

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCVAP 2008/011

BETWEEN:

TRAVIA DOUGLAS

Appellant

and

[1] **SHIVOUGHN WARDE**
[2] **JAVID WARDE**
[3] **DWIGHT WARDE**
[4] **QUICK SERVICE RESTAURANTS (ST. KITTS &
NEVIS) LIMITED (DBA DOMINOS PIZZA)**

Respondents

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

On written submissions:

Mr. Courtney Abel of Caribbean Associated Attorneys for the Appellant
Mr. Anthony Gonsalves of Gonsalves Hamel-Smith for the 2nd and
4th Respondents
Browne and Associates for the 1st and 3rd Respondents

2009: March 16.

REASONS FOR DECISION

[1] **EDWARDS, J.A.:** This is a Notice of Appeal filed on 25th November 2008, against the order of the learned judge upon the Claimant's Application for filing expert evidence. The application was heard at a case management conference on 14th November 2008. The learned judge, Belle J, made an order dismissing the Claimant's application for filing expert witness evidence, gave other directions and set the case down for trial on 27th and 28th April 2009.

[2] The Notice of Appeal was served on Browne and Associates, solicitors for 1st and 3rd respondents on 26th November 2008.

[3] The affidavit of service of the notice of appeal on 2nd and 4th respondents was filed in the High Court Registry on 12th December 2008. However, it was transmitted to this Court only on 4th February 2009, by the appellant's solicitors following case management directions given by this Court.

[4] By order dated 9th January 2009, directions were given for the appellant's counsel to serve the solicitors for the 2nd and 4th respondents by 13th January 2009, with a copy of the notice of appeal; and for the appellant's and respondents' counsel to file and serve by 15th January 2009, submissions on the preliminary issue as to whether the appeal is a procedural appeal requiring the leave of the court. The preliminary issue exists because of the following statutory provisions and Rules.

[5] Section 31(3) of the **Supreme Court Act**¹ 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 order given or made by a Judge except –

- a. where the liberty of the subject or the custody of infants is concerned;
- b. where an injunction or the appointment of a receiver is granted or refused;
- c. in the case of a decree nisi in a matrimonial cause or a judgment or order in an admiralty action determining liability;
- d. in such other cases, to be prescribed, as are in the opinion of the authority having power to make rules of court of the nature of final decisions.”

[6] **CPR 2000** Rule 62.1 defines a “procedural appeal” to mean “an appeal from the decision of a Judge, Master or Registrar which does not directly decide the substantive issues in a claim but excludes –

- (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;

¹ The Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act no. 17 of 1975

- (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 order 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.”

- [7] **CPR 2000** Rule 62.2 stipulates:
“(1) 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. (2) The application for leave to appeal must be made in writing and set out concisely the grounds of the proposed appeal.”
- [8] The record of the court shows that the Deputy Chief Registrar caused the order of 9th January 2009, to be served by fax transmission, on Caribbean Associated Attorneys and Browne & Associates on 12th January 2009. The Registrar of the High Court was requested on 12th January 2009, to serve the order on the solicitors for the 2nd and 4th respondents.
- [9] Following on this order, on 2nd February 2009, the appellant’s solicitors, filed an application for relief from sanction and an extension of time to file the affidavits of service and the required submissions on the preliminary issue. The supporting affidavit alleged that the order made on 9th January 2009, was received in the Appellant’s solicitors’ office on 16th January 2009.
- [10] The order of this court dated 4th February 2009, extended the time for the submissions to be filed by the appellant to 16th February 2009. This order was served by fax transmission, on the appellant’s solicitors on 4th February 2009.
- [11] On 16th February, the appellant filed the required submissions conceding that the appeal against the order of Belle J is a procedural appeal and leave is required.

[12] Amazingly, in their submissions, the appellant's solicitors boldly refer to **CPR 2000** Rule 26 (2)(k) which deals with the court's power to extend time; submitting that the appellant's notice of appeal should be treated as an application for leave since there was a mistaken belief that the appeal was not a procedural appeal requiring leave. The submissions proceed in a vain attempt to clear the relief from sanction hurdles established by CPR 26.8; and request the court to uphold the notice of appeal, set aside paragraph 1 of the learned judge's order, and allow an expert witness in this case with costs to be in the cause.

[13] In **Oliver McDonna v Benjamin Wilson Richardson**² Barrow JA faced with similar submissions described the approach as a misguided one. He stated at paragraph 25 that it is not for counsel to tell the court in his submissions what the purported appellant is entitled to. The purported appellant needs to make a proper application for the extension of time, relief from sanction, and the leave he needs. "That meant making an application in writing, stating grounds for the application, and supporting it by evidence on affidavit."

[14] The effect of this concession is that the purported appellant has acknowledged that there is no appeal in existence because the intended appeal needed leave and no application has been made in time for leave.

[15] The case **Frampton v Ian Pinard**³ presented similar circumstances. Barrow JA in his lead judgment for the full court in **Craig Reeves v Platinum Trading Management Limited**⁴, referred to the decision in **Frampton** while declaring the consequences for failing to apply for leave to appeal in time. He stated at paragraph 31:

"In the **Frampton** case there was no appeal in existence because the intended appellant 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

² Anguilla Civil Appeal No. 3 of 2005 (Unreported Judgment of Barrow JA delivered 29th June 2009)

³ Dominica Civil Appeal No. 15 of 2005 (Unreported Judgment delivered 3rd April, 2006)

⁴ St. Christopher and Nevis Civil Appeal No. HCVAP2007/022 (Unreported Judgment delivered 25th February, 2008)

application for leave. Following an earlier decision to the effect, **Nevis Island Administration v La Copropriete Du Navire J31**,⁵ I decided that although no sanction was expressly imposed for failure to apply for leave to appeal in time there was nonetheless a sanction 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.”

[16] In **Oliver McDonna**⁶ Barrow JA referred to the statutory equivalent in Anguilla of section 31(3) of the **St. Christopher and Nevis Supreme Court Act** (“the Act”)⁷ and explained further that where the right to appeal exists, an appeal filed out of time is an irregularity which the court has jurisdiction to cure by extending the time to appeal; but where statute mandates that a litigant must obtain leave to appeal, the litigant’s “failure to obtain leave to appeal leaves him debarred” in the instant case, by the language of section 31(3) of the Act.

[17] A notice of appeal filed without leave is a nullity and cannot be cured or retrospectively validated, or revived by the subsequent granting of leave.⁸

[18] On 17th February 2009, the purported appellant filed an application for relief from sanction, extension of time for leave to appeal, and for leave to be granted to appeal the said order of Belle J. Having regard to the law previously stated this application has to be dismissed.

[19] On 13th February 2009, the solicitor for the 2nd and 4th respondents filed an application for relief from sanctions and extension of time, to file the submissions which the order of this court dated 9th January 2009, directed to be filed. The fatality of the notice of appeal now makes the 2nd and 4th respondents application otiose. Consequently I make no order on this application.

⁵ St Christopher and Nevis Civil Appeal No. 7 of 2005 (Unreported Judgment of Barrow JA delivered 3rd April 2006)

⁶ See footnote 1 supra at paragraphs 27 and 28

⁷ See paragraph 5 of this judgment

⁸ See **Henderson v Archilla** (1983) 1Bz LR 374 at 377 (Court of Appeal of Belize)

[20] In light of the fact that the solicitor for the 2nd and 4th respondents has filed a notice indicating that the purported appellant's application of 17th February 2009, was not being opposed, and the solicitor for the 1st and 3rd respondents has not participated in the proceedings in this court, I make no order as to costs.

[21] The order therefore is as follows:

- (1) The Notice of Appeal filed on 25th November 2008, is a nullity and is struck out.
- (2) The Application filed by the purported appellant on 17th February 2009, is dismissed.
- (3) No order is made on the application of the 2nd and 4th respondents filed on 13th February 2009.
- (4) No order is made as to costs

Ola Mae Edwards
Justice of Appeal