Trinity Term
[2026] UKPC 23
Privy Council Appeal No 0007 of 2025

JUDGMENT

Wycliffe Baird (Appellant) *v* David Goldgar and four others (Respondents) (St Christopher and Nevis)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis)

before

Lord Reed
Lord Hamblen
Lady Simler
Lord Doherty
Dame Sarah Falk

JUDGMENT GIVEN ON
4 June 2026

Heard on 23 April 2026

Appellant
Rowan Pennington-Benton
Nicholas Leah
(Instructed by Sheridans Solicitors LLP)

Respondent
David Halpern KC
Midge Morton
(Instructed by Sharpe Pritchard LLP and Morton Robinson LP)

LORD HAMBLEN:

Introduction

1. This is an appeal from the Court of Appeal of the Eastern Caribbean Supreme Court. It concerns the appropriate tests to apply when determining whether to strike out an appeal where there has been significant delay in its prosecution.

2. The appeal relates to a remarkably stale claim from Saint Christopher and Nevis. The claim form was issued by the appellant more than 33 years ago, seeking specific performance or damages in respect of an option agreement concerning the purchase of an area of land which fell due for completion in 1991.

3. The appeal is from a judgment of Carter J of 30 July 2019 by which she dismissed the appellant's claim. A notice to appeal was filed on 11 September 2019. On 10 April 2020 the appellant received the transcripts of the hearing and, as the Court of Appeal held, was required to file the record of appeal by 12 June 2020 at the latest pursuant to rule 62.12 of the Civil Procedure Rules of the Eastern Caribbean Supreme Court 2000 ("ECSC CPR"). In the event, the record was not filed until 20 March 2023. The respondents accept that the appellant was not solely responsible for the time which elapsed between 5 January and 20 March 2023 but otherwise contend that the delay was entirely the appellant's fault, and the Court of Appeal so found. The delay in the prosecution of the appeal is therefore some 2 ½ years.

4. In its judgment of 22 December 2023, the Court of Appeal found the delay to be "inordinate, inexcusable and prejudicial" (para 52; para 54) and struck the appeal out as an abuse of process and on the grounds of want of prosecution.

5. Permission to appeal to the Judicial Committee of the Privy Council was granted by a differently constituted Court of Appeal in its judgment of 15 April 2024. Various questions were certified, focusing on the tests to be applied for determining whether to strike out an appeal in cases of delay.

The background facts

6. On 6 February 1989, an option agreement for the purchase of approximately 150 acres of land at Major's Bay, St. Christophers was executed between the third respondent and the fifth respondent as the optionor and the appellant as the optionee. Various amendments were later made to the option agreement, including increasing the amount

of land to 175.56 acres and extending the transaction closing date to 19 February 1991. The option was exercised by the appellant on 5 December 1990.

7. Closing did not take place on 19 February 1991 and the respondents subsequently learned that at that time the appellant did not have the required funds to complete, had not met with his partner in the transaction to finalise arrangements and had not yet formed the entities which he intended to use to take title.

8. On 8 March 1991, the respondents' legal representative wrote to the appellant stating that he was in default of the option agreement and had forfeited all option payments made by him but that the respondents were prepared to continue towards closing, on a without prejudice basis, if a mutually satisfactory conclusion could be reached. No such conclusion was reached.

9. On 7 May 1993, the appellant filed a writ of summons and statement of claim against the respondents, seeking damages or specific performance of the option agreement for the purchase of the land.

10. In 2007, the Government of St. Christopher and Nevis acquired 852.355 acres of land at Major's Bay, including the 175.56 acres that were the subject of the option.

The procedural history

11. In April 2009 the matter came on for trial before Belle J. He ruled that the court would determine the central issue in the case, namely whether the appellant was in funds to complete the purchase on 19 February 1991.

12. In his judgment of 24 November 2009, Belle J held that it was the appellant who failed to close the transaction on 19 February 1991 and that, even if the appellant did have access to the required funds, he was responsible for the respondents' inability to close. He further held that: (i) the appellant failed to close on 19 February 1991; (ii) the appellant was not relieved from the obligation to tender by the fact that the landholding companies were not in good standing, and that (iii) whether or not there should have been a new closing date was a matter for the parties to decide, but parties were unable to agree on new terms for the sale of the land and the negotiations broke down. There was no appeal against Belle J's decision.

13. The respondents brought an application seeking an order dismissing the appellant's claim against them on the basis of the findings made by Belle J. On 30 September 2011, Thomas J dismissed the application. He held that the decision of Belle

J related solely to a preliminary issue as approved by the Court and that it did not decide the entirety of the appellant's case.

14. On 5 October 2012, the third and fifth respondents brought a claim against the Attorney General of St. Christopher and Nevis on the grounds that the Government had acted unlawfully in compulsorily acquiring land without compensating them.

15. On 19 April 2013, Thomas J granted judgment in favour of the third and fifth respondents and awarded them compensation in the sum of US$27,392,721.04 together with post-judgment interest.

16. On 25 November 2015, Carter J granted a freezing order restraining the respondents from removing from St. Christopher and Nevis or disposing of, dealing with or diminishing the value of assets up to the value of US$13 million, which expressly included the sums awarded by Thomas J on 19 April 2013. Carter J also ordered that, of the sum of US$27,392,721.04, any unpaid balance be placed into an interest-bearing account to be agreed by the parties pending the resolution of the appellant's claim. More recently, on 17 September 2020, Ventose J ordered that the unpaid balance (about US$10 million) be paid into court.

17. The trial of the appellant's claim took place before Carter J on 4 - 5 May 2016 with judgment being handed down on 30 July 2019.

18. Carter J held that the appellant's failure to close on 19 February 1991 was a repudiatory breach of the contract which was accepted by the respondents and dismissed the claim.

19. On 24 March 2020, Baptiste JA granted a stay of execution of the discharge of the freezing order (as ordered by Carter J in November 2015) until the hearing and determination of the appellant's appeal.

20. On 13 October 2022, the respondents filed a notice of application to strike out or dismiss the appeal for abuse of process or want of prosecution.

21. On 22 December 2023, the Court of Appeal gave judgment granting the respondents' application, striking out the appeal and setting aside the stay of execution.

22. On 15 April 2024, the Court of Appeal granted conditional leave to appeal to the Judicial Committee of the Privy Council and a stay of execution of the judgment of 22 December 2023 until the hearing and determination of the appeal.

The ECSC CPR

23. The ECSC CPR are modelled on the Civil Procedure Rules 1998 of England and Wales ("E&W CPR"). They share their emphasis on the overriding objective and on active case management. Whilst the ECSC CPR were substantially revised in 2023, the appeal under consideration was heard under the 2000 Rules.

24. The importance of the overriding objective is set out in Rule 1:

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

(d) ensuring that it is dealt with expeditiously; and

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

Application of overriding objective by the court

1.2 The court must seek to give effect to the overriding objective when it –

(a) exercises any discretion given to it by the Rules; or

(b) interprets any rule.

Duty of parties

1.3 It is the duty of the parties to help the court to further the overriding objective."

25. This is in materially the same terms as the provision setting out the overriding objective in the E&W CPR. It makes it clear that dealing with cases justly includes doing so in a proportionate manner, having regard to the court's resources and the interests of other court users and ensuring that the case is dealt with expeditiously. The parties are under a duty to help the court achieve this.

26. The conduct of appeals is dealt with in Rule 62. For appeals from final decisions the notice of appeal must be filed within 42 days of the judgment or order (Rule 62.5(1)). The lower court must then arrange for a transcript of the proceedings to be prepared (Rule 62.9). Within 42 days of receiving notice that the transcript is available the appellant must file the record (Rule 62.12(3)). Within 52 days of such notice the appellant must file a skeleton argument (Rule 62.11(1).

27. In relation to case management, Parts 25 to 27 of the ECSC CPR apply to management of the appeal as they do to case management of a trial (Rule 62.14(1)).

28. In relation to the general powers of the court, 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 62.20(1)).

29. Part 26.3 sets out the court's power to strike out a statement of case, or, in the context of appeals, a notice of appeal. Of particular relevance to appellate delay are sub-rules (1)(a) and (1)(c). These provide that a strike out order may be made:

> "…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
>
> …
>
> (c) 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."

These are in materially the same terms as E&W CPR 3.4(2)(c) and (b) respectively.

30. Under Rule 26.4, where there has been a failure to comply with a rule or court order for which no sanction has been imposed, any other party may apply to the court for an "unless order".

31. Rule 26.8 deals with relief from sanctions and is in notably stricter terms than its E&W equivalent. Any such application must be made promptly and the court:

> "(2) … may grant relief only if it is satisfied that –
>
> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the failure; and
>
> (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions."

The Court of Appeal decision

32. The leading judgment was given by Michel JA, with whom Ellis and Farara JJA agreed.

33. The application to strike out was made on the basis of abuse of process and want of prosecution. In this connection the court referred to its powers of strike out under Rule 26.3(1) and, in particular, 26.3(1)(c). It also referred to the court's inherent jurisdiction to strike out for abuse of process and for want of prosecution. In determining whether to dismiss an appeal for want of prosecution it stated that the relevant factors were those set out by Chief Justice Byron in *The Barbuda Council v The Attorney General* (unreported) 15 January 2004 ("*Barbuda Council*"), namely: (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 ("the four-part test").

34. With regard to the length of the delay, the court unsurprisingly rejected the appellant's argument that the time to file the record only ran from when notice of the availability of the transcript was received rather than from the earlier time when the appellant had actually received the transcript. It held that the transcript had been received in April 2020 which meant that, even if the appellant had obtained the transcript on the last day of that month, the deadline for filing the record was 12 June 2020, at the latest. The record was filed on 20 March 2023, 2 years and 9 months later.

35. As to the reasons for the delay, the court found that no explanation has been given for the delay between receipt of the transcript in April 2020 and the appellant's acknowledgement of its receipt on 14 July 2021, or for the delay between 14 July 2021 and a status hearing on 13 June 2022. At that hearing the appellant was ordered to file the record by 6 September 2022 but failed to do so. It held that the explanation given by the appellant, that pages of the record were illegible and needed to be otherwise sourced, lacked cogency, observing that (para 39):

> "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…"

It concluded that the reasons proffered for the delay were not "good, acceptable or satisfactory" (para 39).

36. In relation to the merits of the appeal, the court concluded that "it is at least arguable" (para 44) but that it "cannot be said to be one with strong prospects of success" (para 47).

37. As to prejudice to the litigants, the court found that the appellant made no assertion that he had suffered prejudice by reason of the delay. The respondents had, however, been unreasonably deprived of the fruits of the judgment in their favour, being the outstanding sum of US$10m in respect of which a stay of execution had been ordered. They had (para 45) "suffered and continue to suffer prejudice because of the appellant's inordinate and unreasonable delay in progressing the appeal."

38. In all the circumstances, including the overriding objective, the court concluded that it ought to strike out the appeal.

39. It did so on the ground of abuse of process, observing that the court may do so "when litigants flout the rules, orders and procedures of the court" (para 51). It also did so on the ground of want of prosecution given the "inordinate, inexcusable and prejudicial delay in the conduct of the appeal" (para 54).

The Issues

40. In granting permission to appeal the Court of Appeal in its decision of 15 April 2024 certified the following questions as being of general public importance justifying consideration by the Board:

> "(1) whether it is correct to apply the same test to determine if to strike out an appeal for abuse of process as for determining whether to strike out an appeal for want of prosecution; and (2) whether it is incorrect to apply the same test, and, if so, what is the correct test to apply to determine if to strike out an appeal for: (a) abuse process or (b) want of prosecution.".

41. The parties agree that the principal issues in the appeal are:

(1) What are the correct tests to apply to applications to strike out (i) on the basis of abuse of process and (ii) on the basis of want of prosecution?

(2) Is it correct to apply the same test to determine whether to strike out an appeal for abuse of process as for striking out an appeal for want of prosecution?

(3) Did the Court of Appeal correctly direct itself in law as to the test to be applied?

(4) Should the Court of Appeal's decision be set aside on other grounds advanced by the appellant in his written case including its approach to the question of prejudice to the appellant, the merits of the appeal, and calculation of time for the purposes of delay?

The proper approach to the appeal

42. It will be apparent that the issues raised may be said to raise matters of practice. Apex courts are generally cautious about intervening in such matters. So, for example, the Supreme Court of the United Kingdom ordinarily leaves matters of practice to the Court of Appeal and the equivalent courts in Scotland and Northern Ireland. The relevant principles and caselaw are addressed in detail in the judgment of Lord Reed in *R (on the application of Gourlay) v Parole Board* [2020] UKSC 50; [2020] 1 WLR 5344 at paras 24–36. At para 36 Lord Reed outlined the position as follows:

> "In summary, therefore, this court will ordinarily be slow to intervene in matters of practice, including guidance given by the Court of Appeal as to the practice to be followed by lower courts… The court recognises that responsibility for monitoring and controlling developments in practice generally lies with the Court of Appeal, which hears a far larger number of cases. This court is generally less well placed to assess what changes in practice can appropriately be made. It cannot respond to developments with the speed, sensitivity and flexibility of the Court of Appeal. Nevertheless, it can intervene where there has been an error of law…"

43. These considerations apply with equal if not more force to appeals to the Judicial Committee of the Privy Council. They concern appeals from a different country or territory and a different jurisdiction and the Board has long recognised the importance of respecting the local knowledge and experience of the Court of Appeal in question.

44. In the specific context of civil procedure, restraint is appropriate even where the procedural rule in question is in materially the same terms as the E&W CPR. As Lord Briggs explained in *Bergan v Evans* [2019] UKPC 33 (para 2):

> "The Board approaches issues about civil procedure…with considerable restraint, all the more so where it is, as here, invited to depart from the broadly uniform view about those issues taken by the courts below. Those courts are generally better informed than the Board about the particular conditions and norms of civil litigation in which the rules of procedure … have effect. Even in a case, such as the present, where Part 32 closely follows the slightly earlier provision … in the Civil Procedure Rules of England and Wales, it forms part of a body of procedural rules which are by no means the same, read as a whole, and regulates the conduct of civil proceedings in a jurisdiction with which the courts below are much more familiar than is the Board. It by no means follows therefore, merely because a rule is …worded in almost identical terms as its English ancestor, that it must be assumed to have precisely the same meaning, effect and scope."

45. The Board will accordingly approach the appeal with appropriate restraint, whilst recognising that the Court of Appeal have specifically sought guidance as to the correct tests to be applied.

Issue (1): What are the correct tests to apply to applications to strike out (i) on the basis of abuse of process and (ii) on the basis of want of prosecution?

46. The Board shall consider want of prosecution first. Under the ECSC CPR significant delays are not meant to occur. Litigation is no longer left to the parties to conduct at the pace they wish. The court manages cases pro-actively so as to ensure they are dealt with expeditiously and the parties are under a duty to help the court to do so.

47. If delay does occur then the rules confer on the court the power to deal with it appropriately, including the sanction of strike out provided for in ECSC CPR Rule 26.3.

48. In the context of appellate delay, the most obviously relevant rule is Rule 26.3(1)(a). Such delay is invariably going to involve a failure to comply with a rule, practice direction or order and so the sanction of strike out will be available.

49. In such cases, it appears to be the practice of the Court of Appeal to apply the four-part test set out in *Barbuda Council* in order to determine whether the delay makes it appropriate to strike out the appeal on the basis of want of prosecution. Indeed, it was common ground between the parties that this was the appropriate test to be applied. Other examples of its application include *First Domestic Insurance v Industrial Enterprises Ltd*,

(unreported) 27 May 2020 and *The Development Control Authority v Mondesir Estates Ltd*, (unreported) 27 November 2024.

50. Mr Pennington-Benton for the appellant criticises the adoption of this test on the grounds that it does not have sufficient regard to the issue of proportionality, as required by the overriding objective. He points out that it appears to be derived from cases concerned with the granting of an extension of time to comply with rules, orders or directions, where no specific issue of strike out is raised. The power to strike out is not a broad discretionary power; it is a draconian power to be used as a last resort only where the facts of the case fully justify it, where it is just and proportionate and available alternatives have been properly considered.

51. In the Board's view there is no error of law or principle involved in the Court of Appeal's adoption of the four-part test to guide it in determining whether it is appropriate to strike an appeal out where there has been a failure to comply with a rule, practice direction or order and delay in the prosecution of the appeal. The appellant accepts that the four considerations identified are "undoubtedly relevant" and they are likely to embrace the most relevant matters in the majority of cases. The Board would, however, add two observations.

52. The first is that the four-part test does not purport to be exhaustive and it is important to recognise that there may be other factors of relevance in particular cases. For example, having regard to Rule 26.8, it may be relevant to consider whether the failure to comply which led to the delay was or was not intentional, whether it has been or can be remedied in a reasonable time, and whether it was due to the party or the party's legal practitioner. Having regard to the judgment of Neuberger J in *Annodeus Limited v Gibson* [2000] 2 WLUK 72; The Times, 3 March 2000 it may, in appropriate cases, be relevant to consider the effect of the delay on other litigants and other proceedings and the extent, if any, to which the other party can be said to have contributed to the delay. It may be that matters such as these fall within the four-part test when considering the reason for and the effect of the delay. The point, however, is that it is preferable not to be too prescriptive about what matters are or are not relevant; cases are infinitely variable.

53. The second is that there is some force in the point made by the appellant that it is important to show that proportionality has been taken into account. Any court striking out an appeal will realise that it is a sanction of last resort and will no doubt consider if alternative orders may appropriately be made. It would, however, be preferable for this to be made clear by, for example, expressly stating that alternative sanctions have been considered and explaining why the sanction of strike out has been determined to be appropriate.

54. Finally, both parties referred to and relied upon *Birkett v James* [1978] AC 297, the leading case on the applicable principles on striking out for want of prosecution when litigation was governed by the Rules of the Supreme Court ("RSC"). The RSC involved different rules and a different litigation culture to the E&W CPR. As Lord Woolf MR stated in *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926 at p1934G:

> "The whole purpose of making the CPR a self-contained code was to send the message which now generally applies. Earlier authorities are no longer generally of any relevance once the CPR applies."

The factors identified as relevant considerations in *Birkett v James* are likely to remain so, and indeed are reflected in the four-part test, but they fall to be considered in the context of the more flexible approach of both the ECSC CPR and E&W CPR and not in the straitjacketed way mandated by the *Birkett v James* jurisprudence.

55. In relation to abuse of process, this is an express ground for strike out under Rule 26.3(1)(c), but there does not appear to be any established practice of the court in dealing with such cases. In such circumstances, useful guidance may be found in the approach of the courts of England and Wales to their equivalent E&W CPR provision. That approach is that delay, even if inordinate and inexcusable, is not in itself an abuse of process, but it may amount to abuse if it is combined with some other factor, such as an intention not to prosecute the appeal—see, for example, *Icebird Ltd v Winegardner* [2009] UKPC 24; [2009] 23 EG 93 (CS); *Adelson v Anderson* [2011] EWHC 2497 (QB); *Wearn v HNH International Holdings* [2014] EWHC 3542 (Ch).

56. A factor which may make delay an abuse is "warehousing". This term covers three categories of case which, in the context of appeals, may be stated as follows: (i) when the appellant, from the outset does not intend to bring the appeal to a decision; (ii) when the appellant at first intends to bring the appeal to a conclusion but later decides to abandon it; and (iii) when the appellant starts an appeal intending to see it to its conclusion, but later decides to pause it, planning to revive it if something happens in the future.

57. Categories (i) and (ii) may relatively easily lead to the conclusion that the continuation of the appeal is an abuse of process. Category (iii) is more nuanced. In *Asturion Fondation v Alibrahim* [2020] EWCA Civ 32; [2020] 1 WLR 1627 Arnold LJ summarised the position as follows (at para 61):

> "…a unilateral decision by a claimant not to pursue its claim for a substantial period of time, while maintaining an intention to pursue it at a later juncture, may well constitute an abuse of process, but does not necessarily do so. It depends on the reason

> why the claimant decided to put the proceedings on hold, and on the strength of that reason, objectively considered, having regard to the length of the period in question. A claimant who wishes to obtain a stay of proceedings for a period of time should seek the defendant's consent or, failing that, apply to the court; but it is not the law that a failure to obtain the consent of the other party or the approval of the court to putting the claim on hold automatically renders the claimant's conduct abusive no matter how good its reason may be or the length of the delay."

58. Another factor which may make delay an abuse is if it involves a wholesale disregard for the rules of court—see, for example, *Habib Bank Ltd v Jaffer* [2000] 3 WLUK 866; [2000] CPLR 438 at para 10 per Nourse LJ (citing *Choraria v. Sethia* [1998] CLC 625).

59. The Court of Appeal in this case referred not just to its powers to strike out under the ECSC CPR but also to the exercise of the court's inherent jurisdiction. In circumstances where the power to strike out for appellate delay is adequately founded on the Rules of the ECSC CPR, it is not necessary to consider whether the court's inherent jurisdiction may also be relied upon. The matter is best considered by reference to the ECSC CPR Rules.

Issue (2): Is it correct to apply the same test to determine whether to strike out an appeal for abuse of process as for striking out an appeal for want of prosecution?

60. As explained above, the Board considers that striking out an appeal for want of prosecution is best dealt with under Rule 26.3(1)(a) and by application of the four-part test, whilst recognising that it is non-exhaustive. Striking out for abuse of process is best dealt with under Rule 26.3(1)(c) and by considering whether there are additional factors which render the delay an abuse of process on the facts. Whilst there is overlap between matters to be considered under both Rules, the tests to be applied are not the same.

61. The main focus of the want of prosecution test is the length of the delay, the reasons for it and its effects. The main focus of the abuse of process test is the non-compliance with court rules, directions and orders, the reasons for it and what it demonstrates about the appellant's attitude to the processes of the court.

Issue (3): Did the Court of Appeal correctly direct itself in law as to the test to be applied?

62. In relation to striking out for want of prosecution the Court of Appeal made specific reference to Rule 26.3(1)(c) rather than Rule 26.3(1)(a). It, however, placed considerable reliance on the appellant's breach of the rules and a court order in respect of the filing of the record. Rule 26.3(1)(a) was therefore addressed in substance even though it was not referred to in terms.

63. The court then correctly applied the four-part test, in accordance with established practice and authority, and as agreed by both parties. It is correct that it did not specifically address the question of whether the sanction of striking out was proportionate, but the court must have had this well in mind. The court appreciated and held that the appellant had an arguable claim. It is obvious that the consequence of striking out the appeal would be the loss of that arguable claim and that the appellant would potentially be prejudiced thereby. The alternative orders available to an appellate court are more limited than for a court of first instance. The only alternative suggested to the Court of Appeal was for the court to fix dates for filing of skeleton arguments and that the appeal be listed for the earliest convenient date—ie no sanction at all. It is entirely understandable that the court should reject this in the light of the findings it had made and instead decide that it was appropriate for the court to use what it described at para 52 as its "nuclear weapon". By so describing it, it is apparent that the court had well in mind the serious consequences of so doing. Proportionality was therefore addressed even though it was not discussed.

64. The court was also criticised by the appellant for focusing on prejudice to the respondents rather than to both parties when addressing the head of "prejudice to the litigants". The court was, however, correct under this head to focus on the prejudice caused by the delay, which effectively means prejudice to the respondents. The appellant is unlikely to assert such prejudice and, as the court held, did not do so. Prejudice to the appellant arises from the order the court makes, particularly if it involves strike out. Such prejudice is necessarily taken into account when considering how arguable the claim / appeal is and before making the decision to impose the sanction of striking out.

65. The Board is accordingly satisfied that there was no misdirection or error of law in relation to the test of want of prosecution.

66. In relation to striking out for abuse of process the Court of Appeal specifically referred to Rule 26.3(1)(c). It identified various breaches of rules and orders. With regard to the failure to file the record it noted that the appellant sat on the transcript for 2 years until a status hearing, convened at the request of the respondents, directed him to file the record of appeal by a stated date. It then commented (para 34):

> "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".

It further observed (para 36):

> "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."

With regard to the overriding objective, the court referred to the objective of ensuring that matters are dealt with expeditiously and the duty placed on the parties by Rule 1.3 to further that objective.

67. The court found the delay to be "inordinate, inexcusable and prejudicial". Whilst the court did not specifically consider whether there were other factors which made such delay an abuse, it did in effect conclude that there had been a widespread disregard of the rules. It essentially accepted the following submission made by the respondents (para 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."

68. This "indifferent attitude" was borne out by the court emphasising the following matters in its conclusion (para 47):

> "…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."

69. It further emphasised in its conclusion that it is appropriate to strike out appeals as an abuse "when litigants flout the rules orders and procedures of the court" (para 51), and it plainly regarded this as being such a case in the light of the findings it had made.

70. The court therefore made findings in relation to disregard of the rules sufficient to support its conclusion that the claim should be struck out as an abuse of process and accordingly made no error of law in relation to the test to be applied.

Issue (4): Should the Court of Appeal's decision be set aside on other grounds advanced by the appellant in his written case including its approach to the question of prejudice to the appellant, the merits of the appeal, and calculation of time for the purposes of delay?

71. At the hearing Mr Pennington-Benton realistically accepted that the appeal was confined to alleged errors of law and did not press the issues raised in the written case as to the merits of the appeal and calculation of time for the purposes of delay. The question of how prejudice to the appellant was addressed has been considered above.

Conclusion

72. In conclusion, in the light of the findings made by the Court of Appeal, it was entitled to conclude that the appeal should be struck out on the grounds of want of prosecution and abuse of process. In so concluding the court did not misdirect itself or err in law.

73. For the reasons given, the Board will humbly advise His Majesty that this appeal should be dismissed.