ROMAIN

Claimant/Respondent

Before:

The Hon. Mr. Errol L. Thomas — Justice of Appeal (Ag.)

On Written submissions:

Mr. Michael E. Bruney for the Defendant/Applicant
Mr. B. Mc Donald Christopher for the Claimant/Respondent

2008: April 7.

JUDGMENT

[1] **THOMAS J.A. (AG.):** On 2nd November, 2006 the claimant filed a claim form in which damages for breach of contract and refund of money had and received were sought.

[2] A default judgment was entered by the claimant on 19th January 2007 by virtue of the failure of the Defendant to file a defence within the time prescribed by CPR 10.3(1).

[3] An application by the defendant to set aside the default judgment was dismissed by the learned Master on 4th April 2007. Then on 27th April 2007 the defendant/ appellant sought leave from a High Court Judge to appeal against the order of the learned Master, notwithstanding the fact that the time for making such an application had expired. The

application was dismissed by His Lordship Mr. Davidson Baptiste on 21st December 2007.

[4] Finally, on 7th January 2008, the defendant/appellant filed a notice of appeal, together with submissions. The notice sought to impugn the decision of the learned Judge made on 21st December 2007. In response the claimant/ respondent filed skeleton arguments and submissions "in opposition to a procedural appeal pursuant to CPR Part 62.10 (2)."

[5] In the notice of appeal the details of findings of fact and law challenged are stated in these terms:

> "(a) (i) The learned judge's findings that the defendant/appellant's application for leave after the deadline had expired had not been made promptly.
>
> (ii) the learned judge's finding that the defendant/appellant failed to give a good explanation for not filing her application for leave to appeal within the time stipulated by the Rules.
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> (b) The learned Judge's decision not to grant to the defendant/appellant leave to appeal on the basis that he was not satisfied that all the criteria under CPR 26.8(1) and 26.8(2) were met by the defendant/appellant."

[6] The grounds of appeal are stated thus:

> "(1) the learned Judge erred in law when he refused to extend the time for the filing of the defendant/appellant's application for leave to appeal notwithstanding that:-
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> (a) the application was made within nine days after the expiration of the deadline
> (b) the defendant/appellant had a good explanation for failing to file her application for leave within the time stipulated by law;
> (c) the defendant/appellant had a real prospect of succeeding on appeal.
>
> (2) The learned Judge's failure to consider adequately or at all the overriding objective of the Civil Procedure Rules in arriving at his decision; in particular –

(a) that the defendant/appellant would suffer a grave injustice and the claimant/appellant would be unjustly enriched should the Default Judgment be allowed to stand unchallenged.

(b) that any prejudice likely to be suffered by the claimant/appellant as a result of granting the defendant/appellant leave to appeal would be minimal compared with that to be endured by the defendant/appellant if deprived of the opportunity to defend the claim."

[7] In the circumstances, the defendant/appellant seeks an order setting aside the decision of the learned Judge with costs in favour of the defendant/appellant.

[8] Given the fact that both grounds are centered on the Judge's refusal to grant leave and the alleged failure to consider the overriding objective, both grounds will be considered together.

[9] As required by CPR 62.10(1) and (2) the defendant/appellant and the claimant/respondent filed submissions on 9th and 11th January, 2000, respectively.

[10] On behalf of the defendant/appellant, it is submitted that in the case of **Ferdinand Frampton and Ors v The Chief Elections Officer and Others**, Mr. Justice Denys Barrow S.C held that in considering an application for extension of time for leave to appeal the criteria prescribed by CPR 26.8 should be applied. It is further stated that: "the learned Justice of Appeal saw the said rule as imposing mandatory conditions, namely that the application must be made promptly and supported by Affidavit. In the said decided case it was also stated that the court may grant relief only if it is satisfied that the failure to comply was not intentional, that there was a good explanation for the failure and that the party in default has been generally compliant."

[11] But while the defendant/appellant concedes that the application for leave was filed eight days after the time prescribed by CPR 62.2(1), it is contended that CPR 26.1(2)(i) empowers the court to extend the time for compliance with any rule even if the application

is made after the time for compliance has expired. In this regard, reliance is placed on a decision of this court in **Ulysses Auguiste v David Rubin and Virginia Peters.**

[12] In terms of the effect which the granting of relief or not would have on each party, the defendant/appellant contends that a refusal would result in the claimant/respondent being unjustly enriched, while the defendant would suffer an injustice without being heard.

[13] The submissions made on behalf of the claimant/respondent relate to no good explanation, consistent non-compliance with time and the consequences to the defendant/appellant if the default judgment is disturbed.

[14] In terms of the good explanation as required by CPR 26.8(2)(b) the submission, in part, is as follows:

> "In the intended Appellant's affidavit for an extension of time filed 27th April and sworn on 27th April 2007, she deposed that *'my legal practitioner was engaged in the preparation for an appeal before the Court of Appeal as a result of which it was not possible for me to meet with him in order to discuss my options and to have this application for leave filed.*' The learned Judge in delivering his judgment stated that there was no good explanation of this failure to comply with the rules to apply on time."

[15] Learned counsel for the claimant/respondent submits further that:

> "…the very same 2 counsel were engaged as adversaries in the same Court of Appeal case: Emanuel Rock v Theresa Jolly which was heard by the Court of Appeal on Tuesday the 17th day of April, 2007. The order not to set aside the default judgment was made on 4th April…"

[16] On the matter of prejudice to the defendant/appellant, it is submitted by the claimant/respondent that the defendant had an option and opportunity to file a counterclaim. This was not done in the draft defence filed when making the application to set aside the default judgment.

[17] In sum, the court is faced with a circumstance where the defendant/appellant has filed a notice of appeal in respect of a decision of a Judge made on 21st December 2007. The

appeal was filed on 7th January, 2008 with submissions but there is no evidence of leave to file the appeal in those circumstances or an application for relief from sanctions. Coupled with this is the fact that the cause of the delay has to do with the schedule of the legal practitioner. Given the circumstances, the consequences flowing from section 30(2)(g) of the **Eastern Caribbean Supreme Court (Dominica) Act** and Part 62.2(1) of **CPR 2000** must be determined.

Analysis

[18] Part 62.1(2) of **CPR 2000** introduced the new term "procedural appeal". With certain exclusions it is defined to mean "an appeal from a decision of a judge, master or registrar which does not directly decide the substantive issues in a claim…" In this court the term 'procedural appeal' has been the subject of extensive interpretations and rulings.

[19] A procedural appeal is usually measured against 'the application test'. This test was explained by Rawlins JA in **Nevis Island Administration and Ors v La Coppropretе Du Navire J31 and others** thus:

> '[13] In these cases, as well as in Astian Group Limited and Another v TNK Industrial Holdings Limited, in which Gordon JA also sat as a Single Judge, this Court sated a preference for the "application test" in order to determine whether an appeal is from an interlocutory or procedural order or from a final order.
>
> [14] In Othniel Sylvester, Byron JA, distinguished the "application test" from the "order test", at page 4 of the Judgment. He repeated it as the applicable principle in Pirate Cove Resorts Limited, in the following terms:
> 'Under the application test, an order would be final if it was made on an application which would have determined the matter in litigation for whichever side the decision was given. It is conceded that if the application test was applied the order of Georges J would be interlocutory, because if he had not set aside the writ and discharged its service, the proceedings would have continued.
> Under the order test an order is final if it finally determined the issue in litigation, or disposed of the rights of the parties. It seems to me that although the order, having adjudged the writ and its service to be invalid, effectively determined the proceedings, it did not determine any issues in litigation between the parties nor dispose of their rights, and therefore was not a final judgment or order.'

[15] The application test accepts that a claim could be totally and effectively disposed or on an interlocutory application, without there being a determination on any of the issues which arise on that claim. The case could thus be disposed of, and yet the order is not a final order because none of the issues on the claim has been determined. Under the application test the resulting order is an interlocutory order. An appeal from such a decision is also a "procedural appeal;" within the definition of that term in rule 62.1(2) of **CPR 2000,** because it is a decision, '…which does not directly decide the substantive issues of a claim'."

[20] The dicta of His Lordship Mr. Denys Barrow SC in **Oliver McDonna v Benjamin Wilson Richardson** further clarifies the matter of interlocutory orders and procedural appeals:

"[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 appeal 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 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'."

[21] Justice of Appeal Barrow in the same case also re-stated the law respecting the application test in this way:

"[19] With the matter of procedural appeals out of the way, I turn to the question whether the present appeal was against an interlocutory order and could only have been brought with leave, or was against a final order for which no leave was required. This court has repeatedly pronounced that this question is to be decided by applying the application test as opposed to the order test. The application test says that the court considering the question whether an order was interlocutory or final must look at the application pursuant to which the order was made. If, whichever way the application was decided that decision would have brought an end to the issue in litigation, the decision given on that application is a final order. If, on the other hand, the proceedings would not have ended if one side was

> opposed to the other side won, the order is not a final order but is an interlocutory order."

[22] The impugned order of the learned Judge relates merely to a refusal to grant leave to appeal. This order must be measured against the application test with the result that the order would not have determined the litigation in the matter and as such by definition it is not a final order. In turn, it gives rise to a procedural appeal and the attendant provisions of **CPR 2000**.

The question of leave to appeal

[23] The court has ruled and maintained that a procedural appeal will usually require leave as a prerequisite to the filing of a notice of appeal. But even then, there are some instances where leave is not required.

[24] The statutory provision is section 30(2) (g) of the **Eastern Caribbean Supreme Court (Dominica) Act** which, with specified exceptions, prohibits appeals against an interlocutory judgment or interlocutory order without prior leave of a Judge of the High Court or of this court.

[25] Additionally, Part 62.2(1) of **CPR 2000** says that if an appeal may be made only with the leave of the court below or the court, a party wishing to appeal must apply for leave within 14 days of the order against which leave to appeal is sought. Part 62.2(2) goes on to provide that an application for leave must be in writing and set out concisely the grounds of the proposed appeal.

[26] Insofar as the notice of appeal is concerned, Part 62.5(a) says that in the case of a procedural appeal it must be filed within 7 days of the date of the decision appealed against, and if leave is required within 14 days of the date when such leave was granted.

[27] Part 62.10 deals exclusively with procedural appeals and in particular it provides that the appellant must file and serve written submissions in support of the appeal with the notice of appeal.

[28] What the defendant/appellant has done in this case is to file a notice of appeal together with submissions. However, there is no evidence of an application for leave or, more importantly, leave to institute a procedural appeal. The mandatory or imperative nature of section 30(2) (g) of the **Eastern Caribbean Supreme Court (Dominica) Act** and Part 62.2(1) of **CPR 2000** render the defendant/appellant's notice of appeal nugatory or a nullity.

[29] The case of **Ferdinand and Frampton and Ors v The Chief Elections Office and Ors** is authority for the proposition that CPR 26.8 governs the matter of extension of time for leave to appeal.

[30] CPR 26.8 in its entirety provides 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
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> (b) supported by evidence on affidavit;
>
> (2) The court may grant relief only if it is satisfied that -
>
> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the failure; and
>
> (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.
>
> (3) In considering whether to grant relief, the court must have regard to -
>
> (a) the effect which the granting of relief or not would have on each party;
>
> (b) the interests of the administration of justice;
>
> (c) whether the failure to comply has been or can be remedied within a reasonable time;
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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.

(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

[31] It has already been noted that CPR 26.8 has been interpreted as imposing mandatory conditions. Added to that, the use of the word "and" at the end of each of penultimate sub-paragraph of paragraphs (1), (2) and (3), suggests further that the various requirements are conjunctive.

[32] The case of **Ulysses Auguiste v David Rubin and Virginia Peters** determined that each application for extension of time for compliance must be considered on its own merit. This is reflected in the following dictum of Alleyne JA, as he then was, in the above- mentioned case:

> "In her submissions on an application for leave to appeal notwithstanding that the time limited for so doing has expired, the intended Appellant has drawn attention to parts 62.20(1) and 26.1 of the CPR, and contends that the making of the application after the time for compliance has passed is not an absolute bar to the application. I cannot but agree. Nevertheless, contrary to the assumptions of both parties, the delay is not inconsiderate, being from 14th December, 2003 until the application for leave filed on February 4th, 2004."

[33] In this case, the application for leave to appeal out of time should have been made promptly; but instead it was filed on 27th April, 2007. Therefore, on the reasoning in the **Ulysses Auguiste** case, the delay was not inconsiderate. This would address the requirement of CPR 26.8(1)(a) that an application must be made promptly. But there are other mandatory requirements.

[34] CPR 26.8(2) prohibits the court from granting relief unless it is satisfied that there is a good explanation for the failure.

[35] The reason advanced by the defendant/intended appellant is that her attorney was preparing for an appeal before this court. This is deposed in an affidavit sworn to by the defendant on 27th April, 2007 in this matter.

[36] Even under the former rules the fact that a litigant's attorney was otherwise engaged was never accepted by this court or the Grenada Court of Appeal as a good reason for granting an extension of time. The leading case is **Mills v John**. In this case, Liverpool JA made an extensive analysis of the Caribbean cases on the point "for the guidance of the profession".

[37] At page 601 His Lordship said this:

> "In Casimir v Shillingford and Pinard, Lewis, CJ delivering the judgment of the Court of Appeal of the West Indies Associated States held that 'pressure of work' was not a good and substantial reason to grant an application to extend the time within which to appeal and in answer to a plea counsel for the applicant that the court should grant the application as a matter of indulgence the learned Chief Justice stated that:
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> > 'If the court did that, then it would be tantamount to doing away with the rule, and it would open the way to a flood of applications by solicitors who might not be diligent in the conduct of their client's business, to apply for the indulgence of the court'."

[38] Justice of Appeal Liverpool concluded as follows:

> "From the combined effect of the case[s] cited above, the following principles may be enunciated:
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> "1. An application for an extension of time within which to bring an appeal or file a record is not granted as a matter of course.
>
> 2. In order to justify a court in extending the time during which some step is required to be taken, there must be some material on which the court can exercise its discretion.
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> 3. There is no material difference between the expressions "good and substantial reasons" and "substantial reasons". Both mean in effect that the applicant must supply the court with *bona fide* and cogent excuses for his failure to comply with the time-table set out in the rules.
>
> 4. Pressure of work on a solicitor impecuniosity of the client will not *per se* be regarded as good and substantial reasons.
>
> 5. Secretarial incompetence in the office of a solicitor *per se* is not acceptable as an excuse for delay.

6. Where the applicant has not really had a trial the court's discretion will be more readily exercised in his favour.

7. The affidavit must also contain grounds of appeal which *prima facie* show good cause for the appeal, i.e. a *prima facie* arguable ground of appeal."

[39] Even before the enactment and adoption of new rules of civil procedure in the Supreme Court of Trinidad, delays caused by legal practitioners were considered to be totally reflected in the dictum of Kangaloo JA in the case of **Mahabir v Phillips** at paragraph 21 unacceptable. In this regard an overview of the Court of Appeal's attitude to the issue is of his judgment:

> "This Court is unable to accept that submission. Gone are the days when the litigant is allowed to pursue litigation dilatorily and use the incompetence of his attorneys as the excuse. The tide turned sometime ago with the **National Commercial Bank of Trinidad and Tobago Ltd v Pouchet** … (unreported) and has continued to flow with the decisions in **Ramkisssoon v Ramkissoon** … (unreported), **Laveau V Port Authority** … (unreported) **Bassett v McKenzie** … (unreported) of Trinidad **and Tobago v Elvis Marketing** … (unreported) and **Williams v Attorney General** … (unreported). It is bound to gather momentum and become torrential, otherwise civil litigation in this country, deprived as it is of modern rules of procedure, is bound to collapse under its sheer weight, made all the more burdensome by the casual and often cavalier approach to litigation by practitioners. The legal profession has a responsibility to police itself to ensure as far as possible that hapless litigants, as Counsel has made the appellant out to be, are not made victims of incompetent and negligent attorneys. The Courts have the responsibility to ensure that [the Court process] is not abused, and that the mattes before [them] proceed with dispatch so that the public gets the quality of justice it deserves. As Lord Bingham said in **Johnson v Gore Wood and Co**. [2001] 2 W.L.R. 72, 90B in the English Context ***'the public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole.'*** The Court eagerly looks forward to the day when a similar statement can be made in the Trinidad and Tobago context without a concomitant hollow ring to it."

[40] The central focus of a good reason for delay giving rise to application for leave is also emphasized by Mr. Justice Hugh A. Rawlins in **Michael James v Tasman Gamin Inc and Betcorp Limited** when he said this**:**

> "It is a trite principle, often repeated in this court, that leave to appeal will be granted if this court is of the view that the appeal has a realistic prospect of succeeding or if there are other compelling reasons why the appeal should be

heard. That, of course, is so providing that the delay has not been inordinate and there are good reasons for it."

[41] But quite apart from the 'good explanation' which in this case is centered on the litigant's attorney, the question whether the failure is due partly to the party's legal practitioner is one of the considerations for the Court under CPR 26.8(3)(d). The other considerations are: the effect of the grant of relief on each party, the interests of the administration of justice, whether the failure has been or can be remedied within a reasonable time and whether the trial date or any likely trial date can still be met if the relief is granted. Given the stage which this case has reached, I consider that the primary considerations are whether the failure was due to the defendant's legal practitioner, the fact the default judgment was entered more than one year ago and the interests of justice. In the end, it means that if the relief was granted the claimant/respondent would be driven from the judgment seat occupied since 19th January, 2007. This has a bearing on the overriding objective to **CPR 2000**.

[42] In a recent decision of **Craig Reeves v Platinum Trading Management Limited** , it was determined by this court that insofar as procedural appeals are concerned, the nature of non-compliance must be examined in order to measure the legal consequence. In the head note to the case the factual matrix and the relevant rules of **CPR 2000** were summarized thus:

> "In the case of procedural appeal which may be brought without leave, the notice of appeal must be filed within 7 days. In the case of a procedural appeal from 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 an appeal with the notice of appeal."

[43] Justice of Appeal Denys Barrow S.C in a very extensive and learned analysis of procedural and interlocutory appeals in the **Craig Reeves** case described a notice of appeal filed, without the requisite written submissions in support of the appeal, as being a live appeal. His conclusion in those circumstances is as follows:

> "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 than 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 complained they were not given even a 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 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 no-compliance, be it ever so slight.

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."

[44] Against the backdrop of the law a determination must be made as to the consequence of non-compliance in the context of a procedural appeal. This case is immediately distinguishable from the **Craig Reeves** case in that leave had been obtained and notice filed. What constituted the non-compliance was the absence of the written submissions. For this reason Justice of Appeal Denys Barrow, S.C characterized the matter as a live appeal based on the language of CPR 62.3(1): "An appeal is made in the case of an

appeal from the High Court by filing a notice of appeal at the court office where the judgment was entered."

[45] In the case at hand the notice was filed outside of the time prescribed by CPR 62.5(a) and without leave and also without application for relief from sanction. And as it turned out the delay in all of this was due to the unavailability of learned counsel for the defendant/appellant. The attitude of the court is that this latter variable has already been identified and as such there is no need to repeat it.

[46] Therefore in the circumstances, I do not consider the non-compliance in this case to be 'trifling'. Rather, it is serious and as such is not an appropriate case for the making of an order under CPR 26.9(3) to put matters right. This does not overlook the overriding objective of **CPR 2000** which is to enable the court to deal with cases justly. But this case has a history beginning with a default judgment.

[47] As indicated before, this case is clearly distinguishable from the **Craig Reeves** case where the non-compliance related merely to the failure to file written submissions with the notice of appeal.

Result

[48] I would strike out the notice of appeal for non-compliance with **CPR 2000**. The Defendant/Appellant must pay the Claimant/Respondent's costs which I fix at $500.00.

Errol L. Thomas
Justice of Appeal (Ag.)