

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVP2020/0034

BETWEEN:

OSCAR VARGAS

Respondent/Appellant

and

[1] BARBARA VARGAS (NEE PIERRE)

1st Respondent/Applicant

[2] CIBC FIRST CARIBBEAN INTERNATIONAL BANK
(BARBADOS) LIMITED

[3] CARIBBEAN UNION BANK

Respondents

Before:

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mde. Margaret Price-Findlay

Justice of Appeal

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

Appearances:

Ms. Chantal Thomas-Marshall for the Respondent/Appellant

The 1st Respondent/Applicant in person

Ms. Mandi A. Thomas for the Second Respondent.

2023: March 20;
December 6.

Notice of appeal – Strike out application – Application test – Whether judgment and orders are interlocutory or final - Whether the notice of appeal ought to be struck out as a nullity as no leave to appeal had been obtained

Oscar Vargas (“the Respondent/Appellant”) and Barbara Vargas (“the Applicant”) were previously married. In 2012, the Respondent/Appellant was ordered to make monthly maintenance payments to the Applicant in respect of their children and in 2015, the court on application by the Applicant made an order increasing the amount to be paid by the Respondent/Appellant. Under the **Maintenance Orders Act**, the orders made in 2012 and 2015 were registered in Antigua & Barbuda. Pursuant to the registration of the said orders, the Applicant sought and on 9th March 2020 obtained a provisional attachments of debts order in respect of the arrears due by the Respondent/Appellant under the maintenance orders.

On 15th June 2020, the Respondent/Appellant applied to discharge the provisional attachments of debts order, however on 15th July 2020, Kelsick J (Ag.) delivered a judgment dismissing that application. Further on the Applicant’s applications, on 21st July 2020, the judge made final a garnishee order against Caribbean Union Bank and on 31st July 2020, the judge made final a further garnishee order against CIBC First Caribbean International Bank (Barbados) Limited.

Initially, the Respondent/Appellant sought leave from this Court to appeal against the judgment dated 15th July 2020, as well as the orders dated 21st July 2020, and 31st July 2020 (“the judgment and orders of Kelsick J (Ag.)”). However, the said application for leave to appeal was dismissed as a nullity having been filed out of time. On 8th October 2020 the Respondent/Appellant then filed an application that time be extended for him to file the notice of appeal (“the extension of time application”) and that the notice of appeal filed on 8th October 2020, be deemed properly filed.

The extension of time application was eventually fixed for hearing before a single judge in Chambers. The Respondent/Applicant sought leave to serve the notice of hearing outside the jurisdiction on the Applicant via WhatsApp and email. On 20th April 2021, Baptiste JA granted that application and adjourned the extension of time application again. On 25th May 2021, Baptiste JA granted the extension of time application and the notice of appeal was deemed to be properly filed.

On 14th October 2022, the Applicant sought among others, to strike out the notice of appeal (“the strike out application”). The main issues raised in the strike out application were: (i) whether the notice of appeal ought to be struck out as a nullity as no leave to appeal had been obtained; (ii) whether the orders of Baptiste JA dated 20th April 2021, and 25th May 2021 ought to be set aside; and (iii) whether the Court has jurisdiction to hear the appeal. The Court highlighted that if it is determined that leave to appeal was necessary and it was not granted, then the notice of appeal would be a nullity and accordingly struck out. There would therefore be no need to address issues (ii) and (iii).

Held: granting the application to strike out the notice of appeal filed on 8th October 2020 as a nullity and ordering the Respondent/Appellant to pay the Applicant’s costs on the application to be assessed if not agreed within 21 days of the date of this judgment, that:

1. The proper means for challenging the order of a single judge is by applying to either vary, discharge or revoke that order within 14 days of it being made. Since the

Applicant has not followed the proper procedure in challenging the orders of Baptiste JA, those challenges are not properly before the Court. In any event, as it relates specifically to the order of Baptiste JA dated 25th May 2021, there is no appeal against an order allowing an extension of time for appealing from a judgment or order.

Rules 62.16(A)(1) and 62.16(A)(2) of the **Civil Procedure Rules 2000** applied; Section 31(2)(b) of the **Eastern Caribbean Supreme Court Act** Cap. 143 of the Revised laws of Antigua and Barbuda applied.

2. No appeal shall lie without the leave of the court below or the Court of Appeal from any interlocutory judgment or order. Whether or not a decision is interlocutory or final is determined by the application test, which states that an order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application could have been decided. The question for the Court is thus whether the judgment and orders of Kelsick J (Ag.) are final or interlocutory. In applying the application test one must look at the possible outcomes of the underlying applications. In respect of the orders of Kelsick J dated 21st July 2020, and 31st July 2020, had the Applicant's applications been denied, then the proceedings would have continued, and the provisional orders would have remained in place until discharged or made final. A denial of the applications therefore would not have brought the proceedings to an end or decided the substantive rights of the parties. A similar conclusion is reached when the application test is applied to determine whether the judgment of Kelsick J (Ag.) delivered on 15th July 2020 is final or interlocutory.

Section 31(1) and 31(2)(g) of the **Eastern Caribbean Supreme Court Act** Cap. 143 of the Revised laws of Antigua and Barbuda applied; Rules 62.2 and 62.1(3) of the **Civil Procedure Rules (Revised Edition) 2023** applied; **Candey Limited v Russell Crumpler et al** BVIHCMAP2020/0021 (delivered 21st September 2021, unreported) followed.

3. On the application test, the judgment and orders of Kelsick J are interlocutory. Therefore, leave to appeal should have first been sought and obtained. The Respondent/Appellant not having done so, the Court is therefore constrained to strike out the notice of appeal as a nullity.

Travia Douglas v Shivoughn Warde et al SKBHCVAP2008/0011 (delivered 16th March 2009, unreported) followed.

JUDGMENT

- [1] **PRICE-FINDLAY JA:** Before the Court was an application by Barbara Vargas (“the Applicant”) filed on 14th October 2022 (“the Application”) to strike out the notice of appeal filed by Oscar Vargas (“the Respondent/Appellant”) on 8th October 2020.

Background

- [2] By application filed in ANUHCVAP2020/0020 on 18th August 2020, the Respondent/Appellant sought leave to appeal against the judgment of Kelsick J [Ag.] dated 15th July 2020 and the orders of Kelsick J [Ag.] dated 21st and 31st July 2020, respectively and both entered on 12th August 2020.
- [3] By order dated 22nd September 2020, Farara JA [Ag.] dismissed the application for leave as a nullity as it was filed out of time and no extension of time had been sought or obtained.
- [4] The Respondent/Appellant then filed an application on 8th October 2020, seeking orders that time be extended for the Respondent/Appellant to file the notice of appeal and that the notice of appeal filed on 8th October 2020, be deemed properly filed (“the extension of time application”). This application was assigned under a new appeal number ANUHCVAP2020/0034.
- [5] By orders dated 20th October 2020, 17th November 2020 and 15th December 2020, Michel JA adjourned the extension of time application for want of service on the Applicant, CIBC First Caribbean International Bank (Barbados) Limited, and Caribbean Union Bank (together, the “Respondents”).
- [6] By application filed on 15th January 2021, the Respondent/Appellant sought leave to dispense with service of the extension of time application as per Rule 6.8 of the

Civil Procedure Rules 2000 (“the CPR 2000”).¹ The Respondent/Appellant stated that on two occasions, the services of Federal Express had been engaged to serve the extension of time application, notice of appeal and other supporting documents on the Applicant at her last known address in Florida, United States of America. He further indicated that he even sought to effect service by emailing the documents to the Applicant’s email address as noted in correspondence sent by her. He posited that as the Applicant had not communicated any other address, no further personal service was practical in the circumstances.

- [7] By order dated 19th January 2021, Michel JA granted the application to dispense with service and ordered that the application for an extension of time be listed for hearing before the Full Court. On 12th February 2021, the application was heard before the Full Court. The Full Court therein listed the extension of time application to be heard before a single judge in Chambers.
- [8] By application dated 26th March 2021, the Respondent/Appellant sought permission of the Court to dispense with service of the notice of hearing on the Applicant pursuant to Rule 6.8 of the CPR 2000. By order dated 30th March 2021, Baptiste JA dismissed the application to dispense with service of the notice of hearing and adjourned the application for an extension of time.
- [9] By ex-parte application filed on 13th April 2021, the Respondent/Appellant sought permission to serve the notice of hearing outside of the jurisdiction via WhatsApp and email pursuant to Rule 7.8 of the CPR 2000. By order dated 20th April 2021, Baptiste JA granted the application for service of the notice of hearing outside the jurisdiction and once more adjourned the extension of time application.
- [10] On 25th May 2021, the extension of time application was finally granted by Baptiste JA and the notice of appeal filed on 8th October 2020 was deemed to be properly

¹ The CPR 2000 was repealed on 31st July 2023 and replaced by the Civil Procedure Rules (Revised Edition) 2023 (“the CPR 2023”). Rule 6.8 of the CPR 2000 is the same as rule 6.8 of the CPR 2023.

filed. After the extension of time had been granted, the Respondent/Appellant filed the record of appeal on 28th April 2022.

The application to strike out the notice of appeal

[11] By Application filed on 14th October 2022, the Applicant sought orders of the Court that:

- (i) the notice of appeal filed on 8th October 2020 be struck out;
- (ii) the order of Baptiste JA dated 20th April 2021 be struck out;
- (iii) the order of Baptiste JA dated 25th May 2021 be struck out; and
- (iv) the Respondent/Appellant pay the Applicant's costs of the application.

[12] The application was premised on the grounds that:

- (i) the notice of appeal was a nullity;
- (ii) the Court had no jurisdiction to hear the appeal; and
- (iii) the Order of Baptiste JA dated 25th May 2021 was a nullity.

Issue raised in the Application

[13] The main issue raised is whether the Application ought to be granted. The Applicant has posited several grounds for striking out the notice of appeal and three main sub-issues arise based on these grounds. They are:

- (i) whether the notice of appeal ought to be struck out as a nullity as no leave to appeal had been obtained;
- (ii) whether the orders of Baptiste JA dated 20th April 2021 and 25th May 2021 ought to be set aside; and
- (iii) whether the Court has the jurisdiction to hear the appeal.

The first sub-issue is essentially a knock-out point. If it is determined that leave to appeal was necessary and it had not been granted, then the notice of appeal would be deemed a nullity and would accordingly be struck out. The consequence of this

would be that there would be no appeal before the Court. There would therefore be no need to consider the further sub-issues (ii) and (iii).

Whether the notice of appeal ought to be struck out as a nullity as leave to appeal was necessary and had not been granted

The Applicant's submissions

- [14] The Applicant posited that the notice of appeal was a nullity as no leave had been sought or obtained to appeal. She cited section 31(2)(g) of the **Eastern Caribbean Supreme Court Act**² (the "**Supreme Court Act**") for the position that no appeal would lie from an interlocutory order without leave of either the judge or the Court of Appeal. She also made reference to rules 62.2(1) and 62.2(1)(A) of the **CPR 2000** which states that leave must first be obtained in an interlocutory matter.
- [15] She cited the decision of this Court in **Ferdinand Frampton v Ian Pinard et al**³ which confirmed that the time for appealing runs from the date of the judgment and not the date the decision was drawn up, sealed or otherwise perfected. She further argued that this Court in **Travia Douglas v Shivoughn Warde et al**⁴ confirmed that after the time limit for applying for leave expires, the applicant was not permitted to apply for leave to appeal and instead had lost the opportunity to appeal.
- [16] Kelsick J [Ag.]’s judgment on 15th July 2020 dismissed the application filed by the Respondent/Appellant on 15th June 2020 to discharge the provisional order dated 9th March 2020 and to set aside the order dated 16th February 2015. His order dated 21st July 2020 was a garnishee order against Caribbean Union Bank in enforcement proceedings of maintenance/support orders against the Respondent/Appellant made in the High Court of Saint Lucia and registered for enforcement in Antigua and Barbuda under the **Maintenance Orders (Facilities for Enforcement) Act** (the

² Cap. 143 of the Revised laws of Antigua and Barbuda.

³ DOMHCVAP2005/0015 (delivered 3rd April 2006, unreported).

⁴ SKBHCVAP2008/0011 (delivered 16th March 2009, unreported).

“Maintenance Orders Act”).⁵ The order dated 31st July 2020 was a further garnishee order, this time against First Caribbean International Bank (Barbados) Limited also in enforcement proceedings.

[17] On the basis of the application test in rule 62.1(3) of the **CPR 2000**, the Applicant argued that the judgment and orders made by Kelsick J [Ag.] were interlocutory orders as they were not determinative of the issues that arose on the claim, whichever way the application could have been decided. To support this position, she cited the decisions of **Abraham Zion v Graham Ferguson Lacey et al**⁶ and **Maria Hughes v The Attorney General of Antigua and Barbuda**⁷ and she stated that these decisions state that orders made during enforcement proceedings were interlocutory and not final. The judgment and orders of Kelsick J [Ag.] were not determinative of the enforcement proceedings themselves and the quantum of the claim was still to be decided.

[18] She thus noted that as no leave to appeal had been granted, the notice of appeal filed on 8th October 2020 was a nullity and therefore there was no proper appeal before the Court. Applying the decision in **Travia Douglas**, she argued that the Respondent/Appellant had lost the opportunity to appeal and was no longer in a position to apply for leave to appeal. She further asserted that according to **Ferdinand Frampton**, the Court would no longer be able to grant leave since the Court could not grant leave where there was no jurisdiction to entertain the appeal.⁸ She further stated that even if the notice of appeal were not a nullity, it should still be struck out as the Respondent/Appellant had not complied with rules 62.10, 62.11 or 62.12 of the **CPR 2000**.

⁵ Cap 257 of the Revised laws of Antigua and Barbuda.

⁶ ANUHCVP2007/0029 (delivered 19th February 2008, unreported).

⁷ ANUHCVP2003/0033 (re-issued 13th April 2004, unreported).

⁸ See also *Candey Limited v Russell Crumpler et al* BVIHCP2020/0021 (delivered 21st September 2021, unreported).

The Respondent/Appellant's submissions in opposition

- [19] In opposition to the Application, counsel for the Respondent/Appellant submitted that whilst it was accepted that enforcement matters were generally interlocutory, the orders must be subject to the application test. Counsel for the Respondent/Appellant stated that the Court was empowered under section 33 of the **Supreme Court Act** to deal with all matters unrestrictedly upon the hearing of the matter. He posited that where the appeal was a matter of mixed fact and law, the failure to attain leave did not undermine the jurisdiction of the Court. He also asserted that section 31(1)(b) expressly granted jurisdiction to the Court to deal with a final issue on enforcement of a judgment. The main issue on the appeal, counsel contended, was whether or not the Court should allow its processes to be used for enforcement notwithstanding the registration of the maintenance order pursuant to section 3 of the **Maintenance Orders Act**. Applying the application test, he contended that the orders were not interlocutory.
- [20] The second point raised by counsel for the Respondent/Appellant was that orders of the Court are to stand unless varied or set aside; they cannot be struck out. He argued that the proper means for challenging the order of the Court made by a single judge was rule 62.16(A)(1) of the **CPR 2000**. Further, rule 62.16(A)(2) of the **CPR 2000** calls for an applicant to make the application to review the Court's order not more than 14 days after the order was made. He asserted that the time for reviewing Baptiste JA's orders had long passed and this Court ought not to set them aside in these circumstances and in absence of an explanation for the delay in making the application. Ultimately, he argued that there was no application before the Court to vary the orders of the single judge nor was there an application made in time as per the **CPR 2000**. Consequently, with no application to set aside Baptiste JA's order granting the extension of time and deeming the notice of appeal properly filed, this Court could not properly consider the Application.

Discussion

- [21] I will first treat with the Respondent/Appellant's second point. The Respondent/Appellant asserts that the proper means for challenging Baptiste JA's orders would be to apply under rule 62.16(A)(1) of the **CPR 2000** to vary or set aside the order. I agree. As per rule 62.16(A)(2) if the Applicant wished to challenge the orders of Baptiste JA she ought to have made her application within the timeframe as envisioned by the **CPR 2000**. This was not done and consequently, her challenges to the orders of Baptiste JA are not properly before this Court.
- [22] Moreover, as per section 31(2)(b) of the **Supreme Court Act**, there is no appeal from an order allowing an extension of time for appealing from a judgment or order. Baptiste JA's order dated 25th May 2021 granted the extension of time for the Respondent/Appellant to appeal. That order, being an order allowing an extension of time to appeal, no appeal shall lie against it as per section 31(2)(b). Consequently, the Applicant's challenge to this order is of no moment.
- [23] Notwithstanding these conclusions, as stated above, the Applicant's argument that the appeal be struck out as a nullity as leave to appeal was necessary and had not been obtained or granted is really the knock-out point in this application. If it is determined that the notice of appeal is a nullity, notwithstanding the shortcomings in the Applicant's request to strike out Baptiste JA's orders, the notice of appeal would be struck out.
- [24] Section 31(1) of the **Supreme Court Act** details the Court of Appeal's jurisdiction to hear and determine appeals from the High Court in civil matters. Under section 31(2)(g) no appeal shall lie without the leave of the judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a judge except where: (i) the liberty of the subject or the custody of infants is concerned; (ii) an injunction or the appointment of a receiver is granted or refused; (iii) in the case of a decree nisi in a matrimonial cause or a judgment or order in an admiralty action determining liability; or (iv) in such other cases, to be prescribed, as are in the

opinion of the authority having power to make rules of court of the nature of final decisions.

[25] Rule 62.2 of the **Civil Procedure Rules (Revised Edition) 2023** (“the CPR 2023”)

sets out how a party may obtain leave to appeal. The rule states as follows:

“62.2 (1) Where an appeal may be made only with the leave of the court below or the court, a party wishing to appeal must apply for leave within 21 days of the order against which leave to appeal is sought.

62.2 (2) Where an application for leave has been refused by the court below, an application for leave may be made to the court within 7 days of such refusal.

62.2 (3) Where an application for leave has been refused by the court below, an application for leave may be made to the court within 7 days of such refusal or within 21 days of the date of the order against which leave to appeal is sought, whichever is later.”

[26] Whether or not a decision is interlocutory, or final is determined by the application test as set out in rule 62.1(3) which states that:

“In this Part -

- (a) a determination whether an order or judgment is final or interlocutory is made on the “application test”;
- (b) an order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application could have been decided; and
- (c) an order on an application for disclosure against a person who is not a party is a final order.”

[27] The application test has long been the yardstick by which the courts of the Eastern Caribbean determine whether a decision is final or interlocutory.⁹ Blenman JA in **Candey Limited v Russell Crumpler et al**¹⁰ at paragraph 21 cited with approval the statement by Edwards JA in **Nigel Hamilton-Smith et al v Alexander M. Fundora**.¹¹

⁹ See also *Oliver McDonna v Benjamin Wilson Richardson* AXAHCVP2005/0003 (delivered 29th June 2007, unreported) and *TSJ Engineering Consulting Limited v Al-Rushaid Petroleum Investment Company et al*, BVIHCVAP2010/0013 (delivered 27th July 2010, unreported).

¹⁰ BVIHCVAP2020/0021 (delivered 21st September 2021, unreported).

¹¹ ANUHCVP2010/0031 (delivered 31st August 2010, unreported).

“[21] The application test has been consistently applied in a number of decisions of this Court. In the case of **Nigel Hamilton-Smith et al v Alexander M. Fundora**, Edwards JA explained the test in this way:

“... it is well established in a plethora of decisions that our courts apply the “application test” to determine whether or not the order or decision is interlocutory. The observations of Vaughan Williams LJ in *Herbert Reeves* reflect our preferred approach. The “application test” looks at the outcomes that were possible on the application. The test is whether a decision on the application had it been decided in favour of the appellant or the respondent would have brought an end to the proceedings...A final order must generally be one which ends the litigation and leaves nothing for the court to do but execute the judgment. In other words, the final order must conclusively determine the substantive rights of the parties.” (Underlining supplied)

- [28] Under the application test, the question for this Court is whether the orders and judgment of Kelsick J [Ag.] are final or interlocutory. The Court must therefore determine whether the orders and judgment conclusively decided the substantive rights of the parties and brought an end to the litigation.

Whether the orders made by Kelsick J [Ag.] were interlocutory or final

- [29] A brief chronology of the facts which gave rise to the litigation is as follows: The Applicant and Respondent/Appellant were previously married and had children. On the breakdown of the marriage, the Applicant filed for divorce in Saint Lucia and the *decree nisi* was granted in 2013. By consent, in 2012, the Respondent/Appellant in this application was ordered to pay to the Applicant maintenance of not less than \$1,500.00 per child per month and half of any medical and educational costs. In 2015, the Applicant sought to have the consent order varied by increasing the monthly maintenance and fixing the educational and medical expenses at \$788.00 per month. The Applicant’s application was heard and granted by Belle J in February 2015 in Saint Lucia. The orders made in the High Court in 2012 and 2015 were subsequently registered in Antigua and Barbuda under the **Maintenance Orders Act**. Pursuant to the registration of the orders in Antigua and Barbuda, the Applicant sought and, on 9th March 2020, obtained a provisional attachments of debts order

in respect of the arrears due by the Respondent/Appellant under the maintenance orders.

- [30] In his judgment dated 15th July 2020, the judge dismissed the Respondent/Appellant's application to set aside the provisional attachments of debts order made against him in respect of arrears due under the maintenance orders. The judge found that in essence the Respondent/Appellant was asking the court to refuse to enforce the 2012 consent order and the 2015 variation order made in Saint Lucia. The Court found that it had no jurisdiction, based on the grounds advanced by the Respondent/Appellant to refuse to enforce the orders and the application was dismissed.
- [31] As opposed to actually determining the merits of the application, the court found that it had no jurisdiction. On the application test, the authorities show that the court looks at whether or not a decision on the application determined the substantive rights between the parties and brought the litigation to an end. In the case of a lack of jurisdiction such as this, the court has not, in essence, made any substantive determination as to the parties' rights and the application has not truly been determined on its merits. As a consequence, it cannot be said that the judge's judgment brought the proceedings to an end or that it was a final decision.
- [32] Kelsick J [Ag.]'s order dated 21st July 2020 made final the provisional garnishee order made against Caribbean Union Bank. The judge's order dated 31st July 2020 also made final the provisional garnishee order made against CIBC First Caribbean International Bank (Barbados). In both instances, the Applicant would have made initial applications to have the provisional orders made final. In looking at the possible outcomes of the underlying application by the Applicant, had the applications been denied then the proceedings would have continued, and the provisional orders would have remained in place until discharged or made final. A denial of the applications therefore would not have brought the proceedings to an end or decided the substantive rights of the parties.

[33] On the application test, neither the orders nor the judgment of Kelsick J [Ag.] could be considered final. Inevitably, they would all fall in the category of interlocutory orders for which leave would be necessary. Moreover, neither the judgment or orders fell under the categories of exceptions in section 31(2)(g) of the **Supreme Court Act** and so leave would be necessary to appeal. Moreover, it would have been incumbent on the Respondent/Appellant to seek leave to appeal within 14 days of the date of the orders and judgment.¹²

[34] It is noteworthy that the Respondent/Appellant did, in fact, initially seek leave to appeal the orders and judgment of Kelsick J [Ag.] by application filed in ANUHCVP2020/0020 on 18th August 2020. This application for leave was filed out of time and no extension of time having been sought or obtained, Farara JA [Ag.] dismissed the application for leave as a nullity.

[35] In appeal ANUHCVP2020/0034, the Respondent/Appellant then filed an application on 8th October 2020, seeking orders that time be extended for him to file the notice of appeal and that the notice of appeal filed on 8th October 2020, be deemed properly filed. No application for leave to appeal was sought in this new application. Instead, the Respondent/Appellant stated in this application that he had:

“re-evaluated the position as it relates to the computation of time and the Appeal generally and it is now appreciated and understood that a Notice of Appeal as opposed to an Application for Leave to Appeal should have been lodged with the Court in any event. This is because the Final Garnishee Orders of Justice Kelsick dated the 31st July 2020 and the 21st July 2020 and both entered on the 12th August 2020 – which stemmed from the Decision/Judgment dated 6th July 2020 but delivered on or about the 15th July 2020 - brought to an end the enforcement proceedings against the Applicant/Appellant in respect of the Garnishee/Attachment of Debts Orders being sought by the 1st Respondent.”

¹² The deadline for seeking leave to appeal against: the judgment dated 15th July 2020 would have been 30th July 2020; the order dated 21st July 2020 would have been 5th August 2020; and the order dated 31st July 2020 would have been 15th August 2020 (however as this was a Saturday the deadline would have been the next day the court office was open which would have been 17th August 2020).

[36] As to the consequences of filing a notice of appeal in an interlocutory matter where no leave had first been obtained, this Court in **Travia Douglas** made it clear at paragraph 17 that:

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

[37] An appeal struck out as nullity would mean that there is, in essence, no appeal before the Court. Although Baptiste JA’s order of 25th May 2021 would have granted the extension of time to appeal and deemed the notice of appeal properly filed, this order cannot and does not cure the nullity of a notice of appeal filed without leave of the Court where leave was necessary.

[38] The fact remains that, as per the application test, the judgment and orders of Kelsick J [Ag.] were interlocutory and not final. Being interlocutory in nature and as per section 31(2)(g) of the **Supreme Court Act**, leave to appeal should have first been sought and obtained. The Respondent/Appellant not having done so, the Court is therefore constrained to strike out the notice of appeal as a nullity. The notice of appeal thus being struck out, there is no need to consider the further grounds set out by the Applicant in the application to strike out the notice of appeal.

Order

[39] I would therefore order as follows:

- (i) The application to strike out the notice of appeal is granted.
- (ii) The notice of appeal filed on 8th October 2020 is struck out as a nullity; and

- (iii) The Respondent/Appellant shall pay the Applicant's costs on this application to be assessed if not agreed within 21 days of the date of this judgment.

I concur.
Gertel Thom
Justice of Appeal

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

By the Court

Chief Registrar