JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CIVIL APPEAL NO 15/2017

APPLICATION NO COA2021APPOO146

BETWEEN	**TELEVISION JAMAICA LIMITED**	**APPLICANT**
AND	**CVM TELEVISION LIMITED**	**RESPONDENT**

5, 6 April and 20 May 2022

Mrs Stephanie Williams and Ms Ariana Mills instructed by Henlin Gibson Henlin for the applicant

Conrad George and Andre Sheckleford instructed by Hart Muirhead Fatta for the respondent

F WILLIAMS JA

[1] I have read the draft reasons for judgment of Brown JA (Ag) and agree. There is nothing further that I wish to add.

D FRASER JA

[2] I too have read the draft reasons for judgment of Brown JA (Ag) and agree.

BROWN JA (AG)

[3] This is an application by Television Jamaica Limited (referred to in this judgment as 'the applicant') to strike out CVM Television Limited's (referred to in this judgment as

'the respondent') appeal for want of prosecution or, in the alternative, that the respondent provide security for the applicant's costs occasioned in defending the appeal.

[4] At the close of the submissions for the parties, we made the following orders:

> "1. The application to strike out the appeal for want of prosecution is refused.
>
> 2. The application for security for costs is refused.
>
> 3. Each party shall bear its own costs."

At the time of giving the preceding orders, we promised to put our reasons in writing. This is a fulfilment of that promise. I will now set out the application and supporting grounds, together with summaries of the evidence and the submissions.

The application

[5] By its notice of application for court orders, filed on 4 August 2021, the applicant sought the following orders:

> "1. The Appeal be struck out for want of prosecution.
>
> 2. In the alternative, the [respondent] provides security for the [applicant's] costs in the appeal in the sum of Four Million Eight Hundred [Thousand] Dollars ($4,800,000.00) within twenty-one (21) days of the date hereof.
>
> 3. The said sum be paid into an interest bearing account at a licensed financial institution in the joint names of the Attorneys-at-Law for the [respondent] and the [applicant] and be held until the determination of the appeal or further order of the Court.
>
> 4. The [respondent's] appeal be stayed until such time as the security for costs is provided in accordance with the terms of the Order herein.
>
> 5. Unless security for costs is provided in the terms of the Order herein, the [respondent's] appeal is dismissed, and judgment entered in favour of the [applicant].

6. The costs of this application be the [applicant's] to be taxed if not agreed.

7. Such further and other relief as this Honourable Court deems fit."

The grounds of the application

[6] The notice of application was supported by some 15 grounds, eight of which appeared to be in aid of the substantive application (dismissal for want of prosecution) and the remainder relating to the alternate application for security for costs. Below are the grounds:

"1. The [respondent] filed its Notice of Appeal on the 20th February 2017.

2. The Notes of Evidence was [sic] made available to the parties on the 9th December 2019.

3. The [respondent] has a duty to take active steps to have its matter heard by the court expeditiously.

4. Pursuant to Rule 2.6 (1) of the Court of Appeal Rules 2002, within twenty-one (21) days of receipt of the lodging of a transcript, the appellant must file with the registry and serve on all other parties a skeleton argument.

5. The [respondent] failed to file and serve its skeleton arguments or take any step to proceed expeditiously with the appeal.

6. The [respondent] has failed and continue [sic] to fail to comply with the rules of this court.

7. The delay has caused great prejudice to the [applicant] and is an abuse of process including the fact that it is being kept out of damages due to it on the successful prosecution of the claim.

8. The [applicant] has still not been paid its damages which is currently in an interest-bearing account at Bank of Nova Scotia since 18th February 2017 on its application.

9. Pursuant to Rule 2.11 (2) of the Court of Appeal Rules 2002, the court or a single judge may order the [respondent] to give security for the costs occasioned by an appeal.

> 10. By letter dated the 17th May 2021, Henlin Gibson Henlin, Attorneys-at-Law wrote to the [respondent's] attorneys-at-law on record Nigel Jones & Co., to request security costs [sic] in the sum of Three Million Five Hundred Dollars ($3,500,000.00).
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> 11. On the 19th February 2021 Hart Muirhead Fatta served an Amended Notice of Appeal. However, to the date hereof the Attorney on record is Nigel Jones & Co.
>
> 12. By letter dated the 29th June 2021, Henlin Gibson Henlin sent a copy of the letter to Nigel Jones & Co. to Hart Muirhead Fatta.
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> 13. The [applicant] has received no payment of security for costs from the [respondent] to date.
>
> 14. The Application [sic] for security for costs is to be made under these circumstances.
>
> 15. It is just in all the circumstances."

The affidavit evidence

[7] The applicant filed two affidavits, the first in support of its application and the other, in reply to the respondent's affidavit. Mrs Dellisha Sterling-Johnson, an associate in the firm of attorneys-at-law on record for the applicant, filed her affidavit on 4 August 2021. Mrs Sterling-Johnson's evidence is as follows. The applicant obtained judgment, from Sykes J (as he then was) against the respondent on 9 August 2016 and 9 January 2017 for the payment of the respective sums of US$85,875.00 and US$40,000.00, plus costs of the first stage of the trial, to be agreed or taxed; and the second stage of the trial, less one day.

[8] On 20 February 2017, the respondent filed its notice of appeal, challenging parts of Sykes J's judgment of 9 August 2016 and, in its entirety, his judgment of 9 January 2017. An amended notice of appeal was filed on 19 February 2021.

[9] By her notice dated 9 December 2019 (exhibited as DSJ 1), the deputy registrar of the Court of Appeal advised the parties that the registrar of the Supreme Court had forwarded to the registrar of the Court of Appeal copies of the documents, notes of evidence and reasons for judgment, on a compact disc ('CD'). The parties were also

advised through that medium that they could obtain copies of the documents from the registrar of the Supreme Court, upon payment of the requisite fees. The parties' attention was further drawn to the provisions of the Court of Appeal Rules 2002 ('CAR') which set out the timetable for the filing of other documents to complete the record of appeal.

[10] Mrs Sterling-Johnson deposed that the respondent was required to file its skeleton arguments within 21 days of receipt of the notice of the lodging of the transcript. She asserted that the delay in doing so caused great prejudice to the applicant by virtue of the deprivation of the fruits of its judgments. The prejudice was also reflected in the fact that the judgment sums have been paid into a low interest-bearing account at the Bank of Nova Scotia.

[11] It was Mrs Sterling-Johnson's further evidence that the applicant feared that it would either be unable, or experience great difficulty, to enforce a costs order against the respondent, should the appeal fail. The applicant expected to incur costs totalling $4,800,000.00, in defending the appeal, supported by an exhibited draft bill of costs. The applicant previously made a written request of the respondent for security for costs, which went without a response from the respondent.

[12] Mr André Sheckleford, an associate at Hart Muirhead Fatta, attorneys-at-law on record for the respondent, swore to an affidavit on 25 March 2022 which was filed on the same day. Mr Sheckleford asserted that the deputy registrar's notice of 9 December 2019, exhibited to Mrs Sterling-Johnson's affidavit, had been erroneously connected to this appeal. He contended that that notice concerned appeal no 93/2015 and application no 162/2015. Furthermore, his perusal of this file at the Court of Appeal registry in late 2020, shortly after his firm was retained, specifically to locate the relevant notice, revealed no such notice on the file. His further enquiries at the Commercial Division of the Supreme Court, to ascertain if any notes of evidence had been prepared was met with the response that no completed notes of evidence were found. In addition, the day before swearing to this affidavit, he enquired of a named member of the registry staff at the Court of Appeal

whether any such notice was on the file and was told none was present. Based on that, he expressed the opinion that the applicant's application lacked merit.

[13] On the question of security for costs, Mr Sheckleford had this to say. The applicant's fear of possibly obtaining an unenforceable costs order was no more than a bald statement without any basis for the fear.

[14] Charah Malcolm, another associate in the firm of attorneys-at-law appearing for the applicant, filed an affidavit on 29 March 2022, which sought to address the issues raised in Mr Sheckleford's affidavit. She contended that the notice exhibited (DSJ 1) in fact concerned the appeal relevant to this application but contained an error in the heading. The heading incorrectly referred to an appeal from an injunction granted by Sykes J. In spite of that error, this affiant swore that the first paragraph clearly indicated that the notes of evidence related to the trial in "Claim No. CD 00112 as no oral evidence was taken in the [a]pplication for the injunction".

[15] Ms Malcolm opined that further enquiries by the respondent's present attorneys-at-law would have brought it to their attention that the only notes of evidence emanated from the substantive matter. In any event, since it was the respondent's appeal, the pertinent information concerning the appeals would have been in their possession.

[16] According to Ms Malcolm, knowing that the respondent had changed its legal representation at about the time the deputy registrar's notice was published, and to ensure that all parties had copies of the notes of evidence, her office sent a copy of the notes of evidence to Nigel Jones and Company, the respondent's then attorneys-at-law. Notwithstanding that, to date the applicant had not been served with the skeleton arguments or record of appeal.

[17] In response to the charge that the fear of holding an unenforceable costs order was a mere assertion or baseless, the applicant countered that the respondent did not have a realistic prospect of success in the appeal.

The submissions on behalf of the applicant

[18] In seeking to support the application to strike out the appeal, learned counsel submitted on two planks. It was firstly submitted that the respondent delayed in prosecuting this appeal. The delay with which the respondent was charged was characterized as inordinate and inexcusable. The inexcusable nature of the delay was made obvious by the absence of a good excuse for it.

[19] Developing the point, learned counsel observed that although the appeal was filed in February 2017, nothing had been done to advance it through the various stages of the process. Although the time for compliance with the CAR was triggered from December 2019, the respondent filed neither skeleton arguments nor a record of appeal. Neither had there been a case management conference. It was also submitted that there was no written evidence that either before, or since December 2019, the respondent made any attempts to secure or follow up on the transcript.

[20] Although the applicant's counsel acknowledged Mr Sheckleford's evidence of searching the registry file, she pointed to the absence of any evidence of what steps were taken in the wake of his discovery. Equally, there was no evidence of any steps taken prior to 2020. There was also a dearth of evidence that either the respondent or its present attorneys-at-law, made any enquiries of the former legal representatives. Certainly none was made of the applicant's counsel. In this vein, it was submitted, reasonable inquiries of counsel who were previously retained by the respondent would have revealed that the erroneous heading of the deputy registrar's notice related to a previous appeal concerning the injunction, and that the notes of evidence bore directly on this appeal. Therefore, learned counsel argued, the court should not countenance reliance on the registry's error in the heading.

[21] In the face of no evidence that the respondent took any steps to pursue the appeal, counsel for the applicant submitted that the inference to be drawn was that the respondent had no real intention to prosecute the appeal. The respondent's duty to prosecute the appeal remained unaffected by the three changes in its legal

representation. Accordingly, the change in counsel was not a good excuse for the respondent's failure to prosecute the appeal.

[22] In learned counsel's submissions, it was of some significance that the respondent never filed an application for an extension of time within which to file skeleton arguments and the record of appeal, in light of this application to strike out the appeal for want of prosecution. This presented an additional ground upon which to draw the inference that the respondent did not have any real intention of prosecuting the appeal.

[23] The second plank of the applicant's contention that the appeal should be struck out, was the prejudice to the applicant occasioned by the delay. The claim to prejudice resulted from the following: (a) being kept out of the fruits of its judgment, (b) the sums awarded were being held in a low rate interest-bearing account, (c) being compelled to incur costs in the context of the respondent's lack of intention to prosecute the appeal, (d) were the applicant to succeed on the appeal, the matter would revert to the Supreme Court where the earliest trial date obtainable is in 2023, with the presumed concomitant adverse effect on witnesses' availability and recollection.

[24] The final salvo from the applicant's counsel on this aspect of the application, challenged the respondent's position that in the absence of the issuance of the deputy registrar's notice their duty to comply with the relevant rules of the CAR did not become engaged. While counsel for the applicant did not lose sight of the registry's responsibility to advance an appeal, she contended that the respondent's position was inconsistent with the duty placed on parties by the overriding objectives of the Civil Procedure Rules 2002, ('CPR') to assist the court to deal with matters expeditiously.

[25] The foregoing submissions were supported by the following cases, some of which I will refer to below. **Sandals Royal Management Limited v Mahoe Bay Company Limited** [2019] JMCA App 12 ('**Sandals v Mahoe Bay**'); **Alcan Jamaica v Herbert Johnson and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 20/2003, judgment delivered 30 July 2004; **Gerville Williams and Others**

v The Commissioner of the Independent Commission of Investigations and the Attorney General of Jamaica [2014] JMCA App 7 ('**Williams v The Commissioner of INDECOM**'); **Norris McLean v Hamilton and Others** (unreported), Supreme Court, Jamaica, Suit No CL M215/1993, judgment delivered 9 April 2002; and **Key Motors v First Trade International Bank and Trust Limited (in liquidation)** [2014] JMCA App 8 ('**Key Motors v First Trade**').

[26] As it concerned the alternative application for security for costs, the applicant relied on rule 2.11(3) of the CAR and the principles adopted by this court in **Cablemax Limited and Others v Logic One Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 91/2009, Application No 203/09, judgment delivered 21 January 2010 ('**Cablemax v Logic One**'). This part of the application had two factual bases. The first arose from the number of times the respondent changed its legal representation. This, it was submitted, pointed to possible instability in its representation, which was likely to be related to financial or management constraints. The second limb of the submission was that the appeal had no reasonable prospects of success on its merits.

Submissions on behalf of the respondent

[27] Mr George, on behalf of the respondent, made two points in response. Firstly, he submitted that the application to strike out the appeal was predicated on the applicant's claim that the respondent was in breach of the rules; with emphasis on rule 2.6(1)(b) of the CAR, which requires the filing of skeleton arguments within 21 days of the receipt of notice of the lodging of the transcript. However, rule 2.6(1)(b) of the CAR was inapplicable since neither party recorded the proceedings as provided for under rule 2.5 of the CAR. A recording of the proceedings can be used as the transcript for appellate purposes, if either the trial judge or all the parties agree.

[28] Secondly, counsel argued that it was not true that there was generalised delay in the prosecution of the appeal. The seriousness of the respondent in pursuing the appeal was amply demonstrated by the filing of an amended notice of appeal and draft skeleton arguments, counsel said. Furthermore, on an assessment of Mr Sheckleford's evidence,

there was no "flurry of activity" on the filing of the present application. Rather, that evidence demonstrated a consistent pattern of requesting information from the registrars of this court, and the one below.

[29] In so far as the applicant also appeared to place reliance on rule 2.6(1)(a) of the CAR, which requires the registry to give notice to all the parties that copies of the transcript were available, Mr George submitted that the notice plainly said on its face that it was issued in appeal no 93/2015. In Mr George's submission, it was untenable for the applicant to argue that all timelines ought to have been observed as a result of the issuance of that notice.

[30] This submission had two bases. One was that in the eyes of the registry, no notes of evidence had been provided, based on an email, dated 15 June 2020 and exhibited as AS1, under the hand of a deputy registrar of this court to the registrar of the Supreme Court. That email listed a number of "appeals for which CDs were received, but the notes of evidence, reasons for judgment and/or record of proceedings were not noticed". Heading that list was "CA No. 15/2017", between the parties to this appeal. The second basis was that the applicant's attorneys-at-law also wrote to the registrar of this court, seeking clarification on the appeal to which the notification related.

[31] Mr George acknowledged that it was reasonable for the applicant's attorneys-at-law, knowing that the respondent had changed its legal representation, to have assumed that the new attorneys-at-law for the respondent received all the papers in this appeal only. He, however, submitted that it was not unreasonable that the new attorneys-at-law would have confined their "consultation" of the file to this appeal only.

[32] On the question of security for costs, Mr George also relied on **Cablemax v Logic One.** After setting out the six principles distilled by Morrison JA (as he then was), learned counsel submitted that there was no costs order in that case in circumstances where the company had been removed from the register of companies and had no enabling licence to conduct business. The refusal of the application for costs, counsel submitted, was

based on two factors: (i) the appeal had some prospect of success; and (ii) the appellant company had items of equipment against which an order for costs could have been enforced.

[33] Mr George addressed these two factors sequentially. He argued that the appeal which this application concerns had not just some, but good prospects of success. To demonstrate this, the following issues were said to arise from the draft skeleton arguments (exhibit AS3):

> "a) whether copyright subsists in the live broadcast of a sporting event;
>
> b) even if, arguendo, copyright does subsist in any part of the material,
>
> i. whether any legal nexus may be drawn between the putative owner of the copyright and TVJ;
>
> ii. whether the IAAF and AMS [a Swiss Company] are capable of holding copyright under Jamaican law;
>
> iii. whether the Copyright Act applies to broadcast emanating from China.
>
> iv. where the defence of fair use and/or dealing applies to matters upon which there is analysis."

Naturally, Mr George concluded that all these issues would be resolved in the respondent's favour.

[34] Turning to the second factor, the pithy submission was that the respondent was an entity which is actively trading.

[35] **Thompson and Others v Thompson and Others** [2011] JMCA App 13 ('**Thompson v Thompson**'), was cited to advance the argument that the applicant is guilty of delay in making its application for security for costs. Reliance was placed on the dictum of Morrison JA (as he then was), expressed at para. [14], that delay is a factor to be considered in an application of this nature. It was then submitted that the applicant

first indicated its desire for security for costs in May 2021, the notice of appeal having been filed in February 2017. This was a significantly longer delay, it was argued, than in **Thompson v Thompson** (two years), in which the application was dismissed.

Discussion

[36] Two issues arise for this court's determination on the substantive application. The first issue is whether the respondent's time for compliance with the CAR had started to run (grounds one to six). The second issue is, whether the respondent was guilty of generalised delay (grounds seven and eight). The issue of whether the respondent should be ordered to give security for the applicant's costs in prosecuting the appeal will be considered last (grounds nine to 14).

[37] The respondent's primary basis for resisting the application to strike out its appeal for want of prosecution was, in essence, that the time for compliance had not yet started to run since it had not been served with a notice from the registry. The respondent sought to rely on the admitted misdescription in the heading of the notice under the hand of the deputy registrar dated 9 December 2019, and the oral information from a staffer at the registry that the required notice was not on the file. The respondent also stressed the emailed enquires made by the deputy registrar of this court of the registrar of the Supreme Court on 15 June 2020.

[38] As counsel for both sides submitted, rule 1.13(a) of the CAR gives the court the power to strike out a notice or counter-notice of appeal, either in whole or in part. The court also has residual power, springing from its inherent jurisdiction to strike out an appeal.

[39] In so far as is relevant for present purposes, once the notice of appeal has been filed, rule 2.5 of the CAR imposes a conjoined duty on the registry of preparation and notification. That is, it is at the instance of the Court of Appeal's registry that the court below prepares a certified copy of the record of proceedings, including a transcript of the notes of evidence and of the judgment. The duty to notify all the parties that copies of

the transcript are available from the registrar of the court below arises once the certified copy has been prepared.

[40] The completion of the appellate process is therefore set in motion by the issuance of the notice by the registry. Rule 2.6 of the CAR sets out the timetable for the filing of documents and the parties' time-specific duties to make the appeal ready for hearing. As Brooks JA (as he then was) observed in **Key Motors Limited and Executive Motors Limited v First Trade International & Trust Limited (in liquidation)** [2014] JMCA App 8 ('**Key Motors v First Trade'**), at para. [9]:

> "The provisions of rule 2.5 and 2.6 of the CAR stipulate, in part, that upon the registry receiving the certified record, it should notify the parties of that receipt. It is at that point that time stipulations are imposed on the parties to the appeal. Certain time periods are given for each party to take the steps necessary to have the appeal proceed as designed by the drafters of the rules."

[41] The general principles of dismissal for want of prosecution were considered in **Sandals v Mahoe Bay**. Foster-Pusey JA, at para. [61], acknowledged that **Grovit v Doctor and Others** [1997] 1 WLR 640 ('**Grovit v Doctor'**), is the leading case in this area. In **Sandals v Mahoe Bay**, as in **Grovit v Doctor**, the application to dismiss for want of prosecution was grounded on inordinate and inexcusable delay. No breach of the rules was alleged.

[42] After reviewing a number of authorities from this jurisdiction, Foster-Pusey JA, at para. [76], rejected six propositions of law advanced on behalf of Mahoe Bay as false or incorrect. I recite those propositions below, slightly rephrased to put them in affirmative language:

1. There can be delay and inaction even though there is no breach of the rules.

2. In order to succeed, the applicant does not have to prove a breach of which the respondent is guilty.

3. The applicant may rely upon evidence of inactivity to prove an abuse of process.

4. The evidence relied upon to establish an abuse of process is capable of supporting an application to dismiss for want of prosecution.

5. The principles to be applied to an application for dismissal for want of prosecution, grounded on inordinate delay and inaction, are not the same principles 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 they (the statements of case) show no reasonable cause of action.

6. The merits of the claim or appeal itself do not fall for consideration as a factor in applications of this nature.

It can therefore be said that an application to dismiss an appeal for want of prosecution may be made in cases of a breach of the rules of court, abuse of process and/or inordinate and inexcusable delay (see **Key Motors v First Trade** and **Sandals v Mahoe Bay**).

[43] This application contends that the respondent has been dilatory both in respect of the CAR and generally. I will consider each prong of the application separately, commencing with the alleged breach of the rules. If, as **Key Motors v First Trade** established, compliance with the timetable under the rules to bring the appeal to the stage where it can be set down for hearing, commences with the notice from the registry, the pivotal question is whether the respondent was served with a notice in compliance with the rules.

[44] It was accepted in argument, if not explicitly so, inferentially, that the notice under the hand of the deputy registrar which was purportedly issued to the parties bore the

description in its heading of another file. Equally without dispute is the fact that the body of this notice contained particulars relevant to this appeal. That was clearly an error on the part of the registry.

[45] That error was compounded by the notice not being placed on the correct file (perhaps due to the error in its designation). That would account for Mr Sheckleford's fruitless search of the file at the registry and, not without some significance, the registry staffer informing him that no such notice was on the file. Underlining the absence of the notice from the relevant file is the deputy registrar's email of 15 June 2020, to the registrar of the Supreme Court, approximately six months subsequent to the notice of 9 December 2019, indicating that the record of proceedings was incomplete.

[46] In my opinion, the confluence of errors and omissions which attached to the notice of 9 December 2019 sufficiently undermined its intended purpose under the rules to render it null and void. Since it was null and void, it can be said that the registry's duty of notification remained unfulfilled. In short, the respondent was not served with a notice as required by rule 2.5(1)(b)(ii) of the CAR. It follows, inexorably, that without the service of that notice, the time for the respondent to file skeleton arguments under rule 2.6 of the CAR, to set in train the compliance with other requirements of the rules to complete the record and advance the matter to case management, had not yet started to run. Since time did not start to run, it cannot credibly be advanced that the respondent is guilty of dilatory non-compliance and, therefore, liable to have its appeal struck out.

[47] In passing, while the submissions of the applicant concerning what fruits diligence on the part of the respondent might have borne, in discovering that the notice was only defective in its heading, are attractive, they are neither reasonable nor fair. Firstly, Mr Sheckleford's evidence that soon after Hart Muirhead Fatta assumed carriage of the appeal he searched the file at the registry for the relevant document met the standard of a reasonable attorney-at-law in his position. Secondly, the applicant itself was unclear as regards the notice, evidenced by its letter to the registrar seeking clarification in the matter. Thirdly, as Mr George submitted, the parties are entitled to rely on the information

obtained from perusal of the court's file. Fourthly, and in any event, the process of getting an appeal hearing-ready is driven by the court, through the registry. Therefore, while parties are not encouraged to remain inactive, they cannot be faulted for allowing themselves to be led (in this case misled) by the actions of the registry.

[48] Grounds seven and eight will be considered together under the second limb of the application. In the written submissions made on behalf of the applicant, it was contended, in essence, that the indolence of the respondent was made manifest by its failure to apply for an extension of time within which to file skeleton arguments or the record of appeal, in spite of being confronted with the application to strike out its appeal. The applicant's position was that the respondent's delay was intentional, an abuse of process and prejudicial to the applicant. Mr George's response, in fine, was that the evidence revealed the respondent's consistent pattern of requesting information from the registry about the notes of evidence.

[49] As was said in **Sandals v Mahoe Bay**, there can be delay and inaction independently of a breach of the rules (see para [40] above). The guidance accepted by this court from **Grovit v Doctor** in **Sandals v Mahoe Bay**, at para. [62], enjoins the court to strike out an appeal only where there has been (1) intentional and contumelious default; (2) inordinate delay on the part of the client or his counsel, which substantially impairs the possibility of a fair trial, or is likely to cause or has caused serious prejudice. This prejudice may be either to the defendants, whether between themselves and the claimant, or between each other, or between them and third parties. These conditions are disjunctive, so that the applicant may succeed upon proof of one or the other.

[50] Whether the respondent has no intention of prosecuting the appeal is a fact to be gathered from all the circumstances of the particular case. Or, as it was expressed in the applicant's written submissions, the lack of real intention can be "evinced" from the respondent's failure to take steps to advance the appeal. In my opinion, this contemplates actions required of the respondent which may fall outside of obeying a rule as in **Sandals v Mahoe Bay**, for example; or failing to obey, or take any intermediate step consequent

on any order or direction of the court (see, for example, **Gerville Williams v The Commissioner of INDECOM**).

[51] The claim in **Sandals v Mahoe Bay** arose out of alleged acts of trespass committed by Sandals upon land said to be owned by Mahoe Bay, and was filed in 1992. Sandals filed a defence and counterclaim in response. The claim and counterclaim meandered through the Supreme Court and eventually made their way to a case management conference ('CMC'), heard on 4 June 2007. At the CMC, Mahoe Bay's statement of case was struck out with costs to Sandals and judgment entered for Sandals on the counterclaim. Mahoe Bay subsequently filed applications seeking to set aside the striking out order and restoring its statement of case. These applications were heard and refused on 18 April 2008.

[52] Mahoe Bay filed its notice of appeal in the matter on 24 April 2008. Between 29 April 2008 and 17 August 2010, the progress of the appeal to hearing-readiness seemed to be moving apace, with one hiccup of a change of attorneys-at-law for Mahoe Bay. That is, written submissions by both sides and the record of appeal were filed, among other ancillary things, done in pursuance of the appeal. In January 2011 an application to strike out the appeal was filed but later withdrawn in March 2011, to facilitate settlement discussions. Mahoe Bay then went into hibernation until it was roused by another application to strike out its appeal.

[53] It is appropriate that the submissions of the applicant be considered against the background of the factual situation in **Sandals v Mahoe Bay**. While the submission of the applicant was replete with assertions of what it was reasonable for the respondent to have done, there is a dearth of evidence of what specific intermediate action the respondent was duty-bound to take but failed to do so. Similarly, there is an absence of evidence of any rule, order or direction of the court, or any subordinate obligation flowing therefrom, that the respondent was in breach of. In short, it has not been demonstrated that the respondent was, to adapt an aphorism, twiddling its thumbs while the appeal languished in the registry.

[54] None of this should be understood to mean that the court does not acknowledge the delay between the filing of the notice of the appeal and the filing of this application. I am not satisfied that the delay was intentional and contumelious. In my view, the evidence also does not reach the threshold where I can be satisfied that the delay was inordinate and inexcusable.

[55] In assessing the reasons for the delay, I had regard to the submissions concerning the apportioning of blame, where the registry is also at fault. The pivotal question in such a circumstance is whether the respondent is to be apportioned a disproportionate share of the blame (see **Sandals v Mahoe Bay**, at para. [70]). In this application, however, there is no question of apportionment. The blame for the delay is entirely the registry's.

[56] The next question is whether the delay has prejudiced the applicant. This has two pillars. The first is that the respondent is entitled to the fruits of its judgment, undergirded by the complaint that the damages were deposited in a low interest-bearing account. The court is always anxious to see that a successful litigant is not kept out of the fruits of its judgment (see Blackstone's Civil Practice 2019, The Commentary, at para. 74.46). The court must engage in a balancing act. That is to say, ensuring the successful litigant gets his due must be counterbalanced by the other value of not summarily driving away a litigant from the seat of judgment. In all the circumstances, notwithstanding the complaint about low interest rate, being kept out of the fruits of the judgment is mitigated by the accrual of interest in the interim.

[57] The second pillar of the argument on prejudice is the availability of witnesses. In the applicant's written submission, delay is presumed to have a negative impact on the availability of its witnesses. Respectfully, the availability of witnesses is a fact susceptible to/of proof. It ought not to be presumed. In **Sandals v Mahoe Bay**, there was evidence that some of Sandals' employees had left the company and either could not be located or had migrated, exposing the company to the risk of incurring expenses to secure their attendance for the trial, should they lose the appeal. In this case, in contrast, the

applicant did not place any evidence before the court concerning the availability of its witnesses.

[58] Lastly, on the question of prejudice, the applicant argued that the delay would presumptively have an impact on the recollection of its witnesses. It is a notorious fact that memories wane with the passage of time. However, from the draft skeleton arguments exhibited by the respondent, the subject-matter of this appeal is not fact-sensitive, or substantially so. In any event, the deficiency in recollection, such as there may be, might be mitigated by refreshing of the witnesses' memories from their witness statements.

[59] The applicant has failed to demonstrate that the respondent was either tardy in complying with the relevant rules or otherwise lackadaisical in prosecuting its appeal. While the court has a duty to protect the interests of the applicant, which already has a judgment in its favour, by insisting on expedition and strict compliance with the rules, in getting the appeal hearing-ready, that duty has to be juxtaposed with the court's corresponding obligation to give audience to a faultless litigant, as in this case. Accordingly, the application to dismiss the respondent's appeal must be refused.

Security for costs

[60] This court has the power to grant security for costs. The power to do so, and the conditions under which an application for such security can properly be made, are governed by rule 2.11 of the CAR, which states:

> "2.11 (1) The court or a single judge may order –
>
> a) the appellant; or
>
> b) a respondent who files a counter-notice asking the court to vary or set aside an order of a lower court,
>
> to give security for the costs occasioned by an appeal.
>
> (2) No application for security may be made unless the applicant made a prior written request for such security.

> (3) In deciding whether to order a party to give security for the costs of the appeal, the court or a single judge must consider –
>
> (a) the likely ability of that party to pay the costs of the appeal if ordered to do so; and
>
> (b) whether in all the circumstances it is just to make the order.
>
> (4) On making an order for security for costs the court or the single judge must order that the appeal be dismissed with costs if the security is not provided in the amount, in the manner and by the time ordered."

[61] In **Cablemax v Logic One**, Morrison JA, at para. [14], set out seven principles which were distilled in **Keary Developments Ltd and Tarmac Construction Ltd and another** [1995] 3 All ER 534, and are also applicable to the present application. These are:

> "(i) The court has a complete discretion whether to order security and accordingly it will act in the light of all the relevant circumstances.
>
> (ii) The possibility or probability that the party from whom security for costs is sought will be deterred from pursuing its appeal by an order for security is not without more a sufficient reason for not ordering security.
>
> (iii) In considering an application for security for costs, the court must carry out a balancing exercise. That is, it must weigh the possibility of injustice to the appellant if prevented from pursuing a proper appeal by an order for security against the possibility of injustice to the respondent if no security is ordered and the appeal ultimately fails and the respondent finds himself unable to recover from the appellant the costs which have been incurred by him in resisting the appeal.
>
> (iv) In considering all the circumstances, the court will have regard to the appellant's chances of success, though it is not required to go into the merits in detail unless it can be clearly

> demonstrated that there is a high degree of probability of success or failure.
>
> (v) Before the court refuses to order security on the ground that it would unduly stifle a valid appeal, it must be satisfied that, in all the circumstances, it is probable that the appeal would be stifled.
>
> (vi) In considering the amount of security that might be ordered the court will bear in mind that it can order any amount up to the full amount claimed, but it is not bound to order a substantial amount, provided that it should not be a simply nominal amount.
>
> (vii) The lateness of the application is a factor to be taken into account, but what weight is to given to this factor will depend upon all the circumstances of the case."

[62] As is evident from ground 10, the applicant seeks security for costs in the sum of $3,500,000.00, which was communicated to the respondent's attorney-at-law, prior to the filing of its application. The estimated costs to be incurred are $4,800,000.00. By that written request, the applicant has complied with the prerequisite of rule 2.11(2) of the CAR. Moving on from there, I must consider the likely ability of the respondent to pay the costs occasioned by the appeal, should the decision on appeal go against it. In this regard, what has been placed before the court to demonstrate possible impecuniosity, respectfully, amounts to no more than conjecture.

[63] The court is being asked to make the quantum leap from the fact of repeated changes in the respondent's legal representation to the state of its financial viability as a company. Were I to make any assumption or inference about the respondent's likely ability to pay, it would be favourable. A company that was able to deposit US$125,975.00 in an escrow account in 2017, without evidence that it is no longer a going concern, ought to be presumed to be able to satisfy the costs order emanating from the appeal.

[64] For completeness, I have considered the respective submissions and the draft skeleton arguments on the likelihood of success of the appeal, and am inclined to the view that the appeal has a realistic prospect of success. This fortifies the position that the

balance of justice lists in the respondent's favour, especially viewed against the lateness of the application, even giving the lateness little weight. The application for security for costs should therefore be refused.

Conclusion

[65] It is indeed unfortunate that this matter continues to wend its way through the justice system. Even more unfortunate is the confluence of errors and omissions to which the delay has been attributed. However, no compelling reason was placed before the court which could fairly be said to warrant a striking out of the appeal. Neither has it been demonstrated that the respondent is potentially unable to satisfy the costs occasioned by the appeal. Accordingly, the application, in both its parts, must be refused.

[66] I considered the question of the costs of this application. The general rule is for costs to follow the event. However, in this case, while the applicant may have acted precipitately and the respondent was not found to be indolent, having regard to the confusion infusing the process which led to the application, we are minded to depart from the normal rule. Accordingly, each party shall bear its own costs.

[67] It was against the background of the above reasoning that the court made the orders listed at para. [4] above.