

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 05 of 2016

**JOSEPH TUDOR
ROSEANN TUDOR**

**First Appellant
Second Appellant**

AND

BANK OF NOVA SCOTIA

Respondent

Before The Hon. Sir Marston C. D. Gibson, K.A. Chief Justice, the Hon. Madam Justice Kaye C. Goodridge, Justice of Appeal and the Hon. William Chandler, Justice of Appeal (Acting)

2016: June 10

2018: June 13

**Ms. Bernadette D. Callender for the Appellant
Mrs. Avenel Hinkson-Forde in association with Ms. Abigail Linton and
Ms. Tanya Simmons for the Respondent**

DECISION

CHANDLER JA (Acting)

INTRODUCTION:

[1] This is an application filed on 15 January 2016 by the respondent seeking an order that the appellants' notice of appeal be struck out and the appeal dismissed with costs for failure or refusal of the appellants to comply with the provisions of **CPR 62.12 (2) to (7)**

and in so doing failed or refused to prosecute the appeal.

[2] It may be convenient here to set out those provisions.

CPR 62.12 (2) - (7) provides:

“(2) The appellant shall, on filing his notice of appeal, obtain from the proper officer in the Registry, an appointment to settle the appeal papers.

(3) The appellant shall serve notice of the appointment on each person on whom the Notice of Appeal is served.

(4) The notice of appointment may be subscribed to the Notice of Appeal.

(5) Before the date appointed for settling the appeal papers, the appellant shall obtain and file in the Registry

(a) the reasons for judgment or the summing up of the court or judge below certified by the proper officer below; and

(b) a copy of the official transcript of the proceedings below or, where there is none, of the judge’s notes or other record of those proceedings.

(6) In a case of doubt as to the accuracy of any part of the transcript or record of the proceedings below, the appellant or a respondent may apply, with notice to all other parties, to the Registrar or a judge for directions;

(7) Before the date appointed for settling the appeal papers, the appellant must

(a) prepare and file in the Registry

(i) a draft index of the appeal papers;

and

(ii) a separate, chronological list of all documents received in evidence and proposed to be reproduced in the appeal papers, including documents exhibited to, or annexed to affidavits, and

(b) serve the draft index and list on all respondents in a reasonable time before the appointment to settle the appeal papers.”

FACTUAL BACKGROUND

[3] The appellants are husband and wife who executed certain mortgages and further charges in favour of the respondent bank over real property situate at Lot 20 Seascap, Inch Marlow, Christ Church, Barbados (the property). The appellants defaulted on their obligations under the mortgages as a result of which the respondent filed an application in the High Court seeking possession of the property.

[4] On 25 February 2015, the application was heard by **Crane-Scott J.** who made the following order (the order):

- “1. That the Notice of Application filed herein by the First and Second Defendants on the 24th day of February 2015 be and is hereby dismissed.
2. That unless the First and/or the Second Defendant jointly and/or severally pay to the Claimant on or before the 30th day of May 2015 all monies due and owing under a Deed of Charge by Way of Legal Mortgage dated the 28th day of May 2002 with a

Further Charge endorsed thereon by way of upstamping on the 27th day of August 2004 and with a Further Charge endorsed thereon by way of upstamping on the 27th day of June 2008 made between the First Defendant and the Second Defendant as Mortgagors of the **ONE PART** and the Claimant As Mortgagee of the **OTHER PART** referred to in the Fixed Date Claim Form filed herein the First and/or the Second Defendant shall deliver to the Claimant possession of the mortgaged property on or before the 31st day of August 2015.

3. That the First and/or the Second Defendant jointly and/or severally pay to the Claimant costs in the sum of \$5,000.00”.

[5] The appellants filed a notice of appeal against the order on 25 March 2016 but took no further steps in relation to the appellate procedure.

THE APPLICATION

[6] The grounds of the application are:

- “1. The First Appellant and the Second Appellant have failed and/or refused to comply with the mandatory provisions comprised in Rules 62.12(2) to (7) of the Supreme Court (Civil Procedure) Rules 2008.
2. The failure and/or refusal of the First Appellant and the Second Appellant to prosecute the appeal has caused great prejudice to the Respondent which has unjustly been delayed in its efforts to realise its security.”

[7] The application was supported by an affidavit (Ms. Edghill’s affidavit) sworn by Ms. Deidre Latoya Edghill (Ms. Edghill), site

representative of the Centralised Retail Collection Unit of the respondent.

COURT'S ANALYSIS AND DISCUSSION

ISSUES

[8] The following three issues fall to be determined:

1. Whether this Court has jurisdiction to dismiss an appeal for failure to prosecute the appeal (the jurisdiction issue);
2. Whether **CPR 62.12 (2) and (3)** create a mandatory requirement to obtain an appointment from the proper officer in the process of bringing an appeal to trial (the **CPR 62.12 (2) and (3)** issue); and
3. Whether this Court should exercise its jurisdiction to strike out the notice of appeal (the striking out issue).

THE JURISDICTION ISSUE

[9] There is no divide between the parties on this issue. This issue was settled in **Victorine Patricia Garvey v Peter Athelstan Wilkinson Civil Appeal No. 7 of 2011**(**Garvey v Wilkinson**) where **Mason JA**, in delivering the judgment of the Court, declared the law to be as follows:

“It is clear...there resides within the bosom of the Court an inherent or implicit authority and jurisdiction to regulate its practice and procedure in order to achieve the purposes for which it was established...It is clear from the abundance of authority that the Court of Appeal

has inherent jurisdiction to control its proceedings and may strike out a notice of appeal where there has been failure and/or refusal to prosecute the appeal.”

[10] We therefore turn to the contested issues.

THE CPR 62.12 (2) AND (3) ISSUE

COUNSEL’S SUBMISSIONS

[11] On this issue, Mrs. Hinkson-Forde for the respondent submitted that the word “shall” in **CPR 62.12 (2) and (3)** was mandatory and required that, on filing the notice of appeal, an appointment to settle the appeal papers be obtained. At that time the proper officer of the court would be available at the Registry to schedule the appointment.

[12] According to counsel, the notice of appeal was served on the respondents by facsimile transmission on 25 March 2015, but no notice of appointment was endorsed thereon and no other documents were served. She stated that one year thereafter, the respondent was still not in receipt of a notice of appointment.

[13] Counsel further submitted that the unavailability of **Crane-Scott J’s** judgment was no bar to compliance and averred that **CPR 62.12 (5)** stipulated that the reasons for the judge’s decision and the certified transcript of the proceedings in the court below referred to

at **paragraphs (a) and (b) of CPR 62.12 (5)** were to be filed before the appointment.

[14] Mrs. Hinkson-Forde also submitted that it was a well-established practice to list the judgment or official transcript last on the record of appeal in the event that they were not available at the date of settling the record of appeal. Consequently, counsel continued, the alleged unavailability of the documents was no excuse for non-compliance.

[15] Whilst conceding that the Registrar of the Supreme Court was obligated to advise when the documents were available, counsel submitted that a perusal of the court file failed to reveal any correspondence from the appellants seeking to obtain the judgment or the transcript.

[16] Counsel submitted that the appellants failed in their duty to make the note of proceedings in the court below available and to transmit the note of judgment to this Court.

[17] Counsel maintained that, having filed an appeal, the appellant failed to pursue it diligently and without delay resulting in prejudice to the respondent which had been without payment of the mortgage debt since 2009 and was now being deprived of its rights to execute the

order for possession. Consequently, argued counsel, the respondent was unable to realise its security and had no means of accessing the property which might be deteriorating in value.

[18] Ms. Bernadette Callender, counsel for the appellants, conceded that the duty to obtain an appointment rested on the appellants. She argued that, since the time for doing so was not stipulated, it ought to be inferred that the appointment was to be scheduled as soon as possible after filing, which presupposed that the proper officer was available to issue the appointment.

[19] Counsel further argued that ‘shall’ was an auxiliary verb connoting the involvement and/or participation of the Registrar of the Supreme Court in notifying counsel of the availability of the transcript and/or judgment appealed against. She continued that since ‘shall’ was obligatory, the hearing for settlement of the record of appeal could only proceed if the reasons for the judgment, the judge’s notes or the official transcript had been obtained and, up until the filing of the appellant’s affidavit, the judgment was still not available.

[20] It was counsel’s contention that, since the index included the judge’s reasons and formal order, compliance with **CPR 62.12** was

impossible and no penalty could arise. The unavailability of the reasons for upwards of fourteen months after the filing of the appeal, and the respondents delay in presenting and disseminating the formal order, counsel continued, demonstrated the respondent's disinterest in the prosecution of the appeal on its merits. She asserted that the absence of the judge's reasons would impede this Court's powers of review and since there was no breach of **CPR 62**, the application for dismissal of the appeal was premature.

[21] Counsel also submitted that the case should not be struck out for inordinate delay, which was excusable particularly where no prescribed time limits had been exceeded. The appellants' conduct did not constitute an abuse of process. She urged the Court to adopt a flexible approach in cases of non-compliance and default and give effect to the overriding objective when interpreting the rules. She also submitted that delay in prosecution as proof of non-compliance only ran from the date of notification by the Registrar of the availability of the judgment or transcript.

[22] Ms. Callender observed that, where the Court could ascertain the reasons for the decision by other means, the appeal could proceed. However, the better view was that reasons were necessary for a fair

disposal of the matter. This would also provide an element of fairness to the appellants who would be afforded the opportunity under **CPR 62.4 (7)** to amend their notice of appeal at least once without leave after receipt of notice of the availability of the judgment. In this way, counsel concluded, the issues could be more accurately and precisely framed for the court of review.

THE LAW

[23] **CPR 62.12 (8)** provides:

“(8) At the appointment to settle the appeal papers, the Registrar shall

- (a) determine what documents and matters shall be included in the appeal papers and the order of inclusion and such other matters as the Registrar thinks fit concerning the preparation of copies of the appeal papers;
- (b) settle the index in accordance with sub-rule (10);
- (c) determine the number of copies of the appeal papers required;
- (d) obtain an estimate of the duration of the hearing; and
- (e) where practicable, fix a date for hearing or list the appeal for hearing in a particular period.

[24] Is “shall” in this rule mandatory or directory?

[25] In **St. Hill v Attorney General (Civil Appeal No. 8 of 2000)**, **Simmons CJ** dealt with this issue in relation to duties imposed on public officials. The Court stated as follows:

“It seems to us that the contemporary approach to finding the true

meaning of the word “shall” in circumstances such as these is to pay especial regard to the consequences of non-compliance...

In *R v. Secretary of State for the Home Department ex parte Jeyanthan* [2000] 1 W.L.R. 354 the Master of the Rolls explained the proper approach to procedural irregularities as follows:

“The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which had not been complied with should be categorised as directory or mandatory. The position is more complex than this and this approach distracts attention from the important question of what the legislator should be judged to have intended should be the consequence of non-compliance. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance.

...

In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a case the tribunal’s task will be to seek to do what is just in all the circumstances: see *Brayhead (Ascot) Ltd v. Berkshire C.C.* [1964] 2 Q.B. 303 applied by the House of Lords in *London and Clydeside Estates Ltd v. Aberdeen D.C.* [1980] 1 W.L.R. 182.

Lord Woolf advised that it is much more important to focus on the consequences of non-compliance. Procedural requirements are designed to further the interests of justice and any consequence which would achieve a result contrary to those interests should be treated with considerable reservation.”

[26] **CPR 1.1 (1)** enjoins the court to deal with cases justly in furtherance of the overriding objective. **CPR 1.1 (2)** provides:

- “(2) Dealing justly with a case includes, so far as is practicable,
- (a) ensuring that the parties are on an equal footing;
 - (b) saving expense;
 - (c) dealing with the case in ways which are proportionate to
 - (i) the amount of money involved;
 - (ii) the importance of the case;
 - (iii) the complexity of the issues; and
 - (iv) the financial position of each party;
 - (d) ensuring that it is dealt with expeditiously and fairly; and
 - (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases”.

[27] Meanwhile, **CPR 1.3** stipulates that the parties are required to help the court to further the overriding objective.

[28] **Goodridge JA** in **June Blackman aka June Gill v. Elma Carmen Gittens et al (Civil Application No.6 of 2012 (June Blackman))** at para [25] succinctly expounded the law when she opined that:

"The overriding objective of the **CPR** is to enable the courts to deal with cases justly and the court must take into account the matters set out in **CPR 1.1 (2)**. Parties are required to assist the courts in furthering this objective. This means that parties are under an obligation to adhere to any time limits prescribed ... Courts no longer treat non-compliance lightly, and a litigant will

pay the ultimate price unless he or she can convince a court to exercise its discretion to forgive non-compliance."

[29] As has already been cited **CPR 62.12 (2)** provides that: the appellant shall, on filing his notice of appeal, obtain from the proper officer in the Registry, an appointment to settle the appeal papers. "Proper officer" is defined in **CPR** as meaning the Registrar or any Deputy or Assistant Registrar of the Supreme Court or any other person who may be designated as having responsibility for the administration of the several departments or sections of the Supreme Court and of the Registration Office. **CPR 62.12 (3)** provides that the appellant shall serve notice of the appointment on each person on whom the notice of appeal is served.

[30] The object of the **CPR** is to create a regime of efficiency in the use of the court's resources and to minimize delay and costs to litigants. This requires attorneys-at-law to adhere to timelines so as to assist in achieving the overriding objective. We are of the view that, in light of the overriding objective, "shall" is to be construed as mandatory and not merely directory. That does not mean that breach of the rule will automatically be a cause for striking out since one must also have regard to the overall justice of the case.

[31] We now turn to apply this law to the factual matrix of this case.

DISCUSSION

[32] The appellants have not contended that they sought to obtain from the proper officer an appointment to settle the papers at the time the appeal was filed. Their contention is that there is no stipulation as to the time within which the appointment is to be obtained and that the use of the verb “shall” connoted the participation of the proper officer in the exercise. It was further contended that the respondent must establish that the appointment could have been scheduled and the substantive hearing brought on but for the appellants’ inactivity. In our opinion, these submissions are predicated upon some misconceptions of the law that we feel constrained to deal with immediately.

[33] First, the burden is on the respondent to establish on a balance of probabilities that the appellants failed in their duty to prosecute the appeal. **CPR 62.12** clearly places the obligation on the appellants to obtain the appointment. They have ventured no explanation for their failure save that they submit that **CPR 62.12 (5)** provides for the appellant to obtain and file the reasons for the judgment, certified by the proper officer and a copy of the official transcript of the proceedings or, where there is none, of the judge’s notes or other record of those proceedings. They further submit that an obligation cannot arise where compliance with **CPR 62.12 (5)** is an impossibility.

- [34] We are of the opinion that this submission does not accurately reflect the purport and intent of the rules under discussion. As previously noted, **CPR 62.12 (2)** requires the appointment to be obtained at filing. **CPR 62.12 (5)** speaks to the procedure after the appointment is obtained, so that compliance with **CPR 62.12 (5) (a)** and **(b)** must occur before the hearing of the appointment and is not a pre-requisite for obtaining the actual appointment. In the event that **CPR 62.12 (5) (a)** and **(b)** had not been complied with because the requested documents were not ready, through no fault of the appellants, an application could have been made to defer the appointment.
- [35] In response to a direct question from the Court, Ms. Callender admitted that she had not made the request of the Registrar for the trial judge's reasons. No attempt had been made to obtain a minute of the proceedings when the order was given. It is only after the request is made that the Registrar can certify that the reasons are unavailable for stated reasons. It is incumbent on the appellants to establish that, through no fault of their own, the appeal process could not proceed. They have failed to do so. In these circumstances, it cannot be reasonably maintained that the unavailability of the reasons or judgment rendered the appellants' compliance with **CPR 62.12 (2)** impossible.

- [36] In similar vein, a literal reading of **CPR 62.12 (7)** shows that the appellant must prepare and file a draft index of the appeal papers before the date appointed for settling the appeal papers. Having failed in their duty to obtain the appointment on filing, the failure to comply with **CPR 62.12 (7)** is attributable to the appellants.
- [37] There are several obligations to be performed under this rule of which the production of the reasons for the decision is but one. The others are capable of being complied with. It cannot, therefore, be maintained that compliance was impossible as submitted by the appellants.
- [38] Counsel for the appellants quite rightly noted that, in the absence of an accurate and complete record, this Court would be handicapped in its review powers. However, it is fallacious to assume that an appeal cannot proceed unless a judge provides his/her stated reasons.
- [39] Second, having held that the onus is on the appellants to obtain the appointment from the Registrar, it is quite wrong, in our view, to seek to place blame for not obtaining an appointment on the Registrar when no evidence has been adduced to establish that the Registrar was asked to perform her role and she did not. Counsel has sought erroneously to invest the Registrar with her clients' obligation to obtain the appointment under **CPR 62.12 (2)**.

[40] Counsel's submissions do not provide a reason for the appellants' failure to comply with **CPR**. They are a mere excuse for non-compliance. For these reasons, we find no merit in the appellants' submissions.

[41] A subsidiary issue arises in relation to **CPR 62.12 (2)** and **(3)**. This involves the presentation and non-dissemination of the order.

[42] Ms. Callender submitted that the respondent had deliberately deferred the dissemination of the perfected court order of which it had carriage thereby demonstrating its disinterest in the prosecution of the appeal. We must now consider the consequences of the non-perfection of the court order on these proceedings.

[43] **CPR 42.2(a)** provides that:

“A party is bound by the terms of the judgment or order whether or not the judgment is served where that party (a) is present whether in person or by a legal practitioner when the judgment is given or the order is made.”

and **CPR 42.8** provides that:

“A judgment or order takes effect on and from the day it is given or made, unless the court specifies that it is to take effect on a different date.”

[44] The order of 25 February 2015 entered on 31 March 2015, reveals that counsel for the appellants was present when the order was given although her clients were absent. In these circumstances, the appellants cannot feign ignorance of the terms of the order. The prosecution of the appeal on its merits is the

responsibility of the appellants and not the respondents. Accordingly, the submission of counsel that the alleged failure of the respondents to perfect and serve the order demonstrated their disinterest in prosecuting the appeal on its merits is without merit.

THE STRIKING OUT ISSUE

COUNSEL'S SUBMISSIONS

[45] Mrs. Hinkson-Forde submitted that the appellants had not produced evidence of such a quality to convince this Court that their non-compliance with **CPR 62.12 (2)** ought to be forgiven. She submitted that, on two occasions in the court below and once in this Court, time frames within which to file documents were not complied with.

[46] Counsel further submitted, that such persistent non-compliance by the appellants with orders of court, was not trifling and resulted in prejudice to the respondent. In support of the allegation of prejudice, the respondent relied upon paragraph 11 of the Edghill affidavit where Ms. Edghill deposed that she was advised that the failure to prosecute the appeal was prejudicial to the interest of the respondent since the appellants were still in occupation of the mortgaged property and continued to fail and/or refuse to pay the mortgage. She finally submitted that the appellants' non-

compliance with **CPR 62.12 (2)** coupled with their breaches of the court orders ought not to be condoned by the court. In the circumstances, counsel urged the court to strike out the appeal.

[47] Ms. Callender submitted that this Court ought not to strike out an appeal for inordinate though excusable delay. Whilst maintaining that the delay was occasioned by the alleged impossibility of performance previously set out in this decision, counsel submitted that this Court has power to rectify an error in procedure or failure to comply with a rule under **CPR 26.4(3)**. She further submitted that the appellants' actions did not equate to an abuse of process. She also argued that the time for establishing delay in prosecuting the appeal ran from notification by the Registrar of the availability of the judgment or transcript. In the absence of a record of appeal, delay was not to be attributed to the appellants.

[48] In conclusion, counsel submitted that the appellants declined to make a formal application for an extension of time which would be nugatory in the circumstances.

THE LAW

[49] We have already adverted to the inherent power of this Court to strike out proceedings for want of prosecution. In **Barbados Rediffusion Services Limited v Asha Mirchandani et al CCJ (No.1 2005) 69 WIR 35 (Mirchandani)**, the Caribbean Court of Justice set out at paras 44 to 48 the following useful guidelines to be taken into account by a judge in striking out proceedings.

These guidelines bear repetition in *extenso*:

“44. Having reviewed a number of authorities it would be useful for us now to identify some of the factors which a Judge who is asked to make a strike out order should take into account in conducting the balancing exercise to which reference has already been made. I should start by making it clear that what follows is not intended to be a comprehensive list of the factors to be considered. The discretion is a wide and flexible one, to be exercised “as justice requires”, and it is quite impossible to anticipate in advance, and it would be impractical to list, all the facts and circumstances which point the way to what justice requires in a particular case. A judge dealing with an application to strike out, should start off by reminding himself that to strike out a party’s case and so deny him a hearing on the merits, is an extreme step not to be lightly taken...

45. Broadly speaking, strike out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the Court’s orders. In this context “fairness” means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the Court. If there is a real risk that a fair trial may not be possible as a result of one party’s failure to comply with an order of the Court, then that is a situation which calls for an order striking out that party’s case and giving judgment against him. One way in which such a situation may come about, is if crucial documents which are not

disclosed within the time prescribed by an order for discovery, are subsequently lost or destroyed, albeit without fault on the part of the non-disclosing party. Another is where a party has been so fraudulent in relation to the discovery process, for example, by forging or deliberately suppressing documents and lying about it, that it is impossible to place any reliance on what he has disclosed as being either authentic or complete, without a long and expensive inquiry.

46. With regard to the use of strike out orders as a response to disobedience of court orders, we respectfully disagree (as other courts have done) with the view of Millett J. expressed in the *Logicrose* case, that such disobedience can never justify the making of a strike out order. We prefer the view expressed by Arden L.J. in the *Stolzenberg* case that the fact that a fair trial is still possible, does not preclude a court from making a strike out order. We accept with some qualifications the principle expounded and applied in cases such as *Tolley v. Morris* (supra), *Hytec Information Systems Ltd. v. Coventry City Council* (supra) 21 and *Re: Jokai Tea. Holdings Ltd.* (supra), that defiant and persistent refusal to comply with an order of the Court, can justify the making of a strike out order. While the general purpose of the order in such circumstances may be described as punitive, it is to be seen not as retribution for some offence given to the court but as a necessary and to some extent symbolic response to a challenge of the court's authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is the type of disobedience that may properly be categorised as contumelious or contumacious.

47. We do not, however, endorse the approach which was adopted by the courts below in this case. This involved a two-step inquiry. The first step was to enquire whether there was non-compliance with an unless order of the Court. Non-compliance having been found, the second step was to consider whether the offending party had demonstrated that its non-compliance was due to some extraneous circumstance. The offending party having failed to do so, the issue of the strike out order was regarded as automatic. Such an approach approximates to the

ticking of boxes on a form, an approach which we join with Robert Walker J. in deprecating. What is required is a balancing exercise in which account is taken of all the relevant facts and circumstances of the case. For one thing, it must be recognised that even within the range of conduct that may be described as contumelious, there are different degrees of defiance which cannot be assessed without examining the reason for the non-compliance. No doubt the fact that what has been breached is an unless order has a special significance, as such an order is framed in peremptory terms which make it clear to the party to whom it is directed, that he is being given a last chance. The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance. It is also relevant whether the non-compliance with the order was total or partial. Normally it will not assist the party in default to show that the non-compliance was due to the fault of his lawyer since as already stated, the consequences of the lawyer's acts or omissions are as a rule visited on his client. There may be an exception made, however, when the other party has suffered no prejudice as a result of the non-compliance. Other factors which depending on the context, have been held to be relevant include such matters as whether the party at fault is suing or being sued in a representative capacity and whether having regard to the nature of the relief sought or to the issues raised on the pleadings, a default judgment can be regarded as a satisfactory and final resolution of the matters in dispute. Regard may have to be paid to the impact of the judgment not only on the party in default, but on other persons who may be affected by it.

48. We would like to emphasise again that what has been offered above is not intended to be a complete catalogue of the matters to be considered but represents a general guide to the approach to be adopted and a sample of the factors which have been held in decided cases to be relevant to the balancing exercise.”

DISCUSSION

[50] This matter has been ongoing for quite some time. The application for possession was filed in the High Court on 8 August 2011 and disposed of by the judge on 25 February 2015. Fourteen months have elapsed between the filing of the appeal and the filing of the application to strike out the appeal. In the interim, no payments have been made with respect to the mortgages or further charges on the subject property. Even if there is a dispute with respect to one of the further charges, no explanation has been given for non-payment and there is no counter to the allegation of prejudice to the respondent.

[51] These matters are of concern.

[52] In addition to considering the need to ensure compliance with the **CPR** and in furtherance of the overriding objective we have to ensure that justice is also done to the appellants. A court must not lightly drive a litigant from the judgment seat where that litigant has an arguable case.

[53] In **Garvey v Wilkinson**, the delay was for a period of over three years. The Court also took into account the non-acknowledgement of the application and the neglect and/or refusal to answer the respondent's affidavit which the Court viewed as less than due regard for the appellate procedure. In addition there was no

application for an extension of time within which to prosecute the appeal.

[54] In **Richard Frederick v Owen Joseph et al Civil Appeal No. 32 of 2005 (ECSC)**, the court found that there had been an abuse of process since the appellant, having filed the notice of appeal, failed to file the record of appeal by the time specified in the rules but applied to set aside the judgment appealed against. Counsel also failed to appear at the hearing of the application for an extension of time within which to file the record of appeal, which was dismissed for want of prosecution. A fresh application for an extension of time was deemed an abuse of the court's process.

[55] We note that an application could and ought to have been made for an extension of time within which to obtain an appointment and put the appeal process back on track with an affidavit in support setting out the reasons for non-compliance. This was not done. We are of the opinion and hold that the explanation given by counsel for the appellants for not doing so is devoid of any merit.

[56] Having regard to our findings above, there is no substance in the submission that delay in prosecution of an appeal as proof of non-compliance only ran from the date of notification by the Registrar

of the availability of the judgment or transcript.

[57] In applying the reasoning in **Mirchandani** to the facts before us, we have to balance the appellants' non-compliance with **CPR** with the need to ensure that justice is done in accordance with the overriding objective. We note that the respondent will, if successful, be entitled to interest on the sums due in accordance with the terms of the mortgage documents. This at least mitigates some of the alleged prejudice that the respondent will suffer, whereas, the appellants will be deprived of a hearing on the merits if the appeal is dismissed. Looking at the matter holistically, and balancing the respective interests of the parties, we do not believe that the ultimate sanction of striking out the notice of appeal would achieve the ends of justice. We are of the opinion however, that the appellants' delay is inexcusable and that they must be sanctioned for their non-compliance.

[58] We are further of the opinion that to deal with this matter justly we will allow additional time for compliance with the procedural requirements of **CPR 62.12 (2)**.

DISPOSAL

[59] Accordingly, it is hereby ordered as follows:

1. Unless the appellants on or before 13 July 2018 apply to the Registrar of the Supreme Court in writing for an appointment to settle the appeal papers, then the appellants' notice of appeal shall be struck out and the appellants shall pay the respondent its costs to be agreed or in default of agreement to be assessed.
2. The appellants will pay the respondent's costs of and occasioned by the application to strike out assessed in the sum of \$2,000.00 to be paid on or before the 13 August 2018.

Chief Justice

Justice of Appeal

Justice of Appeal (Acting)