[2016] JMCA Civ 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 135/2012

APPLICATION NOS 111 AND 112/2015

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (AG)
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**THE COMMISSIONER OF LANDS**	**APPELLANT**
AND	**HOMEWAY FOODS LIMITED**	**1ST RESPONDENT**
AND	**STEPHANIE MUIR**	**2ND RESPONDENT**

Mrs Nicole Foster-Pusey, QC, Solicitor General and Miss Carla Thomas instructed by the Director of State Proceedings for the appellant

Miss Carol Davis for the respondents

15, 18, 19 June 2015 and 29 April 2016

DUKHARAN JA

[1] I have read, in draft, the comprehensive judgment of my learned sister, McDonald-Bishop JA (Ag). I agree with her reasoning, conclusion and the orders that she has proposed and I have nothing useful to add.

MCDONALD-BISHOP JA (AG)

Introduction

[2] The question for determination in these proceedings is an important procedural one, albeit, perhaps, not a novel one. It concerns the approach that this court should take in treating with an appellant's non-compliance with the rules and orders of the court by the second date fixed for the hearing of the appeal.

[3] These proceedings concern two applications that have their genesis in an appeal brought by the Commissioner of Lands, the appellant, against the judgment of Lawrence-Beswick J delivered on 31 July 2012 in favour of the respondents, Homeway Foods Limited (the 1st respondent) and Ms Stephanie Muir (the 2nd respondent). The substantive appeal was fixed for hearing, for the second time, before this court during the week commencing 15 June 2015.

[4] The first application (No 111/2015) was brought by the respondents as a preliminary objection to the hearing of the appeal and for an order that the appeal be struck out due to the failure of the appellant to comply with the case management orders made on 8 July 2014 by Dukharan JA, sitting as a single judge in chambers. Those orders were in relation to the filing of skeleton arguments with list of authorities and a supplementary record of appeal containing the skeleton arguments with list of authorities. This application was filed and served by the respondents on 10 June 2015.

[5] The second application (No 112/2015) is that of the appellant for extension of time to comply with the case management orders relating to the filing of skeleton

arguments with list of authorities and for variation of the case management order requiring the filing of the "supplemental" record of appeal. This application was filed on 12 June 2015, one working day before the date that the substantive appeal was scheduled for hearing for the second time.

[6] The hearing of both applications was consolidated, but although the application of the respondents taking objection to the hearing of the appeal and for the striking out of the appeal predated the appellant's application for extension of time and was heard first during the course of the hearing, for practical reasons, the application for extension of time is considered first. The outcome of that application is determinative of whether the respondents' application for striking out succeeds or fails.

The factual background

[7] On 9 March 2006, pursuant to section 5(1) of the Land Acquisition Act (the Act), the Minister of Land and Environment (the Minister) declared, by the requisite statutory notice published in the *Gazette*, that land located at 6 Kensington Crescent, Kingston 5, in the parish of Saint Andrew and registered in the name of the 1st respondent was needed for a public purpose. The purpose was for the provision of offices for the Students' Loan Bureau (the SLB). The 2nd respondent is a director of the 1st respondent and at the time of the declaration was reportedly in the process of acquiring the shares of the 1st respondent. She indicated her interest in the property by letter to the appellant, dated 12 April 2006.

[8] The appellant was subsequently directed by the Minister to take steps for the acquisition of the land and to enter into negotiations to acquire the land by private treaty. The appellant entered into discussions with the respondents for the acquisition of the land by private treaty but those negotiations failed.

[9] On or around May 2007, the land was vested in the appellant and the necessary endorsement was made on the certificate of title by the Registrar of Titles.

[10] An enquiry was held in accordance with section 11 of the Act to determine the award to be made by way of compensation. On 30 April 2007, pursuant to the Act, an award for compensation in the sum of $20,000,000.00 was made to the 1st respondent. The compensation was made payable to the 1st respondent only, as the 2nd respondent had not yet registered her equitable interest in the land. The award was rejected and, by letter dated 18 May 2007, addressed to the appellant, the respondents requested that the matter be referred to the Supreme Court for an appropriate compensation to be determined pursuant to section 17 of the Act. The ground for the rejection and the request for the referral was that the amount offered as compensation was inadequate.

[11] On 17 April 2008, the appellant, by way of a fixed date claim form, referred the matter to the Supreme Court, for a determination of the compensation that should be awarded.

Proceedings in the Supreme Court

[12] The respondents filed their defence and counter-claim in response to the appellant's claim, in which they basically restated their position that the award of compensation was inadequate. They averred, *inter alia*, that the award should have been based on the market value of the land, which, in their view, stood at the time at $40,000,000.00 and also that they had suffered other losses as a result of the compulsory acquisition for which they should be compensated. They counter-claimed for compensation for the market value of the land and for the losses allegedly suffered.

[13] After several adjournments, the assessment of the award commenced before Lawrence-Beswick J, sitting with two agreed assessors in accordance with the Act. While the assessment was being heard, the respondents, on 14 May 2012, filed an application for court orders in which they sought several declarations, which, for the sake of convenience, have been summarised, as follows:

1. The declaration of the Minister made on 9 March 2006, declaring the land likely to be needed for a public purpose, be set aside.

2. All proceedings for the acquisition of the land and the notice vesting the land in the appellant be set aside by reason of the abandonment of the public purpose, namely for the offices of the SLB.

3. The miscellaneous entry endorsed on the certificate of title for the land be removed.

4. The 1st respondent is entitled to resume possession of the said land.

5. That the respondents are entitled to compensation for the wrongful occupation of the land by the appellant, from the date of entry into possession to date hereof.

[14] The respondents also sought orders for costs of the proceedings, costs thrown away and costs for the attendance of the assessors to be paid by the appellant.

[15] The fundamental ground for this application was that the appellant had abandoned the purpose for which the land was acquired. In support of this averment, the respondents exhibited a newspaper article published in The Daily Gleaner on 9 March 2012, which stated that the SLB had sold its lands in Kensington and had bought land in Downtown Kingston, where it intended to put its offices.

[16] The appellant, in response, filed an application to strike out the respondents' application, alleging that it was an abuse of the process of the court. One of the grounds relied on by the appellant was that the respondents had commenced a claim for declaratory judgment by way of notice for application for court orders and not by a fixed date claim form, which was in contravention of Part 8 of the Civil Procedure Rules, 2002 (CPR). The appellant also contended, among other things, that the respondents

had circumvented the judicial review process, which is the appropriate way to have the Minister's order set aside.

[17] Lawrence-Beswick J, being faced with the two applications from the parties, decided that the applications should be heard and so she discharged the assessors from the assessment hearing for an unspecified date. She proceeded to hear both applications together. At the determination of the hearing, she granted orders in these terms:

> "1. That the declaration of the Minister on March 9, 2006 declaring land registered at Volume 1353 Folio 971 likely to be needed for public purpose that is to construct offices of the Students' Loan Bureau be set aside.
>
> 2. That all proceedings for the acquisition of the said land be set aside.
>
> 3. That the Miscellaneous Entry #1534398 endorsed on May 1, 2008 on title of land registered at Volume 1353 Folio 971 be removed by the Registrar of Titles.
>
> 4. [The 1st respondent] is entitled to resume possession of the said land on or before August 3, 2012.
>
> 5. [The 1st respondent] is entitled to compensation for mense [sic] profits from the date it relinquished possession until the date of recovery of possession. If not agreed within 60 days of this Order, these mesne profits are to be assessed by the Registrar of the Supreme Court.
>
> 6. The declarations sought by Fixed date claim form dated April 17, 2008 in the substantive matter are refused.
>
> 7. Costs of these proceedings and costs thrown away are awarded to [the 1st respondent] and [the 2nd

> respondent] as against [the appellant], to be agreed or taxed. The costs thrown away include the fees to be paid to the Assessors in the substantive matter. Strong recommendation that additional *ex gratia* payment be made to the Assessors."

Proceedings on appeal: the background to the applications

[18] The appellant, being dissatisfied with the decision of Lawrence-Beswick J, on 2 November 2012 applied for and subsequently obtained from this court, on 16 June 2014, an extension of time for the appeal to be brought; permission for the notice and grounds of appeal filed on 31 October 2012 to stand; and a stay of execution of the judgment. Another extension of time was also granted to the appellant to file the record of appeal.

[19] The appeal eventually progressed to case management conference before Dukharan JA on 8 July 2014. Up to then, the appellant had not yet filed her skeleton arguments with list of authorities (and a written chronology of events) as required by rule 2.6 of the Court of Appeal Rules, 2002 (CAR) and no supplementary record of appeal was filed by the appellant pursuant to CAR, rule 2.7(7).

[20] At the case management conference, although no formal application for extension of time was filed, Dukharan JA, to the benefit of the appellant, ordered, among other things, that the appellant should file and serve the skeleton arguments with list of authorities on or before 28 November 2014. He also ordered that the respondents were to file and serve their skeleton arguments and list of authorities on or before 15 January 2015. He also made an order that the appellant was to prepare, file

and serve a "supplemental" record of appeal containing the skeleton arguments on or before 2 March 2015. The appeal was fixed for hearing during the week beginning 9 March 2015. (See formal order filed 21 July 2014.)

[21] In effect, Dukharan JA, on 8 July 2014, gave the appellant an extension of time to comply with the rules of court for the filing of skeleton arguments and the supplementary record of appeal. This would have been roughly three weeks after the time was extended by the court for the appeal to be brought.

[22] The matter was listed for hearing before the court on 9 March 2015, as scheduled by Dukharan JA, but up to then there was no compliance by the appellant with the relevant case management orders and there was no pending application for an extension of time. The hearing of the appeal could not proceed on that date due to the illness of counsel from the Attorney General's Chambers, Miss Carlene Larmond, who had conduct of the appeal on behalf of the appellant. The hearing of the appeal was then adjourned to the week beginning 15 June 2015, when it came before us. Up to then, there was no compliance with the relevant case management orders of Dukharan JA.

The respondents' application

[23] The continued non-compliance by the appellant prompted the respondents, on 10 June 2015, to file their application objecting to the hearing of the appeal and for the following orders:

> "1. That the Appeal herein be struck out.

2. That the appeal herein be struck out for failing to comply with the Orders of the Court.

3. That the Appeal herein be struck out in that the Appellant has failed to apply for any extension of time to comply with the said Orders of the Court.

4. That the Appellant's inordinate delay in pursuing the appeal and in complying with the Rules of Court is prejudicial to the Respondents.

5. Further or other relief."

[24] The respondents relied on the affidavit evidence of the 2nd respondent, the salient features of which may be outlined as follows:

(i) The appellant had filed notice and grounds of appeal out of time but was given an extension of time by the court.

(ii) Pursuant to the case management orders, the appellant was to have submitted skeleton submissions on or before 28 November 2014 but none has been submitted and no application for extension of time was made.

(iii) The respondents were unable to prepare and file their skeleton submissions in the absence of the initial submissions of the appellant.

(iv) Since the adjournment of the hearing of the appeal on 9 March 2015, there had been no compliance with the orders of the court.

(v) The appellant has persistently acted contrary to the rules of court as further evidenced by the requisition notice from the registrar dated 30 September 2013, which was not complied with.

(vi) Even if submissions were to be filed after the date of the affidavit (10 June 2015), the appeal could not proceed as scheduled on 15 June 2015 because there would have been insufficient time for the respondents' attorneys-at-law to file and serve submissions and authorities in response.

(vii) The delay in the prosecution of the appeal is causing great prejudice to the respondents while the delay greatly benefits the appellant. The appellant has taken possession of the respondents' land from 2006 and to date, they have not been paid "one dollar" in compensation for their land. The appellant has both the land and the compensation.

The appellant's application

[25] Upon being served with the respondents' application with the supporting affidavit, the appellant on 11 June 2015 (the following day) filed what they styled, "Appellant's Submissions". These submissions are, from all indications, the skeleton arguments that should have been filed pursuant to the case management orders. For

that reason, those submissions will be referred to as the skeleton arguments despite the title attributed to the document by the appellant.

[26] On 12 June 2015, a day later, the appellant filed the application for extension of time and variation of the case management order to dispense with the requirement to file a "supplemental" record, which is the subject of these proceedings. These are the orders being sought on that application:

> "1. The time be extended for the Appellant to file and serve the written submissions to June 11, 2015.
>
> 2. The Appellant's Submissions filed and served on June 11, 2015 be permitted to stand as having been properly filed.
>
> 3. The Case Management Conference Order be varied to dispense with the requirement to file a supplemental record containing written submissions.
>
> 4. Costs to the Respondents to be taxed if not agreed."

[27] In support of the application for extension of time, the appellant relied on the affidavit evidence of Miss Larmond. In that affidavit, Miss Larmond deponed to the history of the matter as at the date the case management orders were made. She stated that "[r]egrettably" she was unable to comply with the order for filing of the skeleton arguments but that they were filed on 11 June 2015 (after the application to strike out was served). She then explained in paragraph 5 of the affidavit:

> "The non-compliance with the orders of the court is not deliberate nor is it intentional; and is in large measure due to matters not within my contemplation at the time the case management conference orders were made. Those matters include:

a) Due to significant human resources challenges faced by the Chambers in the last 12 - 14 months, I have had to assume increased administrative and legal responsibilities.

b) In the time leading up to and falling after the November 28, 2014 deadline for filing the submissions, eight (8) attorneys-at-law (including me) across 2 divisions of the Chambers headed by the Solicitor General were in urgent and complex litigation challenging the constitutionality of the Proceeds of Crime Act.

c) I have, since the start of the year, appeared as lead counsel in five constitutional claims lasting between one and three weeks each (both at first instance and the appellate levels); and which involved in total four (4) other attorneys.

d) Two of the five constitutional claims required my involvement because they were previously handled by a fairly senior member of the Chambers who resigned at a time when alternative arrangements could not be made. Another of the five matters was fixed and heard as a matter of urgency by this Court; in light of the significant constitutional issues which required immediate resolution.

e) The members of the Litigation Division all have very heavy schedules and upon a review of the overall schedule of the Division, it would have been exceedingly difficult to assign conduct of this appeal as well as other matters in which I have been involved to other members of the Division."

[28] Miss Larmond further explained that the length of time that the matter had been before the Supreme Court is not solely attributable to the appellant and that the court had already found favour with the reasons advanced by the appellant for the two day delay in filing the notice and grounds of appeal. According to her, there is a critical need for this court to determine the jurisdictional issue that arises on appeal and so in view of the reasons advanced for the delay, she "humbly" asks that this court grants the extension of time and the variation of the case management order being sought by the appellant.

[29] There was no affidavit specifically filed by the appellant in response to the application to strike out but the evidence proffered in support of the application to extend time and for variation of the case management order is taken as the evidence that is being relied on to oppose the respondents' application. The same consideration applies to the respondents who were not afforded an opportunity to file an affidavit in response to the appellant's application. The evidence in support of their application is treated as responding to the application of the appellant, to the extent possible.

The issues

[30] The broad and primary issues that have arisen on the applications for resolution are:

(i) whether an extension of time should be granted to the appellant to comply with the case management

order for the filing and service of the skeleton arguments with list of authorities; and

(ii) whether the order that the appellant should prepare, file and serve the supplementary record of appeal containing all the skeleton arguments should be dispensed with; or

(iii) whether the appeal should be struck out due to the appellant's failure to comply with the case management orders.

The submissions in summary

The respondents'

[31] Miss Davis, in making her submissions on behalf of the respondents, argued that pursuant to CAR, rules 2.15(a) (which incorporates CPR Part 26) and 2.20(1), the appeal should be struck out or dismissed because the appellant at every step of the way had been either late, out of time or not in compliance, at all, with rules and orders of the court. According to her, the appellant has shown a "general and persistent disregard" for the orders and rules of the court, which on the basis of authority, may be regarded as an abuse of the process of the court.

[32] She pointed out that in matters on appeal, the court is stricter on time limits than in first instance cases in the Supreme Court. Also, that in this court, there is no requirement for an application to be made for an "unless order" by the applicant as a

precursor to an application to strike out the appeal. According to her the court has repeatedly emphasised the necessity for a party to obey or comply with the rules of court.

[33] She urged the court to find, in keeping with the principles enunciated by the relevant authorities, that (a) the appellant had advanced no good reason or excuse for the failure to comply with the rules and orders of the court; (b) the failure to comply was intentional within the context of the excuse given; (c) greater prejudice is occasioned to the respondents by the delay than to the appellant; (d) the appellant would not be prejudiced if the appeal were to be struck out or dismissed; (e) the delay in the resolution of the matter is inimical to good administration; and (f) it is just to strike out the appeal. Accordingly, she continued, the court should refuse the application for extension of time and variation of the case management order.

[34] Learned counsel also relied on dicta from several authorities to buttress her arguments that the appellant's application should be refused and the appeal struck out. She cited, in particular, **Peter Haddad v Donald Silvera** SCCA No 31/2003, Motion 1/2007, delivered 31 July 2007; **UCB Corporate Services Ltd (formerly UCB Bank plc) v Halifax (SW) Ltd** (1999) Times Law Reports, delivered 23 December 1999; **Watersports Enterprises Limited v Jamaica Grande Limited and Others** [2012] JMCA App 35; **Norma McNaughty v Clifton Wright and Others** SCCA No 20/2005, delivered 25 May 2005; and **The Attorney General v Universal Projects Limited** [2011] UKPC 37.

The appellant's

[35] The learned Solicitor General, Mrs Foster-Pusey QC, in urging the court, on behalf of the appellant, to grant the extension of time and to vary the relevant case management order, contended that the delay in complying with the orders of the court was neither deliberate nor intentional. According to her, the appellant has a good reason for the failure to comply and the court ought to find that the delay does not preclude the exercise of its discretion in favour of the appellant.

[36] The appellant, she said, has an arguable case for appeal as the matters on appeal concern crucial questions regarding the court's jurisdiction both from a procedural standpoint, in terms of how the learned trial judge interpreted the CPR, and also from a substantive standpoint on the question of whether she had exceeded the jurisdiction vested in her by the Act. She argued that the respondents' application in the Supreme Court was "irregular and misconceived" as the Act does not allow them "to look behind the Ministerial Declaration in a compensation assessment". The procedural error, she argued, is fundamental as it goes to jurisdiction.

[37] According to the learned Solicitor General, the implications of the judgment of Lawrence-Beswick J are significant and the questions surrounding the limitations on jurisdiction under the Act are deserving of inquiry. The appellant has very little option, she contended, but to invite the court to thoroughly examine and pronounce on the issue. This would override any prejudice to which the respondents claim they have been subjected, she argued.

[38] The learned Solicitor General contended further that any prejudice that would be suffered by the respondents would mainly relate to the time for them to respond to the appellant's submissions, as well as costs. She urged the court to refuse the respondents' application and to find alternative ways to address this prejudice to the respondents such as allowing them time within which to reply to the skeleton arguments of the appellant and to compensate them in costs, even if on an indemnity basis. Furthermore, she contended, any resulting prejudice that would be caused by the grant of an extension of time for the appeal to be heard could be remedied by an award of interest as well as the payment of recoverable losses sustained by the respondents as part of the compensation to be determined by the Supreme Court. It would be just to grant the orders being sought on the appellant's application, she submitted.

[39] She further argued that the delay and the three applications for extension of time made by the appellant must be looked at in the round and there has been no wholesale disregard of the rules and orders of the court amounting to an abuse of process as contended by the respondents. She urged the court to find that the balance of justice favours the grant of the orders sought on the appellant's application and so the court should allow extra time for the matter to be heard at the earliest possible time.

[40] In advancing her arguments on behalf of the appellant, the learned Solicitor General relied on such cases as **Leymon Strachan v Gleaner Co Ltd and Dudley Stokes** Motion No 12/1999, judgment delivered 6 December 1999; **Jamaica Public**

Service Company Limited v Rose Marie Samuels [2010] JMCA App 23; **Jamaica International Insurance Company Limited v The Administrator General for Jamaica** [2013] JMCA App 2; and **Gerville Williams and Others v The Commissioner of the Independent Commission of Investigations and Others** [2014] JMCA App 7. She argued that the authorities relied on by the respondents are not applicable to the instant case as they are distinguishable.

The relevant legal framework

Extension of time

[41] The CAR, rule 2.15(a), provides that in relation to a civil appeal, the court has the powers set out in rule 1.7 and, in addition, all the powers and duties of the Supreme Court including, in particular, the powers set out in CPR Part 26.

[42] Rule 1.7(2)(b) of the CAR provides that the court may extend time for compliance with any rule, practice direction, order or direction of the court even if the application for the extension is made after the time for compliance has passed.

[43] Rule 1.14 states under the heading, "**Dispensing with procedural requirements**":

> "On the application of any party, a single judge may dispense with any procedural requirements in these rules if he is satisfied that -
>
> (a) the appeal is of exceptional urgency; or
>
> (b) the parties are agreed; or
>
> (c) the appeal relates to specific issues of law and can be heard justly without the production of the full record."

[44] Some of the relevant considerations that govern the question of whether an extension of time should be given to a party in default have been laid down in several cases from this court. These principles have been distilled and outlined as follows:

(i) Rules of court providing a timetable for the conduct of litigation must, *prima facie*, be obeyed.

(ii) Where there has been non-compliance with a timetable, the court has a discretion to extend time. The court enjoys a wide and unfettered discretion under CAR, rule 1.7(2)(b) of the CAR to do so.

(iii) The court, when asked to exercise its discretion under CAR, rule 1.7(2)(b), must be provided with sufficient material to enable it to make a sensible assessment of the merits of the application.

(iv) If there is non-compliance (other than of a minimal kind), that is something which has to be explained away. *Prima facie*, if no excuse is offered, no indulgence should be granted.

(v) In exercising its discretion, the court will have regard to such matters as:

(a) the length of the period of delay;

(b) the reasons or explanation put forward by the applicant for the delay;

(c) the merits of the appeal, that is to say, whether there is an arguable case for an appeal; and

(d) the degree of prejudice to the other party if time is extended.

(vi) Notwithstanding the absence of a good reason for the delay, the court is not bound to reject an application for extension of time.

(vii) The overriding principle is that justice is done.

[45] See, for instance, **Peter Haddad v Donald Silvera**; **Leymon Strachan v Gleaner Co Ltd and Dudley Stokes**; **Jamaica Public Service Company Limited v Rose Marie Samuels**; and **Gerville Williams v The Commissioner of the Independent Commission of Investigations**.

Striking out

[46] In relation to the respondents' position that no extension of time should be granted and that, instead, the appeal should be struck out, CPR rule 26.3(1)(a), which applies to this court by virtue of CAR, rule 2.15(a), becomes applicable. That rule confers an unqualified discretion on the court to strike out an appeal or part of it, for failure to comply with a time limit fixed by a rule, practice direction or court order given in the proceedings.

[47] CAR rule 2.20, on which the respondents also rely, is also applicable. That rule provides, among other things, that where an appellant fails to comply with any of the rules, any other party may apply to the court to dismiss the appeal.

[48] There was a breach by the appellant of these rules and so the case management orders were, in effect, an extension of time afforded to the appellant to comply with the rules of court. This case, therefore, straddles both disobedience of an order of the court as well as disobedience of a requirement of the rule, a breach of either of which attracts the sanction of dismissal or striking out.

[49] In **Bigguzzi v Rank Leisure plc** [1999] 1 WLR 1926, Lord Woolf MR made the important point that under the CPR, the keeping of time limits laid down by the rules or by the court, itself, is, in fact, more important than it was under the old procedural regime. The clearest reflection of this, he noted, is to be found in the overriding objective and in the power of the court to strike out a party's statement of case for, *inter alia,* failure to comply with a rule, practice direction or court order. Lord Woolf MR explained in that case that judges, in exercising their discretion within the scope of the CPR, should be trusted to exercise their discretion fairly and justly in the given case, while recognizing their responsibility to litigants in general not to allow the same defaults to occur as had occurred in the past. The overriding purpose of the rules, he said, is to impress upon litigants the importance of observing time limits in order to reduce the incidence of delay in proceedings.

[50] The authorities have equally made it clear that striking out or dismissing a party's case is a draconian or extreme measure and so it should be regarded as a sanction of last resort. As Lord Woolf explained in **Biguzzi**, there may be alternatives to striking out, which may be more appropriate to make it clear that the court will not tolerate delay but which, at the same time, would enable the case to be dealt with justly, in accordance with the overriding objective. The court in considering what is just, he said, is not confined to considering the effects on the parties but is also required to consider the effect on the court's resources, other litigants and the administration of justice.

[51] In **Barbados Rediffusion Service Ltd v Asha Mirchandani and Others (No 2)** (2006) 69 WIR 52, the question of the appropriateness of the sanction of striking out was also thoroughly and usefully examined by the Caribbean Court of Justice (the CCJ) within the context of an unless order and by reference to some relevant authorities. Some salient principles arising from that decision have been distilled as providing useful guidance on the subject. It is duly accepted, as their Lordships have postulated, at paragraph [40], that the approach of the court, in determining whether to strike out a party's case, must be holistic and so a balancing exercise is necessary to ensure that proportionality is maintained and that the punishment fits the crime. According to their Lordships, at paragraph [44], the discretion of the court is wide and flexible to be exercised as "justice requires" and so it is impossible to anticipate in advance, and it would be impractical to list, all the facts and circumstances which point the way to what justice requires in a particular case.

[52] Some of the pertinent considerations that have been enunciated by the CCJ, at paragraphs [45] to [47], have been distilled and set out in point form below, simply for ease of reference rather than on account of any rejection of their Lordships' formulation.

(i) Strike out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the court's orders. In this context, fairness means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the court.

(ii) If there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order of the court, that is a situation which calls for an order striking out that party's case and giving judgment against him.

(iii) The fact that a fair trial is still possible does not preclude a court from making a strike out order. Defiant and persistent refusal to comply with an order of the court can justify the making of a strike out order. While the general purpose of the order in such circumstances may be described as punitive, it is to

be seen not as retribution for some offence given to the court but as a necessary and, to some extent, a symbolic response to a challenge to the court's authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is any type of disobedience that may properly be categorized as contumelious or contumacious.

(iv) It must be recognised that even within the range of conduct that may be described as contumelious, there are different degrees of defiance, which cannot be assessed without examining the reason for the non-compliance.

(v) The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance.

(vi) It is also relevant whether the non-compliance with the order was partial or total.

(vii) Normally, it will not assist the party in default to show that non-compliance was due to the fault of the lawyer since the consequences of the lawyer's acts or omissions are, as a rule, visited on his client. There

may be an exception made, however, when the other party has suffered no prejudice as a result of the non-compliance.

(viii) Other factors, which have been held to be relevant, include such matters as (a) whether the party at fault is suing or being sued in a representative capacity; and (b) whether having regard to the nature of the relief sought or to the issues raised on the pleadings, a default judgment can be regarded as a satisfactory and final resolution of the matters in dispute.

(ix) Regard may be had to the impact of the judgment not only on the party in default, but on other persons who may be affected by it.

[53] It is recognised, however, that in proceedings at the appellate level, the requirements as to compliance with time limits are stricter and so the approach to the question whether an appeal should be dismissed or struck out for non-compliance with the rules and orders of the court or whether an extension of time should be granted for compliance is a bit different from that which applies to cases at first instance. In **United Arab Emirates v Abdelghafar and Another** [1995] ICR 65, which was cited by Smith JA in **Peter Haddad v Donald Silvera**, it was said:

> "The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. **The party aggrieved by that decision has had a trial to**

> **hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals**." (Emphasis added)

[54] In Blackstone's Civil Practice 2004, first edition, at paragraph 71.41, it is noted, in part, under the heading, "Dismissal For Non-Compliance":

> "Where the rules on lodging documents, skeleton arguments etc. are broken, an appeal may be considered for dismissal… The court sees it as its duty to protect the interests of respondents, who already have a decision of a competent authority in their favour, by insisting on all reasonable expedition and strict compliance with the timetable laid down…"

[55] It means that although striking out should still be considered as a draconian or extreme measure and, therefore, should be considered as a sanction of last resort, the appellate court is less constrained than a court of first instance in resorting to it as an appropriate sanction in the circumstances of a given case.

Analysis and findings

Issue (i): Whether the appellant should be given extension of time

Issue (ii): Whether the case management order should be varied

The nature and significance of the appellant's non-compliance

[56] It is considered necessary, at the outset, to determine the nature and significance of the non-compliance in question. This question goes to the assessment of the seriousness of the failure, which is a material consideration that is not only relevant

to the question whether an extension of time should be granted but assumes even greater prominence in the light of the parallel application made by the respondents that the appeal should be struck out.

[57] It is observed that the non-compliance is twofold. The appellant has not only failed to comply with the rules of court but also with the order of the court. In the first place, there is the non-compliance with CAR rule 2.6(1), which states:

> i. "Within 21 days of —
>
> (a) receipt of the notice under rule 2.5 (1) (b) or (c);
> (b) the lodging of a transcript under rule 2.5(3); or
> (c) the filing of the notice of appeal where rule 2.5(4) applies,
>
> the appellant must file with the registry and serve on all the other parties a skeleton argument."

[58] Secondly, the appellant's non-compliance with that rule has triggered the inability of the respondents to file their skeleton arguments pursuant to CAR rule 2.6(2), which states:

> "Within 21 days of service of the appellant's skeleton argument, any other party wishing to be heard on the appeal must file his or her skeleton argument and serve a copy on all other parties."

[59] Finally, in this regard, the failure of the appellant to file the skeleton arguments in accordance with rule 2.6(1) automatically led to the non-compliance with CAR rule 2.7(7), which states:

> "Within 7 days after the filing of the last skeleton argument, the appellant must file a supplementary record containing all skeleton arguments and the chronology as required by rule 2.6."

[60] The respondents, in contending that the appellant has been in persistent defiance of the rules of the court, also pointed to the registrar's notice, dated 30 September 2013, that was issued to the appellant. The notice was exhibited to the affidavit of the 2nd respondent and stands undisputed. According to the notice, skeleton arguments should have been filed by the appellant on 10 September 2013 and the record of appeal by 17 September 2013. The notice has disclosed that the appellant was notified of the non-compliance with the rules pertaining to those documents and was advised to take steps to seek an extension of time to comply. Even more importantly, for present purposes, the requisition contained this clause:

> "**Failure to file the skeleton arguments and record and to make appropriate application will result in your appeal being dismissed for want of prosecution.**" (Emphasis and underline as in original)

[61] There is no denial that this requisition was brought to the attention of the appellant.

[62] Subsequently, an application was made by the appellant for an extension of time to file the record of appeal, which was granted. Also, on 16 June 2014, the hearing of the application for extension of time to file the appeal was conducted. Up to then, there was no compliance with the requisition concerning the skeleton arguments (and by extension, the filing of a supplementary record) and no extension of time was applied for in relation to those matters, despite the notification from the registrar that that should have been done. There is no reason given by Miss Larmond for that omission.

[63] When the matter was listed for case management conference before Dukharan JA on 8 July 2014, roughly nine months after the registrar's requisition would have been received and three weeks after the court had granted an extension of time for the filing of the appeal, there was still no compliance with the rules and the requisition for the filing of the skeleton arguments and supplementary record. It was against that background, that Dukharan JA, at the case management conference, made additional provisions for those requirements of the rules to be satisfied. In my view, it would have become even more imperative, after that, that there be compliance by the appellant with the orders of Dukharan JA. This is so because at that time, an extension of time was granted to the appellant to comply with the rules of court, which rendered it mandatory, in the absence of a court order dispensing with such requirement, that the rules be obeyed. The filing of skeleton arguments with list of authorities and the filing of a supplementary record, containing the skeleton arguments, are mandatory requirements or "imperative directions" of the rules.

[64] The appellant, therefore, had a duty to comply with the rules in question within the time limits specified by the orders of the learned judge. It means then that the failure of the appellant to comply with the subsequent orders of Dukharan JA, which gave additional time for compliance with the rules, must be viewed, as, what I would call, a 'compound breach' — breach of the order of the court on top of breach of the rules of court with regard to the same matters.

[65] It cannot be ignored too, in examining the question of the nature and significance of the non-compliance, that the appellant's skeleton arguments was filed just two days before the second date scheduled for the hearing of the substantive appeal (the Thursday before the Monday). That was after the appellant would have been given a further opportunity between 9 March 2015 (when the first appeal hearing was adjourned) and 11 June 2015 to take steps to remedy the default so that the second date set for the hearing of the appeal could be met. That opportunity was not exploited and so due to the appellant's continued non-compliance, the appeal could not have been heard on 15 June 2015. This is a crucial fact in the circumstances of this case that is absent from all the authorities relied on by the parties. The fact that the non-compliance had substantially affected the court fixtures in relation to this appeal, thereby forcing an adjournment of the substantive hearing for yet a second time, is a weighty consideration in determining the significance of the non-compliance.

[66] In all the circumstances of the case, the non-compliance by the appellant is not at all trivial; it is serious, albeit that no peremptory order was made by Dukharan JA at the time he afforded a further opportunity to the appellant to obey the rules of court.

The length of the delay

[67] I now turn to the length of the delay as another relevant consideration. The learned Solicitor General submitted that the delay in complying with the orders was only for a period of five months. That computation of time, however, is, with all due respect, erroneous and, is therefore, rejected. On the appellant's best case, the delay in the

filing of the skeleton arguments would have been for a period between the date of the case management order and the date of the actual late filing of the skeleton arguments, being from 8 July 2014 to 11 June 2015. On the most conservative computation, the total period of delay in complying with the order of the court in relation to the filing of the skeleton arguments would have been 11 months. The 28 November 2014 deadline that was set by the order of Dukharan JA was a time limit, and not a starting point and so, the delay in filing cannot merely be counted from the date of the deadline. When the appellant filed the skeleton arguments on 11 June 2015 that would have been more than six months beyond the deadline of 28 November 2014. Furthermore, it would have been roughly 20 months, since the skeleton arguments had become due by virtue of the rules of court.

[68] Also, the order for the filing of the supplementary record by the appellant had not been and could not have been complied with due to the default in the filing of the skeleton arguments and the inability of the respondents to do the same as a result of the appellant's continued default. So, in relation to the supplementary record, there is still no compliance and the appellant is now asking the court to dispense with that procedural requirement. So there has been continuous delay in compliance with that requirement.

[69] The delay on the part of the appellant to comply with the relevant rules and the case management orders of the court as well as to apply for an extension of time to do so was inordinate in all the special circumstances of this case. The length of the delay is

a consideration that strongly militates against the appellant's application for extension of time and variation of the case management order. However, this finding, while being accorded significant weight, is not taken as being determinative of the ultimate question whether the appeal should be allowed to proceed. Another important issue for consideration is whether the appellant has a good explanation or excuse for the delay.

The explanation for the delay

[70] By way of recap, the reasons proffered for the delay are, in summary: (a) significant human resource challenges in the Attorney General's Chambers that resulted in counsel with conduct of the appeal having had to assume increased responsibilities; (b) counsel's court fixtures relating to complex, constitutional, and sometimes, urgent, matters since the start of 2015; and, (c) generally, the heavy work load of the litigation division of the Attorney General's Chambers.

[71] Miss Davis was quite dismissive of those reasons. She pointed out that all the matters put forward by Miss Larmond relate to administrative inefficiency, which, according to the authorities, she said, is not a proper reason for non-compliance with the rules and orders of the court. Furthermore, she argued, the reasons relate to Miss Larmond's personal difficulties, which basically amounted to her saying that she was very busy because she was involved in many cases. According to Miss Davis, "no private attorney would be permitted to put forward [that] as an excuse for non-compliance with Court Orders, and it should certainly not be permitted from the Director of State Proceedings".

[72] Miss Davis contended that the lack of resources complained of could have been remedied with the engagement of external counsel, which is a course adopted by the Attorney General's Chambers, from time to time. Furthermore, the appellant, she said, has the resources to remedy any lack of staff in her department. Miss Larmond's "busy-ness", she argued, is not an excuse for the appellant's failure to comply with the court orders. Furthermore, she stated, the explanation for the failure to comply is required from the appellant.

[73] It seems, indeed, that administrative inefficiency, reportedly, resulting from inadequate staffing and voluminous workload in the civil litigation division of the Attorney General's Chambers, which resulted in increased work pressure on Miss Larmond, is the explanation or reason advanced for the delay.

[74] In **The Attorney General v Universal Projects Limited**, relied on by the respondents, the Board, through the words of Lord Dyson, expressed the view that administrative inefficiency is not a proper excuse for failure to comply with the rules or orders of the court. In that case, the excuse given for failure of the Attorney General to file a defence in time was that there was some difficulty in obtaining authorization for an outside counsel to have conduct of the proceedings on behalf of the Attorney General. There was no Solicitor General, at the time, from whom authorization to do so could have been obtained, and the approval of the Attorney General was required, as a result. By the time outside counsel was instructed, the time for filing the defence had elapsed. Their Lordships stated, at paragraph 23:

> "…Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. **Similarly if the explanation for the breach is administrative inefficiency.**" (Emphasis added)

[75] Miss Larmond has not stated that the failure of the appellant to comply was due to an oversight. In any event, even if she had done so, it would have been an inexcusable oversight in the light of all the circumstances, especially when no explanation, whatsoever, is given for the failure to comply with the relevant rules prior to the case management orders of Dukharan JA and in the light of the registrar's requisition for compliance. This is important because it is not an isolated breach of the court order standing alone but as already noted, it was a continuing or composite breach of the rules and orders of the court with respect to the same matters.

[76] Furthermore, the appellant is asking this court to dispense with a case management order, which, incidentally, is a mandatory requirement of the rules. There is a discrete regime for the mandatory filing of skeleton arguments by an appellant and also a discrete provision dealing with the circumstances in which the court may dispense with a requirement of the rules. In light of all this, this court must be given a good and sufficient reason for the failure of the appellant to comply with the rules, particularly, after the reminder from the registrar, as far back as October 2013, that the skeleton arguments was out of time and that steps should be taken to rectify the situation. No reason for the delay is forthcoming other than counsel's busy work schedule caused, in my view, by administrative inefficiency. This is not a good excuse when all the circumstances are considered.

[77] It must be stated too that Miss Davis' argument that the Attorney General's Chambers could have instructed an outside counsel to have conduct of the appeal, or other urgent matters in which the Chambers was engaged (which is a measure taken by the Chambers from time to time), is not an unreasonable argument. In fact, the Solicitor-General has proffered no reason why such a course was not taken. The appellant is also part of the state apparatus and is acting in this matter as the representative of the State and not in her personal capacity. She is strategically placed to make the requisite representations for the necessary resources to be made available to her to carry out the State's mandate in relation to the prosecution of the appeal.

[78] The administrative inefficiency that flowed from the proclaimed lack of resources and heavy work load that reportedly affected the preparation of this appeal should be placed squarely at the feet of the State and should not be entertained or taken as constituting a good excuse for the appellant's failure to obey the orders and rules of the court. This is not an excuse available to the ordinary litigant or his legal representative and so it cannot be one that should avail the State.

[79] Furthermore, it cannot be ignored that Miss Larmond in her explanation had, effectively, revealed that the department chose to give priority to other matters to the detriment of the prosecution of the appeal of this matter. In fact, some of the important and/or urgent cases that she reported being involved in and which, she seems to be saying, had diverted her attention from this case were, according to her, since the beginning of 2015. However, by the beginning of 2015, the deadline set for compliance,

pursuant to the order of Dukharan JA, would have had already passed. So those constitutional matters in which counsel became involved in 2015 cannot properly be used as an excuse for the appellant's failure to meet the deadline fixed by the case management orders.

[80] Further, and, in any event, it would have been the election or conscious choice of the Attorney General's Chambers and, particularly, counsel who had conduct of this appeal, to direct attention and resources to other matters that they, evidently, viewed as being more important than the prosecution of this appeal. Their election and action ought not to be used to affect the fundamental rights of the respondents to have their grievance addressed by the court within a reasonable time. The fact that this is a case at the appellate level coupled with the fact that a stay of execution had been granted to the appellant, thereby affecting the rights of the respondents to enjoy the fruits of their judgment, has rendered it imperative that the matter be prosecuted with reasonable expedition.

[81] Also, this case is not without its own constitutional implications when one bears in mind that the root of the litigation lies in the State's interruption of the respondents' enjoyment and use of their private property for over eight years without compensation. I am not convinced that the prosecution of this appeal would have been of less importance than all those constitutional cases that were obviously treated with priority by counsel for the appellant before and after the deadline for compliance with the case management orders had passed.

[82] The explanation of the appellant for the delay, in all the circumstances as obtained, is not a good and acceptable one, and is therefore, rejected.

[83] The fact that there is no good explanation for the disobedience of the rules and orders of the court is one that is accorded considerable weight in the scheme of things and it is a factor that has tipped the scale, significantly, against the appellant's application. As Smith JA in **Peter Haddad v Donald Silvera** noted at page 13 (and which has been repeated in several other cases from the court):

> "As the successful party is entitled to the fruits of his judgment the party aggrieved must act promptly. The Court in my view should be slow to exercise its discretion to extend time where no good reason is proffered for a tardy application."

[84] I must point out, however, that even though the excuse for the lengthy delay is not a good one, the authorities have said that the court is not bound to refuse the application. It is but one of the factors to be taken into account in weighing what the interests of justice require. Therefore, my finding that there is no good explanation for the delay is not treated as being conclusive of the issues for determination, albeit that it is, indeed, a weighty one.

Whether the failure to comply was intentional

[85] Another question that is considered relevant in determining whether the extension of time should be granted is whether the appellant's failure to comply was intentional. In **Watersports Enterprises Limited v Jamaica Grande Limited**, at

paragraph [27], the court, in refusing an application for relief from sanctions, expressed the view that the question of whether a failure to comply with the court orders was intentional must be examined in the light of the reasons proffered for the delay. Citing this dictum, Miss Davis contended that where no proper excuse is given, then the lapse should be taken to be intentional.

[86] Miss Davis pointed to the history of the appellant's non-compliance and submitted that the pattern of non-compliance by the appellant suggests that the appellant has no regard for the authority of the court. She invited the court to also find, on that basis, that the appellant's failure to comply was intentional.

[87] I accept, as pointed out by Harris P (Ag) in **Watersports Enterprises Limited v Jamaica Grande Limited**, that the intention of the appellant must be viewed against the background of the explanation given for not complying. As already observed, Miss Larmond's affidavit has not once mentioned that the failure to comply was due to an oversight. While she deponed that the failure to comply was not deliberate or intentional, her explanation does lead to a conclusion that there was a deliberate and conscious decision taken by her and her department to spend time and resources on other matters. Furthermore, the fact that no explanation is given for the failure to file the skeleton arguments at the time the record of appeal was filed in response to the registrar's requisition and no extension of time was sought to do so at any time before the respondents' application to strike out was served, renders a finding that the failure to comply was intentional and deliberate, an irresistible one.

[88] What is clear, however, is that even if the non-compliance was not deliberate or intentional, it would, at best, have been due to willful neglect, when all the circumstances are considered. This would render the appellant's non-compliance "equally culpable", in my view. Therefore, the argument that the appellant's non-compliance was not deliberate or intentional is rejected as a proper basis on which to grant the orders being sought on the application for extension of time and variation of the case management order.

Whether the delay is the fault of the appellant

[89] In looking at the inadequacy of the explanation for the delay, it is not overlooked that it could be argued that the delay is not of the appellant's doing *per se*. The appellant has not furnished any explanation for the delay from her standpoint. It raises the question, therefore, whether the appellant should be excused due to what is put forward as the omission of her legal representatives. There are authorities that have made the point that the court "never likes a litigant to suffer by the mistake of his lawyers". See, for instance, the dictum of Lord Denning in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865, at 866, cited with approval by Morrison JA (as he then was) in **Jamaica Public Service Company Limited v Rose Marie Samuels**, at paragraphs [27] and [30]. I do adopt that statement.

[90] However, I would indicate, for present purposes, that if prejudice or injustice to the innocent party would be the likely result of the lawyers' action, then the sins of the

lawyers, in such, circumstances, would have to be visited on the party in default and especially so, where the prejudice to the innocent party would outweigh the prejudice to the defaulting party. The innocent party ought not to pay for the sins of the defaulting party's representatives to its detriment; that would not be just.

[91] In considering this case against that background, it is taken into account that the appellant is acting in a representative capacity for the State. There is nothing indicated from which it may properly be said that she is likely to be personally affected, in any way, by the outcome of this litigation. The appellant and her lawyers, being just different "branches of the same tree", have a common interest in the outcome of the appeal. This is not a classic case in which the sins of the lawyers would be unfairly visited on the party in default. Therefore, the fact that the reason for the delay and non-compliance is placed at the feet of the appellant's lawyers and not at the appellant's feet, *per se,* is not a consideration that has been accorded any weight that could serve to tip the scale of justice in favour of the application for extension of time and variation of the case management order.

The merits of the appeal

[92] Another relevant and substantial consideration in my deliberation is the merits of the appeal. By this appeal, the appellant seeks to have the court address the questions of the learned trial judge's interpretation of the CPR and whether she exceeded the jurisdiction conferred on her by the Act in making the orders she did in favour of the respondents. It has been contended on behalf of the appellant that there is an arguable

appeal on the merits and so the appellant should not be deprived of the opportunity to present the appeal.

[93] There is no contention by the respondents that the appeal is not arguable or that it has no merit. It is accepted that there is an arguable appeal on the merits. In fact, this court (differently constituted) had already determined that issue when the appellant was granted a stay of execution and extension of time for the filing of the notice and grounds of appeal. The appellant, therefore, has already benefitted from that consideration and finding by the court. There is thus no need for the merits of the appeal to again be explored in these proceedings. The material question now is whether the appellant should once again be given an opportunity to proceed with the appeal on the basis that there is merit in the appeal.

[94] The merits of the appeal, to my mind, while an important and weighty consideration, cannot be the pivotal or the determining one. It is but one of the important considerations to be weighed in the equation in determining what justice dictates at this time. As Professor Adrian Zuckerman noted in a rather instructive article entitled, "The revised CPR 3.9: a coded message demanding articulation" (2013) 32 C.J.Q. Issue 2, 123-138 at 128-129:

> "**The overriding objective introduced into English civil procedure the idea that justice involves not just rendering judgments that are correct in fact and in law but also doing so by proportionate use of court and litigant resources and within reasonable time. Justice is therefore a three dimensional concept in which time and resources play a part alongside the imperative of reaching correct results.**

> The court was not slow to articulate the ideas behind the overriding objective. Laws L.J. brought out this point when he wrote, extra judicially, that the CPR:
>
> > 'involve a conceptual shift in the idea of justice, so that economy and proportionality are not merely desirable aims but are defining features of justice itself. And it is not merely aspiration; it is law.'" (Emphasis added)

[95] So, once it is accepted that the ultimate aim of the court is to do justice, other factors, thrown up on the facts of the particular case, must be weighed in the equation because all the circumstances of the case must be taken into account in determining what is just. One such consideration would be, of course, the question of whether any unfairness or prejudice is caused or likely to be caused to the innocent party. The question of prejudice or unfairness to either party, therefore, looms large as an equally important consideration as the merits of the case.

Prejudice to the parties

[96] The learned Solicitor General pointed out that the court ought to consider as a relevant consideration, the ownership of the land. She asked the court to note that the land has been registered in the name of the appellant, since May 2007. She submitted that the respondents would not suffer any undue prejudice because the Act provides for full compensation, including the payment of interest (at five per cent per annum from the date of possession until payment) and for all recoverable losses resulting from the acquisition of the land. The only real prejudice from the delay, according to learned Queen's Counsel, is that the respondents were not given time to prepare their skeleton arguments in response. This prejudice, she argued, could be addressed by allowing

time to the respondents to file their skeleton arguments and by an award of costs, including indemnity costs.

[97] Miss Davis, on the other hand, citing the fact of the delay and its effect on the prosecution of the appeal, submitted that the delay is prejudicial as it benefits only the appellant. According to her, the appellant is in possession of both the land and the monetary compensation for the land, while the 1st respondent, on the other hand, has been out of possession of its land for eight years without compensation. The respondents, she said, have been denied the benefits of their judgment and have placed their development plans on hold, pending the outcome of the appeal. They continue to incur only losses as a result, she argued.

[98] Learned counsel further submitted that there would be no prejudice to the appellant if the appeal is struck out as the appellant has accepted that the land is not required for the public purpose stated and it is not earmarked for any other purpose. Furthermore, she submitted, the appellant has not provided an explanation for seeking to retain the land, given that the purpose for which it was acquired is no longer applicable.

[99] While there is no information from the respondents quantifying the loss of income sustained as a result of the compulsory acquisition of the property, it is accepted that at least the 1st respondent, to date, has been deprived of, at minimum, the market value of the property as it stood in May 2007, to which it is entitled. It has

also been substantially affected in its right to enjoy the property; to use the land for its own purpose; or to dispose of it as it sees fit.

[100] The fact that the respondents may be entitled to monetary compensation, including interest at five *per cent* per annum (pursuant to sections 30 and/ or 36 of the Act), while relevant, is not taken as a complete or sufficiently potent response to the argument of the respondents that they are being prejudiced by the delay. This is, especially, so when it is borne in mind that the compensation award will be based on the market value of the property as it stood in May 2007 and no later. There is nothing to say that the delay will place the respondents in an equal or more advantageous position than they would have been in had the property not been compulsorily acquired or had they received compensation much earlier.

[101] The true situation is that since the disruption with the respondents' proprietary and business arrangements in 2006, there has been no payment by way of compensation because of the stalemate and the subsequent court proceedings leading to a stay of execution. If the appellant got a further extension of time and the appeal succeeded, the proceedings would have to be remitted to the Supreme Court for the compensation assessment hearing to continue or to commence *de novo.* This would mean a longer delay for the matter to be resolved, which would cause the respondents to be out of pocket for almost 10 years, at least. Furthermore, there could well be a further appeal arising from that compensation assessment hearing which would mean even greater delay in the final resolution of the matter. The situation occasioned by the

delay is untenable, even though the reasons for the delay in the resolution of the matter may not have been entirely the fault of the appellant.

[102] The simple fact is that the delay is more inimical to the rights and interests of the respondents (in particular the 1st respondent) as private citizens than it is to the appellant. The appellant and her legal representatives, as part of the State apparatus, ought not to compound this delay and exacerbate the prejudice to the respondents, without any good and compelling reason. This is what has happened in the conduct of the prosecution of the appeal.

[103] Miss Davis also strongly relied on the fact that the land is no longer needed for the purpose for which it was compulsorily acquired and that there is no indication from the appellant that it is needed for any other purpose. It cannot be ignored, however, that as a matter of law, the declaration from the Minister is "conclusive evidence that the land is needed for a public purpose" (section 5(4) of the Act). It means that legally, even if not in reality, the land is needed for a public purpose. This would be so even though it seems to be accepted that the SLB will no longer be using it. Despite the legal position, however, the reality is that the land is just sitting there in the hands of the appellant without being used for close to 10 years and there is nothing to say that there are any plans for it to be used in the near future. So, even though it is, by law, required for a public purpose, the appellant has not shown the prejudice that would arise and be caused to her (or the State, for that matter) in relation to the land itself if the appeal is not heard and the judgment of Lawrence-Beswick J is allowed to stand, by default.

[104] It is hard to resist the conclusion that the respondents (the 1st respondent, at any rate) are being substantially prejudiced by the deprivation of the land without compensation for almost 10 years with there being no proven corresponding prejudice to the appellant who has the property as well as the money for the compensation. The Solicitor General's argument that the only prejudice to the respondents is that they were not placed in a position to file their skeleton arguments to comply with the court rules and order of Dukharan JA that pertain to them is, therefore, rejected.

[105] Furthermore, the response by the court cannot simply be to give more time and award costs to the respondents as a penalty for the appellant's non-compliance, when there is no good reason for the delay and where it is the appellant's non-compliance that had placed the respondents in a disadvantageous position at the time the substantive appeal came up for hearing for a second time. The prejudice that has already been caused, and which continues to be caused to the respondents, due to the appellant's non-compliance, is a factor that, in my view, should weigh heavily against the appellant's application for extension of time.

[106] Although it is accepted that allowing further time and awarding costs to the respondents is available as a remedial measure in granting an extension of time to the appellants, in the light of the significance of the non-compliance, however, consideration must also be given to other relevant matters such as, the appellant's history of non-compliance, the broader interests of the administration of justice, and, ultimately, the overriding objective to deal with the case justly.

The appellant's history of compliance

[107] Both parties have raised the history of the appellant's compliance with the rules and/or orders of the court as a relevant issue for consideration. It is accepted that consideration should be given to the question whether the appellant has, generally, complied with all other relevant rules, orders or direction of the court in the circumstances where there is a viable application for the appeal to be struck out or dismissed for non-compliance. Although the appellant has not filed an application for relief from sanction, I am of the view that the application for extension of time in these circumstances is analogous to an application for relief. In essence, the appellant is asking the court not to impose the sanction applied for by the respondents. For that reason, I find that in considering whether the appellant should be spared from that sanction, the prior history of compliance should be a relevant consideration as it is in applications for relief from sanctions under CPR, rule 26.8.

[108] The learned Solicitor General also argued that the appellant had complied with all other orders, although not on a timely basis, and so is deserving of the chance to proceed with the prosecution of the appeal. She submitted that at the time of the hearing of the applications, only the skeleton arguments remained outstanding, and it had already been filed by the time of the hearing. Miss Davis, on the other hand, pointed out that the appellant has failed to comply in a timely manner with all the rules and orders of the court, to the prejudice of the respondents, and so ought not to be granted any more time to prosecute the appeal.

[109] With all due respect to the learned Solicitor General, her argument that the appellant has complied generally with the orders of the court, except for the filing of the skeleton arguments, is not accepted. To date, there is no compliance with the order relating to the supplementary record of appeal. So, for all intents and purposes, the appellant is not in compliance with the orders of Dukharan JA, which is required for the appeal to be properly heard.

[110] The appellant, it is seen, has ignored the rules of court, the registrar's requisition and the case management orders concerning the same matters. The persistent breach has stalled the hearing of the appeal, which was set for a second time in the court fixtures on account of the appellant: the first time due to illness of counsel and the second time due to non-compliance. This was all against the background of the appellant having been previously out of time for bringing the appeal and for filing of the record of appeal. One would have believed that once the court had granted the appellant access to its machinery, after an initial late start, that steps would have been taken to adhere to the other rules and orders of the court for the expeditious prosecution of the appeal. But that was not to be so because there was the failure to obey the case management orders in question, which, in effect, would have been the third time that the court was granting an extension of time.

[111] This application before us represents the fourth occasion on which the appellant would be seeking to benefit from the generosity of the court in allowing an extension of time for its rules to be complied with. It is, indeed, true, as the respondents have

urged, and it cannot be ignored, that at every material point in the appellate process, the appellant had been either late in complying or non-compliant with the rules or orders of the court.

[112] In the face of Miss Davis' emphasis on the history of tardiness by the appellant in this matter, on the one hand, and the urgings of the learned Solicitor General, on the other, that the court should focus more on the present and on the way forward, the dicta of this court in **RBTT Bank Jamaica Limited v Y P Seaton and Others** SCCA No 107/2007, delivered 19 December 2008 and **Joan Allen and Louise Johnson v Rowan Mullings** [2013] JMCA App 22, came back to mind for consideration. Those cases, basically, made the point (within the context of the facts of those cases) that the relevant judge whose decision was under review should have concentrated more on the application that was before him and on the way forward rather than on the history of the defaulting party's conduct in the proceedings.

[113] Those authorities, however, have not laid down any rule of universal application that a recalcitrant party's poor history of compliance in the proceedings in question is never a factor that should be accorded any, or any significant, weight in the court's consideration as to whether that party should receive its assistance. With the ultimate goal being the attainment of justice, all issues bearing on the question of what is just in the particular circumstances of a given case, must be considered. Each case must, therefore, turn on its own peculiar facts. Therefore, it seems to make good sense that in the context of this case, where there is an application for striking out with a

corresponding application for extension of time to comply with the orders in issue, being heard at the time scheduled for the hearing of the substantive matter, that the appellant's poor history of compliance in the proceedings must be seriously considered and such weight duly accorded to that consideration as the court sees fit. That is a relevant consideration in examining the current status of the instant case and in determining the way forward.

[114] In reviewing the instant case against that background, the starting point is that this is a matter on appeal in respect of which time limits are accepted as being much stricter. Furthermore, the second "hearing date" for the appeal is lost as a result of the non-compliance, which was not the state of affairs in **RBTT Bank v Y P Seaton** and **Joan Allen and Louise Johnson v Rowan Mullings**. That fact, without more, has rendered those cases readily distinguishable. As Panton P, noted in **RBTT Bank v Y P Seaton**, at paragraph 7:

> "… The learned judge ought to have been looking ahead, not backward. A trial date having been fixed, the focus ought to have been on facilitating the trial. **The situation will be certainly different if the trial date arrives and the applicant is unable to proceed…"** (Emphasis added).

[115] In my view, when all the circumstances of this case are considered, the appellant's poor (or, at best, checkered) history of compliance assumes marked significance and serves to tip the scale away from a favourable consideration of the application for extension of time and variation of the case management order.

The interests of the administration of justice

[116] The appellant's strongest position, it seems, is the implication for the administration of justice and the administration of the Act, governing the compulsory acquisition of property, if the judgment of the learned trial judge is allowed to stand by default. This consideration is closely connected to the argument and finding that the appeal is not unarguable or without merit.

[117] In considering whether to grant relief on an application for relief from sanction, rule 26.8(3)(a) of the CPR allows the court to have regard to the interests of the administration of justice. Since this case is treated as being analogous to a case in which a specific application for relief from sanction under CPR, rule 26.8 is made, that consideration as to what is best in the interests of the administration of justice is accepted as a very relevant and important consideration. In any event, the submissions of counsel on both sides have raised the interests of the administration of justice as a material consideration.

[118] The appellant is interested in having the procedural rules of court and the substantive law that pertain to the determination of compensation within the scheme of the Act adhered to by the Supreme Court, that is to say, not only by the learned trial judge but all judges in the future. That is a legitimate interest for the proper administration of justice, as the court must ensure that errors of law are corrected to ensure certainty in the law and the preservation of the rule of law.

[119] At the same time, the court should also be concerned with challenges posed to its authority, by the failure of litigants to comply with its rules, directives and orders. There is a live and dangerous threat to the rule of law when the court's authority is undermined by inexcusable and persistent disregard for its rules and orders. The court is also concerned with what is fair and just to the parties to the proceedings as well as to other litigants who are standing in line to access the limited resources of the court, the most scarce of which is its time.

[120] In **Bigguzzi**, Lord Woolf also made the important point that the court, in considering whether a result is just, is not confined to considering the effects on the parties but should also take into account the effect of the conduct on the administration of justice, generally, which involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur.

[121] As it now stands, the court, instead of having to consider the substantive appeal that was listed the second time for hearing, had to defer that hearing and had to take the time that should have been allotted to the substantive appeal to not only hear but also to give serious thought to the two satellite applications under consideration. All this would have been rendered unnecessary had there been compliance by the appellant with the orders of the court or had an application for extension of time been sought within a reasonable time before the second date set for the appeal to be heard.

[122] If the court were to grant another extension of time, then the matter would be set, yet again, for a third time for the hearing of the substantive appeal. This would

affect the time to be allotted to other cases as well as putting added pressure on the court's limited and over-burdened resources. This warrants serious consideration in a context where no good reason is proffered by the appellant for the failure to comply with the rules and orders of the court, having been afforded several opportunities and ample time within which to do so.

[123] The same reasoning applies to the application to vary the case management order to dispense with the requirement for the filing of the supplementary record of appeal. The appellant has no good reason for ignoring (a) the rules; (b) the requisition of the registrar that would have led to the filing of that document; and (c) the subsequent order of Dukharan JA that practically extended time for there to be compliance with the rules.

[124] In the Trinidadian case, **The Attorney General v Keron Matthews** [2011] UKPC 38, the Privy Council made reference to the phrase, "cancerous *laissez-faire* approach" that was used by the Trinidad and Tobago Court of Appeal to describe the conduct of civil litigation within that jurisdiction. I find that those words best describe the culture that has characterised the approach to civil litigation (and litigation in general) in our jurisdiction. The crippling effect of delays in our system (of course, not attributable to any one player) has rendered the system practically dysfunctional and this has only served to erode public confidence in the administration of justice, which is a dangerous threat to the preservation of the rule of law. The duty on the court to

encourage and foster discipline in civil litigation is even more compelling when the parties to the litigation are on unequal footing as is the case in the instant matter.

The overriding objective

[125] Ultimately, in interpreting the rules that are engaged in the consideration of the applications before this court, the court must have regard to the overriding objective to deal with the case justly and the parties also have a duty to help the court to further the overriding objective. The CPR, rule 1.1, applies to this court by virtue of CAR, rule 1.1(10) and it provides, in so far as is relevant, that the court in dealing with the case justly must, *inter alia*, save expenses and ensure, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position. It also places a duty on the court to ensure that the case is dealt with expeditiously and fairly and that it is allotted an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

[126] When the interests of the appellant, in having the appeal determined on the merits to correct what is challenged as being an erroneous decision, is balanced against the interests of the administration of justice and the overriding objective, it is found that the considerations that would enure to the benefit of the appellant are significantly outweighed. In fact, the merit of the appeal does not hold sway in the face of all the other compelling and competing factors that have been considered and which have weighed against the appellant's entitlement to reprieve.

Disposal of the appellant's application

[127] There is no good and acceptable reason advanced for the court not to insist that its orders should be obeyed. The appellant had more than ample time and sufficient opportunity to comply with the procedural requirements and orders of the court for the filing of the skeleton arguments with list of authorities as well as the supplementary record of appeal.

[128] Moreover, when one considers the reality that the second date fixed for the hearing of the substantive appeal could not have been met, in all the circumstances, and that a further delay in the hearing of the appeal would prejudice the respondents and other litigants awaiting their turn to utilise the finite resources of the court, it becomes clear that this is not an appropriate case for the exercise of the court's discretion to grant an extension of time and to vary the case management order of Dukharan JA as applied for by the appellant.

[129] After what I believe is a long and, I hope, careful consideration of all the circumstances of this case (which I think it requires), I would refuse to exercise my discretion to grant the orders sought by the appellant for extension of time and variation of the case management order. Accordingly, the skeleton arguments filed on 11 June 2015 is not permitted to stand. I would dismiss the appellant's application with costs to the respondents.

The respondents' application

Issue (iii): whether the appeal should be struck out

[130] With the appellant having not been given the extension of time to comply with the rules and orders of the court, the respondents' application for the appeal to be struck out now arises for disposal. The appellant's case on appeal is in the same position as it stood since the case management orders were made in July 2014. There is no compliance with the case management orders of this court that were made for the proper and fair prosecution of the appeal.

[131] The appellant's persistent failure to comply with the rules and orders of the court without good and acceptable explanation and the action taken in seeking an extension of time and variation of the order on the second date fixed for the hearing of the substantive appeal, knowing that the respondents would have had no time to prepare themselves for the appeal as required by the rules and orders of the court, is not only unfair but is tantamount to an abuse of the process of the court.

[132] The appellant and her legal representatives could have taken appropriate steps to ensure the protection of the case on appeal in the light of the reported human resource constraints existing in the Attorney General's Chambers that was known to them. The respondents cannot be asked to bear the burden of the administrative problems facing the appellant and her representatives, particularly, when the parties do not stand on an equal financial footing.

[133] Even if there were a strong probability that this court would have found that the learned trial judge was wrong to make the orders that she made, the appellant and her representatives had wasted the glorious opportunity provided by this court, its rules and its orders, to set the record straight. They have no one else to blame for the lost chance.

[134] I would simply refer to the dictum of Harris P (Ag) in **Watersports Enterprises Limited v Jamaica Grande**, at paragraph [35], that "[i]t has often been declared by this Court that where time limits are prescribed by the rules a litigant is duty bound to adhere to them". She cited authoritative dicta from the former President, Panton P, in two cases: **Port Services Ltd v Mobay Undersea Tours Ltd and Fireman's Fund Insurance Company** SCCA No 18/2001, delivered 11 March 2002 and **Orrett Bruce Golding and The Attorney General of Jamaica v Portia Simpson Miller** SCCA No 3/2008, delivered 11 April 2008, which prove rather instructive.

[135] Panton JA (as he then was) in **Port Services Ltd v Mobay Undersea Tours Ltd**, at page 10, made it abundantly clear, that which I would reiterate:

> "For there to be respect for the law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this Court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure. Once there is a situation such as exists in this case, the Court should be very reluctant to be seen to be offering a helpful hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction."

[137] In **Golding v Simpson Miller**, at page 11, the learned President then issued a clear and stern warning to litigants and their representatives that they "ignore the Civil Procedure Rules at their peril". That warning stands with equal, if not with greater, force today.

[138] This case, for no good reason, has taken up more than a fair share of the court's resources and, by now, has exhausted the time and resources that are available to be allotted to it in the appeal process. I would embrace the words of Laws LJ in A**doko v Jemal**, The Times, 8 July 1999, and state that "the proper and proportionate use of court resources is now to be considered part of substantive justice itself".

Conclusion

[139] In fine, the same factors that have been considered in determining whether the appellant's application for extension of time and variation of the case management order should be allowed, are the same factors that have been taken into account in considering the application for striking out of the appeal. When all the variables applicable to a consideration of an application for striking out are considered and balanced within the legal framework set out in paragraphs [46] to [55] above, it is found that all the conditions that favour a striking out (or dismissal) of the appeal have outweighed those that do not. The conduct of the appellant in the prosecution of this appeal, to my mind, justifies the imposition of the ultimate sanction; lesser sanctions such as an award of costs and/ or interest, as suggested by the learned Solicitor General, should be reserved for less serious breaches.

[140] I would, therefore, hold that the preliminary objection to the hearing of the appeal should be upheld and the order striking out the appeal should be granted. In keeping in line with the authorities, this sanction is viewed as necessary not only in order for the court to achieve fairness but also for the maintenance of respect for its authority as expressed though its rules, directives and orders.

[141] I would borrow the words of their Lordships of the CCJ, in **Barbados Rediffusion Service Ltd v Asha Mirchandani and Others (No 2)**, at paragraph [46], who aptly summed up the position that I have taken in this case in these words:

> "…While the general purpose of the order [striking out] in [the] circumstances may be described as punitive, it is to be seen not as retribution for some offence given to the court but as a necessary and to some extent symbolic response to a challenge to the court's authority, in circumstances in which failure to make such a response might encourage [the appellant and] others to disobey court orders and tend to undermine the rule of law…"

[142] The sanction is, therefore, imposed not so much to punish the non-compliance of the appellant but, more importantly, to promote a culture of compliance which is necessary to give effect to the dictates of the overriding objective as an indispensable feature of the civil justice system.

[143] I would make the following orders:

(i) The appellant's application for extension of time and variation of the case management order filed on 12 June 2015 is dismissed.

(ii) The respondents' preliminary objection to the hearing of the appeal is upheld and the application for an order striking out the appeal filed on 10 June 2015 is granted. Accordingly, the appeal is struck out.

(iii) Costs for both applications and the appeal to the respondents to be agreed or taxed.

SINCLAIR-HAYNES JA (AG)

[143] I too have read, in draft, the judgment of my learned sister, McDonald-Bishop JA (Ag). I agree with her reasoning and conclusion and there is nothing that I could usefully add. I also agree with the orders proposed.

DUKHARAN JA

ORDER

1. The appellant's application for extension of time and variation of the case management order, filed on 12 June 2015, is dismissed.

2. The respondents' preliminary objection to the hearing of the appeal is upheld and the application for an order striking out the appeal, filed on 10 June 2015, is granted.

3. The appeal is struck out.

4. Costs for both applications and the appeal to the respondents to be agreed or taxed.