EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2016/0037

BETWEEN:

[1] INNA GUDAVADZE
[2] LIANA ZHMOTOVA
[3] IYA PATARKATSISHVILI
[4] NATELA PATARKATSISHVILI

Applicants

and

IVANE CHKHARTISHVILI

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Louise E. Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

On Written Submissions:

Mr. Jonathan Addo of Harneys for the Applicants
Mr. Matthew Neal and Mr. Renell Benjamin for the Respondent

2017: January 11.

Application for revocation or variation of order of single judge of Court of Appeal – Order of court below granting applicants leave to appeal containing condition – Whether leave required to appeal said order made following costs assessment – Order as to costs only – Application for extension of time to comply with condition contained in order – Application for relief from sanctions – Application for rectification of procedural error – Whether fact that leave was conditional amounts to sanction

The applicants appealed a costs award made by the learned judge in the court below. The judge granted the applicants leave to appeal his order, dated 21st July 2016, on the condition that they pay to the respondent a certain sum of money within 7 days of the order granting conditional leave. The applicants failed to pay the specified sum within the stipulated time but, on 6th September 2016, made an application to this Court to extend

time to file a notice of appeal against the judge's order and also to join that appeal with a separate appeal (against the order of a different judge), for which the notice of appeal had already been filed. In this application for an extension of time and joinder, no mention was made of the condition contained in the judge's order of 21st July 2016, which, at that point in time, remained unfulfilled. The applicants sought to have the notice of appeal deemed to be timely filed on the basis that a computer miscalculation had resulted in them getting the deadline wrong for the filing of the notice of appeal. They also stated that it was their view that the judge's costs award was a final order under the Civil Procedure Rules 2000 ("CPR") and accordingly did not require leave to appeal.

The applicants' extension of time and joinder application was dealt with by a single judge of this Court who ruled that the condition in respect of which the grant of leave had been subject not having been fulfilled, there was no valid leave to appeal extant and therefore, the extension of time application in respect of the notice of appeal, then not underpinned by leave, could not be granted as there was nothing to extend, the notice of appeal at that time being a nullity. Furthermore, the joinder sought was rendered nugatory, there being nothing to join. The applicants' application was therefore dismissed. The applicants subsequently applied, on 22nd November 2016, to revoke or vary the decision of the learned single judge as well as for an extension of time to comply with the condition contained in the order of the judge in the court below and also for relief from sanctions. They argued that their failure to comply with the condition granting leave was due to the unclear declaration of the position in law as to the requirement for leave indicated by the court below and the single judge of the Court of Appeal.

Held: dismissing the application to vary the order of the single judge of the Court of Appeal and dismissing also the application for an extension of time to comply with the condition for granting leave to appeal and for relief from sanctions; and ordering that the applicants bear the costs of the applications to be assessed by the court below if not agreed within 21 days, that:

1. Leave is required to appeal an order as to costs only where such costs are left to the discretion of the court. The requirement for leave to appeal against such an order is a provision of substantive law and applies whether the costs order may be said to be final or interlocutory under CPR.

   Section 30(3)(b) of the **West Indies Associated States Supreme Court (Virgin Islands) Act** Cap. 80, Revised Laws of the Virgin Islands 1991 applied.

2. The condition contained in the order of the learned judge in the court below not having been fulfilled at the time when the application for extension of time and joinder was made to this Court, there is no basis for criticising the decision of the learned single judge to dismiss the application. It was within his discretion to do so.

3. The applicants having contended that because they considered the court's order as being ambivalent, it was open to them to form their own view of what the law

was and act upon the view which they held, leads to the conclusion that (having formed a view and acted upon it) their failure to comply with the condition for leave was intentional. Furthermore, in the circumstances, no good explanation was provided by them for their failure to comply. The applicants' application for relief from sanctions therefore failed.

Issa Nicholas (Grenada) Limited v Time Bourke Holdings Grenada (Limited) GDAHDVAP2015/0029 (delivered 8th December 2016, unreported) cited.

REASONS FOR DECISION

[1] **PEREIRA CJ:** On 11th January 2017, the Court considered an application by the applicants to review the order of a single judge of the Court made on 14th November 2016, for an extension of time to comply with the condition contained in the order granting leave to appeal made by the learned judge in the court below, Leon J [Ag.] on 21st July 2016 and for relief from sanctions. The court dismissed the applications and stated that the reasons for its dismissal would follow. These are now set out.

[2] The applicants applied to vary the order of Michel JA dated 14th November 2016 in which he dismissed the application for an extension of time to file the notice of appeal against the costs award of Leon J [Ag.] made on 21st July 2016 following a costs assessment.

[3] The applicants also sought, in an application dated 6th September 2016 ("the Extension Application") to extend time to file the notice of appeal against Leon J [Ag.]'s order (dated 21st July) and to join that appeal with an appeal from an order of Bannister J [Ag.], for which the notice of appeal had been filed on 27th June 2016 (leave to appeal having been granted on 24th May 2016).

[4] Leon J [Ag.]'s order of 21st July 2016 granted to the applicants conditional leave to appeal his order in these terms:

> "Leave to appeal (to the extent leave is required) shall be granted to the Respondents [the applicants] on the condition that the Respondents pay

to the Applicant [the respondent] the sum of USD 393,567.12[1] within 7 days of this Order …"[2]

The Jurisdiction Point

[5] It is necessary to first address the issue as to the Court's jurisdiction to consider the application as the respondent has raised the issue as to the Court's jurisdiction to entertain it. The respondent says that the Court of Appeal has no jurisdiction to review Michel JA's order because there is no pending appeal on the costs judgment since leave to appeal is plainly required, the leave granted having lapsed on failure to fulfil the condition. This reasoning is on the basis that rule 62.16A of the **Civil Procedure Rules 2000** ("CPR") which provides for the court to review a decision of a single judge made pursuant to rule 62.16, is reserved only for decisions on applications made <u>in appeals</u>.

[6] Rules 62.16 and 62.16A state as follows:

> "**Powers of single judge of the court, master and Chief Registrar to make certain orders**
>
> 62.16 (1) A single judge of the court may make orders for –
> (a) an injunction restraining any party from disposing of or parting with the possession of the subject matter of an appeal pending the determination of the appeal;
> (b) a stay of execution on any judgment or order against which an appeal has been made pending the determination of the appeal;
> (c) extension or abridgement of any time limit prescribed in this Part;
> (d) the giving of security for any costs occasioned by an appeal.
>
> (2) The Chief Justice may designate a master or the Chief Registrar to make orders for –
> (a) extension or abridgement of any time limit prescribed in this Part;

[1] This sum was the amount to be paid by way of the further interim costs order made by Bannister J [Ag.], the subject of the notice of appeal filed on 27th June 2016.
[2] See para. 5 of the order of Leon J [Ag.] dated 21st July 2016.

(b) the giving of security for any costs occasioned by an appeal.

(3) An order made by a master or the Chief Registrar may be varied or discharged by a single judge.

Variation, discharge or revocation of an order, direction or decision of a single judge

62.16A (1) Any order, direction or decision made or given by a single judge may be varied, discharged or revoked by two judges where the order, direction or decision relates to an appeal of a class which may be heard and determined by two judges and by the full court in any case.

(2) An application to vary, discharge or revoke an order, direction or decision made or given by a single judge may be made within 14 days of the date of the order, direction or decision. …"

[7] The respondent's contention is not accepted. A close reading of rule 62.16 shows that it is of wider scope and covers not only applications in pending appeals but also applications such as one seeking an extension or abridgement of any time limit prescribed under Part 62. Rule 62.16(1)(c) is in these terms: 'A single judge of the court may make orders for extension or abridgment of any time limit prescribed **in this Part**' (My emphasis). This is quite different to the language used in subrule 62.16(1) (a) or (b) which speak in terms of 'pending the determination of the appeal'. Rule 62.5(1) prescribes time limits for filing a notice of appeal. Additionally, subrule 62.5(3) expressly provides that '[t]he court may extend any of the time limits in this Rule on an application … and any such application may be determined without a hearing'. Accordingly, on applying a combination of rules 62.5, 62.16 and 62.16A, the Court has the power to extend time and also the power of review of a single judge's decision on an application to extend time.

The conditional leave granted by the court below

[8] On the Court's calculation, the time within which the condition to the grant of leave was to be satisfied was no later than 5th August 2016. It is undisputed that this

condition was not fulfilled. As at the date of making the Extension Application, the condition to which the grant of leave was made subject had still not been fulfilled. Indeed, no mention was made by the applicants of the condition nor its fulfilment or lack thereof. The applicants sought to convey to the court that what was sought was merely an extension of time for deeming the notice of appeal filed late to be timely filed and cited as the reason for their lateness a computer miscalculation of the time within which the notice of appeal ought to have been filed with a suggestion that the computer had been so calibrated as to not have regard to three public holidays celebrated in the Virgin Islands during the month of August. Furthermore, the applicants took the view that leave to appeal Leon J [Ag.]'s costs award was not required as in their view the award amounted to a final order.

[9] Counsel for the applicants, in arriving at this view, seek to lay the blame at the court's door both on the learned judge below and the learned single judge of the Court of Appeal, in suggesting that the orders in respect of leave were in some manner vague or equivocal. This, in our view, does not augur well for the applicants as this does not excuse counsel for the applicants who appear not to have bothered to satisfy themselves to determine what the law is as it relates to an appeal against an order for costs only.

[10] The **West Indies Associated States Supreme Court (Virgin Islands) Act**[3] which has been in effect for well-nigh half of a century plainly states in section 30, subsection 3, as follows:

> "(3) No appeal shall lie except by leave of the judge making the order or of the Court of Appeal from–
> *(a)* …
> *(b)* an order as to costs only where such costs are left to the discretion of the court" (My emphasis).

[11] Reliance by the applicants on the provisions of the CPR referencing final orders and interlocutory orders does not avail them. The CPR only seeks to govern the procedure for the exercise of the court's power but does not seek to give to the

[3] Cap. 80, Revised Laws of the Virgin Islands 1991.

court any power or jurisdiction which is not set out by statute or which does not otherwise fall within its inherent jurisdiction. The requirement for leave to appeal against a costs order only is a provision of substantive law and applies whether the costs order may be said to be final or interlocutory under the Rules. Accordingly, we do not hold the view that Leon J [Ag.]'s order was in any way ambiguous or "equivocal" such that the applicants can lay claim to being misled by it as he did not decide that leave was not required. Rather, he granted leave as sought by the applicants but made it subject to the fulfilment of a condition. It seems to us that the applicants were left in the exercise of their own counsel and prudence to proceed in accordance with the dictates of the law relating to leave.

[12] The application before Michel JA was therefore simply an extension application seeking to remedy the late filing of the notice of appeal and for joinder of another appeal. It was only on the respondent's opposition to the Extension Application that the Court was made aware of the conditional nature of the leave to appeal granted by Leon J [Ag.]. Inasmuch as at the time of the making of said application, the condition to which leave had been subject had not been fulfilled, this Court can see no basis for criticising the decision arrived at by Michel JA in which he ruled, in effect, that the condition in respect of which the grant of leave had been subject not having been fulfilled, that there was no valid leave to appeal extant and therefore the extension of time application in respect of the notice of appeal, then not underpinned by leave could not be granted as there was nothing to extend, the notice of appeal at that time being a nullity. It followed further that the joinder sought was rendered nugatory, there being nothing to join.

[13] The application to revoke or vary the decision of a single judge made by the applicants before this Court, on 22nd November 2016, contains a number of other applications. However, the power of this Court on consideration of an application to revoke or vary the order of the single judge is a power of review in determining whether the single judge of the Court of Appeal may have erred in his conclusion.[4]

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[4] John Ledgister and Another v Jamaica Redevelopment Foundation Inc. [2013] JMCA App 10.

The Court will therefore look to the material and the nature of the application before the single judge and not any new material placed before the Court thereafter. For the reasons which we have already given, based on the application to the single judge and the material before him, it was quite within the exercise of his discretion to arrive at the conclusion that he did. There is no reason why this Court should upset this conclusion.

The Application to revoke or vary the order of the single judge

[14] That said, the applicants have now sought from this Court an extension of time to comply with the payment condition contained in the grant of leave given by Leon J [Ag.] by deeming the payment made on 10th October 2016 to have been timely made and in that way, to save the grant of leave given by Leon J [Ag.] after the time for so doing has expired. The applicants have also applied for relief from sanctions pursuant to CPR 26.8, it seems, in full appreciation of the fact that the failure to comply with the condition attached to the leave had the effect of nullifying the leave earlier granted.

[15] We are of the view that prudence required that the applicants would have sought an extension of time for compliance with the condition and if necessary, relief from sanctions either from the judge below or, at the very least, at the time of making their earlier Extension Application (6th September 2016). It is clear that the applicants, having taken the view that leave to appeal was not required, considered that they need not comply with the condition attached to the grant of leave. This was a risk that the applicants elected to take, rooted in the view of the law which they took rather than one expressed by the court. Instead, having failed on their Extension Application before the single judge, they now come before this Court seeking not only a review of the single judge's decision but also for the first time, seeking the indulgence of the Court in granting an extension of time to comply with the leave condition so as to relieve them from the consequence of the leave having been nullified by their non-compliance.

[16] The question then for this Court is whether it is open to this Court to consider the additional relief now being sought in the revocation/variation application. We are of the view that notwithstanding the additional relief was not sought before, it is open to this Court to consider the grant of such relief as a freestanding application to that in which the revocation or variation of the order of Michel JA was sought.

[17] We turn therefore to a consideration of whether the applicants ought to be granted relief from sanctions as the effect of non-compliance with the condition attached to the grant of leave was to render the grant of leave inefficacious. CPR 26.8 requires that the application for relief from sanctions be made promptly and must be supported by evidence on affidavit. It clearly requires more than a mere exercise by the court of correcting or putting right some procedural irregularity for which no sanction attaches using CPR 26.9. In considering the grant of relief from sanctions it has been stated in many decisions of our Court and also on authority from our highest court, namely, the Privy Council, in **The Attorney General v Keron Matthews**[5] that the conditions contained in CPR 26.8(2) are cumulative. A failure to satisfy any one of the three conditions set out therein is fatal to the grant of relief. As has been stated in other cases, rule 26.8 is uncompromising. The framers of CPR clearly intended to ensure that the threat of a sanction imposed whether by a rule or order is not to be treated lightly.

[18] In order for the Court to be satisfied as to whether the conditions have been met, the Court looks to the material before it. In this case, the first consideration is to determine the question of intentionality. The applicants, in essence, say at paragraph 27 of their supporting affidavit that the failure to comply with the condition granting leave was due to the unclear declaration of the position in law as to the requirement for leave indicated by the court below and the single judge of the Court of Appeal. They contend that acting upon advice 'in light of the uncertain order made by Leon J', the requirement for leave was left open for

[5] [2011] UKPC 38.

interpretation and further, that BVI counsel interpreted the Rules as not requiring leave.

[19] In relation to the single judge, they complained that the recital in the order, having stated: 'Upon it appearing that leave is required to appeal' made the position equivocal. None of these explanations are well founded. Firstly, it is quite apparent that to the extent that Leon J [Ag.] considered that leave was required, he in fact granted such leave making same conditional upon payment stated in his order. Indeed, the records show that it is the applicants who made the application for leave and the judge granted it conditionally. It cannot be said that they were not aware of the condition and it cannot be said that they were not granted leave. They took the view unilaterally that no leave was required despite being granted leave and it is indisputable that they failed to comply with the condition seemingly based on that view. Secondly it could hardly be the case that the expression used by the single judge hearing the Extension Application and complained of by the applicants would have provided any basis for the applicants' failure to comply as by then the applicants were already in breach of the condition.

[20] It is open to this Court to infer, based on paragraphs 27-29 of the affidavit in support, coupled with the submissions of the applicants at paragraph 58, that the applicants are saying that because they considered the court's order as being ambivalent, it was open to them to form their own view of what the law was and act upon the view they held. This drives us to the inescapable conclusion, that having formed a view and acted upon it, failure to comply with the condition for leave was intentional.[6] This finding alone is fatal to the grant of relief. However, were the Court required to go further, the course adopted by the applicants in the circumstances would also not provide a good explanation for the failure to comply for the same reasons. The application for relief from sanctions therefore fails and

[6] See: Issa Nicholas (Grenada) Limited v Time Bourke Holdings (Grenada) Limited GDAHCVAP2015/0029 (delivered 8th December 2016, unreported) at para. 8.

the Court cannot therefore grant the relief by extending the time to comply with the condition in the circumstances.

[21] For the above reasons the Court ordered:

(1) The application to vary the order of Michel JA dated 14th November 2016 is dismissed and the application for an extension of time to comply with the condition for granting leave to appeal and for relief from sanctions is also dismissed.

(2) The applicants shall bear the costs of the applications to be assessed by the court below unless agreed within 21 days.

I concur
Louise Esther Blenman
Justice of Appeal

I concur
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar