BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2007/005

BETWEEN:

EMPLOYERS INTERNATIONAL AND OTHERS

Appellants

and

BOSTON LIFE AND ANNUNITY COMPANY LTD.

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins — Chief Justice

Appearances:

Mr. Martin S. Kenney and Ms. Anthea L. Smith for the Appellants, except Darrell W. Daugherty and Dr. Gerardo Aguirre, the 19th and 25th Appellants on the Notice of Appeal

Mr. Michael J. Fay for the Respondent

2008: January 29;
October 21;
Re-issued: November 6.

Civil Procedure – appeal against case management order of a master – applications to dismiss the appeal on grounds of failure to comply with an "unless order" and failure to file written submissions with the appeal - rule 62.10(1) of the Civil Procedure Rules 2000 ("CPR 2000") – application by appellants for an extension of time to file written submissions – whether appeal should be dismissed or whether time should be extended – whether the appeal should be allowed against the case management order – rules 26.8, 26.9, 29.1(2)(k) and 42.10 of CPR 2000

Boston Life and Annuity Company Limited, ("Boston Life") the respondent, is the claimant in the substantive claim. The claim was brought against 63 defendants, including the appellants who number about 53, and who are represented by the firm of J.S. Archibald and Co. ("the JSA defendants"). Boston Life sought a declaration that it (Boston Life) had terminated a policy of insurance between it and the defendants. Boston Life also sought a consequential declaration that it was not liable to repay to any of the defendants any part

of the premium on that policy. The defendants eventually counterclaimed and Boston Life filed a reply and defence to the counterclaim.

In the interim, Boston Life had applied for summary judgment. The master issued case management directions and fixed a date for the hearing of that application. Among other things, the case management directions required the defendants to file evidence and skeleton arguments by a specified date. The JSA defendants failed to comply with these directions. Instead, they applied for an extension of time to file their evidence and skeleton arguments. Subsequently, they also applied for an adjournment of the hearing of their application for extension of time. Boston Life applied for an order debarring the JSA defendants from filing their evidence and skeleton arguments. The master dismissed the applications by the JSA defendants and retained the date which was prior set for hearing Boston Life's application for summary judgment. The JSA defendants appealed.

The Full Court of Appeal granted leave to appeal the master's order to the JSA defendants and stayed the summary judgment order which a judge had by then granted to Boston Life. The JSA defendants filed the appeal within the stipulated time. However, contrary to rule 62.10(1) of **CPR 2000**, they did not file written submissions with the appeal. Boston Life applied for orders dismissing the appeal on the ground that the appeal was a nullity because of this non-compliance, as well for failure by the JSA defendants to comply with an "unless order" of this court. On the other hand, the JSA defendants applied for an order extending the time to file their written submissions.

Held: dismissing Boston Life's applications to dismiss the appeal with no order as to costs; granting the JSA defendants' application to extend time for filing their written submissions for the appeal with no order as to costs; granting the JSA defendants' application for extension of time to file and serve their evidence and skeleton arguments in the application for summary judgment and awarding costs to Boston Life to be paid by the JSA defendants under rule 65.11(3)(c) of **CPR 2000** in this application; and allowing the appeal by the JSA defendants against the order of the master with no order as to costs:-

(1) The caption and an aspect of the text of the written submissions which the JSA defendants filed on 24th October 2007 indicated that those submissions were filed in compliance with the directions in the order of 9th October 2007, which was the basis on which the "unless order" was made. The "unless order" did not therefore take effect to strike out the appeal automatically. Inasmuch as the filed submissions opposed the application to dismiss the appeal and supported their application to extend time, the JSA defendants had, in effect, showed cause why the appeal should not have been automatically dismissed on the "unless order".

(2) The fact that an appellant does not file written submissions with a notice of appeal in a procedural appeal does not prevent the court from having jurisdiction in the appeal. Non-compliance with rule 62.10(1) of **CPR 2000** does not therefore render an appeal a nullity. The court has jurisdiction, in an

appropriate case, to retrospectively extend time to file written submissions notwithstanding the provision of rule 62.10(1) of **CPR 2000**.

Craig Reeves v Platinum Trading Management Limited, St. Kitts and Nevis Civil Appeal No. 22 of 2007 (25th February 2008) applied.

(3) In the present case, Boston Life would not have been prejudiced in the appeal by the filing of the written submissions by the JSA defendants on 17th August 2007. The court would, therefore, without resorting to the provisions and criteria in rule 26.8 of **CPR 2000**, make an order to put the matter right under rule 26.9 of **CPR 2000**, and, thereby, extend the time for filing the written submissions to the date when they were filed. The result would be the same even if the court were to resort to the provisions and criteria in rule 26.8 of **CPR 2000**.

(4) The appeal against the master's order is allowed because in the circumstances of the present case the master should have permitted the JSA defendants to file their evidence and written submissions in the summary judgment application by Boston Life. This is because the summary judgment hearing was scheduled quite early in the proceedings; the JSA defendants were many, in the main resided outside of the jurisdiction and the material from which the evidence had to be complied was voluminous; solicitors for the JSA defendants were prepared to give an undertaking to file and serve the evidence almost immediately, and given the significance of the case.

JUDGMENT

[1] **RAWLINS, C.J.**: On 29th January 2008 the substantive appeal as well as 3 interlocutory/procedural applications in these appeal proceedings came before me, as a single judge of this court. I determined 2 of the applications orally and reserved judgment on the other application and on the substantive appeal. Counsel for the JSA defendants sought leave to make further written submissions. I directed both parties to file written submissions by dates in February 2008. The parties complied and I received them in March 2008. At the outset I apologize to the parties for the delayed delivery of this judgment, which was occasioned by the structural changes which occurred at the court during the course of this year.

[2] In the substantive appeal, the appellants, the JSA defendants, appealed against a case management order which Master Cottle made on 26th March 2007. The

master's order, among other things, dismissed an application by the JSA defendants for an extension of time to file and serve their evidence and written submissions for the hearing of a summary judgment application. Boston Life brought this application against the JSA defendants and 5 of the others. The Full Court of Appeal granted leave to appeal the master's order.[1]

[3] The JSA defendants filed their notice of appeal within the time stipulated by the order of the Full Court. However, they did not file their written submissions with the appeal. Rule 62.10(1) of **CPR 2000** requires an appellant to file written submissions with the notice of appeal. The respondent, Boston Life applied to strike out the appeal as a nullity because the written submissions were not filed with the appeal. For their part, the JSA defendants applied for an order extending the time within which to file their written submissions.

[4] In the course of these proceedings a single judge of this court issued an "unless order" stating that the appeal would have been dismissed automatically if the JSA defendants did not comply with directions that I had previously given. The single judge issued the "unless order" because of what appeared to have been the non-compliance by the JSA defendants with my prior order. Boston Life applied to have the appeal deemed dismissed for the apparent non-compliance. At the oral hearing on 29th January 2008, I dismissed this application. I also held that the fact that an appellant does not file written submissions with a notice of appeal in a procedural appeal does not prevent the court from having jurisdiction in the appeal. That decision meant, in effect, that non-compliance with rule 62.10(1) of **CPR 2000** does not render an appeal a nullity.

This judgment

[5] First, this judgment provides a short background to the appeal and the 3 applications. In the second place, this judgment affords a fuller perspective on the

[1] In Employers International and Others v Boston Life and Annuity Company Limited, British Virgin Islands Civil Appeal No. 5 of 2007, (4th July 2007 Ola Mae Edwards JA (Ag.)

applications, and, in doing so, indicates why I dismissed Boston Life's application to strike out the appeal for failure by the JSA defendants to comply with the "unless order". This judgment will also indicates why I held that this court has jurisdiction to hear the appeal notwithstanding that solicitors for the JSA defendants did not file and serve their written submissions with the notice of appeal. In the third place, this judgment considers the application by the JSA defendants for the order extending time to file their written submissions on the appeal. Allowing this application would require considering the substantive appeal against the order of the master.

Background

[6] On the 7th March 2006, Boston Life filed a claim in the High Court against 63 defendants including the JSA defendants. By that claim Boston Life sought a declaration that Boston Life had terminated a policy of insurance between it and those defendants. Boston Life also sought a consequential declaration that it was not liable to repay to any of the defendants any part of their premiums paid on that policy. Boston Life also sought further or other relief and costs.

[7] The majority of the defendants reside overseas. The law firm of J.S. Archibald & Co. acknowledged service on behalf of the JSA defendants. There are over 50 of them. The firm filed a defence on 26th July 2006 on behalf of those defendants. However, on 24th November 2006, Boston Life filed an application for summary judgment against 62 defendants including the JSA defendants.

[8] The master issued case management directions to facilitate the hearing of the application for summary judgment. The first such directions order was made on 24th November 2006. The master directed Boston Life to file and serve the application for summary judgment together with supporting evidence and skeleton arguments on or before 22nd December 2006. He also directed the defendants to file evidence in response and skeleton arguments on or before 12th January 2007.

Additionally, he ordered Boston Life to file skeleton arguments in response (if necessary) on or before 22nd January 2007. The matter was adjourned to 1st February 2007.

[9] Neither Boston Life nor the JSA defendants fully complied with the master's order of November 2006. Boston Life filed all of its affidavit evidence and its skeleton arguments on 17th January 2007. The defendants did not comply with the order. However, on 9th January 2007 the defendants, excluding the JSA defendant No. 3, filed a counterclaim. They thereby sought relief, which included declarations that Boston Life breached the contract of insurance. They also sought declarations that they (the defendants) are creditors in equity of Boston Life; that all the premiums paid constituted money had and received by Boston Life to the defendants' use. They further sought an account of all premiums received by Boston Life from them (the defendants). The defendants estimated this to be about US$10 million. They also sought ancillary orders. The JSA defendants filed an amended counterclaim on 18th January 2007. Boston Life filed a reply and defence to counterclaim on 24th January 2007.

[10] On 1st February 2007 the master issued further directions. He ordered the defendants to file evidence in response and skeleton arguments on or before 6th March 2007. He also directed Boston Life to file and serve evidence in response (if necessary) on or before 21st March 2007. The master listed the summary judgment application for hearing before a judge on 3rd April 2007. However, on 7th March 2007 the JSA defendants applied for an order extending the time to file and serve their evidence and skeleton arguments. This application was served on Boston Life on 14th March 2007. The hearing was scheduled for 26th March 2007.

[11] In the meantime, on 9th March 2007, Boston Life applied for an order debarring the JSA Defendants from filing evidence and/or skeleton arguments in response to the summary judgment application. On 22nd March 2007 the JSA defendants applied for an adjournment of the hearing of their own application for extension of time.

They served it on 23rd March 2007. Their application for adjournment was brought on 2 main grounds. One ground was that Dr. Archibald, who had carriage of the application for extension of time, was appearing in the Privy Council on 29th March 2007 in the unrelated Nam Tai litigation. Mr. Fay who had carriage for Boston Life was also due to appear in the Privy Council in the same litigation. The other main ground was that solicitors for the JSA defendants had experienced some difficulties getting in all of the evidence from the many defendants whom they represent.

[12] In summary, the applications which the Master heard on 26th March 2007 were:

(i) The JSA defendants' application, filed on 7th March 2007, which sought an extension of time to the 15th March 2007 to file and serve their affidavit evidence and skeleton argument for the summary judgment hearing. When this application was made the hearing of the summary judgment application was already scheduled for the 3rd April 2007.

(ii) Boston Life's application of 9th March 2007 for an order debarring the JSA defendants from filing their evidence and skeleton arguments.

(iii) The JSA defendants' application, filed on the 22nd March, 2007, for the adjournment of the hearing of their own application for extension of time.

[13] When the master heard these applications on 26th March 2007 he made the following order:

1. The defendants' application for an adjournment of the two notices of application listed for 26th March 2007 is dismissed.
2. The defendants' application for an extension of time to file their evidence and submissions is dismissed.
3. The defendants are to file and serve submissions with authorities by the close of business on 27th March, 2007.
4. If the defendants fail to file and serve their submissions by the close of business on 27th March, 2007, the defendants are debarred from making oral submissions at the hearing on 3rd April 2007.
5. The hearing date of the substantive matter on 3rd April 2007 is retained.

This is the order which is the subject of the substantive appeal in these proceedings.

[14] This was an interlocutory order, which required leave to appeal. The Full Court of Appeal granted leave to appeal on 4th July 2007. Hariprashad-Charles J had already granted summary judgment in favour of Boston Life on 14th May 2007. The order of the Full Court, which granted leave to appeal, stayed the summary judgment order pending the determination of the appeal. The master did not provide any reasons for his decision. The Full Court also ordered the production of the master's notes of the hearing of 26th March 2007 for the hearing of the appeal. The hearing and determination of the appeal against the master's order of 26th March 2007 was delayed, however, because the 3 procedural applications were filed in the appeal proceedings. It became necessary to determine these 3 applications before considering the substantive appeal.

The "unless order" application

[15] It was on 20th November 2007 that Ola Mae Edwards JA (Ag.) issued the "unless order" against the JSA defendants. The order stated that the appeal would be automatically dismissed unless by 28th November 2007 the JSA defendants complied with paragraphs 1 and 2 of an order that I issued on 9th October 2007. Paragraph 1 of my order of 9th October 2007 directed solicitors for the JSA defendants to show cause, by way of written submissions, why their appeal should not be struck out for failure to comply with rule 62.10(1) of **CPR 2000**. Paragraph 2 of the order directed the JSA defendants to file and serve those written submissions showing cause by 26th October 2007. Boston Life applied for an order dismissing the appeal on the ground that the JSA defendants failed to show cause why the appeal should not be struck out for failure to comply with that "unless order".

[16] On 24th October 2007 solicitors for the JSA defendants filed written submissions. These were, in substance, in opposition to Boston Life's application to strike out the appeal. These submissions supported their application to extend time to file their written submissions, which they should have filed with their appeal. I

dismissed Boston Life's application to strike out the appeal for non-compliance with the "unless order" particularly because the title and the text of the written submissions which the JSA defendants filed on 24th October 2007 recited that those submissions were filed in compliance with my directions in the order of 9th October 2007. I held that on this basis the "unless order" did not take effect to strike out the appeal automatically. It seems that by filing submissions that opposed the application to strike out and which supported their application to extend time, the JSA defendants had, in effect, showed cause why the court should not have struck out the appeal.

Boston Life's nullity application

[17] Solicitors for Boston Life contended that the failure by the JSA defendants to file their written submissions with the notice of appeal rendered the appeal a nullity. Although the JSA defendants filed the notice of appeal on 18th July 2007, within the time stipulated, they filed their written submissions on 17th August 2007 and served them on 20th August 2007.

[18] It is trite principle, often re-stated by this court, that the failure of an appellant, on a procedural appeal, to seek the leave of the court to appeal, before filing the notice of appeal, renders the appeal a nullity. Such an appeal will be struck out. In the course of the oral decision on 29th January 2008, however, I held that this court has jurisdiction, in an appropriate case, to retrospectively extend time to file written submissions notwithstanding the provision of rule 62.10(1) of **CPR 2000**. This decision means that an appeal is not rendered a nullity for failure to file written submissions with the notice of appeal. Clear authority for this is provided in the decision of the Full Court of Appeal in **Craig Reeves v Platinum Trading Management Limited**.[2]

[2] St. Kitts and Nevis Civil Appeal No. 22 of 2007 (25th February 2008).

[19] In **Craig Reeves**, the appellant appealed against the dismissal of a forum challenge by the High Court. The respondent applied to strike out the appeal on the ground that the appellant did not file and serve written submissions with the notice of appeal in accordance with rule 62.10(1) of **CPR 2000**. The Full Court, in a judgment written by Barrow JA, dismissed the application. In so doing, the court held, *inter alia*, that the failure by the appellant to file written submissions with the notice of appeal did not render the appeal a nullity because such non-compliance is trifling. The result was that such an appeal was still live because the notice of appeal did not depend for effect on being accompanied by written submissions. In these premises I decided to dismiss the application by Boston Life to strike out the appeal on the ground that the appeal was a nullity because of non-compliance with rule 62.10(1) of **CPR 2000**.

[20] The question, then, is whether this was an appropriate case in which to extend the time for the JSA defendants to file their written submissions in this appeal.

The application to extend time

[21] In their application to extend the time for filing their written submissions, the JSA defendants stated as follows, in paragraphs 3 and 4:

> "3. The failure of the Appellants to file written Submissions at the time of filing the Notice of Appeal did not prevent a fair trial of the issues in the Appeal. The Respondents suffered no prejudice having been aware of the Appellants' submissions before the filing on 10 September 2007 of their Application to strike out the Notice of Appeal.
> 4. The Court is empowered to extend the time retrospectively to 17 August 2007 for the filing of the Appellants' written submissions in support of the Notice of Appeal, or to take any necessary step to put matters right."

[22] The JSA defendants state as follows, at paragraphs 4 to 12 of the affidavit in support of their application for extension of time:

> "4. The Notice of Appeal herein was filed on 18 July 2007 and served on the Legal Practitioners for the Respondents on 25 July 2007. By error the points upon which the submissions were intended to be made were incorporated in the said Notice of Appeal rather than in separate

submissions. We recognised that this did not meet the requirements of CPR 62.10(1).
5. Subsequently on 17th August 2007 the Appellants filed separate written submissions and served same on the Legal Practitioners for the Respondents on 20 August 2007. A copy of the filed Written Submissions are exhibited hereto and marked "A".
6. Almost one month after the [respondent was] served with the Appellants' written submissions in support of the Notice of Appeal, the Respondents on 10 September 2007 filed an Application to strike out the Notice of Appeal on the basis that the Appellants had not filed or served any written submissions in support of the appeal with the Notice of Appeal.
7. The Respondent had in fact suffered no prejudice having been aware of all our submissions before the filing on 10 September 2007 of their Application to strike out the Notice of Appeal.
8. In these circumstances the Court is empowered to extend the time retrospectively to 17 August 2007 for the filing of the Appellants' written submissions in support of the Notice of Appeal.
9. Pursuant to CPR Part 26.9 (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.
10. CPR 26.9 is applicable where no consequence for failure to comply has been specified by any rule practice direction or Court Order.
11. There is no consequence specified in CPR Part 62.10 for the failure to file written Submissions in Support of a Procedural Appeal.
12. In the circumstances the Appellants hereby apply for an extension of time to file the Written Submissions lodged on 17 August 2007 and already served on the Legal Practitioners for the Respondent."

[23] This court has stated that an applicant for an order extending the time specified by a rule would usually be required to meet the requirements of rule 26.8 of **CPR 2000**.[3] In doing so this court followed the decision of the English Court of Appeal in **Sayers v Clarke-Walker (a firm)**.[4] This rule provides the guidelines which a court should consider when deciding whether a party that has defaulted in taking a procedural step in keeping with the time specified in the rules should be granted relief from sanctions for the default. Counsel for Boston Life contended that this approach is usually taken even where no sanction is provided for non-compliance

[3] See, for example, 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).
[4] [2002] EWCA Civ 645; [2002] 3 All E.R. 490; [2002] 1 WLR 3095.

with the rule that stipulates the time. To support his contention, learned counsel referred to the statement by Brooke LJ in **Sayers**,[5] that even where a rule does not expressly impose a sanction for non-compliance, the consequence for non-compliance will be exactly the same as if the rule imposed a sanction. Accordingly, the court should follow the checklist contained in English CPR 3.9, which is similar to that contained in our CPR 26.8 in determining whether to grant relief from sanctions and consequently extending time for compliance.

[24] The court held in **Craig Reeves**, that a sanction will not result in every instance of non-compliance and where a sanction is provided it will not usually lead to the dismissal of the appeal. Dismissal will be an exceptional course, because the object of the rules is to bring cases to trial rather than to deny them a trial. According to the court, sometimes non-compliance would be 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 of **CPR 2000**. In **Craig Reeves** the court held that the non-compliance did not attract a sanction, and, accordingly, in accordance with rule 26.9(3) of **CPR 2000**, the court made an order that rectified the non-compliance. In so doing, the court distinguished **Dominica Agricultural and Industrial Development Bank v Mavis Williams**,[6] **Ferdinand Frampton v Ian Pinard,**[7] **Richard Frederick v Owen Joseph**,[8] and **Nevis Island Administration v La Copropriete Du Navire J31**.[9]

[25] The reasoning of the Full Court in **Craig Reeves** on this issue is noteworthy. Barrow JA, who delivered the judgment stated as follows:[10]

> "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.

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[5] Contained in paragraph 21 of the judgment.
[6] Dominica Civil Appeal No. 20 of 2005.
[7] Dominica Civil Appeal No. 15 of 2005.
[8] Saint Lucia Civil Appeal No. 32 of 2005.
[9] St. Christopher and Nevis Civil Appeal No. 7 of 2005 (judgment of Barrow JA delivered on 3rd April, 2006).
[10] In paragraph 29 of the judgment.

(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 submitted, 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."

[26] In applying the provision to the rules, Barrow JA stated:[11]

"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 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.

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

[11] At paragraphs 39-41 of the judgment.

> 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."

[27] There is no stipulated sanction for non-compliance with rule 62.10(1) of **CPR 2000**. Written submissions, which are filed with an appeal, are intended to assist the court, by way of reference to the applicable principles, legal analysis and authorities, to arrive at decisions that are sound, well reasoned, correct in law, reliable and not delivered *per incuriam*. It is understandable then that in **Craig Reeves** Barrow JA found the non-compliance trifling and did therefore warrant a dismissal of the appeal. It is my view that the non-compliance with rule 62.10(1) by the JSA defendants in the circumstances of the present case was also a trifling one which the court should put right by reference to rule 26.9 of **CPR 2000**.

[28] It is noteworthy that solicitors for the JSA defendants actually filed their written submissions on 17th August 2007. In my view Boston Life would not have suffered any prejudice if the time for filing them were extended to that date so that the court could have relied on them in its deliberations. In the event of granting an extension it would have been open to the court to compensate Boston Life for the non-compliance by the JSA defendants. In these circumstances, I shall allow the application by JSA defendants for an order extending the time for filing the written submissions by rectifying the matter under rule 26.9 of **CPR 2000**. I shall accordingly extend the time for the filing of the submissions to 17th August 2007, when they were actually filed, by deeming that they were properly filed on that date. I shall therefore determine the appeal against the order of 26th March 2007.

The appeal against the master's order

[29] It is settled principle that an appellate court would not easily interfere with a case management decision of a judge or master. The following statement from **Royal & Sun Alliance v T & N Limited**[8] elucidates this principle:

> "….[the] Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

[30] The master exercised case management powers as well as a general discretion under rule 26.1(2)(k) of **CPR 2000** when he considered the JSA defendants' application to extend the time for filing their affidavit evidence and skeleton arguments for the summary judgment application. This sub-rule states:

> "Except where these rules provide otherwise, the court may-
> (a) to (j)…
> (k) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed."

[31] The critical question is whether the master exercised his discretion under this sub-rule in accordance with the principles stated in **Royal & Sun Alliance v T & N Limited** or whether his exercise of the discretion was outside of the generous ambit of that discretion. In exercising the discretion to determine whether to extend time the master should have been guided by the relevant provisions of rule 26.8 of **CPR 2000**. These are sub-rules 26.8(1)-(3).

[32] Sub-rules 26.8(1)-(3) state as follows:

> "26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be-
> (a) made promptly; and
> (b) supported by evidence on affidavit

[8] [2002] EWCA Civ. 1964 Para. 38. See also Note 52.3.8 to the UKCPR which states that "permission will be granted more sparingly to appeal against case management decisions."

(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;
(d) whether the failure to comply was due to the party or the party's legal practitioner; and
(e) whether the trial date or any likely trial date can still be met if relief is granted."

[33] The master did not provide a written judgment or reasons for decision. The notes of the hearing do not disclose what the master took into consideration in arriving at his decision to dismiss the JSA defendants' applications to extend time and to adjourn the hearing. There is therefore no analysis which shows that he considered any of the criteria which these provisions require. There are therefore no bases on which I could determine whether he exercised his case management discretion correctly or whether his decision was plainly wrong. It therefore becomes necessary for me to make a determination whether the master should have granted the JSA defendants' application to extend time in the circumstances of the case.

[34] It would be remiss of me not to express concern at the increasing instances in which this court has had to consider appeals in the absence of reasons provided for the decision appealed. Ideally, judges and masters should provide reasons when an appeal is lodged against a decision. In any event, they should, in conjunction with the court office, ensure that case management proceedings are recorded, particularly when a court reporter is not present. It is my suggestion that all proceedings, including case management, should be recorded systematically and the reasons reproduced when an appeal is lodged in a matter which does not have the benefit of a written judgment.

Did the master err?

[35] It is noteworthy that when the Full Court of Appeal granted leave to appeal, that court stated that it was of the view that the application for leave raises an important question of general application under the CPR, as to the matters which a judge or master should consider and weigh when deciding an application for extension of time.[12]

[36] The central issue in the substantive appeal against the master's order revolves around the discretionary powers of the master to refuse to admit evidence in a case. Barrow JA noted in **Teliasonera Finland OYJ v Alfa Telecom Turkey Limited**,[13] that this discretion is classically a case management power that exists to enable a judge or master to control the scope and the flow of the evidence and thereby control the conduct of the case. Barrow JA stated, however, that this type of discretion should be exercised with great circumspection, particularly because in contrast to the English rules of civil procedure, our **CPR 2000** does not contain an express power to exclude admissible evidence.[14] He found that little circumspection was needed in the circumstances of **Teliasonera** to decide that there was no reason to exclude the affidavit evidence because it would not have had even the slightest impact upon the conduct of the proceedings. This, he said,[15] was because the re-filing of the affidavit in response had no impact upon the conduct of the proceedings. Neither did it affect the preparation by counsel or the judge for the hearing of the application or the hearing date.

The present case

[12] See per Ola Mae Edwards JA (Ag.) at paragraph 30 of the judgment.
[13] Virgin Islands Civil Appeal No. 28 of 2007 (18th December 2007), at paragraph 16.
[14] English rule 32.1(2) compared to rule 29.1 of CPR 2000. See paragraph 16 of the judgment.
[15] See paragraph 17 of the judgment.

[37] Against this background it is my view that it would have been reasonable for the master to extend the time as prayed for by the JSA defendants given that the summary judgment hearing was scheduled quite early in the proceedings; taking into consideration that the JSA defendants were many and the volume of material from which the evidence had to be complied; given the fact that solicitors for the JSA defendants were prepared to give an undertaking to file and serve the evidence almost immediately and the significance of the case. I think that the circumstances of the case were such as to point to the suggestion by Barrow JA stated in **Teliasonera** that the master's discretion to admit or not to admit the evidence should have been exercised with great circumspection. Had the master done that, he should have permitted the JSA defendants to file their evidence and skeleton arguments within a few days even if the summary judgment hearing was adjourned for a very short time. He could have recompensed by ordering the JSA defendants to meet the costs of Boston Life for granting the application for the extension of time pursuant to rule 65.11(3)(c) of **CPR 2000**.

[38] It is my view, further, that even if resort were made to the checklist provided by rule 26.8 of **CPR 2000** the result should have been the same. The application for extension of time was made in a timely manner. The relevant directions are those which the master issued on 1st February 2007. By those directions the master required the JSA defendants to file their evidence and skeleton arguments for the summary judgment hearing on or before 6th March 2007. The hearing was scheduled for 3rd April 2007. Solicitors for the JSA defendants applied for the order to extend time on 7th March 2007. This was the day after they should have complied with the directions. Notwithstanding this, rule 26.8(1) was satisfied, in my view, since the application was made promptly and it was supported by evidence. Further, it does not appear that there was anything that indicates that the failure to comply with the direction was intentional. Rule 26.8(2)(a) was therefore satisfied.

[39] Rule 26.8(2)(b) requires an applicant to provide a good explanation for failure to comply with the directions which the master gave.

[40] Solicitors for the JSA defendants stated in the appeal against the master's decision that the master erred when he refused the request by junior counsel at the hearing on 26th March 2007 to permit them to file their affidavit evidence which was in the possession of counsel for the JSA defendants at the time. They contended that the master had the power to order that unless they filed all of their evidence and written submissions within 24 hours they would have been debarred from relying on them at the summary judgment hearing on 3rd April 2007. They further contended that the master erred when he refused to grant an adjournment of the hearing on 26th March 2007 to facilitate the presence of Dr. Archibald, their leading counsel, who was attending to another matter before the Privy Council in England at the time.

[41] Mr. Fay submitted that the JSA defendants gave no satisfactory explanation as to why it was necessary for leading counsel to appear before the master for applications that were not complex, or why leading counsel had to be absent for the hearing. I agree.

[42] The main reason given by solicitors for the JSA defendants for non-compliance with the masters order was that their evidence in opposition to Boston Life's application for summary judgment was quite voluminous, particularly the evidence of one Brad Barros. The appeal states that counsel for Boston Life admitted at the hearing on 26th March 2007 that he already had the evidence in his possession from another source.

[43] Mr. Fay admitted that at the time of the case management conference, the existing evidence for the JSA defendants was voluminous. He stated, however, that that evidence was in witness statement form, and was never filed or disclosed. He said that the applicants had not informed the master that they intended to apply for an adjournment of the summary judgment hearing. The result, he said, was that

the master was unable to make an informed decision as to whether the evidence would give rise to the need for an adjournment. Counsel maintained that in such circumstances the master correctly distinguished between the prejudice caused by late filing of evidence and the mere inconvenience caused by late filing of skeleton arguments. He insisted that the master was entitled to conclude that service of the voluminous evidence, 6 days before the 3rd April 2007, was likely to jeopardize the summary judgment hearing. Mr. Fay also submitted that it would be an injustice to allow the applicants to file such evidence so close to the scheduled hearing since both parties wished the summary judgment hearing proceed on the 3rd April 2007.

[44] On the other hand, Mr. Kenney contended, on the basis of the matters that were pleaded in the notice of appeal, that since the master was exercising his discretion in making the order, the rules mandate that the master ought to have applied the overriding objective. He submitted that based on the nature of the defence of the applicants, whereby they were challenging the policy relied on by the respondent in its claim. He said, further, that taking into consideration, additionally, that the matter concerned the sum of US$10 million premiums paid; the voluminous affidavits and exhibits that were in their possession; and counsel's preparedness and undertaking to file and serve the affidavit evidence by the following day, and the overriding objective of the rules, the master should have granted the application for adjournment and extension of time.

[45] Mr. Kenney further submitted that the master's order was disproportionate, because it gave Boston Life an unfair advantage, while it deprived the JSA defendants of the opportunity to present their evidence at the summary judgment hearing on 3rd April 2007. The applicants, he argued, were therefore deprived of a chance to oppose the evidence of the respondent in such a critical claim.

[46] It is my view that viewed from the foregoing perspective, which is set out in the appeal and summarized by Mr. Kenney, the explanation proffered by solicitors for the JSA defendants for their failure to file and serve their evidence for the

summary judgment was adequate. It is my further view that the matters that are to be considered pursuant to rule 26.8(3) of **CPR 2000** would reasonably have been resolved in favour of the JSA defendants. In particular, it appears that the JSA defendants' failure to comply could have been remedied within a reasonable time, and the date on which the summary judgment application was scheduled for hearing could have been kept. Any delay could have been sufficiently short so as not to prejudice Boston Life. The circumstances of the case indicate to me that it would have been helpful, in the interest of the administration of justice, to afford the opportunity to all of the parties to reasonably make out their cases in an application which could have determined the claim summarily.

[47] In the foregoing premises, I would allow the appeal by the JSA defendants against the order of the master dated 26th March 2007. However, I would order the JSA defendants to meet Boston Life's costs in the application to extend the time to file the evidence and the skeleton arguments in the court below pursuant to rule 65.11 of **CPR 2000**. Consequentially, notwithstanding that the JSA defendants prevailed on this appeal, I make no costs order in their favour in this appeal.

Costs in the applications

[48] I shall make no costs order in favour of the JSA defendants in the application by Boston Life to strike out the appeal for non-compliance with the "unless order". This is because the circumstances which led to that application arose from the default of the JSA defendants. For a similar reason, I shall make no costs order in favour of the JSA defendants in Boston Life's application to strike out the appeal on the ground that it was a nullity notwithstanding that I dismissed that application.

[49] The application by the JSA defendants to extend the time to file their evidence and skeleton arguments for their appeal and the consequential application by Boston Life to dismiss the appeal for the non-compliance were occasioned by the default by the JSA defendants. They did not file their submissions with the appeal as the rules require. I shall therefore order the JSA defendants to meet the costs of

Boston Life in the application to extend time. However, I shall make no costs order in favour of the JSA defendants in Boston Life's application to dismiss the appeal.

[50] In summary then, the following is the order and directions in these proceedings:

1. The application by Boston Life to strike out the appeal for non-compliance with the "unless order" is dismissed with no order as to costs.

2. The application by Boston Life to strike out the appeal on the ground that the appeal was a nullity because of non-compliance with rule 62.10(1) of **CPR 2000** is dismissed with no order as to costs.

3. The application by the JSA defendants for an extension of time within which to file their evidence and skeleton arguments in support of their appeal is granted with costs to Boston Life to be assessed pursuant to rule 65.11 of **CPR 2000**.

4. Consequentially, the application by Boston Life to strike the JSA defendants application for the extension of time within which to file their evidence and skeleton arguments in support of their appeal is dismissed with no order as to costs.

5. The appeal by the JSA defendants against the order of the master dated 26th March 2007 is granted with no order as to costs and the matter is remitted to the High Court for directions to be issued by a master or a judge.

Hugh A. Rawlins
Chief Justice