

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2020/0003

BETWEEN:

ANDREY TITARENKO

Appellant

and

ALEXEI MOSKOV

Respondent

Before:

The Hon. Mr. Trevor M. Ward

Justice of Appeal

The Hon. Mde. Esco L. Henry

Justice of Appeal

The Hon. Mde. Cadie St. Rose-Albertini

Justice of Appeal

Appearances:

Mr. Andrey Titarenko in Person

Mr. Andrew Willins KC for the Respondent

2026: February 27.

Civil appeal – Court of Appeal’s jurisdiction pursuant to section 30(1)(b) of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance (Cap. 80) – Disclosure of documents – Adding and substituting parties pursuant to rule 19.3 of the Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 – Whether the learned trial judge erred in refusing disclosure of privileged material – Waiver of legal professional privilege – Whether the learned trial judge erred in holding that a disclosure application could succeed only if the documents sought were mentioned – Interpretation and application of rule 28.16 of the CPR – The court’s power to determine the order in which applications are heard pursuant to rule 62.24 of the CPR – Striking out appeal for want of prosecution pursuant to rule 26.3(1) of the CPR – Warehousing an appeal – Whether the court can continue to entertain an appeal solely for resolving costs – Service of documents pursuant to rule 5A.18 of the CPR

REASONS FOR DECISION

- [1] **WARD JA:** Before the court were four applications comprising three procedural applications filed by the appellant, Mr. Andrey Titarenko, which were first in time, and the respondent, Mr. Alexei Moskov's, application to dismiss the underlying appeal for want of prosecution. The respondent's application was filed on 3rd September 2025. On 27th February 2026, after hearing arguments, this Court struck out Mr. Titarenko's appeal in **BVIHCOMAP2020/0003** and dismissed the three procedural applications brought by him. These are our reasons.

Background

- [2] A succinct summary of the relevant background is helpfully provided in the respondent's written submissions and is largely adopted in the chronology which follows. On 13th January 2020 Mr. Titarenko filed an application in the long running underlying claim ("the Renova Litigation") for disclosure of documents which Mr. Moskov asserted were protected by legal professional privilege ("the Disclosure Application"). It was Mr. Titarenko's case that privilege had been waived, and he sought disclosure in connection with the resolution of other applications between himself and Mr. Moskov, "the Deemed Admissions Applications", only a brief description of which is necessary here. In short, on 31st October 2019 (amended 8th November 2019), Emmerson (one of the claimants in the Renova Litigation), applied under Rule 18.12(2)(a) of the **Civil Procedure Rules (Revised Edition) 2023** ("CPR") for orders that (i) Mr. Moskov had been properly served with the ancillary claim on 4th March 2019, and (ii) he is therefore deemed to have admitted those claims, on the basis he had failed to file any defence within the prescribed time or at all. Mr. Moskov's position was that he only instructed British Virgin Island lawyers on 7th October 2019, that he had been contemplating a jurisdiction challenge and assumed he would be separately served. The issues for the judge were: (i) whether Mr. Moskov needed an extension of time to file an acknowledgement of service / defence before pursuing his jurisdiction challenge; (ii) whether Emmerson was

entitled to the deemed-admission order; and, (iii) if an extension was needed, whether Mr Moskov required relief from sanctions first.

[3] On 4th February 2020 Wallbank J., dismissed the Disclosure Application. Mr. Titarenko sought leave to appeal Wallbank J.'s order in the Disclosure Application, and, upon leave being granted, he filed a notice of appeal on 13th October 2020. This appeal is **BVIHCOMAP2020/0003** and will be referred to in this judgment as "the Privilege Appeal".

[4] Mr. Titarenko would subsequently issue three successive versions of a "Procedural Application" within this appeal. In this judgment, these will be referred to collectively as "the Procedural Applications", each of which is summarised below.

The Procedural Application filed 14th December 2021

[5] This application was filed one day before the day appointed for a case management conference of the Privilege Appeal which was fixed for the January 2022 sitting. Mr. Titarenko sought an order striking out the notice of intention to oppose the appeal and the written submissions filed on behalf of the respondent, Mr. Moskov. The application is premised on the allegation that 'Appleby Ltd conducts litigation on behalf of Mr. Moskov illegally, in contravention of Sections 18(1) and 18(2) of the BVI **Legal Profession Act**,¹ and in contempt of court'. It contends that a law firm organised as a legal person cannot lawfully practise law. For good order I will adopt the respondent's description of this contention as "the Incorporation Allegation". The application purports to join Appleby (BVI) Limited as a party to the application.

The Amended Procedural Application filed on 7th January 2022

[6] This application purported, without leave of the court, to add Andrew Willins KC (the respondent's lead counsel) as an additional respondent. Additionally, it sought a wasted costs order against Appleby and Mr. Willins KC. It introduced a further allegation that a conflict arose from Appleby's prior involvement, allegedly acting for

¹(Revised Edition) 2020.

the liquidator of Tomsa Limited (In Liquidation) (an allegation that was denied by the respondent) and acting now for Mr. Moskov ("the Conflict Allegation").

The Re-Amended Procedural Application filed on 15th December 2022

[7] In this application, Mr. Titarenko purported to join yet another Appelby legal practitioner, Mr. Fraser Mitchell, as an additional respondent. He also sought an order that Mr. Moskov be represented by different legal practitioners. Thirdly, he sought a declaration that Appleby (defined as the "Appleby Lawyers") had acted in contempt of court. He further sought an order committing Mr. Willins KC and Mr. Mitchell to prison for one year for contempt of court. Interestingly, this application was filed on the day fixed by the Court of Appeal for a special sitting to consider a large number of outstanding applications brought by Mr. Titarenko.

[8] For completeness, it should be stated that the substantive challenge contained in the Procedural Applications, as it relates to the illegality allegation, has its genesis on or about 1st March 2021 when Mr. Titarenko launched substantive proceedings against Appleby and four of its legal practitioners, in claim number **BVIHCM2021/0057**, which will be referred to in this judgment as "the Appleby Proceedings" or "the Deceit Action". In those proceedings he contended that he discharged an order to pay costs to the respondent based on an implicit deceit, namely, that Appleby was lawfully allowed to practise law in the British Virgin Islands ("BVI"). The allegation of illegality arises out of his contention that it is illegal for legal practitioners to practise through entities with a separate legal personality, or with the assistance of foreign practitioners.

Preliminary Matters

[9] This last procedural application, the Re-Amended Procedural Application, can be easily disposed of as it was previously dealt with by the full court (Michel, Ellis and Ward JJA). By order dated 14th November 2023, the full Court held that the Re-Amended Procedural Application had been filed without leave and would not be considered. In our view, the dismissal of the Procedural Application is clearly a final

determination by this Court on the validity of the Re-Amended Application. No more need be said of it.

[10] Another procedural issue that can also be disposed of summarily is the matter of the purported joinder of Mr. Willins KC and Mr Fraser Mitchell to these proceedings. The respondent took the procedural point that Mr. Titarenko has improperly purported to join Mr. Willins KC and Mr. Fraser Mitchell as additional respondents without leave of the court. Mr. Moskov invites the court to follow its own previous course in orders dated 25th April 2024 in related appeals in which it held similar purported joinders (of the registrar and judicial officers) to be invalid. The respondent invites the Court to declare the joinder of Mr. Willins KC and Mr. Mitchell invalid on the same basis.

[11] There is no cognisable legal basis by reference to the **CPR** governing the procedure for adding and substituting parties to litigation (see: **CPR 19.3**) on which the joinder of these persons could be legitimate. Neither Mr. Willins KC nor Mr. Mitchell was a party to the proceedings below that gave rise to the Privilege Appeal. Based on the filed grounds of appeal, there is no discernible connection between the persons purportedly joined and the issues arising on the appeal, which have to do principally with whether the judge erred in refusing the disclosure of privileged material on the basis that the respondent had not waived legal professional privilege. In so far as the Procedural Applications are concerned, no leave was sought to join these persons. The purported joinder of the said persons in these proceedings in a whimsical and capricious manner is strongly deprecated. Accordingly, the names of Andrew Willins KC and Fraser Mitchell are struck from the title of the procedural applications as they are not proper parties.

The Order in which the Applications were Heard

[12] At the hearing, Mr. Willins KC made an application that the respondent's strike out application be heard first, notwithstanding that the appellant's Procedural

Applications were first in time. It was submitted that if the Privilege Appeal is dismissed, the Procedural Applications fall away and should be dismissed in limine.

[13] For his part, Mr. Titarenko relied on the case of **Saint Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited**² in support of his contention that his Procedural Applications were first in time and logically should be heard first.

[14] The court granted the application to hear the strike out application first. In the exercise of its case management powers, the Court of Appeal may determine the order in which applications are heard. **CPR 62.24** confers on it all the powers and duties of the High Court, including the powers in **Part 26** (of the **CPR**); particularly the power to decide the order in which issues are to be determined. Although applications are generally heard in the order in which they are filed, especially where the earlier application may render a later one moot, that is not an absolute rule. Where a later application, such as one to strike out a claim or appeal, may dispose of the proceedings altogether, the court may properly hear it first and is not bound by a rigid “first in time” approach based solely on filing dates.

[15] The case of **Saint Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited**, on which Mr. Titarenko relies, provides a good example of where the first in time approach was adopted because it was logically necessary to do so. The facts, so far as relevant, are that Caribbean 6/49 Limited instituted proceedings by writ of summons against the Saint Kitts-Nevis-Anguilla National Bank Limited for a sum due and owing. The bank lodged an application to strike out the statement of claim as an abuse of process and did not file a defence to the claim within the time stipulated by the **CPR**. An issue arose as to whether the filing of a strikeout application obviated the need for the bank to file its defence. Caribbean 6/49 subsequently lodged an application for the registrar to enter a judgment in default of defence. This application was dealt with before the bank’s strike out application

² Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported).

and granted. The bank's subsequent application to set aside the default judgment failed. The bank appealed.

[16] In allowing the bank's appeal, the Court of Appeal held:

"[17] If the earlier application to strike out the claim had been heard first and decided in the bank's favor then there would have been no claim for which to enter default judgment. This suit would have been put to an end. That possible outcome was sufficient in itself to have dictated that the striking out application should have been heard first. Because the latter application/request was first entertained, the result was to conclusively deny the Bank of its right to a hearing of what was a serious application and one that could have resulted in the dismissal of Caribbean's entire claim."

[17] This was therefore a case in which it was both chronologically and logically necessary to apply the first-in-time approach. However, it is distinguishable on its facts and does not assist Mr. Titarenko. Here, the procedural applications arise within the context of the appeal. If it could be demonstrated, as the respondent contended, that the appeal should be dismissed for want of prosecution and for being in any event now purely academic, this would be determinative of the entire case and the need to entertain the Procedural Applications rendered otiose. Accordingly, the court exercised its case management discretion to hear the strike out application first and indicated that it would consider the procedural applications on the written submissions of the parties, if this became necessary after hearing submissions on the strike out application.

The Parties' Submissions on the Strike Out Application

[18] The respondent submitted that the appeal should be dismissed on grounds of want of prosecution and abuse of process. To demonstrate that this Court has such a power, the respondent cited authorities such as **Burgess v Stafford Hotel Ltd**;³ **Aviagents Ltd v Balstravest Investments Ltd**;⁴ **Grovit and Others v Doctor and Others**;⁵ and, **Gerville Williams and Others v Commissioner of the Independent**

³ [1990] 1 WLR 1215.

⁴ [1966] 1 WLR 150.

⁵ [1997] 2 All ER 417.

Commission of Investigations and Others.⁶ In particular, the respondent cites this Court's decision in **Wycliffe Baird v David Goldgar and Others**,⁷ which sets out four relevant factors: (i) length of delay; (ii) reasons for delay; (iii) merits of the appeal; and (iv) prejudice to the litigant.

[19] As evidence of the appellant's attitude and strategy in relation to the prosecution of the appeal, the respondent chronicled the procedural history of the appeal and advanced the following assertions:⁸

- (1) The Privilege Appeal (filed October 2020, following an application for leave in February 2020) is now approaching six years old and has never been progressed by Mr. Titarenko. He has proffered no explanation for the delay.
- (2) Mr. Titarenko pursued the same Incorporation Allegation across at least four different fora at the same time, which included a judicial review application, two applications in the Commercial Division in the underlying Renova Litigation, the Deceit Action (addressed later in this judgment), and then repeatedly in the Court of Appeal via the Procedural Applications. He simultaneously deployed the same tactic against a different opposing firm (Forbes Hare) in other appeals.
- (3) On 3rd November 2021, Wallbank J had already ruled that the alleged illegality of Appleby practising in the Territory was not relevant to the application then before him, and that Mr. Willins KC was entitled to appear.
- (4) The original Procedural Application was filed the day before a case management conference of the Privilege Appeal and was specifically

⁶ [2014] JMCA App 7 (Jamaica).

⁷ SKBHC VAP2019/0038 (delivered 15th April 2026, unreported).

⁸ Summarized from a combination of the first and second affidavits of Jeffrey Kirk filed on 22nd August 2022 and 3rd September 2025 respectively and the respondent's skeleton arguments filed on 15th January 2026.

intended to derail the listed hearing of the Privilege Appeal. In a similar way, the Re-Amended Procedural Application was filed to delay the hearing of the application to strike out the Deceit Action which was listed to be heard before Wallbank J., on 20th January 2022. Mr Titarenko separately wrote to the Registrar alleging (unfounded) quasi-criminal proceedings against Mr Willins KC.

- (5) The Deceit Action was dismissed by Wallbank J., on 17th March 2022, finding no illegality in Appleby's practice of law; that decision now stands as final following the striking out of the Appeal No. 35 of 2021.

[20] The respondent submitted that it is an abuse of process for Mr. Titarenko to commence or continue litigation without any genuine intention of bringing it to a conclusion. By bringing procedural application after procedural application, his intention is to delay prosecuting his own academic appeal. The respondent relied on Wallbank J.'s findings in the Deceit Action and his characterisation of Mr. Titarenko's broader litigation strategy of targeting opposing lawyers with the intention (that is, Titarenko's intention) of making opposition to him by opposing lawyers as troublesome and disruptive as possible.

[21] The respondent reminded this Court that this Court has already struck out other appeals brought by Mr. Titarenko for want of prosecution. It was further submitted that a delay approaching six years, caused by meritless applications and forming part of a wider pattern of abusive conduct culminating in this Court making a Civil Restraint Order against Mr. Titarenko, plainly justifies dismissal.

Appeal Academic

[22] As an alternative and independent basis for dismissing the appeal, the respondent contended that the appeal is academic for the following reasons:

- (1) the Privilege Appeal challenges a disclosure ruling made in support of the Deemed Admissions Application in support of which Mr. Titarenko

had sought the disclosure. That application has since been finally determined in the appellant's favour on 15th April 2021 so the appeal is substantially academic — success could, at most, affect a costs order.

(2) Courts generally decline to hear academic appeals, deciding only live disputes between the parties: **Ainsbury v Millington** (Note)⁹ and **Sun Life Assurance Company of Canada v Jervis**.¹⁰

(3) The discretion to hear an academic appeal is a narrow one and the Court should generally only exercise that discretion in public law cases or where the issue is recurrent: **KMG International NV v DP Holding SA (a company incorporated under the laws of Switzerland)**,¹¹ and **Ya'axche Conservation Trust v Wilber Sabido et al.**¹²

[23] While acknowledging that if Mr. Titarenko succeeds on the Privilege Appeal that would disturb the costs order made against him below, it was submitted that, it does not make the appeal any less academic. Reliance was placed on **R v Holderness BC Ex p. James Robert Developments Ltd**;¹³ and, **R. (Tshikangu) v Newham LBC**¹⁴ for that proposition.

The Appellant's Response to the Strike Out Application

[24] Mr. Titarenko filed no written skeleton arguments in response to the strike out application. At the hearing he protested that he had not been served with the relevant submissions and authorities. He referred to the case management order dated 16th December 2025 where the respondent was ordered to file and serve written submissions and authorities by 5th January 2026. The parties were also directed to file a consolidated hearing bundle in relation to the procedural and strike

⁹ [1987] 1 WLR 379.

¹⁰ [1944] AC 111.

¹¹ BVIHCMAP 2017/0013 (delivered 16th April 2018, unreported).

¹² [2014] CCJ 14 (AJ).

¹³ (1993) 5 Admin. L.R. 470.

¹⁴ [2001] EWHC Admin 92.

out applications by 11th February 2026. While he accepted that Mr. Willins KC had sent an email to him, he said he would not make any “submissions” on whether he read that email but submitted that, in any event, sending the material via email was not proper service on him.

[25] The Court rejected that assertion. Among the documents placed before this Court is an affidavit of service of Requan Minott filed on 12th September 2025. She deposes that on 3rd September 2025 she attended the address, which Mr. Titarenko had provided for service within the jurisdiction, namely c/o Goldfort Limited, whose registered office is at Kendall Corporate Services, Ground Floor, O’Neal Building, 57 Road Town, Tortola, British Virgin Islands (“Kendall”). At that address, Ms. Minott served a cover letter from Appleby together with the respondent’s notice of application to dismiss the appeal, the second affidavit of Jeffrey Kirk in support of the application and exhibits thereto on one Meurelene Watt-Dasilva, Legal and Compliance Officer at Kendall, who accepted service on behalf of Mr. Titarenko by signing a copy of Appleby’s stamped covering letter of service. The documents were also emailed to Mr. Titarenko on 10th September 2025 at the email address through which he routinely corresponds with the court and the parties to this appeal and its underlying proceedings. Ms. Minott avers that all of those documents had been filed on the electronic portal that said day. He was asked to provide an alternative address for service since Goldfort Limited had been placed into liquidation.

[26] Mr. Willins KC further advised the court that he emailed Mr. Titarenko the submissions and authorities in support of the strike out application. Mr. Titarenko conceded that Mr. Willins KC sent him the documents via email. However, he was coy about whether he read the email and its contents.

[27] We were satisfied that Mr. Titarenko was served at the address for service which he provided as endorsed in the various procedural applications he filed in this appeal. We note additionally that all of the documents have been uploaded to the e-litigation portal to which Mr. Titarenko would have had full access via the Service

Bureau, pursuant to **CPR 5A.18**. If he chose not to access the documents sent via email and the appeal documents uploaded on the portal via the Service Bureau, he cannot complain that he has not been privy to the respondent's strike out submissions and authorities.

- [28] Notwithstanding Mr. Titarenko's failure to file written submissions in response as directed in the case management order of 16th December 2025, the court permitted him to make oral submissions in response.
- [29] Substantively, Mr. Titarenko submitted that the appeal is not academic because while Wallbank J., dismissed Mr. Moskov's challenge to the finding that he had been deemed to admit certain claims against him, he, however, granted Mr. Moskov permission to appeal that order. While Mr. Moskov has not yet exercised his right to appeal, he may yet do so since Wallbank J., also stayed the proceedings below pending appeal. If Mr. Moskov appeals, this would be immediately relevant to the allegedly academic issue of disclosure.
- [30] Mr. Titarenko rejected the submission that costs was the only remaining issue, and argued that, even if it was, this would not make the appeal purely academic. He relied on section 16 of the **Constitution of the Virgin Islands**¹⁵ and Article 6 of the **European Convention on Human Rights**,¹⁶ which contain the protection of the law/fair hearing guarantees, submitting that a party with a substantial pecuniary interest in costs, said to be in the sum of \$100,000.00, is entitled to invoke those protections and be heard on the issue.
- [31] Mr. Titarenko further submitted that the appeal is not academic because if it were, this would invoke the wasted costs regime against his former legal representatives, Lennox Paton who initiated and signed the notice of appeal and whom, astonishingly he describes as a Bahamian and BVI partnership and which, as a

¹⁵ S.I. Order 2007 No. 1678.

¹⁶ (Rome, 4 November 1950; TS 71 (1953))

Bahamian Partnership, was practising law illegally in the Virgin Islands. He submitted that if the Court were to strike out the appeal it must make a wasted costs order against Lennox Paton but cannot do so without affording them a fair opportunity to be heard on the wasted costs order.

[32] Finally, as it relates to whether the appeal is academic, Mr. Titarenko submitted that in granting leave to appeal, the court must have recognised that this was not an academic appeal. It is therefore not open to the respondent to now contend that the appeal is academic.

[33] The court invited Mr. Titarenko to address it specifically in relation to the length of the delay, the reasons for it and to respond to the submission that he was strategically deploying the procedural applications to delay prosecuting his appeal and what purpose the appeal now serves. He did not take the opportunity to do so. Instead, he pivoted to a submission in relation to the incorporation allegation and rendered his interpretation of Wallbank J.'s decision on that issue. He cited and relied on paragraph 137 of that judgment to submit that Mr. Willins KC and Appleby BVI practise law illegally.

[34] In relation to Mr. Willins KC's reliance on the fact that the appeal against Wallbank J's decision in that matter was struck out, he submitted that the appeal was struck out at the end of 2023 after the application had been made to commit Mr. Willins KC and others to prison for contempt of court, and in any event, was struck out as a nullity on a manifestly technical error.

The Law on Striking Out an Appeal for want of Prosecution

[35] The court's power to strike out an appeal for want of prosecution is founded on the **CPR. Rule 62.24** incorporates the case management powers granted to the court under Part 26 of the **CPR**, and in particular Rule 26.3(1)(a). This rule provides in material parts:

“26.3(1) In addition to any other power under these rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

- (a) there has been a failure to comply with the rule, practice direction, order or direction given by the court in the proceedings;
- (b) ...
- (c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings”

[36] The conventional approach and test applied by this Court on an application to strike out an appeal on the basis of want of prosecution is the four-limb test articulated by Byron, CJ in **The Barbuda Council v The Attorney General**.¹⁷ The court is enjoined to consider: (1) the length of the delay (2) the reasons for the delay (3) the merits of the appeal and prospects of the appeal succeeding and (4) prejudice to the litigants.

[37] In the recent case of **Wycliff Baird v David Goldgar**,¹⁸ the Board affirmed this test but qualified it by two observations. The first is that the four-part test is not necessarily exhaustive, as other factors may be relevant, depending on the circumstances of the particular case. Such factors include: (i) whether the failure to comply was intentional; (ii) whether it has been or can be remedied in a reasonable time; (iii) whether it was due to the party or the party’s legal practitioner; (iv) the effect of the delay on other litigants and other proceedings; and, (v) the extent to which, if any, the other party can be said to have contributed to the delay. The Board made the important point that ‘...it is preferable not to be too prescriptive about what matters are or are not relevant: cases are infinitely variable.’¹⁹

¹⁷ Civil Appeal No. 12 of 1994 (delivered 15th January 20004, unreported).

¹⁸ [2026] UKPC 23.

¹⁹ At paragraph 52 of the judgment.

[38] The second observation the Board made was that the court must demonstrate that it has taken proportionality into account, consistent with the dictates of the overriding objective to deal with cases justly, which includes dealing with cases in a manner that is proportionate. In their Lordships words:

“...Any court striking out an appeal will realise that it is a sanction of last resort and will no doubt consider if alternative orders may appropriately be made. It would, however, be preferable for this to be made clear by, for example, expressly stating that alternative sanctions have been considered and explaining why the sanction of strike out has been determined to be appropriate.”²⁰

[39] With these principles in mind, the application to strike out the appeal was considered, applying the four-part non-exhaustive test and other relevant factors.

The Length of the Delay

[40] The period that has elapsed since the filing of the appeal and the filing of the strikeout application is five years and some months. By any standard, this is an inordinate period of delay.

The Reasons for the Delay

[41] Mr. Titarenko has filed no evidence explaining the reasons for this inordinate delay in prosecuting the appeal. Mr. Titarenko might say that the appeal could not proceed unless and until the court had disposed of his procedural applications, which this Court had deferred pending the outcome of Appeal No.35/2021 in which there was to be a substantive hearing of the identical incorporation allegations which Wallbank J., had dismissed. It is noted, however, that Mr. Titarenko has filed no evidence responding to the respondent’s assertion that these procedural applications were tactically deployed and timed to avoid the determination of the strike out application in the Appleby Proceedings and the determination of an academic appeal. The uncontroverted evidence as disclosed in the second affidavit of Mr. Jeffrey Kirk is as summarised below.

²⁰ At paragraph 53 of the judgement.

- [42] The substantive challenge contained in the Procedural Applications, as it relates to the illegality allegation, has its genesis on or about 1st March 2021 when Mr. Titarenko launched substantive proceedings against Appleby and four of its legal practitioners in the Appleby Proceedings contending that it is illegal for legal practitioners to practise through entities with a separate legal personality or with the assistance of foreign practitioners.
- [43] In response to that substantive action, Appleby applied to strike out those proceedings. Appleby's application will be referred to as "the Summary Judgment Application". That application was listed to be heard on 23rd September 2021 with a time estimate of one day. That time proved inadequate to conclude the hearing and the application was adjourned part heard. Before that hearing could come on, however, on 14th December 2021, Mr. Titarenko filed his first procedural application in this appeal, which mirrors the same issues then being litigated before Wallbank J., in the Appleby Proceedings. He then sought to rely on the filing of that procedural application to invite Wallbank J., to adjourn further determination of the Summary Judgment Application, which was listed for hearing on 20th January 2022.
- [44] Mr. Titarenko quickly followed this up with the filing of his Amended Procedural Application on 7th January 2022, which at the same time, purported to join Mr. Willins KC to the application and raised allegations of a conflict of interest. Notably, he sought a stay of the Summary Judgment Proceedings. This application was dismissed by Webster JA in an order dated 19th January 2022. The Summary Judgment Proceedings therefore proceeded before Wallbank J.
- [45] By judgment dated 17th March 2022 ("the Appleby Judgment"), Wallbank J., dismissed the Appleby Proceedings, characterizing the various applications brought by Mr. Titarenko as being totally without merit. Mr. Titarenko sought leave to appeal the orders and judgment of Wallbank J., in the Appleby Proceedings. That appeal is **BVIHCMAP2021/0035** and will be referred to as the Appleby Proceedings

Appeal. It was eventually struck out as a nullity, wrongly it seems, by Order of the full court dated 20th October 2023. I will return to this later in the judgment.

- [46] The foregoing background is important to provide the context in which these Procedural Applications found their way into this appeal, which, be it remembered, is an appeal against an order refusing disclosure on grounds of privilege.

Progress of the Privilege Appeal

- [47] As early as 18th January 2022, Farrara J.A. had, by order, directed that the appeal be fixed for hearing before the full court during the week commencing 9th May 2022. However, at Mr. Titarenko's request at a case management conference, the appeal was adjourned and re-listed for the week commencing 3rd October 2022. That hearing was again vacated.

- [48] The Court of Appeal Registry subsequently fixed a two-day special sitting for 15th and 16th December 2022 to address some eighteen outstanding pending applications which had been filed by Mr. Titarenko at various times, including the Procedural Applications filed in this appeal. On the first day of that special sitting (that is, 15th December 2022), Mr. Titarenko filed his purported Re-Amended Procedural Application. Ultimately, by order dated 14th November 2023, the full court refused to entertain it on the basis that it had been filed without leave. The court, however, stayed the Amended Procedural Application until the determination of the Appleby Appeal Proceedings, which would be the substantive hearing of the identical issues raised in the Amended Procedural Application.

Analysis of Reasons for the Delay

- [49] One would think that it would have been in Mr. Titarenko's interest to progress the Appleby Appeal Proceedings since it would substantively determine and settle the illegality allegation one way or the other. However, although Mr. Titarenko protested to the court that the appeal had been erroneously struck out as a nullity, he took no steps to challenge it. When served with the Court of Appeal's Order striking out the

Appleby Proceedings Appeal, Mr. Willins KC had quite properly, and in the highest traditions of the bar, immediately written to the court, copying in Mr. Titarenko, querying the basis for its determination that the application for leave to appeal was filed out of time and was thus a nullity. In his view, the court had understandably erred in not realizing that Wallbank J., had directed that time to appeal would run from the date when the judgment was sealed (which did not occur until 29th March 2022) although the judgment was dated 17th March 2022.

[50] Mr. Titarenko subsequently wrote to the court querying the order. It does not appear that the order was capable of being remedied by the application of the slip rule properly construed. Mr. Titarenko's was advised that he should seek to appeal the Court of Appeal's order. Some three years later, he has taken no steps to challenge the strike out order. In practical terms this means that Wallbank J.'s judgment in relation to the illegality allegations stands, unless and until set aside by this Court.

[51] Standing back and looking at the history of this appeal, a clear picture emerges. Instead of simply prosecuting the illegality allegation on its merits, Mr. Titarenko deployed a series of strategically timed applications: (i) an initial procedural application filed shortly before the resumption of the Summary Judgment Application in January 2022; then (ii) an "amended" version, purporting to join Mr. Willins KC and alleging conflict of interest just ahead of the 20th January Summary Judgment hearing; then (iii) a "re-amended" version on the very day the Procedural Applications were listed to be heard at a special sitting; and, (iv) an application to adjourn the Privilege Appeal itself when it was first fixed for 9th May 2022. A clear pattern is discernible whereby whenever a hearing date for the Summary Judgment Application or the Privilege Appeal was set or imminent, a new procedural application or adjournment request was made.

[52] The facts give rise to the irresistible inference that Mr. Titarenko sought consistently to leverage the pendency of the Procedural Applications before the Court of Appeal as a reason to adjourn the separate Summary Judgment Application before

Wallbank J, and indeed the Privilege Appeal, as a delay mechanism rather than addressing either on the merits. Purporting to join the respondent's lead counsel as a party to these Procedural Applications and alleging a conflict of interest was transparently a device to introduce another layer of challenge and to potentially disqualify counsel, with the potential to lead to yet more procedural litigation machinations.

- [53] It is therefore clear that the delay in prosecuting this appeal is attributable to the deliberate and calculated litigation strategy of Mr. Titarenko himself, designed to delay conclusive resolution of the appeal while seeking to litigate the same illegality issue across multiple proceedings, rather than adopting a strategy aimed at quick and conclusive resolution of the substantive issue on the appeal. All the evidence suggests that this was intentional on Mr. Titarenko's part and strongly implies that even if he initially intended to prosecute the appeal, there came a point when it became evident that he no longer genuinely intended to prosecute this appeal.

The Merits of the Appeal

- [54] The essence of Mr. Titarenko's main ground of appeal is that Wallbank J., erred in dismissing his application to prevent Mr. Moskov from relying on legal advice unless full disclosure was given. He contends that Wallbank J., wrongly found that Mr. Moskov's intended reliance on that advice did not amount to a waiver of privilege and further erred in failing to hold that paragraphs 21–22 of Mr. Moskov's first affidavit triggered waiver of the full contents of the legal advice. For completeness, paragraphs 21 and 22 of Mr. Moskov's first affidavit provide:

"21. As I gradually started to understand events, it became clearer what might have happened with the box of documents delivered to my house such that my Swiss lawyers could advise properly in respect of the position on service in Switzerland. I then appreciated, for the first time, on the basis of legal advice received (and in relation to which no privilege is waived), that my initial belief that I had not been validly served would be very difficult to establish for two reasons; first, because it involved proof of factual matters that might well be disputed; and second, it may engage expert evidence on Swiss law.

22. I instructed Appleby on 7 October 2019. Following BVI legal advice (over which I do not waive privilege) I did not believe that the case was a proper case for service upon me, that I had been appropriately “served out” with these Proceedings or even correctly joined to them. After further enquiries as explained by Lalive in their letter of 23 October 2019 (exhibited at pages [3-6] of AM-1) and legal advice I instructed Appleby to file the Jurisdiction Application. In view of the risk that service might be found to be valid, I did not challenge the validity of service. I had other grounds on which to challenge jurisdiction and I was anxious to get the application heard as promptly as possible.”

[55] The same argument is advanced in relation to the letter from Mr. Moskov’s Swiss lawyers, the “Lalive Letter”, which Mr. Titarenko says was itself privileged as part of the continuum of lawyer-client communications for the purpose of obtaining legal advice on service, whether or not it contained legal advice, or alternatively contained privileged matters recording legal advice given to Mr. Moskov on service. He also contends that the judge erred in holding that Mr. Titarenko’s disclosure application could succeed only if the documents sought were specifically “mentioned” in Mr. Moskov’s first affidavit and Ms. Wigglesworth’s third affidavit within the meaning of Rule 28.16 and further erred in finding that the documents had not been so mentioned.

[56] The Court is satisfied that these grounds of appeal do not provide a realistic prospect of success. There is no arguable basis for suggesting that the judge misdirected himself in law or on the facts in relation to the test of waiver of privilege and whether Mr. Moskov was relying on the effect of the legal advice rather than on its contents. The judge carefully reviewed several authorities on this subject at pages 14 to 19 of the transcript of his oral judgment. In his application of the principles derived from those authorities, his finding that the references to legal advice was to explain the timing of Mr. Moskov’s application on 23rd October 2019 and was therefore relied on for the fact and effect of that advice and not its contents was entirely properly open to him. He gave careful consideration to Mr. Titarenko’s submission, which he described as a ‘compelling submission’ that Mr. Moskov was really deploying legal advice while dressing it up as the effect on his mind of what he was talking about. Ultimately, however, having carefully perused the third

affidavit of Ms. Wigglesworth, Mr. Moskov's first affidavit and the Lalive letter in which it was alleged that documents were mentioned and that the contents of legal advice were disclosed, the judge concluded that there was no waiver of privilege. I am unable to see that he erred in principle, in law, or fact, in so concluding.

[57] Neither is it arguable that the judge erred in his interpretation and application of Rule 28.16 in relation to the requirement that disclosure is permissible in relation to a document that is mentioned in an affidavit, among other sources, nor in his finding that the documents sought by the appellant had not been so mentioned. At pages 12 to 14 of the transcript of the oral judgment, the judge carefully guided himself by reference to cited authorities on what is meant by saying that a party has "mentioned" a document within the meaning of Rule 28.16. No error of principle is discerned therein.

[58] Having also considered Mr. Titarenko's filed skeleton arguments in support of this appeal nothing therein displaced the court's preliminary assessment that the appeal lacks merits.

Prejudice

[59] Clearly, the party prejudiced by this inordinate delay in prosecuting the appeal is Mr. Moskov who has incurred and will continue to incur costs in defending this appeal. Mr. Titarenko, the author of the delay, cannot complain of prejudice, especially since he has prevailed in the application for which the disclosure was sought in the first place.

The Remedy

[60] This course of conduct by way of litigation strategy adopted by Mr. Titarenko is deserving of sanction. It reflects a manifest want of prosecution, and in any sense, it can also be properly characterized as an abuse of process. In **Wycliffe Baird**, the Board also provided some guidance on the applicable test where the application to strike out an appeal is based on abuse of process:

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

56. A factor which may make delay an abuse is “warehousing”. This term covers three categories of case which, in the context of appeals, may be stated as follows: (i) when the appellant, from the outset does not intend to bring the appeal to a decision; (ii) when the appellant at first intends to bring the appeal to a conclusion but later decides to abandon it; and (iii) when the appellant starts an appeal intending to see it to its conclusion, but later decides to pause it, planning to revive it if something happens in the future. 57. Categories (i) and (ii) may relatively easily lead to the conclusion that the continuation of the appeal is an abuse of process. Category (iii) is more nuanced. In **Asturion Fondation v Alibrahim** [2020] EWCA Civ 32; [2020] 1 WLR 1627 Arnold LJ summarised the position as follows (at para 61):

“...a unilateral decision by a claimant not to pursue its claim for a substantial period of time, while maintaining an intention to pursue it at a later juncture, may well constitute an abuse of process, but does not necessarily do so. It depends on the reason why the claimant decided to put the proceedings on hold, and on the strength of that reason, objectively considered, having regard to the length of the period in question. A claimant who wishes to obtain a stay of proceedings for a period of time should seek the defendant’s consent or, failing that, apply to the court; but it is not the law that a failure to obtain the consent of the other party or the approval of the court to putting the claim on hold automatically renders the claimant’s conduct abusive no matter how good its reason may be or the length of the delay.”

[61] In my view, the facts lead irresistibly to the conclusion that this is a case of warehousing the appeal. Even if Mr. Titarenko initially intended to pursue it, his conduct after the Deemed Admissions Application was decided in his favour strongly indicates that he has since allowed the appeal to remain dormant, with no genuine intention of prosecuting it. If, as he argued, the substantial costs order

against him made the appeal worth pursuing, his conduct is inconsistent with any real intention to pursue it, even for that limited purpose.

- [62] Consideration has been given to whether any sanction short of striking out the appeal would be proportionate in meeting the justice of the case. Realistically, on appeal, the options would usually be limited to making case management orders stipulating strict timelines for progressing the appeal, framed as an unless order. In the context of the egregious conduct engaged in by Mr. Titarenko, the inordinate delay in prosecuting the appeal and the absence of any discernible merit to the appeal, adopting such a course would effectively be to impose no sanction at all. In the court's view, this is an exceptional case in which the last-resort 'nuclear option' of striking out the appeal is fully justified.

Academic Appeal

- [63] For completeness, we would add that had it been necessary, we would have been prepared to hold that this appeal is now completely academic. This Court in **KMG International NV v DP Holdings SA (a company incorporated under the laws of Switzerland)**²¹ held that a Court of Appeal may exercise its discretion by declining to hear an appeal, or to deliver its judgment on an appeal already heard where the underlying proceeding has been dismissed or has become academic. An appeal may be said to be academic or theoretical where there is no live issue to be resolved between the parties: **Ya'Axche Conservation Trust v Wilber Saligo et al.**²² In that case, the Caribbean Court of Justice ("the CCJ") held that notwithstanding an appellate court's competence to entertain an appeal,²³ "it is an important feature of our judicial system that this Court decides disputes between the parties before it and does not pronounce on abstract or hypothetical questions of law where there is no dispute to be resolved. In general, there must exist between

²¹ BVIHCMAP2017/0013 (delivered 16th April 2018, unreported).

²² [2014] CCJ 14 (AJ).

²³ At paragraph [3]. In the context of the present case, see Section 30(1)(b) of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance which sets out the jurisdiction. of the Court of Appeal.

the parties a matter in actual dispute or controversy which this Court can decide as a live issue.”

[64] However, this is not an absolute rule. In appropriate circumstances, an appellate court may hear an academic appeal even though no live issue remains between the parties by the time the appeal is reached. The CCJ identified such circumstances as including cases that raise a discrete point of statutory interpretation of public importance which has arisen before and is likely to arise again. It also recognised that an academic appeal may warrant determination where the issue is recurrent and is likely to become moot before it can reach the final appellate court. It gave the example of a challenge to the legality of an annual licence or permit,²⁴ which would ordinarily expire before the question of its validity could be finally determined.

[65] It summarised the position thus:

“...this Court should be cautious in the exercise of its discretion to entertain an academic appeal and should in principle only do so where the question is one of public law (as distinct from private law rights disputes between parties) and where there are good reasons in the public interest to hear such an appeal.”²⁵

[66] Two important points emerge from these cases. First, as **KMG** illustrates, a change in circumstances during the pendency of an appeal can render it academic. Secondly, whether the Court of Appeal entertains an academic appeal is a matter within its discretion.

[67] Applying all the principles derived from these cases, here the first point to note is that this appeal challenges Wallbank J’s refusal to order disclosure of material he held to be privileged. Mr. Titarenko sought that disclosure for use in the Deemed Admissions/Extension Application involving Mr. Moskov. That application was resolved in Mr. Titarenko’s favour in April 2021 when Wallbank J., held that Mr. Moskov was deemed to have admitted the Ancillary claim. That determination

²⁴ At paragraph [5].

²⁵ At paragraph [4].

means that the occasion and purpose for which the privileged material was sought have therefore passed.

[68] Secondly, it is plain that the appeal concerns a private law disclosure dispute which turned largely on the judge's interpretation of the evidence and his application of the law to the facts found by him; it raises no issue of public law and discloses no public interest reason for being heard. Proceeding with it would serve no practical or functional purpose and would be inconsistent with the overriding objective, including the need to allocate the court's resources and time proportionately.

[69] Mr. Titarenko contended that the appeal is not academic because as a party with a substantial pecuniary interest in costs, said to be in the sum of \$100,000.00, he is entitled to be heard and invoke the constitutional right to a fair hearing on the issue.

[70] The respondent relies on **R v Holderness B.C. Ex p. James Roberts Developments Ltd**²⁶ for the proposition that where the only live issue arising by the time of the appeal is costs, that does not make the appeal any less academic. In that case, a judicial review application of a refusal to grant planning permission by the Council, whose Chairman was himself a local builder/developer, had been rendered academic. That was because by the time that the judicial review proceedings were re-listed for hearing, planning permission had been granted and the Chairman, against whom bias had been alleged, had lost his seat in the council elections and could therefore not sit on any future applications for planning approval by rival developers. The only live issue was costs, which the parties could not agree because the appellants insisted on their costs as a condition for discontinuing the proceedings. The judge considered that he first had to take a view of the success or otherwise of the application for judicial review to determine which party should be liable for costs. He proceeded to do so and made a costs order which was appealed.

²⁶ [1993] 1 PLR 108.

[71] On appeal, an issue arose as to whether the appeal should be entertained, and the majority held that it should. Simon Brown L.J., dissenting, was of the view that the appeal should not be entertained, although he did go on to consider the substantive issue, given the majority's view. Importantly, even though Brown, L.J. dissented, he seems to have accepted that '...litigation may sometimes be properly continued for the sole purpose of resolving an issue as to costs when all other matters in dispute have been resolved',²⁷ and that 'provided that there remains a *lis* between the parties – even if it be only the unresolved issue of costs – the court can continue to entertain an appeal.' Brown, L.J. further held:

“Where the only remaining *lis* between the parties is an unresolved issue of costs, it will be within the discretion of the appeal court ... whether or not to entertain the appeal. It seems to me that they would be unlikely to do so unless a point of general importance arises. That this is a matter of discretion seems to be evident from the terms of Lord Bridge's speech in **Ainsbury v Millington**.”²⁸

[72] Butler- Sloss L.J., citing **Ainsbury v Millington**, affirmed that 'the issue of costs alone may keep litigation alive.'²⁹ The majority seems to have taken the view that the judge could not fairly determine costs unless he resolved who was right on the substantive judicial review claim. Since he had the jurisdiction to do so, the Court of Appeal could not decline to entertain the appeal against his cost order which was substantial.

[73] In principle, therefore, it seems to be that the fact that the only live issue remaining is costs does not necessarily render an appeal academic and provide a justification for refusing to entertain the appeal.

[74] That said, we were satisfied that this case is different. First, it is a private law dispute that raises no issue of general importance. Secondly, in **Holderness**, the matter became academic because of developments independent of the parties, namely that the developers eventually obtained the planning permission they had sought,

²⁷ At page 119 of the judgement.

²⁸ *Ibid.*

²⁹ At page 120 of the judgment.

after revising a fourth application following discussions with the Council's planning officers, and the Chairman lost his position on the Council. All that remained was the question of who should bear the costs of the judicial review application. By contrast, this appeal became academic because Mr. Titarenko succeeded on the Deemed Admissions Application for which he sought disclosure in the Privilege Appeal. The costs of this appeal will depend on its merits, and we have already concluded that it lacks merit. In these circumstances, the existence of a costs issue does not justify preserving an otherwise academic private law appeal that has little or no prospect of success and raises no issue of general importance.

- [75] These reasons would have provided an alternative and free-standing basis for refusing to entertain the appeal.

Disposition

- [76] For the foregoing reasons, the court made the following orders: (i) that the names Andrew Willins KC and Fraser Mitchell are struck from the Procedural Applications, (ii) appeal **BVIHCMAP2020/003** is struck out; and (iii) each of the Procedural Applications stands dismissed.

[77] Mr. Titarenko shall pay Mr. Moskov's costs of the dismissal application and the procedural applications, to be assessed by a judge of the Commercial Division of the High Court in the British Virgin Islands, if not agreed within 21 days of the delivery of this judgment.

I concur.
Esco L. Henry
Justice of Appeal

I concur.
Cadie St. Rose-Albertini
Justice of Appeal

By the Court

Chief Registrar