SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2011/017

BETWEEN:

C.O. WILLIAMS CONSTRUCTION (ST. LUCIA) LIMITED

Applicant/Defendant

and

INTER-ISLAND DREDGING CO. LTD.

Respondent/Claimant

Before:

The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mde. Janice M. Pereira	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal

Appearances:

Ms. Shan Greer with Mr. Michael Du Boulay the Applicant/Defendant
Mrs. Petra Nelson for the Respondent/Claimant

2011: July 20;
2012: March 19.

Civil appeal – Application for leave to appeal order of learned judge denying application for extension of time to file defence – Whether application for relief from sanctions must accompany application for extension of time – Rules 26.7, 26.8, 27.8 and 26.9 of the Civil Procedure Rules 2000 – Criteria to be satisfied in making application for extension of time where there is no express sanction for non-compliance with rule, practice direction, statutory provision or court order which prescribes time limit

C.O. Williams Construction (St. Lucia) Limited ("COW") and Inter-Island Dredging Co. Ltd. ("IDC") were the parties to a dredging contract which IDC contended had been unlawfully terminated by COW on 31st March 2009. IDC claimed a sum of US$677,646.82 for costs incurred and monies due and owing under the contract, as well as damages, interest and costs for breach of contract. Proceedings were served on COW and COW duly acknowledged service, stating that it intended to defend the claim. Two days before the expiration of the 28 days for service of COW's defence, counsel for COW wrote to counsel for IDC requesting further information to facilitate the preparation of the defence. They sought the consent of IDC to a 42 day extension of time to file their defence (which would have included the 21 day period within which IDC had to reply to the request for further

information). IDC denied COW's request, resulting in COW's application to the court for certain orders, including an extension of time to file their defence. The learned judge denied the application, on the ground that a separate application for relief from sanctions should have accompanied the application for extension of time.

COW appealed to this court, challenging the approach of the learned judge in her application of the case law which she relied on in arriving at her decision. Additionally, COW contended that the two affidavits filed in support of their application for an extension of time satisfied the "check-list" for applications for relief from sanctions in sub-rules 26.8(2) and (3) of the Civil Procedure Rules 2000 ("CPR 2000"), and the learned judge failed to consider this in determining whether their application should be granted.

Held: granting the application for leave to appeal and treating that application as the appeal, allowing the appeal, setting aside paragraphs 2 and 3 of the order of the learned judge, and giving the applicant 30 days from the date of delivery of this judgment within which to file its defence, that:

1. The learned judge erred in refusing to consider the merits of the application for extension of time because no application for relief from sanctions was filed.

2. CPR 26.7(2) admits of only one interpretation and extending this rule to apply to CPR 10.3(1) and other factual situations which fit uncomfortably under the rule, having regard to the scheme of CPR 2000, produces results which are untenable and inconsistent with the overriding objective.

3. CPR 27.8 stipulates the circumstances that must exist for a party to apply for an extension of time and relief from sanctions. That party would have to be seeking to vary a date which the court has fixed for: a case management conference; or for a party to do something where the order specifies a sanction for non-compliance; or for pre-trial review, return of a listing questionnaire, or a trial; or for the variation of a date set by the court or the rules for doing any act which will affect any of the previously mentioned dates. It is only where those circumstances exist and the party seeks to vary a date set in the timetable after the deadline date has passed that CPR 27.8(4) requires that the party must apply for an extension of time and relief from the sanction to which the party has become subject under these Rules or any court order.

4. The circumstances envisaged in CPR 27.8 did not exist for the applicant. Neither was there any express sanction to which the applicant had become subject under CPR 2000 or any court order. The applicant would be subject to an implied sanction on the authority of Sayers v Clarke Walker (a firm), only where the learned judge found the case to be complex; and the criteria to be applied to the application for extension of time in that case would be left to the discretion of the judge depending on how the judge saw it.

   Sayers v Clarke Walker (a firm) [2002] EWCA Civ 645 applied.

5. The instant case did not present any complex circumstances as to cause an invocation of CPR 26.8 where the Sayers approach is applied. In such a case the learned judge would be exercising her case management powers to extend time under CPR 26.1(2)(k) only, and not under CPR 27.8(4). In that regard, CPR 26.9 would be applicable. The learned judge would be making an order to put matters right under CPR 26.9(3) in the absence of any stated consequence of failure stipulated by a rule, practice direction, or order.

6. An application for extension of time to perform an interlocutory step in the proceedings prior to a scheduled case management conference, would require different considerations and a different approach from an application for extension of time involving a failure to comply with case management directions, or a failure to file an appeal against a decision on the merits after a trial, or a failure to make a timely application for leave to appeal an interlocutory decision.

7. The absence of express criteria in the Rules for applications for extension of time falling outside of the purview of CPR 26.7(2) and (3), CPR 26.8, and CPR 27.8(3) and (4), does not mean that there is no established criteria for determining applications for extension of time.

8. The Court has a very broad discretionary power under CPR 26.9 which cannot be exercised in a vacuum or on a whim, but must be exercised judicially in accordance with well-established principles. Overall, in the exercise of this discretion, the court must seek to give effect to the overriding objective which is to ensure that justice is done as between the parties. On applications for extension of time generally, where no sanction is specified for failure to comply with the rule which prescribes the relevant time limit, the court, in the exercise of its discretion, will consider: (1) the length of the delay; (2) the reasons for delay; (3) the chances of the appeal succeeding if the extension is granted; and (4) the degree of prejudice if the application is granted.

   Carleen Pemberton v Mark Brantley Saint Christopher and Nevis HCVAP 2011/009 (delivered 14th October 2011, unreported) followed; John Cecil Rose v Anne Marie Uralis Rose Saint Lucia Civil Appeal No. 19 of 2003 (delivered 22nd September 2003, unreported) followed.

JUDGMENT

[1] EDWARDS, J.A.: This is an application filed on 24th June 2011 for leave to appeal against a case management decision of the learned judge. The applicant/defendant, C.O. Williams Construction (St. Lucia) Limited ("COW"), filed an application on 16th December 2010, which the judge heard on 8th June 2011. In this application, COW sought an order to compel the respondent/claimant, Inter-

Island Dredging Co. Ltd. ("IDC"), to comply with the Request for Further Information, which was filed and served on IDC on 9th December 2010. The deadline sought for compliance was on or before 30th December 2010. COW also asked that the learned judge grant 21 days extension of time for COW to file its defence. The 21 days extension of time sought was to run from the date that IDC filed and served its answers to COW's request. COW's application for leave to appeal relates to that part of the learned judge's order refusing an extension of time.

[2] The rule governing extension of time exists in Rule 26.1(2)(k) of the Civil Procedure Rules 2000 ("CPR 2000") which states:

> "26.1(2) Except where the these rules provide otherwise, the court may –
>
> …
>
> (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."

[3] CPR 2000 does not specify any criteria for granting an application for extension of time. However, CPR 1.2 states that "The court must seek to give effect to the overriding objective when it – (a) exercises any discretion given to it by the Rules; or (b) interprets any rule."

[4] The overriding objective is defined by CPR 1.1. This rule states:

> "The overriding objective
>
> 1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.
>
> (2) Dealing justly with the case includes –
>
> (a) ensuring, so far as is practicable, that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with cases in ways which are proportionate to the –
>
> (i) amount of money involved;
>
> (ii) importance of the case;
>
> (iii) complexity of the issues; and
>
> (iv) financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

The Order of the Judge

[5] It is important to set out in full the learned judge's Order, as it referred to a decision of this Court which has frequently and fundamentally guided the approach of the Courts in our jurisdiction in determining applications for extension of time. While the correctness of that authority has not been challenged, the approach of the learned judge in applying this authority is being questioned:[1] -

> "UPON THE Defendant's application filed 16th December 2010 coming on for hearing
> AND UPON HEARING COUNSEL for the respective parties
> AND UPON:-
>
> 1. The Court being guided by prior statements of this Court and Court of Appeal when it has been stated it is an abuse of process to request the Court to look outside of the application and affidavit before it for information which rightly ought to be in the application before the Court
> 2. The Court being of the view that the affidavit of Mr. Barrie Hobbs filed December 16th 2010 and Mr. Richard Monplaisir filed May 31st 2011 in support of the Defendant's application, fail to specify requests and information sought
> 3. Counsel for the Claimant relying on the Pendragon case in opposition to the application for an extension of time to file the Defendant's defence, and the Court being guided by the Pendragon case
>
> IT IS HEREBY ORDERED
>
> 1. The application for an order seeking information is denied. This order does not bar the Defendant from making a further application of this nature.
> 2. The application for an order extending time to file a defence is denied.
> 3. Costs to the Claimant in the sum of $750.00."

[1] See draft order approved by Wilkinson J. dated 8th June 2011.

The Grounds of the Application

[6] The grounds of COW's application for leave to appeal allege that:[2]

> "1. The Learned Judge was misdirected by Counsel for the Respondent as to the applicability of *Pendragon International Limited et al v Bacardi International Limited (Civil Appeal No 3 of 2007),* in holding that where an application for an extension of time is filed, the applicant is required, in addition thereto, to apply for relief from sanctions pursuant to Rule 26.8(2) and (3) of the Civil Procedure Rules 2000.
> 2. The Learned Judge erred in failing to consider whether the Affidavits of Barrie Hobbs filed on 16th December 2010 and Richard Monplaisir filed on 31st May 2011 both in support of the Application for an Extension of Time satisfied the check-list in sub-rules 26.8(2) and 26.8(3) of Civil Procedure Rules 2000.
> 3. The order made does not finally determine the matter before the court and is therefore within the realm of a procedural appeal.
> 4. Section 26(2)(g) of the Eastern Caribbean Supreme Court (Saint Lucia) Act states that an Appellant under these circumstances must first seek leave of the Court to appeal a decision made in a procedural application.
> 5. The proposed Appeal stands a real prospect of success for the grounds set out above."

The Court of Appeal Hearing

[7] Learned counsel for IDC filed an Opposition to the application for leave to appeal on 12th July 2011 in the absence of any order from the Chief Justice or a single judge. The application came up for hearing by the full court, and we permitted IDC's counsel Mrs. Nelson to address us on the merits of the proposed appeal. We also had the benefit of both counsel's extensive written submissions and authorities on the prospect of success of the proposed appeal. We agreed at the hearing that if leave were granted, it is unlikely that the points would be canvassed in much greater depth or detail at the substantive hearing. We had the relevant documents before us and we had the opportunity to go through them and deal with them in a way that a court dealing with the substantive appeal would. We therefore indicated at the hearing that if we were of the view that leave should be granted and we were satisfied that the case is likely to succeed, we would then

[2] See Notice of Application dated 24th June 2011.

treat the application for leave as the appeal upon granting leave to appeal. Mrs. Nelson, additionally, made submissions regarding the timeliness of the application for leave and the failure of the applicant to apply for extension of time to file the application for leave to appeal. We concluded that that those submissions had no merit, before hearing arguments from counsel on the prospect of success for the proposed appeal. Before addressing the submissions of both counsel I must state some background facts which will place the submissions of both counsel in their proper perspective.

Background Facts

[8] IDC claimed the sum of US$677,646.82 or EC equivalent of $1,841,098.65 for costs incurred and monies due and owing under a dredging contract made between IDC and COW, which was unlawfully terminated by COW on 31st March 2009. IDC also claimed damages, interest and costs for breach of contract. IDC filed its statement of case on 29th October 2010 and served it on COW on 17th November 2010. COW filed an Acknowledgment of Service on 23rd November 2010, in which it was stated that COW intended to defend the claim. COW's legal representatives, Floissac Fleming & Associates, on 9th December 2010 (2 days from the expiration of the 28 days for service of a defence), wrote to Mrs. Nelson, requested certain further information to facilitate the preparation of COW's defence, and sought the consent of IDC to a 42 day extension of time (inclusive of the 21 day period within which IDC should reply to the request for further information) to file its defence.

[9] By letter dated 14th December 2010, Mrs. Nelson advised COW's legal representatives that their "request for information is premature" and that "it is believed that the request is being made to delay this matter as it is our understanding that your client is undergoing severe financial problems…". This letter denied the request for extension of time made by COW's legal representatives. It was as a result of this letter that COW made the application to the Court which the learned judge decided in favour of IDC.

Analysis of the Submissions

[10] Learned counsel Ms. Greer contends that the learned judge dismissed COW's application for extension of time to file its defence on the ground that pursuant to Pendragon International Limited and Others v Bacardi International Limited,[3] the applicant should have made an application specifically for relief from sanctions; and refused to consider the extension of time application in the absence of an application for relief from sanctions. She submitted that the case Pendragon was not authority for saying that there must be an application for relief from sanctions accompanying an application for extension of time as learned counsel Mrs. Nelson submitted in the court below. I agree with this submission for reasons that will be disclosed later.

[11] Ms. Greer submitted also that the rules relating to the filing of defence in Part 10 of CPR 2000 do not set out a sanction for failing to file a defence. In practical terms, the "sanction" that would be visited upon a defendant is a risk that a claimant could obtain judgment under Part 12 of CPR 2000. Ms. Greer referred to Pendragon in which a single judge (Rawlins J.A. as he then was, now Rawlins C.J.) stated at paragraph 11 of his judgment:

> "…in Sayers v Clarke Walker (a firm), the English Court of Appeal stated that where a rule stipulates the time within which a procedural step is to be taken, although no sanction is expressly stated for failure to comply with that rule, failure to comply within the time stipulated would have the same effect as if a sanction were imposed because of the consequence of the court's possible refusal or unwillingness to grant an extension for failure to comply. In Sayers, therefore, the court applied and recommended the check-list which CPR r 3.9 of the English Rules provides as the criteria for determining whether the time that is stipulated in the Rules should be extended."

[12] Ms. Greer submitted that on the authority of Pendragon, it is clear that on an application for extension of time, the applicant must satisfy the criteria set out in CPR 26.8(2) and (3). At paragraph 14 of the judgment, it is stated that "…criteria set out in rule 26.8(2) of CPR 2000 are compendious, and, accordingly, the court

[3] Anguilla Civil Appeal No. 3 of 2007 (delivered 23rd November 2007, unreported).

may only extend time if all criteria are satisfied. The sub-rule is also stated in imperative terms. It is fatal to an application, as this court stated in Dominica Agricultural and Industrial Development Bank,[4] if an applicant for an order extending time does not first satisfy rule 26.8 (2) of CPR 2000. Accordingly, the effect of the requirements of this rule falls to be determined even before the requirements of rule 26.8(3) are considered."

[13] Counsel Ms. Greer submitted further that the learned judge should have considered the criteria in CPR 26.8 in determining whether or not COW's application for extension of time should be granted. She submitted that the supporting affidavits have satisfied all of the criteria in CPR 26.8. Ms. Greer took us through the evidence in support of the application and applied it to the criteria in seeking to establish that the evidence has established: (i) that the application was made without delay; (ii) that the failure to comply was not intentional; (iii) that there was a good explanation for the failure to file the defence in time; and (iv) that COW has generally complied with all other relevant rules, practice directions, orders and directions. Despite the submissions of learned counsel Mrs. Nelson, who sought to persuade us that the criteria under CPR 26.8 have not been satisfied, in my opinion, the criteria were satisfied.

[14] Learned counsel Mrs. Nelson submitted that counsel for COW was estopped from raising as an issue in the proposed appeal that the learned judge erred in applying Pendragon, since that issue was not raised in the court below when COW's counsel was given the opportunity to respond to the submissions of IDC's counsel. The authority cited by Mrs. Nelson in support of her stance renders no assistance to this submission in my view. Gordon J.A., in John Paul Dejoria and Another v Gigi Osco-Bingeman and Others,[5] made observations about the appellants' ground of appeal, that it was an abuse of the Court's process for the respondent's to aver that the Agreement in question does not apply to two of the parties CDC or AR when they have been beneficiaries of opposite averments before the California

[4] Dominica Agricultural and Industrial Development Bank v Mavis Williams, Dominica Civil Appeal No. 20 of 2005 (delivered 18th September 2006, unreported).
[5] Anguilla Civil Appeal No. 4 of 2005 (delivered 24th April 2006, unreported).

courts. Gordon J.A. stated that "This issue does not seem to have been raised in any way before the court below." He concluded that if there has been no decision on an issue then there can be no appeal, and to permit the appellants to raise this issue for the first time before the Court of appeal is to put the respondents at a disadvantage.

[15] We are dealing here with a complaint that the judge made an error in law in the exercise of her discretion. This is quite different from misframing or failing to frame an issue from pleadings, and then seeking to argue that issue for the first time on appeal. COW's counsel did not invite the judge to take the questioned course that the learned judge took. Neither is this a case where counsel was required to object in the court below in order to preserve the error for appeal. COW's counsel's failure to make submissions countering the approach advocated by counsel Mrs. Nelson did not deprive the judge of the ability to evaluate the supporting evidence in the affidavits and make the necessary findings in respect of CPR 26.8 (2) and (3). Ms. Greer explained that counsel for COW did not respond because it was "trial by ambush" as COW's counsel did not have the benefit of a copy of Pendragon when Mrs. Nelson made that oral submission. Indeed, the proper course for counsel to take in such circumstances would be for counsel to request a brief adjournment in order to instruct themselves on the applicable law. Regrettably, this did not occur.

[16] Mrs. Nelson sought to justify her submissions in the court below, and the decision of the learned judge, by relying on CPR 26.7(2) which states:

> "If a party has failed to comply with any of these rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 does not apply." (Emphasis mine)

[17] However, CPR 26.7(2) does not advance Mrs. Nelson's argument in my respectful view, as it specifically refers to a rule, direction, or order which itself imposes a

sanction. In David Goldgar and Others v Wycliffe H. Baird[6] and Irma Paulette Robert v Cyrus Faulkner and Another,[7] I made a similar observation as a single judge. CPR 26.7(2) admits of only one interpretation in my view and extending this rule to apply to CPR 10.3(1) and other factual situations which fit uncomfortably under the rule, having regard to the scheme of CPR 2000, produces results which are untenable and inconsistent with the overriding objective, in my humble view.

[18] As Ms. Greer quite rightly pointed out, the sub-rule that COW breached is CPR 10.3(1) which states:

> "The general rule is that the period for filing a defence is the period of 28 days after the date of service of the claim form."

CPR 10.3(5) states that "The parties may agree to extend the period for filing a defence specified in paragraph (1)…". CPR 10.3(8) states that "The defendant must file details of such an agreement." None of the other nine sub-rules in CPR 10.3 or any other rule in Part 10 imposes a sanction for failing to file a timely defence. It is only where a sanction is implied by analogy, as a series of cases from our Court have advocated, based on the statements of Lord Justice Brooke in the English case Sayers v Clarke Walker (a firm),[8] that CPR 26.8 has been automatically engaged by some judges in the absence of an express sanction. In my view, CPR 26.7(2) is not relevant in the present case.

The Decision in Sayers

[19] In Sayers, Lord Justice Brooke referred to the English CPR 52.4(2) (a) and (b) which provide for the appellant to file the notice of appeal within 14 days after the date of the decision of the lower court that the appellant wishes to appeal, in the absence of any other period being directed by the Court. He also referred to the English CPR 3.1(2)(a) which provides that the court may extend or shorten the

[6] Saint Christopher and Nevis Civil Appeal No. 13 of 2007 (delivered by a single judge Edwards J.A. on 23rd October 2007, unreported) at paras. 21 and 22.
[7] Saint Lucia Civil Appeal No. 29 of 2007 (delivered by a single judge Edwards J.A. on 25th October 2007, unreported) at paras. 13 and 15.
[8] [2002] EWCA Civ 645.

time for compliance with any rule, practice direction or court order (even if an application for an extension is made after the time for compliance has expired); the English CPR 52.6, which provides that an application to vary the time limit for filing an appeal notice must be made to the appeal Court and the parties may not agree to extend any date or time limit set by the rules, relevant practice direction or an order; CPR 52PD, para 5.2 which states that an appellant requiring extension of time for filing his notice of appeal must make the application in the notice of appeal, stating the reason for the delay and the steps taken prior to the application being made; and the English CPR 3.9(1) which is fully in these terms:

> "3.9(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –
>
> (a) the interests of the administration of justice;
> (b) whether the application for relief has been made promptly;
> (c) whether the failure to comply was intentional;
> (d) whether there is a good explanation for the failure;
> (e) the extent to which the party in default has complied with other rules, practice directions and court orders and any relevant pre-action protocol;
> (f) whether the failure to comply was caused by the party or his legal representative;
> (g) whether the trial date or the likely date can still be met if relief is granted;
> (h) the effect which the failure to comply had on each party; and
> (i) the effect which the granting of relief would have on each party."

[20] Lord Justice Brooke observed that it should not be assumed that CPR 52PD, para 5.2 sets out all the information a court may be likely to require in every case when deciding whether it is just to extend time for appealing in the face of non-compliance with the mandatory requirements of CPR 52.4(2). He stated further:[9]

> "18. … The court's general power to extend the time for compliance with a rule (even if an application for extension is made after the time for compliance had expired) is contained in CPR 3.1(2)(a), and in deciding how to exercise that power the court must of course take into account the overriding objective in CPR 1.1. The question then arises whether the Civil Procedure Rules give any further guidance to judges as to how they should exercise their discretion when making orders under

[9] At paras. 18-19 and 21-22.

> CPR 3.1(2)(a), or whether, uncharacteristically, the way is left wide open for the creation of judge-made check-lists ….
>
> "19. In very many cases a judge will be able to decide whether to extend or shorten a period of time for complying with a rule, practice or direction without undue difficulty after considering the matters set out in CPR 52PD, para 5.2. In more complex cases, of which this is undoubtedly one, a more sophisticated approach will be required.
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> …
>
> "21. In my judgment, it is equally appropriate to have regard to the check-list in CPR 3.9 when a court is considering an application for an extension of time for appealing in a case of any complexity. … .
>
> "22. It follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider "all the circumstances of the case" including [the criteria stated in CPR 3.9(1) (a) to (i)]. In the case of a procedural appeal the court would also have to consider item (g), "whether the trial date or the likely trial date can still be met if relief is granted." (My emphasis)

[21] The approach in Sayers does not require an applicant to file an application for relief from sanctions along with the application for extension of time as learned counsel Mrs. Nelson contended. Rule 27.8 stipulates the circumstances that must exist for a party to apply for extension of time and relief from sanctions. That party would have to be seeking to vary a date which the court has fixed for either a case management conference; or a date set by a court order to do something and the order specifies a sanction for non-compliance; or a date for pre-trial review, return of a listing questionnaire, or a trial; or where a party wishes to vary a date set by the court or the rules for doing any act which will affect any of the previously mentioned dates. It is only where those circumstances exist and the party seeks to vary a date set in the timetable after the deadline date has passed that CPR 27.8(4) requires that the party must apply for an extension of time and relief from sanctions to which the party has become subject under these Rules or any court order.

[22] The circumstances envisaged in CPR 27.8 certainly did not exist for COW. Neither was there any express sanction to which COW had become subject under

CPR 2000 or any court order. COW, on the authority of Sayers, would be subject to an implied sanction only where the learned judge found the case to be complex; and the criteria to be applied to the application for extension of time was left to the discretion of the judge depending on how the judge saw it.

[23] The instant case did not present any complex circumstances as to cause an invocation of CPR 26.8 in my view, where the Sayers approach is applied. In such a case the learned judge would be exercising her case management powers to extend time under CPR 261(2)(k) only, and not under CPR 27.8(4). In that regard CPR 26.9 would be applicable. The learned judge would be making an order to put matters right under CPR 26.9(3) in the absence of any stated consequence of failure stipulated by a rule, practice direction, or order.

[24] I therefore adopt the observations of Lord Justice Jonathan Parker in Keen Phillips (A Firm) v Field,[10] who, in rejecting counsel's submission that the court was powerless to extend time in the absence of an application for relief from sanctions, stated:[11]

> "… I would regard such an interpretation of a CPR as perverse and as flying in the face of the overriding objective of dealing with cases justly."

Reconciling the Decisions of this Court following Sayers

[25] Before the decision in Pendragon, three of our cases which approved the Sayers approach were the cases: (1) Nevis Island Administration v La Coppropretе [sic] Du Navire J31 and Others;[12] (2) The Nevis Island Administration v La Copropriete Du Navire J31 and Others;[13] and (3) Ferdinand Frampton v Ian

[10] [2006] EWCA Civ 1524.

[11] At para. 18.

[12] Saint Christopher and Nevis Civil Appeal No. 7 of 2005 (delivered by a single judge Rawlins J.A. (as he then was) on 29th December 2005, unreported). The applicant filed a procedural appeal without the leave of the court and after the respondent had filed an application to strike out the notice of appeal, the applicant filed an application for extension of time and did not withdraw or discontinue the notice of appeal. The notice of appeal was struck out for being a nullity.

[13] Saint Christopher and Nevis Civil Appeal No. 7 of 2005 (delivered by a single judge Barrow J.A. on 3rd April 2006, unreported). The application for extension of time within which to apply for leave to appeal the interlocutory decision, was filed on 24th December 2005. Barrow J.A. held that the matters on which the applicant relied to support its application for an extension of time did not satisfy the requirements of the

Pinard and Others.[14] In the first case, Rawlins J.A. (as he then was) now Rawlins C.J., stated at paragraph 3 that: "The application for extension of time does not arise for consideration in this Judgment because it has not been canvassed. As far as the application for extension of time is concerned, the attention of Counsel is drawn to rules 26.1(k), 26.3 and 26.8, as well as to the learning in Sayers v Clarke Walker (a firm)."

[26] The need to apply the Sayers approach apparently arose because of section 24 of the Eastern Caribbean Supreme Court (Saint Lucia) Act[15] ("the Court Act") which provides that the jurisdiction so far as it concerns practice and procedure in relation to appeals in civil matters from the High Court shall be exercised as nearly as may be in conformity with the law and practice for the time being in force in England where no special provisions are contained in this Act or rules of court. Similar provisions exist in the Court Acts of the other islands of the OECS.

[27] Our CPR 26(1)(k) is the equivalent of the English CPR 3.2(1)(a) where it empowers the court generally to "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" except where these rules provide otherwise. Rule 26.3 of CPR 2000 empowers the court to "strike out a statement of case or part of a statement of case if it appears to the court that – (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings..."

[28] Our CPR 26.8 (comparable to the English CPR 3.9(1)) contains the mandatory criteria for determining an application for relief from sanctions. It provides as follows:

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relevant Rule 26.8 and dismissed the application.

[14] Commonwealth of Dominica Civil Appeal No. 15 of 2005 (delivered by a single judge Barrow J.A. on 3rd April 2006, unreported). This was a case where the applicant applied for an extension of time to file a notice of appeal.

[15] Chap. 2.01, Revised Laws of Saint Lucia 2008.

"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.

(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.

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

[29] In the second Nevis Island Administration case, Barrow J.A. (a single judge) rejected the submission of respondents' counsel that the criteria against which to consider an application for extension of time was that adumbrated in Quillen and Others v Harney, Westwood Riegels,[16] because it was decided before the introduction of Civil Procedure Rules 2000. In that case four factors were identified for consideration in deciding whether to exercise the judicial discretion in favour of a dilatory applicant, namely: (1) the length of the delay, (2) the reasons for the delay, (3) the chances of the appeal succeeding if the application is granted, and (4) the degree of prejudice to the respondents if the application is granted. Barrow J.A. accepted the proposition of the applicant's counsel that in this jurisdiction we should be guided by the decision of the English Court of Appeal in Sayers v Clarke Walker which established that the criteria relevant to an

[16] [1999] E.C.L.R. 23.

application for an extension of time for appealing are those contained in CPR 2000, at rule 26.8.

[30] The rationale for applying CPR 26.8 to an application for extension of time was stated by Barrow J.A. thus:

> "[4] The argument in favour of relying on the criteria laid down in rule 26.8 recognizes that there is no express sanction prescribed for failing to apply for leave to appeal in time, in the way, for example, that failure to file a witness statement is visited with the sanction that the witness shall not be called. However, although not expressed as such, the consequence that an intending appellant who fails to apply in time for leave to appeal when leave is required may not thereafter apply for leave to appeal is nonetheless a sanction. It is because the application for relief against that consequence or sanction is in essence no different in nature from the standard application for relief from an express sanction that it is appropriate, in my judgment, that the criteria prescribed in rule 26.8 should be applied.
>
> "[5] An undoubted advantage that is to be gained from relying on the criteria for granting relief from sanction that CPR 2000 prescribes is certainty. There is no longer need to rely on judge made criteria with the uncertainties that attend varying judicial viewpoints as to what those criteria should be and what emphasis should be given to which of them. For example, in the Quillen case Singh JA stated that the appearance of "some chance of success" of the proposed appeal trumped both inordinate delay (six months) and the clear absence of good reason for delay. It was emphasized that the discretion to extend time was unfettered. In contrast, certain of the criteria that are set out in rule 26.8 are made conditions precedent to the grant of relief and the court is expressly precluded from granting relief if certain of them are not satisfied. Therefore, the discretion to grant relief under CPR 2000 is distinctly fettered and, it may be noted, this is in sharp contrast to the open discretion that is found in the comparable English rule 3.9 (1)."

[31] In the third case, Frampton v Pinard, Barrow J.A. (a single judge) reinforced the approach favoured in a number of recent decisions of this court in considering applications for the grant of an extension of time for appealing, to rely on the criteria found in rule 26.8. Barrow J.A. held that the applicants did not address even one of the three conditions that must be satisfied. He stated at paragraph 19 that: "The rule is uncompromising that the court is prohibited from exercising its discretion to grant relief from sanctions if these conditions are not satisfied."

[32] The case Dominica Agricultural and Industrial Development Bank v Mavis Williams[17] was delivered by the Full Court (Gordon J.A., Barrow J.A. and Benjamin J.A. [Ag.]) in September 2006. The court determined the appellant's application for an extension of time for appealing against the liability judgment in which the learned judge held that the respondent was wrongfully dismissed. The affidavits in support of the application established that the appellant decided not to appeal after taking legal advice, but to await the determination of the assessment of damages. It was only after the decision was taken to appeal against the quantum of damages that it was decided that both judgments should be appealed. Barrow J.A., writing for the Court, referred to the previous decisions of the Court in Nevis Island Administration and Frampton v Pinard which held that the principles which guide the court's exercise of discretion on whether to extend time for appealing are contained in the provisions of CPR 2000 dealing with relief from sanctions for non-compliance, in rule 26.8.

[33] Counsel for the appellant referred to earlier decisions of the court including Rose v Rose,[18] which was decided after CPR 2000 was introduced. Sir Dennis Byron C.J. stated at paragraph 2 in that case:

> "Granting the extension of time [to appeal] is a discretionary power of the Court, which will be exercised in favour of the applicant for good and substantial reasons. The matters which the Court will consider in the exercise of its discretion are: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if the extension is granted; and (4) the degree of prejudice to the Respondent if the Application is granted."

Sir Dennis relied on prior decisions of the court which predated the introduction of CPR 2000 in stating these criteria. The judgment does not mention that he took into consideration the overriding objective in the exercise of his discretion.

[17] Dominica Civil Appeal No. 20 of 2005 (delivered 18th September 2006, unreported).
[18] Saint Lucia Civil Appeal No. 19 of 2003 (delivered 22nd September 2003, unreported).

[34] Barrow J.A., referring also to the decision in Quillen,[19] concluded[20] that:

> "[18] Even if Quillen and Rose remain good law, and I am respectfully of the opinion that they do not, I do not see that they are applicable to the present case because, it seems to me, the facts of this case make it exceptional. As I have concluded, the appellant made a deliberate decision not to appeal … . Such conduct, to my mind, is an abuse of the process of the court … . Such conduct threatens the very foundation of the new ethos that CPR 2000 introduced … .
>
> "[21] It is worth repeating that under rule 26.8 (2) the court may not grant relief from sanction if the failure to comply was intentional … .
>
> "[22] Even, as I have said, if the criteria of rule 26.8 were not applied to the appellant's application or their severity were relaxed in this instance, because this is an early case being decided upon the basis of these criteria, the appellant could not benefit from the decisions in Quillen and in Rose because in neither case was there anything approaching a deliberate decision not to appeal within the time limited."

[35] Since then, those cases which follow Sayers as well as the decisions in Richard Frederick v Owen Joseph and Others[21] and Pendragon are routinely used by most counsel for respondents as binding authorities for applications for extension of time. They invoke the CPR 26.8 criteria, however simple and straightforward the application may be in order to obtain a desired result in their favour. That practice surprisingly exists, even where the application for extension of time was made before the time for complying with the relevant rule, practice direction, order or direction of the court has expired. The practice invites a rigid application of CPR 26.8 to applications for extension of time, failing to take into account the stage at which the proceedings have reached; or the absence of complex circumstances in the particular case before the court. Far too often, that practice results in disproportionate and unjust results in my view.

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[19] See paragraphs 29 and 30 of this judgment where Quillen is discussed.

[20] In Dominica Agricultural and Industrial Development Bank v Mavis Williams, Dominica Civil Appeal No. 20 of 2005 (delivered 18th September 2006, unreported).

[21] Saint Lucia Civil Appeal No. 32 of 2005 (delivered by a single judge Rawlins J.A. (as he then was) on 16th October 2006, unreported). The appellant applied for an extension of time to file and serve the record of appeal. Rawlins J.A. (as he then was) applied the check-list in CPR 26.8 and dismissed the application, holding that the application was not made promptly, the explanation for the delay was unconvincing and not a good reason, and the failure of the appellant amounted to an abuse of process.

[36] It appeared to us at the hearing of the application that the statements of Lord Justice Brooke in Sayers have been taken out of context, giving rise to misunderstandings and error in applying CPR 26.8 to all applications for extension of time. Lord Justice Brooke advocated that the checklist under the English CPR 3.9(1) should be taken into account along with the overriding objective in a case of complexity. Sayers was a case involving allegations of professional negligence against a firm of accountants, and was of some complexity. The time for appealing had already expired when the application for extension of time was made. Lord Justice Brooke himself recognized that in cases which did not present complicated circumstances it was unnecessary to invoke the relief from sanctions criteria. The decisions of our Court previously reviewed do not reflect due regard to this distinction in my humble and respectful view.

[37] The other side of the divide is reflected in Michael Baptiste and Yoland Bain-Joseph.[22] As a single judge determining a purported application for extension of time to file the skeleton argument (the record of appeal also had not been filed for over nine months), I considered the decisions in Richard Frederick, Dominica Agricultural and Industrial Development Bank v Mavis Williams and Sayers and expressed my views as to why I was departing from the stand taken in these cases at paragraphs 22 and 24 as follows:

> "[22] A compelling interpretation of the Rules in my opinion, is that the absence of a check-list in CPR 26.1 (2)(k) and 26.3 (1)(a) reflects the draftsman's intentions that the discretion should be exercised by simply having regard to the overriding objective. Having read the judgment of Benjamin J and the grounds of appeal, I am of the view that the appeal does not involve complex issues or require legal arguments of any complexity. In the absence of any expressed sanction prescribed by any rule or order, or practice direction or other direction, which would upon default, take effect under CPR 26.7, there is no need to imply a sanction, since the case is not one of complexity requiring the "sophisticated approach" advocated by Brooke L.J. The respondent has a right of appeal, and there is nothing in the language of the relevant statute or Rules which suggest [sic] that an appellant who has failed to file the skeleton argument in time is to be debarred from prosecuting the appeal. Such default appears to me to be an irregularity which may be cured by

[22] Grenada HCVAP 2006/026 (delivered by a single judge Edwards J.A. on 7th February 2008, unreported).

the court by simply having regard to the overriding objective on an application for extension of time.

…

"[24] Turning now to the application to strike out the notice of appeal, in my opinion Ratnam[23] is of value here, for illustrating the considerations that the court may legitimately take into account when seeking to give effect to the overriding objective, in the exercise of its discretion to extend time for filing skeleton arguments, or strike out an appeal for such default. The principles that I have extracted from Ratnam which in my view synchronize with the overriding objective are: that an order other than striking out the notice of appeal should be made if some satisfactory excuse is given for the neglect to file the skeleton argument, and the delay is not inordinate; in the absence of any evidence that the default has been intentional, or has prejudiced the respondent. These principles are in fact reflected in CPR 26.8.

"[25] I therefore understand the overriding objective to require in this case that I do not strike out the appeal if the Affidavit of Keron Regis contains material sufficient to warrant the favourable exercise of this court's discretion. The material ought to be regarded as sufficient where it contains a satisfactory excuse for the neglect to file the skeleton argument and the delay is not inordinate; in the absence of any evidence that the default has been intentional, or has prejudiced the respondent. The overriding objective also permits me to take into account the failure of both the appellant and the respondent to comply with CPR 62.12 concerning the filing of the record of appeal; and the fact that no timetable has been fixed for the hearing of the appeal."

[38] I concluded thereafter that the notice of appeal should be struck out as there was no explanation for delaying and neglecting to file the skeleton argument within the time limit computed under the rules. This compelled the conclusion that the appellant's conduct was intentional and an abuse of process of the court.

[39] The Privy Council, on 26th November 2009, also gave us indications in Texan Management Limited and Others v Pacific Electric Wire & Cable Company Limited[24] that our approach in applying CPR 26.8 to cases where there was no express sanction for non-compliance may have been inconsistent with the

[23] Ratnam v Cumarasamy and Another [1964] 3 All E.R. 933 (Privy Council – Malaysia).
[24] [2009] UKPC 46; Privy Council Appeal No. 18 of 2009 (Territory of the Virgin Islands).

overriding objective. The indications came in answering the question posed at paragraph 77 of the judgment:

> "Does EC CPR r.9.7(4) require that the evidence in support of the application must be filed at the same time as the notice of application is filed, and, if so, does failure to file mean that the application is a nullity, or does the court have power to excuse or cure non-compliance (and if so, should the power be exercised)?"

[40] The Board held that although EC CPR r. 11.11(4) requires that when the notice of application is served, it must be accompanied by any evidence in support, and EC CPR r. 30.1(6) requires that an affidavit must be filed before it can be used in proceedings, there is nothing in EC CPR Part 11 which requires evidence in support of an application to be filed when the application is made. Nor was there anything in EC CPR 9.7 or Part 11 which makes the validity of an application dependent on service or filing of evidence in support at the time the application is filed or served. The High Court had a discretion to treat the notice as sufficient under EC CPR r.11.11(3) and a discretion under EC CPR r. 26.9(3) to put matters right if there has been a failure to comply with a rule. There was consequently no basis for the contention which was accepted by the Court of Appeal, that a failure to serve evidence with the application means that the application is not made or is a nullity. At paragraph 80, the Board observed:

> "It is only necessary to deal with PEWC's point that the judge ought to have applied the check list for relief from sanctions in EC CPR r. 26.8. No question of a sanction arises. Even if PEWC were right in saying that there was no proper application under r.9.7 and therefore Texan and Dragon were to be treated as having accepted that the court had jurisdiction to try the claim, that is not a sanction, since it applies to any defendant who files an acknowledgment of service and is not in a position to contest the jurisdiction." (My emphasis).

[41] This review of our existing authorities serves to fortify the observations that we made during the hearing of this application. We stated then that there is an urgent need for the Court of Appeal to reconcile its multiple conflicting decisions, and reconsider the Sayers approach to the interpretation of the Rules and practice under CPR 2000 relating to implied sanctions, in light of the existing uncertainty

and confusion as to how and when to apply CPR 26.8, and whether it should be applied at all.

[42] It is necessary to remember that an application for extension of time to perform an interlocutory step in the proceedings prior to a scheduled case management conference, would require different considerations and approach from an application for extension of time involving a failure to comply with case management directions; or a failure to file an appeal against a decision on the merits after a trial; or a failure to make a timely application for leave to appeal an interlocutory decision. The absence of an express criteria in the Rules for applications for extension of time falling outside of the purview of CPR 26.7(2) and (3); CPR 26.8; and CPR 27.8(3) and (4); does not mean that there is no established criteria for determining applications for extension of time.

[43] As I stated in Michael Baptiste v Yoland Bain-Joseph,[25] the statutory provision in our CPR 1.1 permits common law principles to be considered and applied by a judge when exercising any discretion or interpreting the provision. The word "includes" in CPR 1.1(2) suggests that the matters listed in CPR 1.1(2) (a) to (e) are not exhaustive of the matters to be taken into account when the Court strives to deal justly with cases. However, in applying such principles the Court's discretion by its very nature should be guided and not fettered by the principles, bearing in mind that CPR 2000 has significantly changed the practice in relation to appeals and cases in the High Court. The Court should be cautious in applying the common law principles under the old Rules which may not necessarily reflect the transformation under the new regime.

[44] Prior to our CPR 2000, the criteria for granting extension of time in relation to appeals was stated in Rule 9 of the Court of Appeal Rules, 1968. That rule stated:

> "Subject to … [Order 64, rule 6 of the Rules of the Supreme Court], the Court may enlarge or abridge the time appointed by these Rules, or fixed by an order enlarging time, for doing any act or taking any proceeding,

[25] At para. 12.

upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, or the Court may direct a departure from these Rules in any other way where this is required in the interests of justice."

[45] Rule 9 of the Court of Appeal Rules has not been repealed by CPR 2000 though the Rules of the Supreme Court (Revision) 1970 have been repealed by CPR 2000.

[46] Order 64 rule 6 (now repealed) stated:

> "6.–(1) Without prejudice to the power of the Court of Appeal under Order 3 rule 5 to extend the time prescribed by any provision of these Rules, the period for filing notice of appeal under rule 5 (1) or for making an application for leave to appeal under rule 4 (4) may be extended by a single judge of the Court on application made not later than one month after the expiration of that period.
> (2) …
>
> (3) …
>
> (4) When time is so extended a copy of the order granting such extension shall be annexed to the notice of appeal."

Sub rules (2) and (3) prescribed the mode of and the method for filing the application. Sub rule (2) required the application to be "supported by an affidavit setting forth substantial reasons for the application and by grounds of appeal which *prima facie* show good cause therefor."

[47] CPR 26.1(2) (k) replaced Order 3 rule 5 which stated:

> "5.–(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any judgment, order or direction, to do any act in any proceedings.
>
> (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.
>
> (3) …
>
> (4) …"

[48] It was against this statutory background that Singh J.A. in Quillen made the statements referred to by Barrow J.A. at paragraphs 29, 30, and 34 above. The well established criterion for an application for extension of time to be made promptly, and for the length of delay to be taken into account where the application relates to an appeal, obviously is reflected in and/or arose from the stipulated requirement under the old Rules that the application should be made no later than one month beyond the deadline for filing the appeal. The requirement for the reason for the delay to be satisfactory, no doubt is reflected in, or originated from the requirement in the old Rules that the affidavit should contain substantial reasons for the application. The criteria focusing on the chances of success of the appeal if the extension of time is granted emanated from the demand under the old Rules that the grounds of appeal should *prima facie* show good cause. That the degree of prejudice to the respondent, must be considered stems from the Court having to assess the "justice of the case" for both parties and giving directions in the interest of justice under the Court of Appeal Rule 9. Having regard to the authorities cited by Sir Dennis Byron C.J. in Rose v Rose, it is obvious that this same criteria guided his approach in considering the application for extension of time to appeal after the introduction of CPR 2000. In assessing the prejudice to the respondent, the court would, following the introduction of CPR 2000 in a manner of speaking, be giving effect to some of the matters to be taken into account under the overriding objective.

[49] Under the old rules, timelines were established for making applications to extend the time for applying for leave to appeal and filing notices of appeal. That timeline was one month from the stipulated deadlines in the Rules or Statute. Noticeably, no such timeline existed in the old Rules for applications for extension of time in the High Court. It also does not exist in any rule under CPR 2000. I can see no reason why the well established principles governing applications for extension prior to CPR 2000 should be disregarded. Those principles are in fact dressed up in different clothing in my view under CPR 26.8 and CPR 1.1 and 1.2. Under the provisions of CPR 26.8 the draftsman chose to describe them differently, and gave

them a stipulated rank and weight, causing them to impact differently as the criteria for relief from sanctions.

[50] The English Court of Appeal also had to consider what impact the newly introduced overriding objective Rule 2A (similar to the English CPR and also our CPR 2000) had on previous established guidelines existing in case law, which govern applications for extension of time in proceedings before the Employment Appeal Tribunal, where the Rules prescribe a 42 day time limit to appeal, but prescribe no criteria for applying the overriding objective when considering applications for extension of time. The English CPR does not apply to proceedings in the Employment Appeal Tribunal). Lord Justice Rimer, in Jurkowska v Hlmad Limited,[26] while accepting that "rule 2A has not somehow trumped the … guidelines so as to require the EAT to put them on one side and instead approach extension applications by reference to some wholly undefined and unprincipled appeal to justice", stated:

> "The contrary argument ignores the basic point that dealing with cases justly requires that they be dealt with in accordance with recognized principles. Those principles may have to be adapted on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made. The … principles reflect that rules as to time limits are expected to be respected, and there is precisely nothing unjust or unfair about that. Litigants are not entitled to expect rules of practice to be re-written so as to accommodate their own negligence, idleness or incompetence. But the principles also recognise that nobody is perfect, that errors will happen, that time limits will be missed and that in appropriate circumstances it may therefore be just to extend time for compliance. That, however, is in the nature of an indulgence and the guidelines are directed at outlining the approach to the question of whether it will or may be fair so to indulge the appellant."

[51] In a recent case subsequent to the hearing of the instant application, Pereira J.A. took a somewhat similar approach. In Carleen Pemberton v Mark Brantley[27] the appellant filed the Notice of Appeal some six days out of time, and a subsequent

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[26] [2008] EWCA Civ 231 at para. 19.

[27] Saint Christopher and Nevis HCVAP 2011/009 (delivered by a single judge Pereira J.A. on 14th October 2011, unreported).

application to stay the execution of the judgment pending the determination of the appeal. The respondent filed an application to strike out the notice of appeal. Both applications were considered by Mitchell J.A. [Ag.] who made an order for the appellant to show cause why the appeal should not be struck out. Twelve days later the appellant filed an application for extension of time for filing the notice of appeal. The respondent opposed this application. All of the applications with written submissions of counsel for both parties were considered by Pereira J.A. on 6th October 2011. Notably, in considering the application for extension of time, Pereira J.A. in her judgment made no mention of the cases Sayers, Nevis Island Administration v La Coppropretе [sic] Du Navire (No. 1), The Nevis Island Administration v La Copropriete Du Navire (No. 2), Ferdinand Frampton v Ian Pinard and Others, Dominica Agricultural and Industrial Development Bank v Mavis Williams, Richard Frederick v Owen Joseph and Others, and Michael Baptiste and Yoland Bain-Joseph.

[52] Instead, Pereira J.A. applied CPR 26.9, having found that no sanction is specified for the unspecified filing of the notice of appeal. She stated at paragraphs 12 to 14 of her judgment that she had a discretionary power under CPR 26.9 which was "a very broad one." She stated that this discretionary power:

> "[12] …cannot be exercised in a vacuum or on a whim, but must be exercised judicially in accordance with well established principles. Overall, in the exercise of the discretion the court must seek to give effect to the overriding objective which is to ensure that justice is done as between the parties.
>
> "[13] Much depends on the nature of the failure, the consequential effect, weighing the prejudice, and of course the length of the delay, and whether there is any good reason for it which makes it excusable. This is by no means an exhaustive list of all the factors which may have to be considered in the exercise. Another very important factor, for example, where the application, as here, is to extend time to appeal, is a consideration of the realistic (as distinct from fanciful) prospect of success.
>
> "[14] I am mindful, that there are a number of decisions by judges of this Court, addressing the various principles to be applied. In fact one of the earliest decisions on the ushering in of CPR 2000 is the case of John Cecil Rose v Anne Marie Uralis Rose, a judgment of Byron CJ (as he then was) sitting also as a single judge in which he dealt with an

> application for an extension of time to appeal. This case, in my view, captures the essence of the exercise of the discretion with respect to applications of this type, and applications for extensions of time generally, (where no sanction is specified for failure). [See paragraph 33 above where the statement of Sir Dennis Byron C.J. is quoted]. The Full Court recently applied these principles in relation to an application for extension of time to appeal in the case of Spectrum Galaxy Fund Ltd. v Xena Investments[28]"

[53] Our posture at the hearing has been further justified by the more recent decision of the Privy Council in the Trinidad case The Attorney General v Keron Matthews[29] which was delivered on 20th October 2011. This decision has overtaken, but fortified our judgment. 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).

It was held that where the language of the rules admits of only one interpretation it must be given effect.

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[28] Territory of the Virgin Islands Civil Appeal No. 13 of 2011 (oral judgment delivered on 27th September 2011).
[29] [2011] UKPC 38.

[54] The recognized and established principles which existed prior to CPR 2000 for determining an application for extension of time have not been trumped by the overriding objective in CPR 1.1. Dealing with cases justly when giving effect to the overriding objective requires that applications for extension of time be dealt with in accordance with those recognized principles subject to any relevant Practice Direction or Rules of the Supreme Court that may exist. I would hold that the preferred approach when considering applications for extension of time for the time being, is reflected in the decision in Carleen Pemberton v Mark Brantley, subject to any relevant Practice Direction or Rule of the Supreme Court.

Conclusions

[55] I would say therefore, that the application for leave to appeal should be granted since the appeal has more than a realistic prospect of success. There were also compelling reasons for hearing the appeal. The application should be treated as the appeal. I stated previously at paragraph 12 above that the affidavit evidence that was before the learned judge had cleared the criteria for CPR 26.8 in my respectful view. Consequently, it also would clear the criteria stated in Carleen Pemberton v Mark Brantley where we exercise the discretion to determine the application for extension of time afresh. In my view the application would be granted and I would give the applicant 30 days within which to file the defence from the date of delivery of this judgment. I would therefore allow the appeal, set aside paragraphs 2 and 3 of the order of the learned judge which denied COW an extension of time to file its defence and awarded costs against COW to be assessed if not agreed.

[56] In summary, I would hold that –

(1) CPR 26.7(2) admits of only one interpretation and extending this rule to apply to CPR 10.3(1) and other factual situations which fit uncomfortably under the rule, having regard to the scheme of CPR 2000, produces results which are untenable and inconsistent with the overriding objective.

(2) The statements of Lord Justice Brooke in Sayers have been taken out of context, giving rise to misunderstandings and error in applying CPR 26.8 to all applications for extension of time. Lord Justice Brooke advocated that the checklist under the English CPR 3.9(1) should be taken into account along with the overriding objective in a case of complexity. The case Sayers was a case involving allegations of professional negligence against a firm of accountants, and was of some complexity. The time for appealing had already expired when the application for extension of time was made. Lord Justice Brooke recognized that in cases which did not present complicated circumstances it was unnecessary to invoke the relief from sanctions criteria. The decisions of our Court considered at paragraphs 6, 10, 11, 12 and 25 to 35 of this judgment do not reflect due regard to this distinction.

(3) The approach in Sayers does not require an applicant to file an application for relief from sanctions along with the application for extension of time. CPR 27.8 stipulates the circumstances that must exist for a party to apply for extension of time and relief from sanctions. That party would have to be seeking to vary a date which the court has fixed for either a case management conference; or a date set by a court order to do something and the order specifies a sanction for non-compliance; or a date for pre-trial review, return of a listing questionnaire, or a trial; or where a party wishes to vary a date set by the court or the rules for doing any act which will affect any of the previously mentioned dates. It is only where those circumstances exist and the party seeks to vary a date set in the timetable after the deadline date has passed that CPR 27.8(4) requires that the party must apply for an extension of time and relief from the sanction to which the party has become subject under these Rules or any court order.

(4) The circumstances envisaged in CPR 27.8 certainly did not exist for the applicant. Neither was there any express sanction to which the applicant

had become subject under CPR 2000 or any court order. The applicant, on the authority of Sayers, would be subject to an implied sanction only where the learned judge found the case to be complex; and the criteria to be applied to the application for extension of time in that case would be left to the discretion of the judge depending on how the judge saw it.

(5) The instant case did not present any complex circumstances as to cause an invocation of CPR 26.8 where the Sayers approach is applied. In such a case the learned judge would be exercising her case management powers to extend time under CPR 26.1(2)(k) only, and not under CPR 27.8(4). In that regard, CPR 26.9 would be applicable. The learned judge would be making an order to put matters right under CPR 26.9(3) in the absence of any stated consequence of failure stipulated by a rule, practice direction, or order.

(6) The learned judge erred in refusing to consider the merits of the application for extension of time because no application for relief from sanctions was filed.

(7) An application for extension of time to perform an interlocutory step in the proceedings prior to a scheduled case management conference, would require a different approach and different considerations from an application for extension of time involving a failure to comply with case management directions; or a failure to file an appeal against a decision on the merits after a trial; or a failure to make a timely application for leave to appeal an interlocutory decision.

(8) The absence of an express criteria in the Rules for applications for extension of time falling outside of the purview of CPR 26.7(2) and (3); CPR 26.8; and CPR 27.8(3) and (4); does not mean that there is no established criteria for determining applications for extension of time.

(9) The recognized and established principles which existed prior to CPR 2000 for determining an application for extension of time have not been trumped by the overriding objective in CPR 1.1. Dealing with cases justly when giving effect to the overriding objective requires that applications for extension of time be dealt with in accordance with those recognized principles, subject to any relevant Practice Direction or Rule of the Supreme Court. The preferred approach when considering applications for extension of time for the time being, subject to a Practice Direction or Rules of the Supreme Court is reflected in the decision in Carleen Pemberton v Mark Brantley.

Ola Mae Edwards
Justice of Appeal

Janice M. Pereira
Justice of Appeal

Davidson Kelvin Baptiste
Justice of Appeal