

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2019/0038

BETWEEN:

WYCLIFFE BAIRD

Appellant

and

[1] DAVID GOLDGAR  
[2] PAUL B. COBURN  
[3] CARIBE (REALTIES) CANADA LIMITED  
[4] IMMEUDBLES CARIBE CANADA LTEE  
[5] BETTS REALTY LIMITED

Respondents

**Before:**

The Hon. Mr. Mario Michel  
The Hon. Mde. Vicki Ann Ellis  
The Hon. Mr. Gerard St. C Farara

Justice of Appeal  
Justice of Appeal  
Justice of Appeal [Ag.]

**Appearances:**

Mr. Christopher Hamel-Smith SC with Mr. Terence Byron and Ms. Talibah Byron for  
the Appellant  
Ms. Midge Morton and Ms. Maurisha Robinson for the Respondents

---

2023: April 26;  
December 22.

---

*Civil Appeal – Interlocutory Application - Application to strike out or dismiss appeal for abuse of process or want of prosecution – Inherent jurisdiction of the court to guard and protect its process from abuse by litigants - Delay in filing record of appeal – Factors to be considered in striking out appeal for want of prosecution – Length of delay- Whether delay in filing record of appeal was inordinate - Reasons for delay – Whether there are good reasons for the delay*

*– Merits of Appeal – Prospects of success on appeal – Prejudice to the litigants – Furthering the overriding objective*

The appellant and the respondents entered into an agreement in 1989, which appears to have fallen apart by 1991, leading to a claim being filed by the appellant against the respondents on 7<sup>th</sup> May 1993. For reasons not explained, 16 years after the claim was filed, the matter came up for trial in the High Court in April 2009. The claim was not tried but on 24<sup>th</sup> November 2009 the court made a ruling on a preliminary point which did not determine the claim. Another 7 years elapsed before the matter came back before the High Court for trial, which trial was conducted on 4<sup>th</sup> and 5<sup>th</sup> May 2016. Judgment on the claim was not rendered until 30<sup>th</sup> July 2019. In her judgment, the learned judge dismissed the appellant's claim, discharged a freezing order previously granted by the court against the respondents, and awarded costs to the respondents. The appellant appealed the judgment by notice of appeal filed on 11<sup>th</sup> September 2019.

On 10<sup>th</sup> April 2020, the transcript of the proceedings in the High Court was prepared by the Registry of the High Court and was obtained by the appellant during the aforesaid month of April 2020. The appellant did not however inform the respondents that he had obtained the transcript until 14<sup>th</sup> July 2021.

By an email dated 5<sup>th</sup> August 2021, the appellant's legal practitioners wrote to the respondents' legal practitioners stating, *inter alia*, that they were instructed to have the appeal ready to be disposed of at the next sitting of the Court of Appeal for St. Kitts and Nevis during the week of 6<sup>th</sup> December 2021 and that they proposed to file submissions and authorities in support of the appeal by 6<sup>th</sup> September 2021. The appellant, however, did not file any submissions and authorities by the proposed September 2021 date. By letter dated 31<sup>st</sup> March 2022, the respondents' legal practitioners wrote to the Chief Registrar pointing out that the record of appeal had still not been filed by the appellant and requested that the appeal be listed for status hearing. At the status hearing on 13<sup>th</sup> June 2022, it was ordered *inter alia* that: the respondents inform the appellant by 17<sup>th</sup> June 2022 of the documents they wished to be included in the record of appeal; the appellant file the record of appeal and submissions by 6<sup>th</sup> September 2022; the respondents file submissions in reply by 7<sup>th</sup> October 2022 and the matter be listed for hearing at the Court of Appeal sitting in St. Kitts and Nevis during the week commencing 7<sup>th</sup> November 2022.

When the appeal came before the Chief Registrar for case management on 30<sup>th</sup> September 2022, neither the record of appeal nor the appellant's submissions had, however, been filed by the appellant. Counsel appearing for the appellant at the case management conference informed the Chief Registrar that he was having difficulty preparing the record of appeal because some pages were illegible and that he intended to file an application for an adjournment of the appeal set down for hearing during the week of 7<sup>th</sup> November 2022.

Thereafter, on 13<sup>th</sup> October 2022, the respondents filed an application seeking an order that the appeal be struck out or dismissed for abuse of process or want of prosecution. The sole issue which arises for determination by this Court is whether the appeal ought to be struck out for abuse of process of the court or dismissed for want of prosecution due to the protracted delay by the appellant in filing the record of appeal.

**Held:** granting the respondents' application; striking out the appeal as an abuse of process and/or dismissing the appeal for want of prosecution; awarding costs on the application to the respondents to be assessed if not agreed within 21 days; and making the orders set out at paragraph 56 of the judgment, that:

1. Courts have an inherent jurisdiction to guard and protect their processes from abuse by litigants. This they can do either by the use of the strike out weapon to strike out claims or appeals as abuses of the process of the court when litigants flout the rules, orders, and procedures of the court or by dismissing claims and appeals for want of prosecution when litigants fail to pursue their claims or appeals expeditiously. The factors that the court must consider in determining whether to dismiss an appeal for want of prosecution are: (i) the length of the delay; (ii) the reasons for the delay; (iii) the merits of the appeal; and (iv) the prejudice to the litigants.

Rules 26.3 and 62.20(1) of the **Civil Procedure Rules, 2000** applied; **Hunter v Chief Constable of the West Midlands Police and others** [1982] AC 529 considered; **The Barbuda Council v The Attorney General et al** ANUHCVP1994/0012 (delivered 15<sup>th</sup> January 2004, unreported) followed.

2. As to the length of delay, while it is correct that no notice of availability of the transcript was sent out by the court office and so the respondents never knew that the transcript was available until 14<sup>th</sup> July 2021, the appellant knew of its availability and had obtained a copy of it since April 2020. It is the appellant who is responsible for the progression of his appeal by filing and serving the record of appeal and his skeleton argument upon receipt of the transcript. Even after it was found out by the respondents that the transcript had been obtained, it took the appellant another 20 months before he actually filed the record of appeal. This cannot be and is not in keeping with the overriding objective and in particular, ensuring that matters are dealt with expeditiously. On these facts and the applicable law, the appellant's delay in filing the record of appeal was inordinate.
3. The reasons put forward by the appellant for the delay are not good ones. There is no explanation by the appellant as to why between the date of receipt of the transcript in April 2020 and the revelation and acknowledgement of his receipt of it on 14<sup>th</sup> July 2021, nothing was done by him to progress the appeal. There is also no explanation as to why between 14<sup>th</sup> July 2021 and the status hearing on 13<sup>th</sup> June 2022 nothing was done to progress the appeal. The explanation proffered by the appellant as to why the record of appeal was still not filed even after the date stipulated in the status hearing order (6<sup>th</sup> September 2022), that 'some pages are illegible', lacks cogency. Additionally, the appellant never availed himself of the other avenues open to him to enable his appeal to be progressed, including applying for an extension of time to file the record of appeal and his skeleton arguments, or filing what might have been an incomplete record of appeal and seeking to amend it once the missing documents were located and the illegible papers were replaced or at least rendered decipherable. Accordingly, there is no satisfactory explanation or reasons for the delay in filing the record of appeal.

4. Having considered the merits of the appeal, in terms of its relative strengths and weaknesses, the Court finds that the appellant does have an appeal that is at least arguable. Nevertheless, this factor alone would not warrant dismissing the strike out application. The Court must have regard to all the factors and the circumstances of the case.

**First Domestic Insurance Co. Ltd. et al v Industrial Enterprises Ltd. et al**  
DOMHCVAP2014/0024 (delivered 27<sup>th</sup> May 2020, unreported) followed.

5. With respect to the issue of prejudice to the litigants, the respondents have suffered and continue to suffer prejudice because of the appellant's inordinate and unreasonable delay in progressing the appeal. The respondents have been prejudiced by being denied the full benefits of their success in the court below since 30<sup>th</sup> July 2019. Further, with a stay of execution being granted by a single judge and subsequently affirmed by the Full Court, the respondents have never been able to fully enjoy the benefits of the judgment which was given in their favour. The fact that the respondents have already received part of the amount due does not negate the fact that they were the successful parties in the lower court and ought not to be unreasonably deprived of any of the fruits of their success. This is an unsatisfactory state of affairs which does not advance the overriding objective to deal with cases justly and to ensure that matters are dealt with expeditiously, and this Court cannot continue to countenance it.
6. In view of all the circumstances, the inordinate, inexcusable, and prejudicial delay by the appellant in progressing his appeal is an abuse of the process of the court, on the basis of which the appeal should be struck out. The inordinate, inexcusable and prejudicial delay in the conduct of the appeal by the appellant also amounts to a want of prosecution of the appeal on the basis of which the appeal should be dismissed as well.

## **JUDGMENT**

- [1] **MICHEL JA:** This is an application by the respondents to strike out or dismiss the appeal filed by the appellant on 11<sup>th</sup> September 2019 for abuse of process or want of prosecution.

### **Background**

- [2] The appellant and the respondents entered into an agreement in 1989, which appears to have fallen apart by 1991, leading to a claim being filed by the appellant against the respondents on 7<sup>th</sup> May 1993. For reasons not explained in the judgment under appeal or in any of the documents filed in the appeal, 16 years after the claim

was filed, the matter came up for trial in the High Court before Belle J in April 2009. Belle J did not however try the claim, but on 24<sup>th</sup> November 2009 he made a ruling on a preliminary point which did not determine the claim. For reasons similarly unexplained, another 7 years elapsed before the matter came back before the High Court for trial, which trial was conducted by Carter J on 4<sup>th</sup> and 5<sup>th</sup> May 2016. Still unexplained, judgment on the claim filed in May 1993 and heard in May 2016 was not rendered until 30<sup>th</sup> July 2019. In her judgment, Carter J dismissed the appellant's claim, discharged a freezing order previously granted by the court against the respondents, and awarded costs to the respondents.

[3] By notice of appeal filed on 11<sup>th</sup> September 2019, the appellant appealed the judgment of Carter J.

[4] On 10<sup>th</sup> April 2020, the transcript of the proceedings in the High Court was prepared by the Registry of the High Court and was obtained by the appellant during the aforesaid month of April 2020. This much was averred by the first respondent in his affidavit filed on 13<sup>th</sup> October 2022<sup>1</sup> and was not controverted by the appellant in his affidavit in response filed on 28<sup>th</sup> October 2022. The appellant did not however inform the respondents that he had obtained the transcript until 14<sup>th</sup> July 2021, the day after the respondents' legal practitioners had written to the Registrar of the High Court (and copied the appellant's legal practitioners) requesting an update on the preparation of the transcript.

[5] By an email dated 5<sup>th</sup> August 2021, the appellant's legal practitioners wrote to the respondents' legal practitioners stating, *inter alia*, that:

1. they were instructed by the appellant to make every effort to have the appeal ready to be disposed of at the next sitting of the Court of Appeal for St. Kitts and Nevis during the week of 6<sup>th</sup> December 2021;

2. the appellant proposed to file submissions and authorities in support of the appeal by 6<sup>th</sup> September 2021, that the respondents would file submissions and authorities in response by 6<sup>th</sup> October 2021, with the appellant at liberty to reply by 29<sup>th</sup> October 2021; and

---

<sup>1</sup> Affidavit of David Goldgar filed on 13<sup>th</sup> October 2022, paragraph 8.

3. the appellant proposed to complete the record of appeal in 2 paginated bundles, with the first bundle to be completed during the course of the month of August 2021.

[6] The month of August 2021 came and went, as did the week of 6<sup>th</sup> December 2021, with no submissions and authorities filed by the appellant to which the respondents could respond and no record of appeal (whether first or second bundle) filed by the appellant.

[7] By letter dated 31<sup>st</sup> March 2022, the respondents' legal practitioners wrote to the Chief Registrar pointing out that the record of appeal had still not been filed by the appellant and requested that the appeal be listed for status hearing.

[8] The appeal was listed for status hearing by the Chief Registrar on 13<sup>th</sup> June 2022. At the status hearing it was ordered that:

(1) the respondents inform the appellant by 17<sup>th</sup> June 2022 of the documents they wished to be included in the record of appeal;

(2) the appellant file the record of appeal and submissions by 6<sup>th</sup> September 2022;

(3) the respondents file submissions in reply by 7<sup>th</sup> October 2022; and

(4) the matter be listed for hearing at the Court of Appeal sitting in St. Kitts and Nevis during the week commencing 7<sup>th</sup> November 2022.

[9] On the very day of the status hearing order (13<sup>th</sup> June 2022) the respondents' legal practitioners wrote to the appellant's legal practitioners informing them of the documents which the respondents wished to be included in the record of appeal.

[10] The appeal came before the Chief Registrar for case management on 30<sup>th</sup> September 2022, in advance of the scheduled hearing of the appeal during the week of 7<sup>th</sup> November 2022. Neither the record of appeal nor the appellant's submissions

had, however, been filed by the appellant by the date of case management. Counsel appearing for the appellant at the case management conference informed the Chief Registrar that he was having difficulty preparing the record of appeal because some pages were illegible and that he intended to file an application for an adjournment of the appeal set down for hearing during the week of 7<sup>th</sup> November 2022.

- [11] The response of the respondents (no doubt by then thoroughly frustrated with the delays) was to file an application on 13<sup>th</sup> October 2022 seeking “an order that the appeal be struck out or dismissed for abuse of process or want of prosecution”.

#### **The respondents’ application**

- [12] The nub of the respondents’ application was that over 3 years after the filing of an appeal, very little had been done by the appellant to prosecute the appeal, whilst the respondents are not able to enjoy the fruits of their judgment, execution of which has been stayed pending the hearing of the appeal.
- [13] The respondents contend that the obligation of the appellant to file the record of appeal arose when he obtained the transcript of the proceedings in the court below, which he obtained in the month of April 2020. Thereafter, the appellant must file the record of appeal within 42 days. Assuming that the appellant had obtained the transcript even on the last day of April 2020, he was required to file the record of appeal by 12<sup>th</sup> June 2020. The appellant did not however file the record by 12<sup>th</sup> June 2020 as he was required to do by the rules of court, or ‘in the course of the month of August 2021’ as he undertook to do in his email to the respondents’ legal practitioners on 5<sup>th</sup> August 2021, or by 6<sup>th</sup> September 2022 as he was directed to do by order of the Chief Registrar at the status hearing of the appeal on 13<sup>th</sup> June 2022. Instead, when the appeal came up for case management before the Chief Registrar on 30<sup>th</sup> September 2022, the appellant’s legal practitioner informed the court (and the respondents) for the first time that he was having difficulty preparing the record of appeal because ‘some pages were illegible’. Moreover, the record of appeal was only filed by the appellant on 20<sup>th</sup> March 2023, over 3 ½ years after the

filing of the notice of appeal and almost 3 years after the appellant had obtained the transcript of the proceedings in the High Court. Notably, there was no application ever made by the appellant, or order made by the court, for an extension of time to file the record of appeal, or the skeleton argument of the appellant in support of the appeal, the filing of which should shortly follow the filing of the record of appeal.

- [14] The respondents contend that the apparent indifference which the appellant had shown towards the prosecution of the appeal, ignoring the **Civil Procedure Rules, 2000** (“CPR”) and failing to honour his own undertakings and the orders or directives of the court, constitutes an abuse of the process of the court and the appeal should accordingly be struck out for abuse of process or dismissed for want of prosecution.
- [15] The respondents rely on the judgment of this Court in the Dominican case of **First Domestic Insurance Co. Ltd. et al v Industrial Enterprises Ltd. et al**,<sup>2</sup> the facts of which they contend are similar to those in the present case. In that case, the record of appeal was filed over 3 years after the transcript was available and the reasons given by the appellant for the delay in filing the record of appeal were that there was a large volume of documents in the court below and the time that was required to retrieve these documents which would form part of the record. The appellant in **First Domestic Insurance** also sought to bring into play the passage of Hurricane Maria and the difficulties it created in locating and retrieving documents.
- [16] Blenman JA, who authored the reasons for the decision of the Court in **First Domestic Insurance**, adopted the approach of this Court in **The Barbuda Council v The Attorney General et al**<sup>3</sup> in setting out the 4 factors which a court must consider on an application to strike out an appeal for want of prosecution. These factors are: (1) the length of the delay; (2) the reasons for the delay; (3) the merits of the appeal; and (4) the prejudice to the litigants.

---

<sup>2</sup> DOMHCVAP2014/0024 (delivered 27<sup>th</sup> May 2020, unreported).

<sup>3</sup> ANUHCVP1994/0012 (delivered 15<sup>th</sup> January 2004, unreported).

[17] The respondents contend that the length of the delay between the time when the transcript of proceedings was obtained by the appellant in this case and his filing of the record of appeal was just short of 3 years, whilst it was 3 ½ years in **First Domestic Insurance** - a difference which, for all practical purposes, was insignificant. Indeed, Blenman JA took the view that even if the Court minuses from the length of delay the entire period of over 2 years between the passage of Hurricane Maria and the filing of the record of appeal, the delay in filing the record would be 11 months, which she found 'was clearly inordinate'.

[18] The respondents contend that the reasons for the delay were unsatisfactory. When the appeal came up for case management before the Chief Registrar on 30<sup>th</sup> September 2022 (in advance of the scheduled hearing of the appeal on 7<sup>th</sup> November 2022) the appellant's lawyer, Mr. Terence Byron, informed the court for the first time that he was having difficulty preparing the record of appeal because 'some pages were illegible'<sup>4</sup>; it was also the first time that the respondents and their lawyers were hearing that. The respondents, therefore, contended that over 3 years after filing his appeal, and 2 years and 5 months since obtaining the transcript of proceedings, the appellant had still not filed the record of appeal, because 'some pages', presumably of the transcript, 'were illegible'. The respondents submit that this is not a good reason for the delay.

### **The appellant's response**

[19] The appellant says that his counsel encountered a number of difficulties during the preparation of the record of appeal. There were numerous pages missing from the trial bundles that had been used in the court below and a significant number of pages were either wholly or partly illegible. Counsel therefore had to review numerous files to identify and make copies of the missing or illegible pages for inclusion within the record of appeal. The process was laborious and time consuming and, as such, it was not completed by the time of the case management conference on 30<sup>th</sup> September 2022. After the filing of the application to strike out,

---

<sup>4</sup> Affidavit of David Goldgar filed on 13<sup>th</sup> October 2022, paragraph 4 (k).

the appellant continued efforts to finalise the record of appeal, liaising with the respondents' new legal counsel in February 2023. The appellant says that, after confirming with the respondents' new counsel the documents to be included in the record of appeal, the record was filed on 20<sup>th</sup> March 2023. It is worthy to note that some of the aforesaid statements by the appellant were made in his affidavit filed on 28<sup>th</sup> October 2022 in opposition to the strike out application, without any averment that the statement made by Mr. Goldgar in paragraph 4(k) of his affidavit of 13<sup>th</sup> October 2022 was either inaccurate or incomplete.

#### **The issue for determination**

- [20] The issue which arises for determination by this Court is whether the appeal ought to be struck out for abuse of process of the court or dismissed for want of prosecution due to the protracted delay by the appellant in filing the record of appeal.

#### **The respondents' arguments in support of striking out**

- [21] The respondents submit that since the filing of the appeal by the appellant on 11<sup>th</sup> September 2019, it took 3 ½ years for the record of appeal to be filed by him on 20<sup>th</sup> March 2023. This, they submit, was not only in contravention of the rules of court, but also of the status hearing order dated 13<sup>th</sup> June 2022. There was no order excusing non-compliance by the appellant, nor did the appellant even seek such an order. The respondents further submit that the appellant's request to the respondents' counsel in early 2023 for 2 documents to be provided to him for inclusion in the record could not have contributed to any delay in filing the record of appeal, since the request was made several months after the status hearing order of 13<sup>th</sup> June 2022 directing the filing of the record, and not long before the record was actually filed. In any event, the respondents submit that the requested documents were insignificant.
- [22] The respondents submit, therefore, that not only was the delay in filing the record of appeal inordinate, but the reasons advanced for the delay were not good ones. They submit that the appellant's indifferent attitude to the pursuit of the appeal was

compounded by the fact that the appellant failed to avail himself of the avenues open to him to avert the striking out of his appeal, like seeking an extension of time to file the record or even filing an incomplete record and applying to correct it when once he had obtained any missing documents. In the circumstances, the respondents submit that to allow the appeal to proceed would make a mockery of the court's rules and demote, rather than promote, the overriding objective.

[23] In terms of the third of the 4 factors which our courts have determined that a judge should consider in deciding whether to strike out an appeal for want of prosecution, the respondents submit that the appeal was without merit, because the grounds of appeal essentially challenge findings of fact made by the learned judge, which appellate courts have shown great hesitancy to interfere with. Moreover, the respondents submit that, even if it was shown that the appeal had a reasonable prospect of success, this alone - on the authority of **First Domestic Insurance** – would be insufficient to deny the application to strike out the appeal.

[24] As to the fourth factor, the respondents argue that they had been severely prejudiced by the appellant's conduct. When one considers the history behind the matter, the fact that the dispute arose since about 1991, that many of the witnesses had died, that the dispute had been before several appeal tribunals, and that the Government had money in excess of USD\$10,000,000.00 which has been kept from the respondents pending the determination of this appeal, there could be no serious argument that the respondents had not been prejudiced. The respondents also submit that, based on what was at stake in the appeal, the appellant ought to have approached the matter with much greater expedition.

**Appellant's arguments against striking out**

[25] Whilst the appellant concedes that there had been delay on the part of his attorneys in filing the record of appeal, the delay – he submits - was far less extensive than the 3 years contended by the respondents. The appellant argues that the length of the delay was 6 ½ months, because the obligation to file the record of appeal only arose when, in accordance with rule 62.9(1)(a) of the CPR, the court gives notice to

the parties that the transcript is available. Thereafter, in accordance with rule 62.12(3), the appellant would have 42 days to file the record of appeal. The appellant accordingly submits that until the notice was given, no obligation to file the record of appeal arose. The appellant states that the court never gave notice of the availability of the transcript and that it was the appellant's counsel who arranged with the Registrar of the High Court to have the transcript prepared. The appellant submitted, therefore, that the earliest date by which the obligation arose to file the record of appeal was 6<sup>th</sup> September 2022, by virtue of the status hearing order of 13<sup>th</sup> June 2022. Consequently, when the appellant filed the record of appeal on 20<sup>th</sup> March 2023, this resulted in a delay of only 6 ½ months in filing the record.

[26] The appellant further contends that in seeking to have the record of appeal filed by 6<sup>th</sup> September 2022, counsel encountered problems. Some documents to be included in the record were missing pages and many pages were wholly illegible or partly legible. Counsel for the appellant would have contacted the Registry of the High Court to source some of the documents, but a mold outbreak at the Registry meant that the files in this matter were not available to counsel. The appellant's counsel also searched through his office's archives and this proved to be a time-consuming and laborious effort. The appellant further contends that the delay was compounded by the fact that the respondents had changed their attorneys and the appellant only found out about this in early 2023. Further, the respondents' original attorneys never properly confirmed what documents they wished to have included in the record. Whilst conceding that he could have filed the record and seek an order correcting it, the appellant contends that this would not allow the appeal to be heard more expeditiously than simply filing the correct record in the first place.

[27] The appellant submits that the appeal was strong on its merits, because the learned judge had misconstrued the case of **King et al v Urban & Country Transport Ltd et al**<sup>5</sup> which was an authority for the proposition that when neither party was in a position to close on the date of closing, that did not put an end to the contract. The

---

<sup>5</sup> (1973) 1 O.R. (2d) 449.

appellant says that this contradicted the judge's finding of repudiatory breach by the appellant. The appellant submits that the respondents were not in a position to close on 19<sup>th</sup> February 1991, since the 5<sup>th</sup> respondent was in a state of dissolution, having been struck off the register of companies in Canada since 1974; and the appellant says that this was admitted by the respondents. The judge, he says, then erroneously decided that the agreement between the parties was terminated as a result of the appellant's repudiatory breach in failing to close on 19<sup>th</sup> February 1991, and that the respondents accepted such breach; the learned judge accordingly dismissed the appellant's case. The appellant further contends that he did not need to give evidence and/or call any witnesses, nor cross-examine the 1<sup>st</sup> respondent, since the strength of the appeal came from the 1<sup>st</sup> respondent's unchallenged evidence that the respondents were not in a position to close on 19<sup>th</sup> February 1991.

- [28] The appellant submits that the delay did not cause any significant unfairness to the respondents, since the respondents had already received more than \$17,000,000.00 and, if the appeal were to succeed, the remaining \$10,000,000.00 to be paid by Government would belong to the appellant and not to the respondents. The appellant submitted that, in the circumstances, it would be contrary to the overriding objective for the Court to exercise its discretion to strike out the appeal for want of prosecution.

### **The Law**

- [29] The legal provisions and principles applicable to the application to strike out the appeal are not in dispute. Rule 62.20 (1) of the CPR stipulates that:

“In relation to an appeal the Court of Appeal has all the powers and duties of the High Court including in particular the powers set out in Part 26.”

Rule 26.3(1)(c) stipulates that:

“In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that ... the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings”.

- [30] As it pertains to the powers of the Court of Appeal, the reference to 'statement of case' is to be substituted with 'notice of appeal', so that the Court of Appeal may strike out a notice of appeal as an abuse of the process of the court or as likely to obstruct the just disposal of the proceedings.
- [31] The court's power to strike out a statement of case or notice of appeal on the ground of abuse of process is a power which – according to Lord Diplock in the case of **Hunter v Chief Constable of the West Midlands Police and others**<sup>6</sup> - "any court of justice must possess to prevent misuse of its procedure in any way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."
- [32] As to the factors the Court must consider in determining whether to dismiss an appeal for want of prosecution, these were set out by Chief Justice Byron in the case of **The Barbuda Council v The Attorney General et al**<sup>7</sup> as follows: (i) the length of the delay; (ii) the reasons for the delay; (iii) the merits of the appeal; and (iv) the prejudice to the litigants.

### **Length of delay**

- [33] There can be no question that there was a delay in filing the record of appeal. The parties however dispute the length of the delay, with the respondents contending that the delay was in excess of 3 years, and the appellant arguing that it has only been 6 ½ months since he was obligated to file the record. The appellant's argument is that no obligation to file the record of appeal arose before the status hearing order, since the Registry never sent out the notification to the parties that the transcript was available, although it was contended by the respondents and not controverted by the appellant that the appellant had obtained the transcript since April 2020,

---

<sup>6</sup> [1982] AC 529 at 536.

<sup>7</sup> ANUHCVP1994/0012 (delivered 15<sup>th</sup> January 2004, unreported).

which had to have been sometime between 10<sup>th</sup> April 2020 when it was prepared and 30<sup>th</sup> April 2020, which was the last day of that month.

[34] What the appellant seems to be asking this Court to find is that, despite having the transcript in hand since April 2020, no obligation to file the record of appeal would arise unless and until a notification is sent out by the court office to the parties that the transcript was available, or the appellant is ordered by the Court to file the record by a particular date. So an appellant would write to the Registry of the High Court requesting the transcript of proceedings; he would obtain the transcript and sit on it for nearly 3 years, until a status hearing, convened at the request of the respondents 2 years after the receipt of the transcript, directs him to file the record of appeal by a stated date. But that's not the end of it. Having been given a date by an order made by the Chief Registrar at a status hearing by which date he must file the record, the appellant still does not file it by the date ordered and complains instead about his difficulty in reading or locating documents; a difficulty which either would not have arisen if he had sought to compile and file the record when he had obtained the transcript, or one which there would have been adequate opportunity to resolve.

[35] No rule of court could countenance such an absurdity. The party who requested the transcript and who requires it to comply with his obligations under the rules of court, obtains the transcript requested by him and awaits a notification by the court office that the transcript is ready (the same one that he has already obtained from the court office) before he does what he is required to do under the rules to prosecute an appeal filed by him.

[36] On the facts, it is correct that no notice of availability of the transcript was sent out by the court office and so the respondents never knew that the transcript was available; but the appellant knew; and it is he (the appellant) who must act upon receipt of the transcript by filing and serving the record of appeal and his skeleton argument. Should this Court overlook the fact that the appellant actually had the transcript and did nothing to progress the appeal, not even informing the

respondents that he had the transcript until he was found out over 15 months later. Even then, it took the appellant another 20 months before he actually filed the record of appeal. This cannot be and is not in keeping with the overriding objective.

[37] Rule 1.1(1) of the CPR provides that the overriding objective of the CPR is to enable the court to deal with cases justly. Subrule (2) provides a list of non-exhaustive factors that the court ought to take into consideration in furthering the overriding objective, one of which is to ensure that matters are dealt with expeditiously. Rule 1.2 specifies that in interpreting any rule the court must seek to give effect to the overriding objective. Rule 1.3 places a duty on the parties to help the court to further the overriding objective. In interpreting rule 62.9(1)(a) in light of the overriding objective, the purpose of the notification by the court office is to let parties know that the transcript is ready so that they could pay the requisite fee and obtain a copy of it. It would appear that if the parties, particularly the appellant who is responsible for progressing the appeal, obtains a copy of the transcript prior to the notification being sent out, the need for the notification by the court office is rendered nugatory. What further purpose could the notification serve if the parties already have the transcript in hand?

[38] On these facts and the applicable law, it cannot be gainsaid that the appellant's delay in filing the record of appeal was inordinate.

#### **Reasons for the delay**

[39] I have noted the reasons put forward by the appellant for the delay in filing the record and I find that they are not good ones. In his skeleton arguments, the appellant completely disregarded the period before the date of the status hearing order. There is no explanation by the appellant as to why between the date of receipt of the transcript by the appellant in April 2020 and the revelation and acknowledgement of his receipt of it on 14<sup>th</sup> July 2021 nothing was done by him to progress the appeal. There is also no explanation as to why between 14<sup>th</sup> July 2021 and the status hearing on 13<sup>th</sup> June 2022 still nothing was done to progress the appeal. The rationale advanced by the appellant that the obligation to prepare the record of

appeal did not arise until the status hearing order on 13<sup>th</sup> June 2023 does not find favour with this Court, as would have been revealed in paragraphs 33 to 36 above. The explanation proffered by the appellant as to why the record of appeal was still not filed even after the date stipulated in the status hearing order (6<sup>th</sup> September 2022), that ‘some pages are illegible’, lacks cogency. If the appellant had put any store on complying with the rules or orders of the court, he would at least have attempted at that stage to seek assistance in obtaining legible copies of the illegible pages, whether from the Registry or the respondents’ counsel, or he would have filed the record with the illegible pages and applied to correct the record afterwards, or he would simply have applied for an extension of time to file the record. He did none, which is why I find that the explanation which he proffered and the reasons which he advanced for the delay in filing the record of appeal are not good, acceptable, or satisfactory; whichever of the words used intermittently by the courts that best captures the Court’s disapproval.

### **Merits of the appeal**

- [40] In addressing the merits of the appeal, it must be kept in mind that the Court’s role at this juncture is not to decide the appeal, but rather to examine the relative strengths and weaknesses of the appeal. The appellant’s strongest argument is that the learned judge erred by distinguishing **King v Urban** on the facts. The appellant contended that, as neither party was in a position to close on 19<sup>th</sup> February 1991, the principle in **King v Urban** was applicable and there was no repudiatory breach by the appellant. During oral submissions, counsel for the respondents indicated that there had been expert evidence in the lower court to the effect that, despite being struck off the register of companies in Canada since 1974, the 5<sup>th</sup> respondent still had the capacity to close on 19<sup>th</sup> February 1991.
- [41] In her judgment, Carter J accepted the earlier decision of Belle J which determined the preliminary issue of the appellant’s failure to close. On the basis of Belle J’s ruling, Carter J proceeded to determine the remaining issues, including whether the agreement was terminated as a result of the appellant’s failure to close. In

paragraph 20 of her judgment, Carter J distinguished **King v Urban**, stating that the facts of that case were not the same as those in the case at bar. In **King v Urban** neither party had been ready to close on the contractual date for closing. The Ontario Court of Appeal noted that it had been held that this did not put an end to the contract. The court also stated that it was sufficiently established that a 'time of the essence' provision and non-compliance with it by a claimant, could be set up as a defence only by a party who was himself ready, willing and able to close on the agreed date.

- [42] Carter J noted the appellant's argument that the 5<sup>th</sup> respondent was also not in a position to close, and at paragraph 19 of the judgment<sup>8</sup> she stated:

"The claimant drew to the court's attention the fact that it became known after the date of closing that the defendants may not have been in a position to close at all. The claimant pointed to the contents of a letter from the defendants' solicitors dated 12<sup>th</sup> April 1991 in which counsel expressed that:

'Our clients instruct us to indicate that they too wish to consummate this transaction and without prejudice proposals in this regard follow. We are instructed to state the following in preface to the proposals:

"(1) Our clients maintain their position as set out in our letter to you of 8<sup>th</sup> March 1991 that your client was not in a position to close on 19<sup>th</sup> February 1991.

(2) As has now become apparent neither was Betts Realty Limited in a position to close on that date a fact which was not at the time known to Dr. Goldgar'."

- [43] Despite this, Carter J never determined the issue of whether or not the 5<sup>th</sup> respondent was also not in a position to close. It is arguable that had she determined that issue, she may have then gone on to consider the situation where neither party was in a position to close, and the effect this would have on the agreement. Further, had she addressed her mind to the issue, the parties' arguments as to whether or not expert evidence was led as to the 5<sup>th</sup> respondent's legal capacity to close on 19<sup>th</sup> February 1991 would have been considered. Instead, Carter J simply distinguished **King v Urban** on the facts. Even so, this is all speculative, because

---

<sup>8</sup> SKBHCV1993/0084 (delivered 30<sup>th</sup> July 2019, unreported).

for Carter J to have erred in her application of **King v Urban** there had to have been a positive factual finding that the 5<sup>th</sup> respondent, though ready and willing, was unable to close on 19<sup>th</sup> February 1991.

- [44] Having considered the merits of the appeal, I find that it is at least arguable. Nevertheless, as the authority of **First Domestic Insurance** shows, this factor alone would not warrant dismissing the strike out application.<sup>9</sup> The Court must have regard to all the factors and the circumstances of the case.

### **Prejudice to the litigants**

- [45] With respect to the issue of prejudice to the litigants, the appellant contended that since the respondents have already received more than \$17,000,000.00, the prejudice to them is not as significant as they claim, because the \$10,000,000.00 outstanding will only be theirs if they succeeded on the appeal. They submit too that, in considering prejudice, the Court ought to look at prejudice to both parties and not only to the respondents. But the fact that the respondents have already received part of the amount due does not negate the fact that they were the successful parties in the lower court and ought not to be unreasonably deprived of the fruits of their success. Besides, the appellant made no assertion that he suffered any prejudice by reason of his own delay. It is the respondents therefore who have suffered and continue to suffer prejudice because of the appellant's inordinate and unreasonable delay in progressing the appeal. Even then, I would have been prepared to hold that in a situation in which a party is deprived of the benefits of a judgment in his favour in order that the other party can pursue an appeal against that judgment, it is the prejudice to the first party which alone should be considered by the court, particularly when the second party is protected by a stay of execution order.
- [46] Further, with a stay of execution granted by a single judge on 24<sup>th</sup> March 2020 and affirmed by the Full Court on 12<sup>th</sup> June 2020, the respondents have never had all of the benefits of the judgment which was given in their favour. There is no question

---

<sup>9</sup> DOMHCVAP2014/0024 (delivered 27<sup>th</sup> May 2020, unreported), paragraph 61.

therefore that this is an unsatisfactory state of affairs which does not advance the overriding objective to deal with cases justly and to ensure that matters are dealt with expeditiously, and this Court cannot continue to countenance it.

### **Conclusion**

- [47] It is clear from the foregoing that I am persuaded that the respondents had the better argument. In view of all the circumstances, particularly the inordinate delay by the appellant in pursuing the appeal; the lack of cogency in the reasons advanced by the appellant for the delay; the fact that the appeal, though arguable, cannot be said to be one with a strong prospect of success; the prejudice to the respondents; and the overriding objective; this Court ought properly to exercise its discretion to grant the application to strike out the appeal. I am fortified in my view by the fact that the appellant did not avail himself of the other avenues open to him to enable his appeal to be progressed, including by applying for an extension of time to file the record of appeal and his skeleton arguments, or filing what might have been an incomplete record of appeal and seeking to amend it once the missing documents were located and the illegible papers were replaced or at least rendered decipherable.
- [48] In terms of the actual order to be made on the appeal, the notice of application filed by the respondents on 13<sup>th</sup> October 2022 applied for '[a]n order that the Appeal be struck out or dismissed for abuse of process or want of prosecution'. But what is the difference between these 2 orders sought in the alternative by the respondents in the appeal and should one or both of them be granted?
- [49] As discussed in paragraphs 29 and 30, Rule 26.3(1) clearly sets out the provisions in the Rules dealing with the striking out of statements of case, while Rule 62.20 applies these provisions to the Court of Appeal, in terms of the striking out of documents filed in relation to an appeal, like the notice of appeal.
- [50] So this Court can exercise all of the powers which the High Court can exercise under rule 26.3(1), including the power to strike out. And, of course, the Claim Form which

commences a claim in the High Court is the equivalent of the Notice of Appeal which commences an appeal in the Court of Appeal.

[51] Apart from the Rules, the court – both at the High Court and appellate level – has an inherent jurisdiction to guard and protect its processes from abuse by litigants. This the court can do either by the use of the strike out weapon to strike out claims or appeals as abuses of the processes of the court when litigants flout the rules, orders and procedures of the court, or by dismissing claims and appeals for want of prosecution when litigants fail to pursue their claims or appeals with expedition.

[52] By reason of all of the above, I find that the inordinate, inexcusable and prejudicial delay by the appellant in progressing his appeal is an abuse of the process of the court, on the basis of which the appeal should be struck out. The pertinent facts justifying the court's use of its nuclear weapon bear repeating.

[53] The appellant filed the appeal on 11<sup>th</sup> September 2019, within the 42 days provided for under the CPR, obtained the transcript of proceedings in the court below between 10<sup>th</sup> and 30<sup>th</sup> April 2020, and did not file the record of appeal until 20<sup>th</sup> March 2023, and only after application was made to strike out or dismiss the appeal. The reason given by the appellant's lawyer for this delay is that he was having difficulty preparing the record because some pages were illegible – a reason given for the first time at a case management conference held on 30<sup>th</sup> September 2022 (2 years and 5 months after the last day by which the appellant must have obtained the transcript). The respondents have in the meantime been prejudiced by being denied the full benefits of their success in the court below since 30<sup>th</sup> July 2019 – the date of the judgment of Carter J in the High Court.

[54] I also find that the inordinate, inexcusable and prejudicial delay in the conduct of the appeal by the appellant amounts to a want of prosecution of the appeal by the appellant and that the appeal should be dismissed on this basis as well.

[55] To be clear, either of these findings, that is, the abuse of process or the want of prosecution, suffices as a basis to determine the appeal. I find though that they are both made out on the relevant facts and applicable law.

**Order**

[56] Based on the foregoing, I make the following orders:

- (i) The respondents' application filed on 13<sup>th</sup> October 2022 is granted.
- (ii) The appeal is struck out as an abuse of process and/or dismissed for want of prosecution.
- (iii) The respondents are awarded costs on the application, to be assessed if not agreed within 21 days.
- (iv) The stay of execution granted by the single judge on 24<sup>th</sup> March 2020 and affirmed by the Full Court on 12<sup>th</sup> June 2020 is set aside.
- (v) Costs are awarded to the respondents on the stay application granted by the single judge on 24<sup>th</sup> March 2020 in a sum to be assessed if not agreed within 21 days.

I concur.  
**Vicki Ann Ellis**  
Justice of Appeal

I concur.  
**Gerard St.C Farara**  
Justice of Appeal

**By the Court**

**Deputy Chief Registrar**