

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL**

**COMMONWEALTH OF DOMINICA**

**DOMHCVAP2014/0024**

**BETWEEN:**

**FIRST DOMESTIC INSURANCE CO. LTD.**

Appellant/Respondent

and

**[1] INDUSTRIAL ENTERPRISES LTD.**

**[2] J. ASTAPHAN & CO. (1970) LTD.**

Respondents/Applicants

**Before:**

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

**Appearances:**

Mrs. Heather Felix-Evans for the Respondents/Applicants

Mr. Ian Benjamin, SC with him, Ms. Danielle Wilson for the Appellant/Respondent

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2020: May 15;  
May 27.

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*Civil appeal – Application to strike out notice of appeal – Rule 26.3 (1)(a) of the Civil Procedure Rules 2000 – Failure to file record of appeal and skeleton arguments within stipulated time – Rules 62. 11(1) and 62.12(3) of the Civil Procedure Rules 2000 – Delay – Length of delay – Whether the delay was inordinate – Reasons for delay – Whether there were good and sufficient reasons for delay – Whether there was a reasonable prospect of success on appeal – Prejudice – Prejudice suffered by IEL – Failure to apply for an extension of time pursuant to Rule 26.1(2)(K) – Overriding objective – CPR 1.1 (2) and 1.3 – Costs*

## **REASONS FOR DECISION**

### **Introduction**

- [1] **BLENNMAN JA:** This is an application brought by Industrial Enterprises Ltd. and J. Astaphan & Co. (1970) Ltd. (collectively “IEL”) on 26<sup>th</sup> March 2020 to strike out the appeal (“the strike out application”) of First Domestic Insurance Co. Ltd (“FDIC”) on the basis of want of prosecution. The strike out application was strenuously opposed by FDIC who denied that it failed to take steps to prosecute the appeal. On 15<sup>th</sup> May 2020, this Court heard the application to strike out the appeal and granted it. We indicated then that we would provide written reasons for doing so. We do so now.

### **Background and Chronology**

- [2] In considering the strike out application and in order to provide the requisite context, it is necessary to give a brief outline of the factual background and chronology of events.
- [3] The application arose in circumstances where, following losses suffered due to a fire at the business premises of Industrial Enterprises Ltd. and the passage of Hurricane Dean, both incidents occurring in August 2007, IEL claimed indemnity from FDIC, its insurance provider, under its respective insurance policies for fire, hurricane and loss of profits. These claims were rejected by FDIC by letter dated 20<sup>th</sup> March 2008.
- [4] The denial of these claims culminated in proceedings in the court below. On 15<sup>th</sup> August 2014, three years after the trial of the claim, the learned judge delivered the judgment in favour of IEL wherein over \$4,000,000.00 was awarded under the following heads: (i) stock losses - \$1,734,000.00; (ii) buildings - \$499,500.00 for Building C and \$799,920.00 for Building P; (iii) machinery and equipment - \$400,000.00; (iv) bargain centre stocks - \$162,778.96; (v) other items and component - \$105,944.28 and \$50,688.59; (vi) furniture - \$100,000.00; and (vii) \$18,558.37 for expenses.

- [5] Being dissatisfied with the decision of the learned judge, FDIC appealed and filed a notice of appeal on 25<sup>th</sup> September 2014 challenging primarily the judge's findings of facts, inferences of facts and some findings of law.
- [6] In October 2016, the parties received the notice of the availability of the transcript of trial proceedings from the High Court Registry. By virtue of rule 62.12(3) of the **Civil Procedure Rules 2000** ("the CPR"), FDIC was required to file the record of appeal within 42 days of having received the notice of availability of transcript. FDIC was also mandated by rule 62.11(1) to file the skeleton arguments within 52 days of the receipt of the notice of availability of the transcript. To date, neither rule has been complied with.
- [7] In May 2017, FDIC filed and served on IEL a notice of intention to proceed with the appeal. Thereafter, no further steps were taken to progress the appeal.
- [8] In September 2017, Hurricane Maria struck causing island wide destruction and halted all operations on the island and by extension that of the court.
- [9] On 4<sup>th</sup> February 2019, a hearing was conducted by the Chief Registrar in order to determine the status of the appeal. During that hearing, the Court gave an order ("the Order") in the following terms:
- "1. The parties shall file the Record of Appeal as agreed on or before 29<sup>th</sup> March 2019.
  2. The appellant shall file and serve written submissions with authorities on or before 30<sup>th</sup> April, 2019.
  3. The respondent shall file and serve written submissions with authorities on or before 31<sup>st</sup> May 2019.
  4. The appellant is at liberty to file and serve written submissions, with authorities, in reply, if necessary on or before 14<sup>th</sup> June 2019.
  5. The hearing of the appeal is adjourned to the next sitting of the Court of Appeal in the Commonwealth of Dominica during the week commencing 30<sup>th</sup> September 2019".

[10] It was a common ground that the parties had agreed to communicate with the view to meet the 29<sup>th</sup> March 2019 deadline. Despite IEL complying with FDIC's request on which documents to include in the record of appeal and providing timeous feedback and assistance, FDIC failed to file the record and there was no application for an extension of time before this Court to do so.

[11] At the case management conference held on 5<sup>th</sup> September 2019, the Court noted that FDIC had not complied with the Order and accordingly removed the matter from the list and placed it for status hearing on 23<sup>rd</sup> September 2019. As a consequence, the appeal was not heard during the sitting of the Court in Dominica in September 2019. Again, FDIC had taken no steps to prosecute the appeal.

[12] It is against this background that the application to strike out the appeal for want of prosecution was filed by IEL.

### **Grounds of Application**

[13] The grounds which undergird the application can be categorised as follows:

- (i) FDIC's delay in filing the record of appeal and written submissions was inordinate;
- (ii) FDIC's failure to provide good and sufficient reasons for the delay in filing the record of appeal and the skeleton arguments;
- (iii) Realistic prospect of success; and
- (iv) The prejudice suffered by IEL;

### **The issue before the Court**

[14] Arising from the grounds of application, the primary issue which emerged was whether or not the Court should have exercised its discretion to strike out the appeal on the basis of want of prosecution. In resolving this issue, four main factors which mirrored the grounds of the application, were interrogated.

### **IEL's Submissions**

- [15] Learned counsel Mrs. Felix-Evans remained resolute in her position that the Court should strike out the notice of appeal. In seeking to persuade the Court that this was a proper case in which to exercise its discretion to strike out, Mrs. Felix-Evans methodically took the Court through the pleadings, the relevant paragraphs of the judgment and affidavits filed on behalf of FDIC and IEL. She emphasised that FDIC had been consistently dilatory in meeting the timelines set by the rules in relation to the prosecution of the appeal. She complained that despite the best efforts of IEL and its full cooperation to assist FDIC to complete and file the record of appeal, the latter seemed bent on delaying the expedition in so doing or at the very least, was not efficient in expediting the compilation and filing of the record. To support this argument, she took the Court through several paragraphs of Mrs. Genevieve Astaphan's affidavit.
- [16] Mrs. Felix-Evans reminded this Court that 11 months had elapsed, since the notice of availability of the transcript had been sent to the parties, before Hurricane Maria struck and within that time, FDIC had failed to comply with the rules. She argued that that the failure could not be properly put at the foot of the hurricane; but that FDIC must take full responsibility for its tardiness. Mrs. Felix-Evans accepted that given the voluminous nature of the appeal, 42 days as provided by the CPR may have been an inadequate time within which to prepare and file the record of appeal but argued that 11 months would have been and was in fact highly inordinate.
- [17] She pointed this Court to evidence which indicated that by August 2018, the parties were agreed on the documents which were to comprise the record of appeal. She was adamant that the Court should take into account both the pre and post hurricane period, in determining whether or not the delay was inordinate. Mrs. Felix-Evans insisted that the infractions of the rules in terms of the filing of the record of appeal were committed exclusively by FDIC and she indicated that the evidence reveals that IEL's conduct throughout the entire time was consistent with urgency.

- [18] Mrs. Felix-Evans maintained that the reasons proffered by FDIC for the delay were not good and substantial reasons. She relied on the pronouncements of the former Chief Justice Sir Dennis Byron in the case of **The Barbuda Council v The Attorney General et al**<sup>1</sup> in support of this argument. On this limb, she submitted that rule 62.12(3) places the obligation on FDIC to file the record of appeal and core bundle; and that its only obligation was to inform FDIC of the documents which they wished to have included in the record of appeal or core bundle. She further argued that rule 62.11 directs the appellant (FDIC) to file and serve skeleton arguments on a respondent (IEL) within 52 days of receiving notice of the availability of the transcript. This, to date, this has not been done. Mrs. Felix-Evans also contended that the email dated 18<sup>th</sup> February 2019 from FDIC's attorneys-at-law conveyed the impression that the record of appeal could be filed on time. Mrs. Felix-Evans argued that the unchallenged evidence is that IEL provided timely and co-operative assistance in order to enable FDIC to file the record of appeal by 29<sup>th</sup> March 2019. It is undisputed that this was not done, and the skeleton arguments had not been filed either. She underscored that FDIC made no request for assistance or other documents after August 2019.
- [19] Mrs. Felix-Evans maintained that the judge was careful in his treatment of the evidence and the application of the law and made no error in so doing. She took the Court through various aspects of the judgment in seeking to undergird her arguments on this point. She was adamant that the notice of appeal indicates that the appeal is primarily against findings of fact and that FDIC would have to meet a very high threshold if the Court were to interfere with those findings of fact. She relied on the case of **Beacon Insurance Company Limited v Maharaj Bookstore Limited**<sup>2</sup> in support of this ground.
- [20] During the course of her arguments, she underscored the Courts' obligation to deal with cases justly in keeping with the overriding objective. She said that it is clear from an examination of all the circumstances, that FDIC's failure to prosecute the matter in a

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<sup>1</sup> ANUHCVP1994/0012 (delivered 15<sup>th</sup> January 2004, unreported).

<sup>2</sup> [2014] UKPC 21.

timely manner has resulted in severe hardship and injustice to IEL and more importantly, detracts from the Court's ability to deal with the case justly. During her oral arguments, she further pointed out that even at the date of the hearing of the application, FDIC had not applied for an extension of time within which to file the record of appeal. She submitted that this failure itself was fatal. In support of this argument, she referred the Court to **Michael Baptiste v Yoland Bain-Joseph**.<sup>3</sup> She also urged the Court not to rely on the principles stated in the English cases cited by FDIC. She stated that in any event, those cases were distinguishable from the factual circumstances at bar.

[21] In relation to the prejudice occasioned by the delay, Mrs. Felix-Evans further complained that nearly 6 years after the judgment, IEL was yet to receive any monies towards the judgment. She underscored this by submitting that the loss occurred in August 2007 and the claim was commenced in 2008 consequently, IEL has been deprived of the benefit of its compensation for almost 13 years. She submitted that this has caused tremendous hardship to IEL resulting in it having to obtain loans at commercial interest rates rather than use the judgment sum in the course of its business.

[22] She also argued that the intimation made by counsel for FDIC, during the course of the hearing, that it filed the record of appeal on the morning of the hearing of the strike out application, severely undermined the correctness of its position that several office copies of the documents were destroyed and she urged the Court to view that evidence from Mr. Curtis Tonge, the Executive Chairman of FDIC, unfavourably. Accordingly, she urged the Court to grant IEL's application in its entirety.

### **The FDIC's Submissions**

[23] Learned Senior Counsel Mr. Ian Benjamin<sup>4</sup> eloquently submitted to the Court that this was not a proper case for it to exercise its discretion to strike out FDIC's appeal. He

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<sup>3</sup> GDAHCVAP2006/0026 (delivered 7<sup>th</sup> February 2008, unreported).

<sup>4</sup> The written submissions were filed by learned counsel Ms. Danielle Wilson, but the oral arguments were advanced by Senior Counsel, Mr. Ian Benjamin.

suggested that the Court should utilise some alternative case management options to give directions in relation to the prosecution of the appeal. He submitted that having regard to the totality of the circumstances, the delay was not so inordinate so as to warrant the appeal being struck out for want of prosecution. He posited that the filing of the notice of intention in May 2017 was in fact an indication given of the steps taken by FDIC to proceed with the appeal.

[24] While Mr. Benjamin, SC accepted that there was delay by FDIC in filing the record of appeal, he rejected the complaint that it was inordinate and suggested that the Court had to examine the delay against the backdrop of pre and post Hurricane Maria. He recommended that the Court, in determining the question of delay, should utilise the starting point of 29<sup>th</sup> March 2019 ,as indicated in the Order and not from the date the parties received the notice of availability of the transcript from the Registry.

[25] In a very forceful yet respectful submission, Mr. Benjamin, SC similarly addressed the prospect of success, reasons for delay, prejudice, and the state of the record. On the merits of the appeal, Mr. Benjamin, SC submitted that IEL mischaracterised the appeal as challenging primarily the factual findings of the judge. He argued that the grounds of the appeal can be separated into two parts: (i) challenges to liability and (ii) issues of quantum. He submitted that there were live issues for determination before this Court. These included fraudulent exaggeration, cooperation, insurable interest, quantification and loss of profits. He further submitted there are principles of law, particularly in insurance, that invite further consideration and guidance by this Court. He referred the Court to several paragraphs of the judgment which he says bears out his complaint. He therefore contended that the notice of appeal, when read together with the judgment, demonstrates that the appeal is arguably meritorious and the challenges made, are not only to primary factual findings but also secondary and inferential facts. Accordingly, he submitted that **Beacon Insurance** was not relevant in this case.

[26] Mr. Benjamin, SC submitted that the reasons for the failure to comply with the Order are as follows: (i) the voluminous nature of the file; (ii) the passage of Hurricane Maria and

consequently, the inability to locate various documents, to include in the record of appeal at the chambers or at the registry of the High Court, some of these documents dating back to the 1990s; (iii) the failure of the parties to agree on the documents to comprise the record; (iv) that the obligation to file the record of appeal rested on both parties and therefore some blame must be attributed to IEL; and (v) the complexity of the matter. He relied on the case of **Finnegan v Parkside Health Authority**<sup>5</sup> for the proposition that the absence of any good reason for the delay is just one factor to be considered in the application for an extension of time. He submitted that the Court had to consider all the circumstances of the case and recognise that the overriding principle is that justice must be done. He also relied on the case of **Annodeus Ltd and Anor v Gibson and Anor**<sup>6</sup> in support of his argument on the relevant factors to be considered in determining the application to strike out an appeal for want of prosecution.

[27] Mr. Benjamin, SC argued that in the circumstances IEL had suffered no prejudice, and in his view, it would not be correct to say that IEL suffered prejudice since there was a consent order between the parties to place the judgment sum in an interest bearing account. He therefore argued that any loss purported to have been suffered by IEL is recoverable or at least that any loss would be mitigated.

[28] He conceded that an extension of time had not been applied for but suggested that the reason for this was consistent with the notion of cooperation by IEL and the saving in costs. He also quite properly and professionally conceded that the obligation was on FDIC to prepare and file the record. However, he was adamant that this was not a case, based on the evidence of Mr. Tonge, which demonstrated that there was nothing other than earnest efforts made by FDIC to complete and file the record of appeal. He suggested that in keeping with this effort, on the morning of the hearing, the record of appeal had been filed.

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<sup>5</sup> [1998] 1 All ER 595.

<sup>6</sup> [2000] All ER (D) 115.

[29] Mr. Benjamin, SC relied on rule 26.1(2)(k) of the CPR which provides that the Court has the discretion to extend or shorten time to comply with a rule or order even if the application for an extension of time is made after the time for compliance has passed. He therefore urged this Court to further the overriding objective by dismissing the application and to invoking its discretionary powers to extend the time to comply with the Order, particularly in the light of the fact that the record of appeal had been filed.<sup>7</sup>

### **Discussion**

[30] At the heart of the application, was the question of whether this Court should strike out the appeal on the basis of want of prosecution.

[31] Before addressing the grounds of the application and the applicable law, it is necessary, at this juncture, to refer to some of the relevant provisions in the CPR.

[32] Rule 1.1 provides that the overriding objective of the CPR is to enable the court to deal with cases justly. Subsection (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 stipulates that interpreting any rule or when exercising any discretion given by the rules, the court must seek to give effect to the overriding objective. Critically, rule 1.3 also places a duty on the parties to help the court to further the overriding objective.

[33] The Court can further the overriding objective through its case management powers, granted in Part 26 of the CPR. Of relevance to this application is rule 26.3 (1) (a) which, for the purposes of this application, provides 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 –

(a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings

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<sup>7</sup> Mr. Benjamin, SC indicated that the record of appeal was filed on the morning of the hearing of the application, but the court had not had sight of it and took his word at face value.

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...

[34] Rule 26.1(2)(k) stipulates that:

“Except where 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;

”  
...

[35] Rule 62.14 provides that Parts 25 to 27 of the CPR in so far as they are relevant, also apply to the management of an appeal.

[36] It is also useful to refer to the judicial pronouncements in which the relevant principles guiding the Courts’ exercise of its discretion to strike out an appeal were examined.

[37] In the case of **Barbuda Council**, the issue before the Court was whether or not the appeal should be dismissed for want of prosecution on the ground that over 8 months had elapsed since the Barbuda Council received the transcript and failed to file the record of appeal in the required time or at all. The learned Chief Justice, as he then was, Sir Dennis Byron identified four factors to be considered by the court in the exercise of its discretion. These are: (i) the length of delay; (ii) the reasons for the delay; (iii) the merits of the appeal; and (iv) the prejudice to the litigants. In determining the issue identified above, the Court considered these four factors.

[38] In **St. Kitts Apparel Ltd v The Bank of Nevis**,<sup>8</sup> the appellant filed his notice of appeal on 22<sup>nd</sup> July 1991 but failed to file record of appeal within 6 weeks which would have expired on 22<sup>nd</sup> September 1991 as required by Order 64 Rule 11(1). The respondent filed a motion of dismissal of the appeal on 10<sup>th</sup> March 1992 for want of prosecution

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<sup>8</sup> Saint Christopher and Nevis, Civil Appeal No. 7 of 1992 (delivered 26<sup>th</sup> March 1992, unreported).

and in response the appellant filed an application for an extension of time to file the record of appeal out of time. The reasons given for the delay were that the notes of evidence were disclosed on 27<sup>th</sup> September 1991 and due to illness of his attorney, the record could not be completed for the sitting in October 1991. No explanation was given for failure to prosecute the appeal during the period that elapsed between Oct 1991 and March 1992. The Court observed that:

“As no good and sufficient reason has been advanced **for the delay of over six months in applying for an extension of time to file the record of appeal out of time**, there is nothing on which to base the exercise of the court’s discretion in favour of the appellant and the application for extension of time is therefore dismissed, and the appeal is accordingly dismissed for want of prosecution with costs” (emphasis mine)

[39] In the case of **Pete Drummond et al v Carl McFarlane**,<sup>9</sup> the Court of Appeal in Jamaica granted an application to strike out an appeal filed on 4<sup>th</sup> October 2007. On 26<sup>th</sup> May 2009, at a case management conference, Dukharan JA ordered that the appellant file a supplemental record of appeal to include the notes of evidence and fixed the appeal for hearing on 28<sup>th</sup> September 2009. The matter was removed from the list on that date due to the unavailability of the notes of evidence. The court suggested that efforts be made to agree the notes of evidence in the absence of the learned judge’s notes. Several letters were written to the appellant’s attorneys-at-law following up on the orders and suggestions made by the court, to which no response was given. By letter dated 19<sup>th</sup> September 2011, the applicant’s attorneys-at-law notified the respondent of their intention to apply to the court to strike out the appeal if there were no response within 21 days. Again, there was no response and on 16<sup>th</sup> August 2012, the applicant duly filed its application to strike out the appeal. It was only when the application came on for hearing that there was an attempt to secure the notes of evidence.

[40] Learned Morrison JA, as he then was, in delivering the judgment of the court, stated that:

“There can be no question that the delays in prosecuting this appeal and the level of inaction by the respondent’s attorney-at-law have been extraordinary.

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<sup>9</sup> [2013] JMCA App 28.

It is typical that the only response made on the respondent's behalf was made at the last moment and even then, by the respondent's attorney's secretary and not by the attorney himself. Bearing in mind that the action in this case relates to a 1990 accident, we consider this a case in which the court is fully justified in making an order for immediate striking out of the appeal."<sup>10</sup>

[41] In **Michael Baptiste v Yoland Bain-Joseph**, a case of recent vintage from this Court, learned Edwards JA [Ag.] as she then was, granted an application to strike out an appeal for want of prosecution on the basis of the appellant's failure to file his skeleton arguments within the time limit computed under the rules. Briefly, the facts which led to the application are as follows. The appellant filed his notice of appeal on 27<sup>th</sup> September 2006 and the parties received notice that the transcript of the notes of evidence was ready on 17<sup>th</sup> July 2007. The rules required that the skeleton arguments be filed 52 days after the receipt of this notice of availability of the transcript. This was not complied with despite reminders from the respondent's counsel and the appellant took no further steps to prosecute the appeal until he was served with the strike out application. The learned Edwards JA [Ag.] having examined the relevant provisions and their application to the circumstances of the case observed that:

"[14] ...I am concerned with the exercise of the discretion to strike out the notice of appeal for delay in filing the skeleton argument. In my view, relevant principles from decisions about the exercise of the court's discretion in comparable circumstances, under the provisions of former rules, may be useful in applying the overriding objective in this case. I must therefore endeavour to steer a course which is fair and reasonable to the parties, having regard to the circumstances of this case, the matters set out in CPR 1.1(2), and any relevant principles which may provide additional bases for giving effect to the overriding objective. In balancing the relevant considerations for and against the respondent and the appellant I must also recognise the need to insist in adherence to the rules regulating appeals.

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**[24] ... The principles that I have extracted from Ratnam which in my view synchronise 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**

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<sup>10</sup> Ibid para 10.

**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.” (emphasis mine)

[42] The learned Edwards JA [Ag.] was of the view that though the delay was not inordinate and there was no evidence of prejudice to the respondent, no explanation was given for the failure to file the skeleton arguments within the time limit. She concluded that, “[t]his compel[ed] the conclusion that the default was intentional”. She further stated that slight or no explanations must be accorded slight or no effect.

[43] There is no need to journey as far as the English cases to which Mr. Benjamin, SC has kindly referred the Court and neither is it necessary to delve into the authorities cited by Mr. Benjamin, SC since they do not advance FDIC’s case. With respect to learned Senior Counsel, there are sufficient cases which are closer to home, have stood the test of time, have adequately dealt with this particular point and are more applicable and relevant. The aforementioned pronouncements are very instructive, and the principles espoused therein remain good law, therefore the Court can do more than to helpfully apply them to the case at bar.

[44] Taking into consideration the relevant provisions of the CPR and the cases which have been précised above, it is clear that the Court in exercising its discretion on whether or not to grant the strike out application, is to do so in furtherance of the overriding objectives. Essentially, the focus is directed on what is fair and just in the circumstances of the case since the overarching duty of the Court is to do justice to each case.

[45] It is therefore proposed that each of the factors of the application will be addressed in turn. The issue of length of delay, will be examined first.

### **Length of delay**

[46] Rule 62.12(3)<sup>11</sup> of the CPR provides:

“Subject to paragraph (4), within 42 days of receipt of such notice under rule 62.9(1)(a), **the appellant must prepare and file with the court office 6 sets of the record for the use of the court** comprising a copy of each of the following documents –

- (a) affidavits (with exhibits) which were put in evidence before the court below;
- (b) a transcript or other record of the —
  - (i) evidence given in the court below; and
  - (ii) judgment;
- (c) the documents required by rule 39.1(5) to be lodged with the court (including any core bundle);
- (d) the notice of appeal and any counter-notices that have been served on the appellant; and
- (e) the chronologies under Rule 62.11.” (emphasis mine)

[47] Rule 62.11(1) stipulates that the appellant should file and serve its skeleton arguments on all other parties within 52 days of receiving the notice of availability of the transcript from the High Court Registry.

[48] On the question of delay, the submissions advanced by Mrs. Felix-Evans were more attractive and persuasive, that in determining whether or not the delay was inordinate the Court must look at the entire period of time from the date of the notice of availability of the transcript. In so far as 11 months had elapsed before Hurricane Maria, it was clearly inordinate and it is apparent that there is no need to go any further. However, out of deference and respect for the arguments of learned Senior Counsel Mr. Benjamin, we will look at the post Maria delay.

[49] As indicated earlier, the notice of availability of the transcript was given by the Registry in October 2016. FDIC had 42 days within which to prepare and file the record of appeal and the core bundle and 52 days to file the skeleton arguments. This would therefore have given FDIC until December 2016 to comply with both timelines as set by the CPR. However, the record of appeal was only filed on the morning of the hearing, over 3 years after the receipt of the notice of availability of transcript. To date,

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<sup>11</sup> For clarity, it should be noted that reference to the “notice under rule 62.9(1)(a) refers to the notice of availability of transcript from the High Court Registry.

the skeleton arguments have not been filed. FDIC has attributed the length of the delay to the effects of Hurricane Maria and submitted that it has taken all necessary steps to locate, retrieve and compile the documents that were lost or destroyed in the passage of Hurricane Maria and have spent a considerable amount of hours doing so. However, as Mrs. Felix-Evans indicated and it is clear from the evidence that FDIC failed to outline: (i) what steps were taken; (ii) a description of the documents that are missing and difficult to retrieve; (iii) whether complete agreement between the parties is necessary; and (iv) how the absence of these documents prevents it from completing the record of appeal. There is no doubt that these very bare and bald assertions of FDIC, devoid of any particulars, do little to nothing to advance its case.

[50] The rhetorical question can be asked, namely, if these documents were so critical and were lost or destroyed, how was FDIC able to file the record of appeal on the morning of the hearing of the strike out application and what would have prevented it from doing so several months ago? It is evident that it would have been prudent for FDIC to have filed a record of appeal and then in the event that these documents were located, file a supplemental record. Consequently, when viewed against this backdrop, the strength and veracity of FDIC's argument about the loss and destruction of documents falls away.

[51] While the Court may appreciate the difficulties encountered by FDIC in the preparation of this appeal due to the passage of Hurricane Maria, had FDIC been efficient as they are required to do under the rules, this would not have been the predicament since the record of appeal should have been filed at latest 7 months before Hurricane Maria struck. By the time of the passage of Hurricane Maria, FDIC was already guilty of inordinate delay. Taking into account the post Hurricane Maria period, it is unacceptable, unreasonable and inordinate to take more than 2 years to file the record of appeal. Both the pre-Maria and post Maria infractions make the delay of the process grossly inordinate. Therefore, despite the sophisticated arguments of Mr. Benjamin, SC, it is apparent that this largely administrative task, done under the supervision of an attorney, should reasonably take no more than 3 months from the date of receipt of the

notice of availability of the transcript. This is being very generous in terms of the timeline, even bearing in mind Mr. Benjamin's submission that this was a complex and voluminous matter, which lasted two weeks with a number of expert and lay witnesses.

[52] In **Barbuda Council**, Sir Dennis Byron noted that the period of delay which elapsed due to the appellant's failure to take steps to complete the record of appeal for over 8 months was "excessive and inordinate". Undoubtedly, FDIC's argument that, in the circumstances, the delay is not inordinate is of no consequence. This is because, firstly, even if the Court were minded to accept that time began to run from 29<sup>th</sup> March 2019,<sup>12</sup> the length of delay would still be inordinate as it would be in excess of a year. Taking into account the stipulations of rule 62.12(3) and the protracted history of the matter, I am not persuaded by this argument by learned counsel. If the Court were to accept this submission, this would effectively make a mockery of the rules, the timelines provided therein for the management of cases before the courts and certainly undermine, rather than promote the overriding objective. Secondly, FDIC had 11 months **prior** to the passage of Hurricane Maria to prepare and file the record of appeal but instead chose to remain dormant for this entire period. During this 11-month period, FDIC failed to prosecute the appeal. Given the fact that FDIC has been quite dilatory in pursuing the appeal, the Court cannot, on any view of the facts, agree with Mr. Benjamin's submissions that the length of delay is not so inordinate or excusable, in the circumstances of the case.

[53] There is no doubt that if ever there was a case of real inordinate delay, this was it. The record of appeal was only filed on 15<sup>th</sup> May 2020, over 3 years of having received notice of the availability of the transcript. The CPR was never intended to be utilised like that; in fact the CPR contemplates that all matters should be completed within a year or two. IEL has a judgment in its favour and is yet to enjoy the fruits of said

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<sup>12</sup> FDIC cannot properly rely on its breaches of the rules and its own failure to adhere to the timelines set by the rules, which resulted in the matter being listed in order for its status to be determined, and to then use those directions given at that hearing to claim that it was absolved from its obligation to comply with the strict time lines set out by the CPR.

judgment. That is unfair and unreasonable to say the least and undermines the overriding objectives of the CPR.

#### **Reason for the delay**

[54] FDIC has placed substantial reliance on the passage of Hurricane Maria and the effects that that has had on the preparation of the record of appeal. It is clear that this argument ought to fail in light of the reasons already stated. However, for the value of emphasis, FDIC had approximately 11 months between the date of the receipt of the notice of the availability of the transcript and the passage of Hurricane Maria to prepare the record of appeal. Further, there is no excuse for the inaction of FDIC during this period. One may well form the view that upon close consideration of the various factors and in the totality of the circumstances, FDIC had no interest in pursuing the appeal until they were faced with the threat of the appeal being struck out.

[55] Furthermore, FDIC's argument that IEL also had a responsibility to prepare the record of appeal is moot. The onus rested on FDIC and the only obligation on all other parties was to inform FDIC of the documents which it wished to have included in the record of appeal or the core bundle.<sup>13</sup> The Order was merely the Court trying to assist the parties, primarily FDIC, in light of this matter's protracted journey in the court system, to do what it was obliged to do to bring the matter to finality, in furtherance of the overriding objective. The Order given by the Chief Registrar was never intended to override the clear dictates of the CPR which mandated FDIC to file the record of appeal within 42 days of receiving the notice of availability of the transcript. FDIC therefore cannot unilaterally shift the obligation to IEL in light of the pellucidly clear, mandatory language in rule 62.12(3). At most, as IEL has indicated, the reference directing "the parties" to prepare and file the record of appeal could only mean that IEL was required to assist as much as was reasonably possible. It is clear therefore that, based on the evidence before this Court, this was in fact done by IEL. The evidence adduced also seems to be consistent with the fits and starts by FDIC and a piecemeal

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<sup>13</sup> See Rule 62.12(2) of the Civil Procedure Rules 2000.

approach to the request for the documents to be included in the record. This could never amount to cooperation and working together and definitely was not in keeping with the parties' obligation to further the overriding objective.

[56] It should be underscored that FDIC also failed to file its skeleton arguments in accordance with rule 62.11(1) of the CPR. In its written submissions, FDIC contended that the filing of the record of appeal precedes the filing of submission. The argument is that in a similar way that IEL did not file its submissions since the obligation did not arise, so too in the absence of the record of appeal, FDIC was not in a position to file its submissions. With respect to learned counsel, this is a wholly unmeritorious argument and, in the Court's view, emphasises the general tardiness of FDIC. Furthermore, this argument is untenable considering that the rule does not provide that the filing and service of the record of appeal is a condition precedent to the skeleton arguments being filed and served.

[57] It is also very noteworthy and rather strange that FDIC has failed, to date, to file an application for an extension of time to file the record of appeal and/or to comply with the Order. The statements in the written submissions filed by FDIC, in support of its opposition to the application, purporting to do so are improper, in view of the clear procedure outlined in the rules for invoking the court's discretionary power to extend or shorten time for compliance with a rule or order.

[58] The Court has a duty to protect the interest of justice and in so doing should take into account the fact that IEL has a decision of the High Court, which was rendered in excess of nearly 6 years, in its favour, a duty which could only be discharged by insisting on the reasonable expedition and strict compliance with the timetables laid down by the Court. Further, this Court has the jurisdiction under rule 26.3 to strike out a statement of claim for failure to comply with a rule or order of the court. This also includes a notice of appeal.

[59] In light of all that has been said above, I am of the clear view that the reasons advanced by FDIC are not satisfactory given the totality of the circumstances of the case.

### **The merits of the appeal**

[60] There are very few appeals in which no questions of law would arise. However, while I am of the view that some matters of law do arise in this instance, a review of the notice of appeal reveals that there is no doubt that most of the grounds challenge the judge's findings of fact. It is well-established that an appellate court has a very limited role in terms of findings of fact of a trial judge. Essentially, the function of the appellate court is one of review and it will not lightly interfere with or overturn a trial judge's findings of fact unless it is satisfied that the learned judge was plainly wrong. The principles which guide an appellate court on the approach to findings of fact are well-known, have been consistently applied by this Court in cases such as **Yates Associates Construction Company Ltd. v Blue Sand Investments Limited**,<sup>14</sup> **Skynet Ltd et al v Global Skynet International Ltd et al**<sup>15</sup> and **Flat Point Development Limited v Mary Dooley**.<sup>16</sup> Accordingly, these principles need no extensive recitation. Suffice it to say, unless it can be shown that the findings and conclusions of the court are not supported by the evidence, or it is clear that the court did not take advantage of the benefit of having seen and heard the witnesses, then the appellate court would not disturb those factual findings.

[61] In light of the above pronouncements and without taking a settled position, I am of the view that FDIC seems to have very little prospect of success given the undoubtedly uphill task it would face in challenging the judge's factual findings. In relation to the points of law that have been raised in the notice of appeal, for present purposes I am prepared to assume that Mr. Benjamin, SC is correct in asserting that the appeal is arguable with a real prospect of success. This however by itself is not sufficient to persuade the Court since in exercising its discretion, the Court is required to take into

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<sup>14</sup> BVIHCVAP2012/0028 (delivered 20<sup>th</sup> April 2016, unreported).

<sup>15</sup> AXAHCVP2018/0012 (delivered 3<sup>rd</sup> October 2019, unreported).

<sup>16</sup> ANUHCVP2015/0029 (delivered 13<sup>th</sup> March 2019, unreported).

account all relevant matters. This is only one of them and though relevant, could not be determinative of the manner in which this Court should exercise its discretion.

### **Prejudice**

[62] It is important to state at the outset, that I am not persuaded by FDIC's submissions on this factor. The claim has been outstanding since 2007. For close to 13 years, IEL has not had the benefit of indemnification for the losses incurred and sustained. The fact that the judgment sum is placed in an interest-bearing account is beside the point. It is incomprehensible how it could be reasonably argued that the fact that the parties have consented to the judgment sum being placed in an interest-bearing account could be a substantial or major answer to IEL's claim of prejudice. Essentially, FDIC has reasoned that IEL has not been deprived of the fruits of the judgment in the High Court in the circumstances of the appeal. It is evident that it is sufficient to state this proposition in order for it to be rejected.

[63] As stated by the learned Sir Dennis Byron in **Barbuda Council**, "justice delayed is justice denied". The fire and hurricane caused loss and damage to IEL's businesses in August 2007. The claim was filed in 2008. The trial took place over two weeks in 2011. Through no fault of the parties, judgment was not delivered until 3 years later in August 2014. To date, there is no evidence that IEL has had the opportunity to reap the benefits of judgment which was given in its favour. There is no question 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. It follows therefore that there has been substantial prejudice caused to IEL by the delay in filing the record and the skeleton arguments. FDIC, throughout the years, maintained no active interest in progressing the hearing of the appeal and cannot, at the last moment, seek refuge in the Court's discretionary power to enlarge time where no urgency was displayed in moving the appeal forward. Further, it is surprising, given the substantial sums of monies involved, that FDIC would adopt such a cavalier approach to having the appeal heard and determined.

[64] It is clear, from all that has been said before that I am persuaded by and attracted to the arguments of Mrs. Felix-Evans. In view of all the circumstances including FDIC's consistent failure to observe the rules, the dormancy and delay in prosecuting the appeal, no good and substantial reason for the grossly inordinate delay, the prejudice to IEL and the prospect of the appeal together with the failure to apply for an extension of time, it is evident that there is only one conclusion to which the Court could have arrived at in exercising its discretion namely to entertain the application and strike out the notice of appeal. To exercise this Court's discretion otherwise would neither further the overriding objective nor do justice between the parties.

### **Costs**

[65] On the question of costs, the Court having indicated its position in so far as granting the application, learned counsel Mrs. Felix-Evans asked for costs in the sum of \$2,500.00. Mr. Benjamin, SC in response quite professionally stated that he could not resist the application for costs but suggested that the appropriate sum should be \$1,500.00. However, in view of the circumstances, the Court awarded costs in the sum of \$2,000.00 to IEL.

### **Conclusion**

[66] Based on the totality of the circumstances and for the above reasons, we granted Industrial Enterprises Ltd. And J. Astaphan & Co. (1970) Ltd.'s application and accordingly struck out First Domestic Insurance Co Ltd.'s appeal for want of prosecution and awarded costs to Industrial Enterprises Ltd. And J. Astaphan & Co. (1970) Ltd. assessed in the sum of \$2000.00.

[67] I gratefully acknowledge the assistance of all learned counsel.

I concur.

**Mario Michel**

Justice of Appeal

I concur.

**Gertel Thom**

Justice of Appeal

**By the Court**

**Chief Registrar**