[2019] JMCA App 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 41/2008

APPLICATION NO COA2019APP00085

BEFORE:	**THE HON MRS JUSTICE MCDONALD-BISHOP JA** **THE HON MISS JUSTICE STRAW JA** **THE HON MRS JUSTICE FOSTER-PUSEY JA**

BETWEEN	**SANDALS ROYAL MANAGEMENT LIMITED**	**APPLICANT**
AND	**MAHOE BAY COMPANY LIMITED**	**RESPONDENT**

Christopher Kelman and Yakum Fitz-Henley instructed by Myers Fletcher and Gordon for the applicant

Paul Beswick and Miss Gina Chang instructed by Ballantyne, Beswick and Company for the respondent

30 April and 7 June 2019

MCDONALD-BISHOP JA

[1] I have read in draft the comprehensive reasons for judgment of my sister, Foster-Pusey JA. Her reasons reflect my own reasons for concurring in the decision of the Court and I have nothing useful to add.

STRAW JA

[2] I too have read the reasons for judgment of my sister Foster-Pusey JA and agree with same. There is nothing I wish to add.

FOSTER-PUSEY JA

[3] By notice of application for court orders filed 17 April 2019, the applicant, Sandals Royal Management Limited (Sandals Royal Management), the respondent in the appeal, sought the following orders:

> "The appellant's appeal is dismissed for want of prosecution, or in the alternative, the appellant's appeal is struck out as an abuse of process.
>
> Costs of this application and costs thrown away to the respondent to be taxed if not agreed."

[4] The grounds on which the orders were sought were that (a) the delay by Mahoe Bay Company Limited (Mahoe Bay), the appellant, had been inordinate in all the circumstances; (b) Mahoe Bay's delay has been prejudicial to the Sandals Royal Management and (c) the prolonged inactivity of Mahoe Bay amounts to an abuse of the process of the court.

[5] On 30 April 2019, we heard this application and made the following orders:

i. The appellant's appeal filed on 27 April 2008 is dismissed for want of prosecution.

ii. Costs of the application and costs thrown away to the respondent to be taxed if not agreed.

Background

[6] Kimberly Campbell, legal officer employed to Sandals Resort International Limited, swore to the affidavit which was filed on 17 April 2019 in support of the application. The affidavit was the only evidence before the court in respect of the application, as Mahoe Bay did not file an affidavit in response to that of Kimberly Campbell or at all. The facts outlined in the affidavit provide the relevant background to this matter.

Proceedings in the Supreme Court

[7] On 6 August 1992, Mahoe Bay filed a writ of summons in which it sought damages for trespass on the basis that on or before 1 July 1992, Sandals Royal Management commenced work on the land, on both sides of the entrance to Sandals Royal Caribbean Hotel, to erect a walled structure. The land in question, which was registered at Volume 649 Folio 68, belonged to Mahoe Bay and as a result Mahoe Bay claimed that it had suffered loss and damage.

[8] Mahoe Bay also claimed an injunction to restrain Sandals Royal Management by itself or its servants or agents, from erecting or continuing to erect any structure on either side of the entrance to Sandals Royal Caribbean Hotel; an order that Sandals Royal Management forthwith pull down and remove so much of the structure and/or wall as is erected on either side of the entrance to Sandals Royal Caribbean Hotel, along with costs, interest, and such further or other relief as may be just.

[9] On 28 December 1992, Mahoe Bay filed a consent to file statement of claim out of time and thereafter the statement of claim was filed by Mahoe Bay on 7 January 1993. Mahoe Bay, in providing further details of its claim, pleaded at paragraph 5;

> "That despite the orders of this court restraining they [sic] continued erection of the said structure, the [respondent] in or about December 1992, completed the said structure on both sides of the reserve road and on [Mahoe Bay's] land."

[10] The statement of claim also outlined additional acts of trespass allegedly committed by Sandals Royal Management, including the placing of a propane gas tank on the west side of the reserve road and the dumping of laundry waste water and debris on Mahoe Bay's property; the dumping of sewage waste, effluent and kitchen waste water into the sea contaminating Mahoe Bay's land at the beach area; Sandals Royal Management's removal of large quantities of sand from "[Mahoe Bay's] beach" on its land; the erection of telephone and electricity poles and drainage pipes on Mahoe Bay's property; and the erection of a guard house and road barrier, which impeded access to Mahoe Bay's property beyond the barrier. The allegations of trespass appeared to be quite serious.

[11] On 25 January 1993, Sandals Royal Management filed its defence and counterclaim. Among the matters pleaded were the following:

a. The land in question was a part of an approved subdivision development with which Mahoe Bay had proceeded.

b. This development included a reserved area which was to be used as access to the subdivision development by means of an asphalted roadway, sidewalk and grass verge.

c. It was denied that Sandals Royal Management commenced construction of a walled structure on both sides of the reserved road on or before 1 July 1992. Instead a wall and column had existed in the same location for a period in excess of 30 years and Sandals Royal Management and its predecessors in title had had the benefit of access to that structure over the period in question. Sandals Royal Management had also carried out repairs, renovation and construction of the wall on both sides of the reserved road and had completed same before the suit was filed.

d. Mahoe Bay had given permission for the respondent's predecessor in title to construct and maintain a wall for the purposes of advising persons travelling along the main road of the location of the means of access to Sandals Royal Management's hotel and Sandals

Royal Management had acquired an easement and/or licence to have the wall in its then position to continue to fulfil this purpose.

e. The subdivision approval had as a condition to the carrying out of the subdivision development that certain areas be reserved to be vested in the local authority for use as roadway and for road widening. The wall in question had been constructed in or about 1959 on land in the reserved area to be ceded to the local authority under the terms of the subdivision approval.

f. Sandals Royal Management as registered owner of land in the subdivision was entitled to have Mahoe Bay vest the reserved areas in the local authority as required by the subdivision approval.

g. The renovation, repair and construction of the wall was completed before Mahoe Bay's suit; and

h. The sewage system about which Mahoe Bay complained was approved by the relevant authority, the sand previously removed was replaced by Sandals Royal Management under an agreement with Mahoe

Bay and the electricity and telephone poles were erected by the relevant utility company.

[12] Sandals Royal Management counterclaimed for a declaration that it had acquired and/or enjoyed from Mahoe Bay an easement and/or licence over the wall in question and had the right to erect signs signifying the means of access to Sandals Royal Management's property. It also claimed an order that the reserved areas in the subdivision development be vested in the local authority in accordance with the subdivision approval of the property.

[13] On 4 February 1993, Mahoe Bay filed a reply and defence to counterclaim in which, inter alia, it stated that the construction undertaken by Sandals Royal Management was not merely repairs but was a major architectural change. Mahoe Bay denied that the construction had been completed before suit was filed and denied that Sandals Royal Management had any right or "precedent" to construct the changes to the wall without its permission or consent.

[14] Thereafter the following occurred:

a. summons for directions filed 25 May 1993;

b. notice of change of attorney-at-law filed 24 October 1994;

c. certificate of readiness filed 1 November 1994;

d. reissued certificate of readiness filed 20 May 1995; and

e. order on summons to remove name from record made 19 September 1995.

[15] On 4 October 1995, a notice of change of attorneys-at-law was filed by the firm Grant, Stewart, Phillips and Company. By letter dated 12 March 1996, Sandals Royal Management's attorneys-at-law, Myers, Fletcher and Gordon signed a joint letter with Grant, Stewart, Phillips and Company agreeing to the request by Grant, Stewart, Phillips and Company for an adjournment of the trial, which had been fixed for hearing on 18 March 1996. By joint letter dated 26 November 1997, trial dates fixed for the week of 8 December 1997 were also vacated.

[16] By letter dated 27 November 2003, Mahoe Bay's then attorneys-at-law, Crafton Miller and Company, made a request to the Supreme Court for a case management conference to be set in the matter. Here a historical fact is relevant, as this requirement came about due to the advent of the new Civil Procedure Rules in 2003. Over the transitional period, a request for a case management conference had to be made by 31 December 2003 in respect of all pre-existing matters, failing which the matters would be struck out. Counsel for the respondent, Mr Kelman, highlighted the fact that the request for a case management conference in this matter was therefore made quite late in the day.

[17] A notice of change of attorneys-at-law was then filed by James and Company on behalf of Mahoe Bay. The hearing of the required case management conference was scheduled for 2 March 2005.

[18] After several adjournments, the case management conference came on for hearing on 9 January 2007. It was further adjourned to 4 June 2007, at which time Mahoe Bay's statement of case was struck out with costs to Sandals Royal Management to be agreed or taxed, by the order of Jones J, for failure of the appellant's representatives to attend the case management conference. On 4 June 2007 judgment was also entered for Sandals Royal Management on its counter claim in the following terms:

> "It is hereby declared that [Sandals Royal Management] has acquired and enjoys from [Mahoe Bay] an easement over the wall the subject matter of the suit herein and the right to erect signs signifying the means of access to [Sandals Royal Management's] premises;
>
> The said reserved areas in the subdivision development be vested in the local authority in accordance with the subdivision approval in respect of the property."

[19] On 5 June 2007, a notice of change of attorneys-at-law was then filed by Grant, Stewart, Phillips and Company on behalf of Mahoe Bay. On the same date, Mahoe Bay filed a notice of application to set aside the order made on 4 June 2007 by Jones J striking out its statement of case for failure of its representatives to attend the case management conference and ordering that judgment be entered for Sandals Royal Management on the claim and counterclaim. Mahoe Bay also sought an order for its

statement of case to be restored. After being adjourned on 19 December 2007, the application was heard and refused by further order of Jones J on 18 April 2008.

Proceedings in the Court of Appeal

The notice of appeal

[20] On 24 April 2008, Mahoe Bay filed a notice of appeal in respect of the order made by Jones J on 18 April 2008. In the notice of appeal, Mahoe Bay outlined the details of the order appealed as:

a. Application for relief from sanction refused.

b. Costs to [Sandals Royal Management].

c. Leave to appeal granted.

Mahoe Bay challenged the following finding of fact and law:

> "The application for court order is refused. There is not enough reasons in the Affidavits to grant relief. Mahoe Bay] is a registered company. At the time of the Case Management Conference [Mahoe Bay] did not have a representative despite time given on the 4 June 2007 for [Mahoe Bay] to secure the attendance of a representative, no representative was in attendance at the Case Management Conference."

[21] By way of the notice of appeal, Mahoe Bay urged that the learned judge had failed to apply the overriding objective in the Civil Procedure Rules (CPR) and so had not dealt justly with the application for relief from sanction; the learned judge wrongly exercised his discretion in finding that there was not sufficient explanation given for the absence of a representative of Mahoe Bay; and the learned judge failed to consider any

or all of the conditions adumbrated in Part 26.8(2) and Part 26.8(3) of the CPR and so exercised his discretion in a manner that was plainly wrong. Mahoe Bay, therefore, asked that the order of 18 April 2008 be set aside, that relief from sanction be granted and its statement of case restored. In addition, it sought an order that the registrar of the Supreme Court be directed to schedule a case management conference in the matter.

Progress of the matter in the Court of Appeal

[22] The chronology of events provided by counsel for Sandals Royal Management outlined the following events:

a. 29 April 2008 - Mahoe Bay's written submissions filed;

b. 30 April 2008 - record of appeal filed;

c. 14 May 2008 - notice of application for court orders filed by Mahoe Bay seeking regularization of late filing of submissions;

d. 15 May 2008 - notice of application for court orders filed by Sandals Royal Management seeking, inter alia:

    i. permission to file submissions in response;

    ii. security for costs; and

iii. correction of record of appeal to include amended defence and counterclaim filed by Sandals Royal Management and minute of order for Case Management Conference which came on for hearing 9 January 2007.

e. 8 July 2008 - order of Panton P granting notices of application for court orders filed by Mahoe Bay on 14 May 2008 and Sandals Royal Management on 15 May 2008 delaying hearing of appeal until execution of order;

f. 31 October 2008 - notification of order of Panton P received by Sandals Royal Management's attorneys-at-law;

g. 31 October 2008 - submissions filed by Sandals Royal Management;

h. 8 January 2009 - notice of application for court orders filed by Mahoe Bay seeking regularization of late payment of security for costs;

i. 21 January 2009 - order of Cooke JA granting Mahoe Bay's application seeking regularization of payment of security for costs;

j. 20 March 2010 - notice of application to remove name from record filed by Grant, Stewart, Phillips & Co.;

k. 28 June 2010 - second notice of application to remove name from record filed by Grant, Stewart, Phillips & Company;

l. 17 August 2010 - order of Dukharan JA granting second notice of application to remove name from record filed by Grant, Stewart, Phillips & Company.

[23] After August 2010, nothing else occurred until a significant event for the purposes of this application. On 12 January 2011, Sandals Royal Management filed a notice of application seeking dismissal of the appeal for want of prosecution or alternatively, striking out the appeal for abuse of process. In referring to this event Sandals Royal Management, at paragraph 3 of the affidavit of Kimberly Campbell, said:

> "… at that time [Mahoe Bay] had failed to prosecute the appeal for almost three (3) years after having failed to prosecute the claim for almost six (6) years thereby causing prejudice to the respondent in the manner deponed to in the Affidavit of Taynia Elizabeth Nethersole filed on January 12, 2011."

[24] Taynia Nethersole, in the affidavit filed on behalf of Sandals Royal Management on 12 January 2011, had deponed among other things, that the continuous delay by Mahoe Bay had resulted in great prejudice to Sandals Royal Management which had been placed in a position of uncertainty for over 18 years since the claim had commenced and had incurred administrative expenses for the period. Taynia Nethersole also deponed in part, at paragraph 15 of her affidavit that:

> "Some of [Sandals Royal Management's] witnesses have left the company since the action commenced and cannot now be located. Other witnesses have migrated since this action has commenced and [Sandals Royal Management]..will now be put to the additional expenses of paying for the overseas travelling and local lodging of its witnesses as a result of [Mahoe Bay's] ... delay in prosecuting its claim and subsequent appeal. Given the length of time which has passed since the claim has arisen the recollection of [Sandals Royal Management's]…witnesses will also be adversely affected as a result of [Mahoe Bay's]…extended delay."

[25] On 1 March 2011, Sandals Royal Management filed a notice of withdrawal of the application for court orders, which had been filed on 12 January 2011. The notice of withdrawal expressly indicated that the withdrawal was "without prejudice to its [Sandals Royal Management's] rights therein". Kimberly Campbell deponed that the withdrawal of the notice of application was to facilitate settlement discussions between the parties so that the matter, which had spent almost 20 years in the court system as at 2011, could have been brought to an end. Despite the parties agreeing to discuss settlement, Mahoe Bay did not approach Sandals Royal Management for the holding of any such discussions and no discussions were, in fact, held.

[26] The next event occurred over seven and a half years later. On 10 December 2018, on behalf of Mahoe Bay, a notice of change of attorney-at-law was filed by the firm Ballantyne, Beswick and Company. Sandals Royal Management's attorneys-at-law, Myers Fletcher & Gordon, on 15 March 2019, were then served with a notice of hearing of appeal scheduling the appeal for hearing on paper during the week commencing on 29 April 2019. There is nothing in the evidence indicating what led to the issuance of the notice of hearing. Mahoe Bay filed further submissions on 4 April 2019.

[27] Spurred to action by the resurfacing of the matter, on 17 April 2019, Sandals Royal Management filed a fresh notice of application seeking similar orders as sought in 2011 for the dismissal of the appeal for want of prosecution or, alternatively, the striking out of the appeal as an abuse of the process of the court.

[28] The reasons for Sandals Royal Management's notice of application are succinctly outlined in the affidavit of Kimberly Campbell. In this affidavit, she deponed at the following paragraphs:

> "[18] The failure of [Mahoe Bay] to prosecute this appeal for now almost 11 years to date has caused significant prejudice to the respondent. This is against the background of [Mahoe Bay] having failed to prosecute the claim for almost six (6) years between the vacating of the trial date in 1997 and the date of [Sandals Royal Management's application for a Case Management Conference in 2003…
>
> [19] The continuous delay by [Mahoe Bay] has resulted in great prejudice to [Sandals Royal Management] who [sic] has been placed in a position of uncertainty for almost 27 years from the date of commencement of the action, and [Sandals Royal Management] incurred administrative expenses in relation to same for the said period.

> [20] Some of [Sandals Royal Management's] witnesses have left the company since the action commenced and cannot now be located. Other witnesses have migrated since this action has commenced and [Sandals Royal Management] will now be put to the additional expense of paying for the overseas travelling and local lodging of its witnesses as a result of [Mahoe Bay's] delay in prosecuting its claim and subsequent appeal. Given the length of time which has passed since the claim has arisen, the recollection of [Sandals Royal Management's] witnesses will also be adversely affected as a result of [Mahoe Bay's] extended delay."

The submissions of Sandals Royal Management

[29] Counsel for Sandals Royal Management first addressed the question as to whether it was entitled to bring the current application to dismiss the appeal for want of prosecution in light of the fact that it had withdrawn, albeit "without prejudice", its previous application in 2011. Relying on the case of **Hamilton (Andrew) et al v The Asset Recovery Agency** [2017] JMCA Civ 46, counsel referred to the three distinct, though related, ideas subsumed in the principle of res judicata, being (i) cause of action estoppel; (ii) issue estoppel; and (iii) '**Henderson v Henderson** abuse of process'.

[30] He argued that when Sandals Royal Management withdrew its application in 2011, it was clearly stated that this was done "without prejudice to its rights", which indicates that the issues raised in that application were neither previously determined nor abandoned. Counsel argued, in any event, that further excessive and inordinate delay by Mahoe Bay is sufficient ground to precipitate a new application for dismissal on the basis of delay. As a result, Sandals Royal Management was entitled to seek dismissal and/or striking out of the appeal.

[31] Counsel then addressed the grounds relating to want of prosecution and abuse of process together, as in his view, notwithstanding that the law differs, the factual matrix which satisfied both is the same.

[32] He submitted that, notwithstanding that no express rule of the Court of Appeal Rules ("CAR") had been breached, the appeal should be dismissed for want of prosecution or struck out for abuse of the process of the court for the following reasons:

> i. Mahoe Bay has allowed its appeal to languish in the court for 11 years with no step to expedite same;
>
> ii. despite agreeing to hold settlement talks, Mahoe Bay took no step whatsoever to arrange those discussions, let alone to settle the issues in dispute despite the accommodating position taken by Sandals Royal Management to, in good faith, withdraw its initial application to dismiss/strike out the appeal; and
>
> iii. the delay of Mahoe Bay has caused Sandals Royal Management significant prejudice in that it will be asked to defend an appeal in respect of which 11 years have passed since the facts

> which gave rise to the appeal and, if the appeal is successful, to defend a claim which has seen over quarter century pass since the facts which gave rise to the claim. Some of the witnesses on whose testimony Sandals Royal Management would have to rely in its defence have left Sandals Royal Management's employ and have migrated since the commencement of the claim.

[33] Counsel relied on rule 1.13 of the CAR, which provides that the court may strike out the whole or part of the notice of appeal and referred to rule 2.20 which, in counsel's view, makes it clear that it is the duty of the registrar of the court to ensure that all parties comply with the provisions of the rules. He relied on the cases of **Grovit v Doctor and Others** [1997] 1 WLR 640, which was applied in the case of **Gerville Williams and Ors v The Commissioner of the Independent Commission of Investigations and the Attorney General of Jamaica** [2014] JMCA App 7. Counsel highlighted that in the **Gerville Williams** case, the primary basis relied on by Morrison JA (as he was then), in making a finding of an abuse of process and dismissing the appeal for want of prosecution, was: "the appellants had shown no real intention of pursuing the appeal". Morrison JA had noted that the appellants in the **Gerville Williams** case had failed to take any steps to progress their appeal for well over a year.

[34] Counsel argued that a lack of real intention to pursue an appeal can be "evinced" from the failure to take steps to progress hearing of the case and that this can be seen even where reasons for delay can be apportioned between a plaintiff and a court registry, as seen in the case of **Norris McLean v Hamilton et al** (unreported), Supreme Court, Jamaica, Suit No CL M215/1993, judgment delivered 9 April 2002. In the **Norris McLean** case, the reasons for delay could have been apportioned between the Supreme Court registry and the plaintiff but the significance of the plaintiff's contribution to the delay was taken into account. The court struck out the proceedings for want of prosecution as the defendants were prejudiced by the long delay, including the fact that the ability to have a fair trial would have been significantly prejudiced as the defendant was unable to "get its witness". The latter issue is a key consideration in the court's determination as to whether an abuse of the process of the court has taken place (see: **Alcan Jamaica Company v Johnson and Anor** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No. 20 of 2003, judgment delivered July 30, 2004).

[35] Counsel argued that for six years, Mahoe Bay had shown no interest in pursuing the claim in the Supreme Court which led to the claim being struck out. An appeal was filed in respect of the striking out of the claim and for almost three years (between 2008 and 2011), Mahoe Bay showed no interest in moving its appeal forward. There was also no interest shown by Mahoe Bay to have the substantial dispute in the matter resolved as it failed to approach Sandals Royal Management regarding settlement

although Sandals Royal Management had been accommodating in withdrawing its first application that it had filed for the dismissal of the appeal in 2011.

[36] Counsel further contended that "the appellant is guilty of complete inaction in its conduct of its appeal" and highlighted that appeals and matters had been struck out for inordinate delay and or abuse of the process of the court for much shorter periods than that reflected in the instant appeal. For example, one year in **Gerville Williams**, five years in **Alcan Jamaica Company** and five years in **Pete Drummond & Anor v Carl McFarlane** [2013] JMCA App 28. The appeal having been filed in April 2008, counsel noted that April 2019 marked the "unhappy anniversary" of its 11th year in this court. Furthermore, the claim having been filed in 1992, the year 2019 would mark 27 years since it had commenced.

[37] Counsel noted that were the appeal to be heard and allowed, the matter would have to be sent back to the Supreme Court for the holding of a case management conference and a trial date would have to be set, with trial dates now currently being set for as far away as 2024. The resulting prejudicial impact to Sandals Royal Management, a company with employees that come and go, would be significant with some witnesses who have left its employ being untraceable while others have migrated. In addition, the memories of the company's witnesses would have been negatively impacted over the period.

[38] Counsel relied on the overriding objective of the CPR, which is for cases to be dealt with expeditiously and fairly, and argued that no expedition was displayed by Mahoe Bay.

[39] It was also highlighted that not only had Mahoe Bay's claim been struck out on 4 June 2007, but at the same time, judgment had been entered in favour of Sandals Royal Management by way of a declaration that Sandals Royal Management had acquired and enjoyed an easement over the wall which was the subject matter of the claim and it had the right to erect signs signifying the means of access to its premises. In addition, rights had been vested in a third party as, by virtue of the judgment, the reserved areas in the subdivision development had been vested in the relevant local authority. A reopening of the matter after 12 years would not only deprive Sandals Royal Management of the judgment in its favour but also deprive the local authority of the rights which had been vested in it.

Mahoe Bay's submissions

[40] Counsel for Mahoe Bay, Mr Beswick, indicated that Mahoe Bay strenuously objected to the application and would assert that; "at no time did [Mahoe Bay] fail to comply with any requirement of the court of appeal rules, as the matter languished in the registry and was never placed before the court to be heard".

[41] It was argued that the appeal was of vital importance to Mahoe Bay as the orders made by Jones J to strike out the claim were grossly prejudicial to its interests. Counsel argued that the orders made by Jones J, in striking out Mahoe Bay's claim on

the basis that a representative of Mahoe Bay had failed to attend the case management conference, were arbitrary and draconian.

[42] Counsel made the bold submission that the principles which apply to a consideration of an application to dismiss an appeal for want of prosecution or strike out an appeal as an abuse of the process of the court are the same as those which apply to the striking out of a claim. Counsel argued that the application before the court was draconian and was itself an abuse of the process of the court.

[43] In line with his submission that the relevant principles to be considered are those which relate to the striking out of a claim, counsel referred to the decision of this court in **S&T Distributors Ltd v CIBC Jamaica Ltd et al** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 112/2004, judgment delivered 31 July 2007, in which Harris JA highlighted that the striking out of a claim is a severe measure and the power to do so is to be exercised with extreme caution. Further, such action should only be taken in plain and obvious cases. This view was supported by F Williams J (as he was then) in the Supreme Court in the matter of **Hamilton, Herbert A v Minister of National Security and Attorney General of Jamaica** [2015] JMSC Civil 39.

[44] Counsel also relied on the case of **Peerless Limited v Gambling Regulatory Authority and others** [2015] UKPC 29 in which the Privy Council held that considerable caution and proportionality should be exercised where the draconian power to terminate proceedings without a hearing on the merits is being exercised. He highlighted that the Privy Council noted that there were options which could be

exercised instead of terminating proceedings such as the making of wasted costs orders and the award of costs.

[45] Counsel submitted that Mahoe Bay had a strong claim and that Jones J had no good reason for striking out the claim. Counsel relied on the case of **Wayne Reid, Jentech Consultants Ltd v Curtis Reid** [2015] JMCA App 3 in which the learned President highlighted that although the court was unhappy with the length of time that a matter had been before the court, the overriding objective was for justice to be done in light of the serious complaint which had been made in respect of the decision of the judge at first instance.

[46] Counsel argued that Mahoe Bay had complied with the rules of the court by filing the notice of appeal promptly as well as the record of appeal and its submissions in support of the appeal. Further "there was nothing that the rules required [Mahoe Bay] to do as this appeal would have been one to be considered on paper". The file was therefore complete and there was no need for Mahoe Bay to do anything else. As Mahoe Bay had fully complied with the rules they should not now be sanctioned "when at all times they had indicated and enforced their right to appeal."

[47] Counsel highlighted that Mahoe Bay would suffer great prejudice if the appeal is struck out as the relevant limitation period has expired. He argued that the claim was still live before the court so there could still be a fair trial. Further, Sandals Royal Management had suffered little or no prejudice as the lands in question belong to the appellant. Counsel argued that while the court has a discretion to strike out a statement

of case for non-compliance with an order of the court or for delay, this discretion is to be exercised subject to the court's mandate to deal with cases justly. He referred to the cases of **Strachan v The Gleaner Company** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999, which was approved in the case of **Charmaine Bowen v Island Victoria Bank Ltd, Union Bank Limited et al** [2014] JMCA App 14 in which Phillips JA highlighted that in exercising a discretion to strike out a statement of case the court should consider the length of the delay, the reasons for the delay, the merit of the case and whether any prejudice may be suffered by the opposing side. Further, in the **Strachan** case it was highlighted that; "Notwithstanding the absence of a good reason for delay, the court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done".

[48] Counsel also relied on the cases of **Costellow v Somerset County Council** [1993] 1 WLR 256 and **Hugh Bennet and Jacqueline Bennet v Michael Williams** [2013] JMSC Civ 194, arguing that the court should determine whether any prejudice to Sandals Royal Management is substantial in nature.

[49] Mr Beswick argued forcefully that there is no delay or inaction unless there is a breach of the Rules. There is no fault, delay, inactivity or breach by Mahoe Bay. No litigant can force a registrar to set down an action. There is no evidence to show that any delay is the fault of Mahoe Bay. Mahoe Bay does not have to do anything other than what the Rules require, such as filing the notice of appeal, the record of appeal

and submissions. There is no requirement for Mahoe Bay to write and enquire as to what has happened to the appeal. He also argued that in order to succeed in their application, Sandals Royal Management must show that there is a breach of which Mahoe Bay is guilty. Delay and inactivity can only occur if there is a breach.

[50] He submitted that Sandals Royal Management's argument that it has been prejudiced is a mere bald assertion as the claim is buttressed by paper, there is title to the land and the fundamental claim is grounded in trespass. Prejudice arises when your validly asserted right is denied which is what will happen if the appeal is struck out. There would be no prejudice if a reversal of the orders made on the counterclaim on 4 June 2007 takes place. This is because Sandals Royal Management had no such right before those orders were made.

[51] Counsel concluded that Mahoe Bay owns registered title to the land in question, the boundaries had been trespassed on by Sandals Royal Management and it was almost impossible to deny the merits of the case.

[52] He submitted that the principles governing striking out of cases were also relevant to the application and so the court should consider the merits of the appeal.

Sandals Royal Management's response to the authorities cited by Mahoe Bay

[53] In responding to the authorities, Mr Kelman made a number of general statements including the fact that none of the authorities cited by Mahoe Bay addressed the issue of dismissal for want of prosecution. He maintained that although Mr Beswick made a bold statement in so far as the relevant and applicable legal principles are

concerned, he did not cite any case dealing with the issue of dismissal for want of prosecution which supports his submission that delay in relation to want of prosecution can only occur if there is a breach of or non compliance with a rule.

[54] Mr. Kelman further contended that while counsel for Mahoe Bay urged the court that the merit of the appeal was an appropriate consideration in applications of this type, none of the cases on dismissal for want of prosecution have looked at merit as "exculpatory in respect of prolonged inactivity".

[55] He argued that, contrary to the argument of Mr. Beswick that there is no prejudice unless there was a pre-existing right that was impacted, prejudice in matters of this type is not dependent on a pre-existing right but instead includes matters of expense and impact on the recollection of the witnesses.

[56] Counsel distinguished the cases on which Mahoe Bay had relied, although not all of them had been provided in the bundle of authorities:

i. in the **Wayne Reid** case the matter concerned an application for a stay of execution;

ii. in the **Peerless** case the matter involved an application for leave to apply for judicial review and so does not assist the appellant;

iii. the **Herbert Hamilton** case was a judicial review matter and an application was made to strike out the

claim for failure to disclose reasonable grounds; not to dismiss for want of prosecution, or to strike out due to inactivity and an abuse of the process of the court;

iv. the case of **AG v Dixon** concerned an application to extend time to file a defence;

v. the **Costellow** case related to a striking out and extension of time to file appeal; and

vi. for the **Strachan v Gleaner Co** and **Charmaine Bowen** cases no copies were provided, however those cases did not involve issues of dismissal for want of prosecution or the striking out of an appeal for inaction such as to constitute an abuse of the process of the court.

[57] He concluded that the cases relied on by Mahoe Bay did not provide any useful guidance to the court in respect of the application.

Discussion and analysis

Was this application barred?

[58] It did not appear that Mr Beswick, on behalf of Mahoe Bay, was of the view that Sandals Royal Management was barred from making this application by virtue of the

doctrine of res judicata. We note that this issue was raised by Sandals Royal Management, perhaps out of an abundance of caution, in light of the fact that it had withdrawn a previous application in similar terms as the one we heard. It was our view that Sandals Royal Management was not barred from making this application.

[59] In any event, we also agree with the submission made by Sandals Royal Management that "further excessive and inordinate delay by [Mahoe Bay] is sufficient ground to precipitate a new application for dismissal on the basis of delay". Proceedings in court are ongoing. It is quite possible that an application to dismiss for want of prosecution could fail and thereafter facts arise which later justify the dismissal of the claim.

[60] Sandals Royal Management was therefore entitled to pursue the application to dismiss the appeal for want of prosecution or to strike it out as an abuse of process of the court.

The Law

Dismissal for Want of Prosecution and Striking out a claim as an abuse of the process of the court due to inactivity and/or delay

[61] The applicable principles to applications of this type are currently quite settled in our jurisdiction. There is hardly a matter that has been determined in our jurisdiction without reference to the locus classicus House of Lords decision of **Grovit v Doctor and Others**. The facts in that matter are useful. They are helpfully outlined in the headnote:

> "On 25 August 1989 the plaintiff brought proceedings against seven defendants, alleging, inter alia, that a written reference given by the first defendant to the second defendant in August 1989 was defamatory of the plaintiff. By a defence served on 25 October 1989 the defendants admitted publication of the statement and that it intended to refer to the plaintiff but denied that it was defamatory and pleaded justification. Subsequently, the claims against the fourth to seventh defendants were dismissed by consent. The third defendant went into liquidation and took no part in the appeal. On 11 July 1990 Wright J. dismissed an application under R.S.C., Ord. 18, r. 19 to strike out the libel claim and directed trial of the preliminary issue whether the words relied on were capable of bearing a defamatory meaning. The plaintiff took no further steps in the action after 20 September 1990. By summons dated 12 October 1992 the defendants applied to strike out the writ and statement of claim for want of prosecution. The deputy judge held that there had been inordinate and inexcusable delay and that the plaintiff had no interest in actively pursuing the litigation and ordered the action to be dismissed for want of prosecution. The Court of Appeal dismissed the plaintiff's appeal."

[62] The House of Lords dismissed the plaintiff's appeal. Lord Woolf wrote the judgment of the court and early on in his judgment outlined the approach adopted by the courts at that time. At page 642 of the judgment he stated:

> "The approach which is adopted at the present time by courts on an application to dismiss an action for want of prosecution is set out by Lord Diplock in *Birkett v James* [1978] A.C. 297, 318F-G. Lord Diplock basing himself upon a note to R.S.C., Ord. 25, r. 1 in the *Supreme Court Practice 1976*, said:
>
> > 'The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of

> the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party'."

[63] Both the deputy judge and the Court of Appeal had concluded that the appellant maintained the action in existence notwithstanding that he had no interest in having it heard. Lord Woolf opined at pages 647 to 648:

> "... I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the appellant's inactivity in the libel action for a period of over two years. This conduct on the part of the appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in *Birkett v. James* [1978] A.C. 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.
>
> It is possible that in his judgment Evans L.J. was indicating that in a hybrid situation, an action could be dismissed for want of prosecution albeit that the evidence strictly fell short of what is required under limb (1) and limb (2) when each is

> considered separately. I can appreciate the reasons why it could be thought to be appropriate to adopt this approach. I would prefer to leave this qualification on Lord Diplock's approach to be finally determined in a case where the issue is fully argued on both sides."

[64] In the case of **Pete Drummond and Jamaica Public Service Company Ltd v Carl McFarlane** [2013] JMCA App 28, the court heard and granted an application to strike out an appeal from the judgment of M McIntosh J which had been given on 18 September 2007. By notice of appeal filed 4 October 2007, the respondent challenged the judge's findings of contributory negligence and the quantum of damages assessed. At a case management conference held on 26 May 2009, Dukharan JA ordered that the respondent file a supplemental record of appeal to include the notes of evidence and fixed the appeal for hearing on 28 September 2009. The matter was taken out of the list on that date as the notes of evidence were still unavailable. The court suggested that efforts be made to agree the notes of evidence in the absence of the learned judge's notes.

[65] The applicant's attorneys-at-law wrote several letters to the respondent's attorneys-at-law following up on the orders and suggestions made by the court. There was no response. The applicant's attorneys-at-law by letter dated 19 September 2011 notified the respondent's attorneys-at-law that they intended to apply to the court to strike out the appeal if a response was not provided within 21 days. There was no response to the last letter and so the applicant, on 16 August 2012, filed an application

to strike out the appeal. It was only when the application came on for hearing that there was a flurry of activity in an attempt to secure the notes of evidence.

[66] Morrison JA opined at paragraph [10] of the judgment:

> "There can be no question that the delays in prosecuting this appeal and the level of inaction by the respondent's attorney-at-law have been extraordinary. It is typical that the only response made on the respondent's behalf was made at the last moment and even then, by the respondent's attorney's secretary and not by the attorney himself. Bearing in mind that the action in this case relates to a 1990 accident, we consider this a case in which the court is fully justified in making an order for immediate striking out of the appeal."

[67] In the case of **Gerville Williams and Ors v The Commissioner of the Independent Commission of Investigations and the Attorney General of Jamaica** [2014] JMCA App 7, the appellants, by notice of appeal filed 13 June 2012, challenged the 25 May 2012 judgment of the full court of the Supreme Court dismissing their claim. By notice filed 31 May 2013, the 1st respondent applied for an order dismissing the appeal for want of prosecution. The appellants applied for orders extending the time within which to serve their skeleton arguments and file the record of appeal. Both applications were heard together and the court refused the appellant's application to extend time and dismissed the appeal for want of prosecution.

[68] Morrison JA stated at paragraphs [31] – [33] of the judgment:

> "Without an order for extension of time, the appellants are back in the position in which they found themselves on 4 November 2013. I think it is fair to conclude that…as at that date the appellants had shown no real intention of pursuing

> the appeal. For, not only had they failed to take any further steps to progress their appeal for well over a year…but over that same period they had resumed-and sustained-active participation in the trial before the learned Resident Magistrate. It seems to me that the juxtaposition of these two factors, complete inaction in this court, as against steady activity in the other, supports a clear implication that the appellants had made an election between the two sets of proceedings.
>
> In my view, this is a clear abuse of the process of this court in the sense described by Lord Woolf in **Grovit and Others v Doctor and Others** [1997] 2 All ER 417, 424…
>
> Accordingly, on the basis of the same considerations that have formed my view that the appellants were guilty of an abuse of the process of this court, I came to the conclusion that the 1st respondent was entitled to an order dismissing the appeal for want of prosecution."

[69] In the case of **Norris McLean** Jones J (Ag) (as he was then) heard an application by the defendants to strike out proceedings for want of prosecution and an application by the plaintiff to enlarge time. In that matter the plaintiff filed a writ of summons against the defendants together with a statement of claim on 1 July 1993 claiming damages for false imprisonment. The Attorney General, as 4th defendant, entered an appearance on 26 August 1993 and filed a defence on 24 September 1993. The court ordered that the matter be set down for trial within 30 days of 27 April 1994 and the plaintiff filed a certificate of readiness on 6 February 1996. On 15 December 1996 the plaintiff filed an application to enlarge time. This was adjourned due to the absence of the plaintiff and short service. The 4th defendant contended that since the re-listed summons to enlarge time was served 29 January 1997 the plaintiff took no further action until February 2002 when he again served the 4th defendant with the relisted summons. The 4th defendant brought a summons to dismiss the writ of

summons for want of prosecution, contending that its defence was prejudiced as one of the police officers involved had resigned and could not be located, and that, while another was still available, the passage of time had eroded his memory. As a consequence, the 4th defendant would have been unable to have a fair trial given the long delay.

[70] The attorney-at-law for the plaintiff attributed the cause of the delay to the fault of the Supreme Court registry as the file had been lost. Jones J (Ag) indicated that the delay in the matter was clearly inordinate. The learned judge however sought to address the issue as to whether delay caused in part by the act of a third party (the registry) was sufficient to excuse the plaintiff's delay and lead to the refusal of the summons to dismiss the claim for want of prosecution. At paragraph 14 of the judgment, Jones J (Ag) indicated that the defendants were not to be blamed in any way for the delay impacting the matter but instead the delay could be apportioned between the plaintiff and the Supreme Court registry. The question therefore arose as to whether the contribution by the plaintiff to the delay was significant. The learned judge then concluded that the contribution of the registry to the overall delay could be assessed at just below half. In concluding at paragraph 17, the learned trial judge found as follows:

> "The court finds that the defendants were prejudiced by the long delay and are unable to get its witnesses to have the matter tried fairly. That fact taken together with the significant contribution to the delay by the plaintiff himself or his attorneys, leads me to conclude on balance that in the interest of justice, the Writ of Summons should be struck out

against the…Defendants, and the action against them should be dismissed for want of prosecution...”

[71] This case was cited by Sandals Royal Management to demonstrate how the court approached circumstances where the registry was also to be blamed for the delay in the matter.

[72] In the matter of **Alcan Jamaica Company v Herbert Johnson and Idel Thompson Clarke** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 20/2003, judgment delivered on 30 July 2004, this court upheld the decision of a single judge of appeal. The single judge of appeal, Bingham JA, considered the appeal in keeping with the regime in place at that time whereby procedural appeals were determined by single judges. He allowed an appeal in respect of an unless order for a suit to be dismissed for want of prosecution, unless the plaintiff filed and served a statement of claim within 14 days of the date of the order. A writ of summons had been filed on 11 December 1996 arising out of an accident on 12 December 1993 which had claimed the lives of two individuals. The driver of one of the vehicles involved was an employee of the appellant, Alcan Jamaica Limited. Appearance was entered to the suit on 2 September 1997. A summons to dismiss the suit for want of prosecution dated 26 August 2002 was pursued by the appellant. It was heard on 29 January and 11 March 2003 and the learned trial judge made the unless order which was appealed by Alcan Jamaica Limited.

[73] Cooke JA wrote the judgment of this court. Having reviewed a number of cases decided on the issue, he stated at page 15:

> "This review of the cases indicates that in the development of our jurisprudence in this area much emphasis has been placed on whether or not there is a substantial risk that a fair trial is not possible when there is inordinate and inexcusable delay. Delay is inimical to there being a fair trial… Inordinate and inexcusable delays undermine the administration of justice. Even moreso public confidence will tend to be eroded."

[74] The matter of the time by which the matter was likely to come to trial, were it to be allowed to proceed, was considered. Cooke JA opined at pages 22 to 25 of the judgment:

> "If this case were to be allowed to proceed to trial even with court management, taking into consideration the realities of the trial process in the Supreme Court the most optimistic forecast is that it would not come up for trial for another nine months. At that time there would have been a substantial risk that it would not be possible to have a fair trial. The passage of time would probably have wreaked havoc with the memory of the potential witnesses on both sides…
>
> It is also my view that in this case the delay is likely to cause serious prejudice to the defendants. In paragraph 7 of the Marcia Tai Chun affidavit the evidence is that the 1st respondent/defendant who was the driver of the appellant/2nd defendant's vehicle is no longer in the employment of the 2nd defendant. Further, he cannot be located...
>
> I hold that the fact that the 1st respondent/defendant cannot now be located is likely to cause serious prejudice to the appellant/2nd defendant in advancing its defence…The conduct of the 2nd respondent/plaintiff demonstrated unpardonable indolence in the pursuit of her claim. This refusal to get on with it speaks to a decided disinclination to proceed."

[75] The attorney-at-law for the plaintiff, by affidavit, asserted that the plaintiff was still interested in proceeding with the suit. Cooke JA was not impressed with this expressed interest and opined at page 25:

> "It is my view that this professed intention is all too late. It should have manifested itself long ago. It would seem that the protracted inaction of the plaintiff indicates an abuse of the process of the court. This is a case that beckons the exercise of the inherent jurisdiction of the court to demonstrate that such abuse will not be tolerated."

The principles argued and cases relied on by Mahoe Bay

[76] Having outlined the state of the law in this jurisdiction in the area of dismissal for want of prosecution and the striking out of matters as an abuse of the process of the court, including due to delay and inactivity, it is clear that Mr Beswick's submissions as to the relevant principles to be applied, are incorrect. It is not correct, contrary to his assertions, that there can be no delay or inaction unless there is a breach of the Rules. Neither is it correct that in order to succeed in its application Sandals Royal Management must demonstrate some breach of which Mahoe Bay is guilty. In the case of **Grovit v Doctor and Others,** Lord Woolf highlighted the fact that the evidence relied upon to establish an abuse of process may be "the plaintiff's inactivity"; and that same evidence will "then no doubt be capable of supporting an application to dismiss for want of prosecution" (see also the case of **Icebird Limited v Alicia P Winegardner** [2009] UKPC 24). It is also not correct that the principles to be applied to applications such as these, where the reason for the application is inordinate delay and inaction, are the same as those relevant in respect of applications to strike out

matters on the basis that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court or that they show no reasonable cause of action. Furthermore, the merits of the claim or the appeal itself do not fall for consideration as a factor in applications of this nature. The courts in Jamaica have maintained the principles as outlined in the line of cases including **Grovit v Doctor and others**.

[77] In the main, I agree with the submissions made by Mr Kelman that the cases cited on behalf of Mahoe Bay did not support the arguments made by Mr Beswick and were inapplicable to the matter being considered by this court. The case of **Wayne Reid and Jentech Consultants Ltd v Curtis Reid** involved the question as to whether an appeal, filed before the order being appealed against had been served, was valid. The court, having ruled that the appeal in question was invalid, granted an extension of time for the filing of the appeal as well as a stay of execution.

[78] The case of **Peerless Limited v Gambling Regulatory Authority and others** is also not helpful with the issues being considered in this application. The appeal arose from the judgment of the Supreme Court of Mauritius refusing the appellant leave to apply for judicial review. The basis of the refusal to grant leave was the failure of the appellant to make full and frank disclosure of facts by reason of misleading statements made in the appellant's affidavits. It was in the context of considering that issue that the Board referred to the fact that the power to terminate proceedings without a hearing on the merits needs to be exercised with considerable

caution and in a proportionate way. The Board concluded that notwithstanding the appellant's conduct of the proceedings before, there was a sufficiently arguable case to call for the grant of leave to apply for judicial review on the issue of absence of reasons and the question of the proportionality of the decision of the Gambling Authority not to renew the appellant's licence.

[79] The case of **Joseph Henry William Costellow v Somerset County Council** [1993] 1 All ER 952 is, however, relevant although it is earlier in time than the case of **Grovit v Doctor and others**, in which the principles relating to applications to dismiss were so helpfully distilled. In the **Costellow** matter the plaintiff's action had been struck out for failure to serve a statement of claim and an application made by the defendant to dismiss the claim for want of prosecution was granted. The claim arose from an accident which occurred in September 1987 and a writ had been served in January 1991. The statement of claim became due on 2 February 1991. In May 1991, the district judge granted an application made by the defendant for the dismissal of the claim for want of prosecution. An appeal was filed and in addition the plaintiff, by November 1991, had filed a summons seeking leave to serve the statement of claim out of time. One of the questions considered by the court concerned in what order such opposing applications should be heard. It will be seen that the circumstances in the application being heard by this court are different. There is no allegation that the appellant has breached a rule and there is no application for extension of time by the appellant. Sir Thomas Bingham MR in delivering the judgment of the court stated at page 960:

> "In the present case, the judge was in my view misled by Price v Dannimac Limited and by reliance on an inappropriate analogy with Order 6, rule 8 into taking much too narrow a view of the task before him. Had he viewed the case in the round, he would have been bound to hold that there was no ground for dismissing the action for want of prosecution in the absence of prejudice to the defendants. He would also have felt it unjust to stifle the plaintiff's claim on the basis of a delay which he described as 'relatively minor', however lame the excuses for it, in the absence of such prejudice. The plaintiff's case may not be very strong, but on a proper direction in law the conclusion is in my view inescapable that he should not be precluded from pursuing it for whatever it is worth. Since the judge's exercise of discretion was in my judgment vitiated by misdirection, it is for this court to exercise its discretion afresh. I would do so by granting the plaintiff the extension he seeks and refusing the defendants' application to dismiss for want of prosecution."

[80] In the instant application, the defendant has alleged prejudice and the delay in the prosecution of the appeal cannot be described as "relatively minor".

The cases of **Attorney General v Roshane Dixon and Attorney General v Sheldon Dockery** [2013] JMCA Civ 23 were appeals in which the appellant sought to set aside orders made by the Master in which she refused to grant applications by the appellant to extend time within which to file defences. The principles which apply, where the court is asked to exercise its discretion on an application for an extension of time, involve consideration of the length of the delay, the reasons for the delay, whether there is an arguable case for an appeal, defence, or claim, as the case may be, and the degree of prejudice to the other parties if time is extended. Notwithstanding the absence of a good reason for delay, the court is not bound to reject an application for an extension of time as the overriding principle is that justice should be done. The

matter being considered by this court does not fall within the type of matters to which these principles apply.

Application of the relevant principles to the instant matter

[81] This is a matter in which it is clear that Mahoe Bay, for an extensive period of time, felt no urgency whatsoever for the appeal and, ultimately, the claim to be determined. When one considers the nature of the claim that was filed, this is obvious. This is a claim for trespass and for injunctive relief. Mahoe Bay has claimed that a wall was built on its land and wrongfully so. Not only has Mahoe Bay complained that this wall was built on its land, but it has complained of the placing of a propane gas tank on the west side of the reserve road, the dumping of sewage waste, effluent and kitchen waste water into the sea "contaminating its land at the beach area", the erection of telephone and electricity poles and drainage pipes on its property, and the erection of a guard house and road barrier impeding the its access to its own land. Such serious allegations, if true, would certainly have led to grave inconvenience to Mahoe Bay and would cry out for urgent resolution. Mahoe Bay had sought the remedy of an injunction to restrain Sandals Royal Management from erecting the offending structure and had also sought an order for Sandals Royal Management to pull down and remove the alleged offending structure. Certainly, one would not be surprised if Mahoe Bay were to have felt that an application for a speedy trial would have been justified.

[82] The nature of the orders leading to the appeal would therefore highlight the need for expedition in the hearing of the appeal. Mahoe Bay's claim had been struck out in 2007, and was brought to a premature end without the merits having been

determined. Not only was its claim brought to this disappointing determination, but a judgment had also been granted against it in 2007, conferring rights on Sandals Royal Management as well as on the relevant local authority. It is therefore not correct, contrary to Mr Beswick's submissions, that Mahoe Bay's claim is still "alive".

[83] Instead of urgency and expedition, what has occurred? The claim having been struck out in June 2007, declaration having been granted to Sandals Royal Management conferring proprietary rights, an application for relief from sanction having been refused in April 2008, the appeal, having been filed in April 2008, only came on for hearing 11 years later in April 2019.

[84] No interest was shown by Mahoe Bay in having the matter settled, when in 2011 the respondent withdrew its application to dismiss the appeal for want of prosecution. Mahoe Bay filed no affidavit and, therefore, did not provide any explanation for the failure to pursue this avenue. It is not enough for a litigant to file the relevant papers and comply with the procedural rules, then sit back thereafter and allow years to pass with no movement of its appeal saying to himself or herself: "I have done all I am supposed to do. Even if ten years pass and my matter is not moving, it is not my fault, I cannot be blamed, I am still entitled to have my matter heard". It is not enough, because litigants are to show an interest in having their matters completed. It is not enough, because as time progresses, it becomes more likely that it may be difficult for a fair trial to take place. Witnesses move on or even die. Their recollection of the facts related to the claim may have faded. Documents may be lost, misplaced, destroyed or

damaged. The other party has to continue to expend funds to respond to the matter. Rights, obligations and entitlements may be in doubt as persons await the ruling of the court.

[85] It is correct that the registry of the court is required to carry out its role and take the necessary steps for a matter to proceed. It is also correct that Mahoe Bay had no duty imposed by the Rules to enquire as to the progress of the appeal. This does not, however, undermine, contradict, or override in any way, the duty of a litigant to maintain an active interest in having his or her matter proceed with expedition. Parties have a duty to assist the court to deal justly with cases including assisting the court to deal with matters expeditiously.

[86] I agreed with the submissions of Mr Kelman, counsel for Sandals Royal Management, that the delay and inactivity in this matter has been truly extraordinary, even if viewed solely at the appellate court level, as 11 years have elapsed since the appeal was filed. Mahoe Bay has filed no evidence and has made no attempt to explain what has led to this extraordinary delay and inactivity. For example, there was no explanation as to what, if anything, occurred between August 2010 and December 2018.

[87] Consider that in this particular matter, if the appeal were to be heard and allowed, were it to be sent back to the Supreme Court to proceed to trial, it may not be tried before 2024 as both counsel agreed that trial dates are currently being scheduled in that year. Witnesses would be asked to give evidence in relation to events that are

alleged to have occurred in or about 1992. By 2024, 32 years will have passed since the writ was filed. Sandals Royal Management, by its affidavit evidence, has indicated that some of its witnesses have resigned and cannot be found. Even if they can be found, they no longer work with the respondent and it will be costly for them to return for a trial. Clearly their recollection will have been negatively impacted after 27 years. There is therefore a substantial risk that it will not be possible to have a fair trial of the issues and Sandals Royal Management has demonstrated prejudice.

[88] Sandals Royal Management having secured a judgment conferring it with a right in 2007, would also suffer prejudice if the judgment were to be set aside after 12 years. Such an occurrence in these circumstances would be truly inimical to and undermine the administration of justice.

[89] I conclude that there has clearly been inordinate and inexcusable delay and inactivity on the part of Mahoe Bay. In addition, the evidence led me to the view that Mahoe Bay was neither interested in a speedy resolution of the appeal nor the substantive issues which led to the claim. In fact, Mahoe Bay has shown, for a considerable time, a lack of interest in the matter.

[90] This set of circumstances also reflected an abuse of the process of the court. I acknowledge that striking out for abuse of process is a measure of last resort and should be done only in plain and obvious cases such as in this matter.

Conclusion

[91] In all the circumstances, I saw it fit to dismiss the appeal for want of prosecution and to award costs to Sandals Royal Management as detailed in paragraph [5] above in agreement with my learned sisters.