EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2017/0013

BETWEEN:

KMG INTERNATIONAL NV

Appellant/Respondent

and

DP HOLDING SA
(a company incorporated under the laws of Switzerland)

Respondent/Applicant

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Anthony Gonsalves, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Moverly Smith, QC for the Applicant/Respondent
Mr. Allan Choo Choy, QC with him, Ms. Tameka Davis for
the Respondent/Appellant

2017: November 20;
2018: April 18.

Application to revoke, discharge or vary order of single judge striking out counter notice – Application for extension of time within which to apply for leave to file counter appeal – Reviewability by Full Court of order of a single judge – Whether failure to comply with a rule, order or direction where no sanction is expressed nonetheless attracts the application of the provisions of rule 26.8 of the Civil Procedure Rules 2000 dealing with relief against sanctions

On 10th May 2017, Wallbank J [Ag.] delivered a judgment in the court below. The judgment dealt with two issues. Firstly, it allowed DP Holding SA's ("DPH") application

seeking the setting aside of permission to serve the appellant's, (KMG International NV, hereinafter referred to as "KMG") originating application for the appointment of liquidators out of the jurisdiction on forum non conveniens grounds (the "Forum Issue"); and secondly, it refused DPH's application seeking to set aside the appointment of provisional liquidators over DPH pending the determination of the originating application (the "PL Issue").

It is common ground that the judgment was an interlocutory judgment and in view of this KMG applied for and was granted permission on 6th June 2017 to appeal the judgment. KMG then filed its notice of appeal on 8th June 2017 and it was deemed served on DPH on 13th June 2017. DPH thereafter filed and served a counter notice on KMG on 28th June 2017. In its counter notice DPH sought to uphold the judge's ruling on the Forum Issue for the reasons given by the learned judge and for additional reasons and to the extent that KMG's appeal on the Forum Issue succeeded, cross-appealed on the PL Issue.

In September 2017, KMG then being of the view that DPH required leave to appeal that part of the counter notice by which it cross-appealed on the PL Issue, applied to strike out that part of the counter notice in respect of the cross appeal on the PL Issue on the basis of DPH's failure to obtain leave. The single judge, although alive to the fact that KMG took issue only with the cross appeal dealing with the PL Issue, ordered that the counter notice of appeal be struck out.

The single issue raised on the application for review by the Full Court of the single judge's order striking out the counter notice was whether permission was required for filing the counter notice. This issue raised a tangential issue as to the reviewability by the Full Court of the order of a single judge, as well as the question whether an application for extension of time to comply with a rule, order or direction where no sanction is expressed nonetheless attracts the application of the provisions of rule 26.8 of the Civil Procedure Rules 2000 ("CPR") dealing with relief against sanctions.

Held: setting aside the single judge's order and reinstating the counter notice as at the date of its filing, that:

1. Once an appeal against a judgment is commenced, whether as of right or with permission, the jurisdiction of the Court of Appeal to deal with any issue arising under the judgment becomes engaged, and the party desiring to cross-appeal on an issue considered in the same judgment may do so by counter-notice without requiring separate leave. It does not matter in the case of a counter notice that it is the counter appellant and not the appellant who has placed the other issues before the Court of Appeal. In the present case, the leave granted to KMG to appeal the judgment, and KMG having launched an appeal pursuant to that leave, enabled DPH to cross appeal on an issue which was the subject of that judgment without necessitating DPH seeking separate permission.

   Frett v Wheatley Consulting & Ors BVIHCVAP2006/0002 (delivered 1st June 2006, unreported) approved; **Andriy Malitskiy & Anor v Oledo Petroleum Ltd.** BVIHCMAP2013/0006 (delivered 6th March 2014, unreported)

considered; **The Attorney General v Seghers & Komodo Holdings** BVIHCVAP2003/0015&0021 (delivered 15th July 2004, unreported) considered.

2. The power or jurisdiction given in relation to an appeal is that of the Court, and not that of a single judge, and which power may, in certain circumstances, in essence be delegated to a single judge of the Court, with the Court retaining the overarching power of reviewability in the circumstances. It is now well settled that a single judge of the Court has no power to hear and determine an appeal. A single judge's jurisdiction can only arise in the context of a pending appeal, whether through the avenue of rule 27 of the **Court of Appeal Rules**, or through CPR 62.16. Although the Court may permit certain of its powers to be exercised by a single judge, that permission does not thereby operate to deprive the Full Court of the power vested in it by statute or its inherent jurisdiction to review the single judge's exercise of that power. In the case at bar, the single judge's jurisdiction to treat with the interlocutory application to strike out the counter notice therefore arose within the pending appeal commenced by KMG's notice of appeal filed on 8th June 2017. It follows that the Full Court would accordingly be empowered to review the single judge's decision on the strike out application, being an order made on an interlocutory application in a cause or matter pending before the Court.

   Danone Asia PTE Limited et al v Golden Dynasty Enterprise Limited et al BVIHCVAP2009/002 (delivered 28th May 2009, unreported) applied; **Cage St. Lucia Limited v Treasure Bay (Saint Lucia) Limited)** SLUHCVAP2011/045 (delivered 23rd January 2012, unreported) applied; Rule 27 of the **Court of Appeal Rules** applied; Rule 62.16 of the **Civil Procedure Rules 2000** applied; Section 27 of the **Supreme Court Order 1967** applied.

3. Where no sanction had been expressed for failure to comply with a rule, order or practice direction, the regime set out in CPR 26.8 for applying for relief from sanctions does not apply. The **Civil Procedure Rules 2000** makes no room for implying sanctions and none should otherwise be implied in any case.

   Carleen Pemberton v Mark Brantley SKBHCVAP2011/009 (delivered 14th October 2011, unreported) followed; **C.O. Williams Construction (St. Lucia) Ltd v Inter-Island Dredging Co. Ltd.** SLUHCVAP2011/017 (delivered 19th March 2012, unreported) followed; **Attorney General v Keron Matthews** [2011] UKPC 38 applied; **Sayers v Clarke Walker (a firm**) [2002] 1 WLR 3095 considered.

REASONS FOR DECISION

[1] **PEREIRA CJ:** On 20th November 2017, the Court heard an application made on behalf of the respondent, DP Holding, SA ("DPH") to set aside an order of a single

judge of the Court in which he struck out DPH's counter notice filed on 28th June 2017 as being "a nullity having been filed without leave when leave was required for its filing."[1] Following the hearing, the Court set aside the single judge's order, thereby allowing the counter notice to stand and indicated that written reasons for so doing will be provided at a later stage. We now do so.

[2] The relevant background to the application may be shortly stated:

(a) On 10th May 2017, Wallbank J [Ag.] delivered a judgment in the court below. The judgment dealt with two issues:

i. It allowed DPH's application seeking the setting aside of permission to serve the appellant's, (KMG International NV hereinafter referred to as "KMG") originating application for the appointment of liquidators out of the jurisdiction on forum non conveniens grounds (the "Forum Issue"); and

ii. It refused DPH's application seeking to set aside the appointment of provisional liquidators over DPH pending the determination of the originating application (the "PL Issue").

(b) It is common ground that the judgment was an interlocutory judgment.

(c) KMG applied for and was granted permission, on 6th June 2017, to appeal the judgment.[2]

(d) KMG then filed its notice of appeal on 8th June 2017 and it was deemed served on DPH on 13th June 2017.

(e) DPH filed and served a counter notice on KMG on 28th June 2017. In its counter notice DPH sought:

[1] The single judge's order was made on 2nd November 2017.
[2] By order of Baptiste JA dated 6th June 2017.

i. to uphold the judge's ruling on the Forum Issue for the reasons given by the learned judge and for additional reasons; and

ii. to the extent that KMG's appeal on the Forum Issue succeeded, cross-appealed on the PL Issue.[3]

(f) In September 2017, KMG then being of the view that DPH required leave to appeal that part of the counter notice by which it cross-appealed on the PL Issue, applied to strike out that part of the counter notice in respect of the cross appeal on the PL Issue on the basis of DPH's failure to obtain leave.

(g) The single judge, although alive to the fact that KMG took issue only with the cross appeal dealing with the PL Issue, ordered that the counter notice of appeal be struck out.

The Issue

[3] The single issue raised on the application for review by the Full Court of the single judge's order striking out the counter notice was whether permission was required for filing the counter notice.

[4] This issue raised a tangential issue as to the reviewability by the Full Court of the order of a single judge. It was thought that the jurisdiction of the Full Court to review an order made by a single judge of the Court had been settled in the Court's decision in **Danone Asia PTE Limited et al v Golden Dynasty Enterprise Limited et al**[4] where the ambit of rule 27 of the **Court of Appeal Rules**[5] was discussed. Rule 27 provides that:

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[3] It was common ground that if the Forum appeal was unsuccessful the appointment of the Provisional Liquidators would automatically fall away.
[4] BVIHCVAP2009/0002 (delivered 28th May 2009, unreported).
[5] Cap. 336, S.R.O. 58/1968.

"(1) In any cause or matter pending before the Court, a single judge of the Court may upon application make orders for-

(a) …
(b) …
(c) …
(d) … ;

and may hear, determine and make orders on any other interlocutory application.

(2) Every order made by a single Judge of the Court in pursuance of this rule may be discharged or varied by any Judges of the Court having power to hear and determine the appeal." (emphasis added)

Rule 62.16 of the **Civil Procedure Rules 2000** ("CPR") is substantially in the same terms as rule 27(1) of the **Court of Appeal Rules** and CPR 62.16A(1) provides for review by the Full Court in substantially the same terms as rule 27(2) of the Court of Appeal Rules.

[4] KMG does not suggest that the single judge had no jurisdiction to hear the application to strike out the cross appeal contained in the counter notice, but says that the Full Court's power of review relates only to orders made on an application in a pending appeal. Learned Queen's Counsel, Mr. Choo Choy relies on **Danone Asia** and more so, the dictum of Mitchell JA in **Cage St. Lucia Limited v Treasure Bay (Saint Lucia) Limited)**[6] following **Danone Asia** for the proposition that the decision of a single judge can only be reviewed in respect of a pending appeal. He says that the order of the single judge does not relate to an appeal which is extant, as the cross appeal cannot be said to be a pending appeal.

[5] In our view, the single judge's jurisdiction can only arise in the context of a pending appeal, whether through the avenue of rule 27 of the Court of Appeal Rules, or CPR 62.16. If the single judge had jurisdiction to determine the application to strike out (which it is accepted he had), it could only have been in the context of an interlocutory application in a cause or matter pending before the Court as

[6] SLUHCVAP2011/045 (delivered 23rd January 2012, unreported).

envisaged under rule 27(1) of the Court of Appeal Rules. It is now well settled that a single judge of the Court has no power to hear and determine an appeal.

[6] A counter notice can only arise and be filed in respect of a pending appeal or, put another way, a counter notice is parasitical on a pending appeal. The single judge's jurisdiction to treat with the interlocutory application to strike out the counter notice therefore arose within the pending appeal commenced by KMG's notice of appeal filed on 8th June 2017. It follows that the Full Court would accordingly be empowered to review the single judge's decision on the strike out application, being an order made on an interlocutory application 'in a cause or matter pending before the Court'.

[7] In **Danone Asia**, the issue was whether the Full Court could review a decision of a single judge in which he held that leave to appeal was not required and dismissed the application seeking leave to appeal. At paragraph 14 of that decision, the Court considered the jurisdiction of the Court of Appeal conferred by the **Supreme Court Order 1967** which enabled certain powers of the Court to be exercised by a single judge of the Court. There it was sought to make clear that the power in any event is vested in the Court of Appeal, but that provision may be made by rules of court enabling a single judge of the Court to exercise certain of those powers vested in the Court of Appeal in instances where that exercise does not involve the determination of an appeal. It was further enacted that 'any order, direction or decision made … by a single judge **in the exercise of any such power may be varied discharged or revoked … by the Full Court**'[7] (emphasis added). There can be no doubt that the power or jurisdiction given in relation to an appeal is that of the Court, and not that of a single judge, and which power may, in certain circumstances, in essence be delegated to a single judge of the Court, with the Court retaining the overarching power of reviewability in the circumstances. It is on this basis that the Court was able to conclude in **Danone** at paragraph 15 that

[7] See sections 9 and 10 of the Windward Islands and Leeward Islands Order in Council 1959 imported by virtue of section 27 of the Supreme Court Order 1967 establishing the Eastern Caribbean Supreme Court.

"[t]he provisions of the 1959 Order giving the Full Court jurisdiction to review a decision of a single judge are… quite clear and require no further elucidation".

[8] In our view, it is in this context that the dictum of Mitchell JA in **Cage St. Lucia** at paragraph 8 is to be understood. His general statement that "[t]he jurisdiction of the Full Court to review an order made by a single judge of the Court is based on the inherent jurisdiction of the Court" ought not to be narrowly construed by his statement next following where he states: "The Court as a matter of law and practice has always had jurisdiction to review any decision of a single judge on any matter relating to a pending appeal". Rather, it must be understood in the context of what powers of the Court of Appeal may, by rules of court, be delegated for exercise by a single judge. As discussed above, a single judge of the Court may not by rules of court exercise any powers of the Court involving the determination of an appeal. This is a limitation placed by statute. Accordingly, a single judge may only exercise the power of the Court in relation to an application made in a cause or matter pending before the Court and which is not determinative of that cause or matter. In short, although the Court may permit certain of its powers to be exercised by a single judge, that permission does not thereby operate to deprive the Full Court of the power vested in it by statute or its inherent jurisdiction to review the single judge's exercise of that power. On the basis that the single judge could exercise the Court's power to strike out the counter notice, it was clearly within the power of the Full Court to review the single judge's decision thereon.

The counter notice – was leave required?

[9] KMG argues in essence that even though the CPR would not work practicably given the timelines contained in CPR 62.8[8] for the filing of a counter notice on service of a notice of appeal, the CPR cannot derogate from the statutory requirement for leave and refers to section 30(4) of the **Eastern Caribbean**

[8] CPR 62.8(1) says in effect that any party upon whom a notice of appeal is served may file a counter notice and the counter-notice must be filed within 14 days of service of the notice of appeal.

Supreme Court (Virgin Islands) Act[9] (the "Supreme Court Act") which provides that no appeal shall lie without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge except in the cases expressed in subparagraphs (i) to (iv), none of which exceptions are engaged in the instant matter.

[10] KMG also accepts that there would have been no need for DPH to appeal or cross-appeal on the PL Issue unless KMG had appealed the Forum Issue, as the order appointing provisional liquidators (the PL Issue) would naturally fall away if the judge's conclusion on the Forum Issue was left undisturbed. Nevertheless, KMG says that inasmuch as DPH's counter notice also contained by way of cross appeal a challenge to the judge's decision on the PL Issue, it was in effect 'an appeal' and therefore DPH required leave to bring the cross appeal.

[11] Mr. Moverly Smith, QC, on behalf of DPH, contended that no leave to cross appeal was required KMG having obtained leave to appeal the judgment and having commenced an appeal pursuant to the leave granted.

The authorities

[12] There is a dearth of authority treating with this issue in this jurisdiction despite counter notices being routinely filed in matters once an appeal has commenced whether as of right or with leave. This is perhaps a reflection that it is a point rarely taken. KMG has referred to two decisions of the Court namely, **the Attorney General v Seghers & Komodo Holdings**[10] and **Andriy Malitskiy & Anor v Oledo Petroleum Ltd**.[11] DPH refers to the decision in **Frett v Wheatley Consulting & Ors**.[12] All three decisions are decisions of single judges of the Court. We treat with each of these decisions in turn.

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

[10] BVIHCVAP2003/0015&0021 (delivered 15th July 2004, unreported).
[11] BVIHCMAP2013/0006 (delivered 6th March 2014, unreported).
[12] BVIHCVAP2006/0002 (delivered 1st June 2006, unreported).

[13] In **Komodo**, Saunders CJ [Ag.], was treating with two applications; one made on behalf of the Attorney General to vary a previously varied order, which application had been dismissed on the basis that the application to further vary was in essence seeking to impeach the first variation order. A stay was however granted. The respondents appealed the stay. The other was by the Attorney General seeking leave to file a counter notice of appeal. From a reading of the decision, it is clear that the learned judge's reasoning proceeded on the accepted assumption that leave was required as the Attorney General's application was one for leave. Nowhere in the reasoning does it address the discreet question of whether leave was in fact required to file a counter notice assuming one had been timely filed. As the learned judge noted, the counter notice had been filed out of time and thus considerations as to prospects of success would have come into play in deciding whether permission ought to be granted. This decision does not therefore afford much assistance.

[14] In **Malitsky,** Mitchell JA was there dealing with an interlocutory appeal filed by the appellants with leave, against the refusal of the commercial judge to make final a provisional sanction earlier granted and his dismissal of their derivative claim on the basis that they had also filed an unfair prejudice claim. The respondents cross appealed the costs award made in their favour as being inadequate. The cross appeal put forward reasons why the judge's refusal and dismissal of their derivative claim should be upheld and additionally challenged the costs award. At paragraph 10 of the judgment, the learned judge, seemingly of his own motion, and without inviting submissions on the point opined:

> "However, this cross-appeal has been filed without leave of the court as required by section 30 of the Eastern Caribbean Supreme Court (Virgin Islands) Act and is not properly before me."

It does not appear that his attention had been drawn (no doubt because the point was not taken as to the requirement of leave for filing the cross-appeal) to the earlier decision of Barrow JA in **Frett**, a decision in which the point was in fact taken. There, Mr. Frett had appealed as of right in respect of a finding of liability

and a consequential award for damages and costs against him. The claimants filed a counter notice in which they challenged the order directing that they pay the costs to another defendant (Mr. Schultheis) in respect of the claim brought by them against Mr. Schultheis, but which claim had been dismissed against him. In their counter notice, the claimants contended that Mr. Frett (and not the claimants) ought to have also been ordered to pay Mr. Schultheis' costs. Mr. Schultheis applied to strike out the counter notice, one of the bases being that the claimants needed leave to appeal an order for costs only and no leave having been sought that the counter notice was a nullity. At paragraph 14 of his judgment he had this to say:

> "In the case of a counter-notice there is already before the court of appeal the other issue or issues raised by the notice of appeal. Therefore, a counter-notice as to costs only is not equivalent to an appeal as to costs only. … In this particular appeal, before there was the counter-notice, there was first Mr. Frett's appeal against liability and damages. It seems to me right on principle that if the appellant needs no leave to appeal against an order as to costs, when costs are but one aspect of the order that is being appealed, then a counter appellant similarly needs no leave since costs are but one aspect of the order that is being appealed. … Once costs are not the sole issue no leave is required. I see no reason why it should matter, in the case of a counter notice that it is the counter appellant and not the appellant who has placed the other issues before the court of appeal."

Discussion

[15] The decision in **Malitsky** is at variance with the decision in **Frett** and was not the subject of detailed analysis as it was not a point which appears to have been taken or subject to any arguments put forward thereon, whereas in **Frett** the point was fully argued and carefully considered. To our mind, the approach adopted by Barrow JA is the correct approach and we adopt his reasoning that it should not matter in the case of a counter notice that it is the counter appellant and not the appellant who has placed the other issues before the Court of Appeal. Once an appeal has been commenced whether as of right or with permission, it does not matter that it is the counter appellant, and not the appellant who has placed another issue or other issues which was the subject of the judgment or decision on appeal before the Court of Appeal. The leave granted to KMG to appeal the

judgment, and KMG having launched an appeal pursuant to that leave, enables a counter appellant to cross appeal on an issue which was the subject of that judgment without necessitating the counter appellant seeking separate permission.

[16] The Forum Issue and the PL Issue were the subject of a single judgment of the court below made on 10th May 2017. It is not in dispute that the judgment was an interlocutory one requiring leave to appeal it. KMG, being dissatisfied with the judge's conclusion on the Forum Issue sought and obtained leave to appeal the judgment, whereupon it launched an appeal against the judgment, albeit that KMG was seeking to overturn the judge's decision only in relation to the Forum Issue. KMG's notice of appeal on filing, commenced the appeal against the judgment. DPH having been served with the filed notice of appeal, then filed and served a counter notice in part upholding the judge's ruling on the Forum Issue and challenging his ruling on the PL Issue.

[17] We agree that an appeal is from an order or judgment of the Court and that a court's order may resolve more than one issue, as in this case. In our view, the correctness of this approach is more apparent than in **Frett**, as here, the Forum Issue and the PL Issue are inextricably bound, in the sense that a decision on the Forum Issue affects the PL Issue. If the Forum Issue was not appealed by KMG, the PL Issue would have become academic.

[18] As stated above, there can be no counter notice without there being an appeal. In our view, section 30 of the **Supreme Court Act** contemplates the requirement for leave where a party is commencing an appeal. Once an appeal against a judgment is commenced with leave, then the jurisdiction of the Court of Appeal to deal with any issue arising under the judgment becomes engaged, and the party desiring to cross-appeal on an issue considered in the same judgment may do so by counter notice without requiring separate leave. This avoids a multiplicity of proceedings and promotes judicial economy of time and expense. CPR 62.8 is premised on this approach. This does not involve the Rules being in conflict with

section 30 of the **Supreme Court Act** once the true scope of the provision in the Act is understood and applied in its proper context.

Conclusion

[19] For these reasons the counter notice was reinstated as at the date of its filing having been timely filed.

Extension of time

[20] While it is not necessary to deal with the further arguments in respect of DPH's application for an extension of time to seek permission to file its counter notice having determined that no separate leave was required, we consider it useful to make an observation in respect of the question: whether an application for extension of time to comply with a rule, order or direction where no sanction is expressed nonetheless attracts the application of the provisions of CPR 26.8 dealing with relief against sanctions, or in any event attracts the approach to the grant of extensions as laid down by Brooks LJ in the English decision of **Sayers v Clarke Walker (a firm)**.[13] We do so as it appears that doubt still lingers as to whether such applications should satisfy the requirements for relief from sanctions or the approach advocated in **Sayers** whereby a sanction should be implied in complex cases. The doubt is understandable having regard to dicta in the decision of this Court in **C.O. Williams Construction (St. Lucia) Ltd v Inter-Island Dredging Co. Ltd.**,[14] a decision of the Full Court, which adopted the approach in **Sayers** in holding that a sanction may be implied in complex cases, thus bringing the relief from sanctions regime under CPR 26.8 into play. **C.O. Williams** was then followed in **Eastern Caribbean Collective Organisation for Music Rights (ECCO) Inc. v Mega-plex Entertainment Corporation**,[15] a decision of a single judge.

[13] [2002] 1 WLR 3095.
[14] SLUHCVAP2011/017 (delivered 19th March 2012, unreported).
[15] SLUHCVAP2013/0012 (delivered 10th September 2013, unreported).

[21] In **Sayers**, Brooke LJ was concerned that a body of judge-made rules or checklists would grow out of applications for extensions of time in considering how the court should exercise its discretion in treating with applications to extend time for compliance with a rule. At paragraph 20 of his judgment he had this to say:

> "The philosophy underpinning CPR Pt 3 is that rules, court orders and practice directions are there to be obeyed. If a sanction is imposed in the event of non-compliance, the defaulting party has to seek relief from the sanction on an application made under CPRr 3.8, and in that event the court will consider all the matters listed in CPRr 3.9, so far as relevant. Similarly, if an application is made under CPRr 3.6 to set aside a judgment obtained under CPRr 3.5, the court will consider all the matters listed in CPRr 3.9 unless it is shown that the right to enter judgment had not arisen at the time when it was entered: see CPRr 3.6(3) and (4)."

Then at paragraph 21 he introduced the concept of an 'implied sanction' by saying:

> "In my judgment, it is equally appropriate to have regard to the check-list in CPRr 3.9 when a court is considering an application for an extension of time for appealing in a case of any complexity. The reason for this is that the applicant has not complied with *CPR r 52.4(2)*, and if the court is unwilling to grant him relief from his failure to comply through the extension of time he is seeking, the consequence will be that the order of the lower court will stand and he cannot appeal it. Even though this may not be a sanction expressly "imposed" by the rule, the consequence will be exactly the same as if it had been, and it would be far better for courts to follow the check-list contained in CPRr 3.9 on this occasion, too, than for judges to make their own check-lists for cases where sanctions are implied and not expressly imposed."

[22] It is not apparent from Lord Brooke's reasoning in **Sayers** the rationale for applying a more stringent regime analogous to relief from sanctions in respect of a complex case, but not for one considered to be simple, save, it seems, that in a simple case, whether or not to exercise the discretion may be more obvious and present the deciding judge with a simpler task. With the utmost respect, this does not appear to us to provide a sound basis rooted in the overriding objective of the CPR justifying such a distinction.

[23] At the time when the Court came to decide **C.O. Williams**, it had become aware of two decisions dealing with applications for extensions of time namely, the decision of the Court in **Carleen Pemberton v Mark Brantley** [16] and the decision of the Privy Council in **Attorney General v Keron Matthews**,[17] both of which expressed the view that where no sanction had been expressed for failure to comply with a rule, order or practice direction, that the regime set out in CPR 26.8 for applying for relief from sanctions did not apply.

[24] At paragraph 53 of **C.O. Williams**, Edwards JA opined that the decision in **Keron Matthews** had 'overtaken but fortified our judgment'. She then had this to say:

> "The notion of an implied sanction existing under the rules of the **Civil Procedure Rules of the Republic of Trinidad and Tobago** fell for consideration by the Board. The Trinidad CPR contains provisions similar and/or comparable to our CPR 2000. At paragraph 16 of the judgment, Lord Dyson, writing for the Board, declared:
>
> > "There is no rule which states that, if the defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits. The rules do, however, make provision for what the parties may do if the defendant fails to file a defence with[in] the prescribed period: rule 10.3(5) provides that the defendant may apply for an extension of time; and rule 12.4 provides that, if the period for filing a defence has expired and a defence has not been served, the court must enter judgment if requested to do so by the claimant. **It is straining language to say that a sanction is imposed by the rules in such circumstances. At most, it can be said that, if the defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the claimant that judgment in default should be entered in his favour. That is not a sanction imposed by the rules. Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose.**" (My emphasis)."

[25] At paragraph 54 of her judgment, Edwards JA then said this:

> "I would hold that the preferred approach when considering applications for extensions of time for the time being, is reflected in the decision in

[16] SKBHCVAP2011/009 (delivered 14th October 2011, unreported).
[17] [2011] UKPC 38.

> **Carleen Pemberton v Mark Brantley**, subject to any relevant Practice Direction or Rule of the Supreme Court."

[26] It is our view that the decision of the Privy Council in **Keron Matthews** in considering provisions of the CPR of Trinidad and Tobago (on all fours with ours) rejected once and for all the notion of an implied sanction as espoused by **Sayers** and has thus settled the matter. At paragraph 15 Lord Dyson stated:

> "Rule 26.6(2) [our CPR 26.7(2)] provides that where a party has failed inter alia to comply with any rule, "any sanction for non-compliance **imposed** by the rule … has effect unless the party in default applied for and obtained relief from the sanction" … In the view of the Board, this is aiming at **rules which themselves** impose or specify the consequences of failure to comply." (emphasis added)

[27] This Court holds a similar view, as earlier expressed in **Pemberton** and endorsed in **C.O. Williams**, and for the sake of clarity and completeness, adopts the statements of the Privy Council in **Keron Matthews**. We accordingly observe and would have been prepared to hold, were it necessary, that our CPR makes no room for implying sanctions and none should otherwise be implied in any case.

[28] We are grateful for the assistance of learned counsel for the parties.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
Anthony Gonsalves, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar