Application to discharge or vary a condition.

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION Appeal No. 479

22 December 2016

Before:

Mr John Martin QC
Sir David Calvert-Smith
Mr William Bailhache, Bailiff of Jersey

Between:

TORGEIR NORDBO **Appellant**

-and-

EDRIC & DIANE BAKER **Respondents**

This is the judgment of the Court

MARTIN JA:

1. The nature of the application before the Court emerges from the following narrative. This is the Court's judgment on that application.

2. On 16 May 2014 the Seneschal of Sark gave the respondents, Edric and Diane Baker ("the Bakers"), permission to use the services of the Prevot of Sark to evict the appellant Torgeir Nordbo ("Mr Nordbo") from a tenement on the Island of Sark. In his judgment explaining his order, the Seneschal determined that a tenancy formerly held by Mr Nordbo of that tenement had come to an end. He also ordered Mr Nordbo to pay the Bakers indemnity

costs of £15,567. Mr Nordbo did not attend the hearing before the Seneschal, despite having due notice of it.

3. Mr Nordbo appealed to the Royal Court of Guernsey against the Seneschal's decision. On 5 September 2014 the Royal Court (Judge Finch) dismissed the appeal, so that the Seneschal's order remained in effect. Again, Mr Nordbo did not attend the hearing before the Royal Court, despite having due notice of it.

Setting down the appeal to this court

4. On 2 October 2014 Mr Nordbo gave notice of appeal to this court against the decision of the Royal Court upholding the Seneschal's decision. The basis of the appeal was alleged violations by the Court of the Seneschal of Article 6 (1) of the European Convention on Human Rights, requiring civil courts to be independent and impartial, and the alleged incompatibility of the Sark law relating to leaseholds with the Convention. We call this "the main appeal". He requested the Sergeant to serve the notice of appeal on the Bakers, and paid the £50 service fee.

5. On the same day Mr Nordbo lodged a complaint with the European Court of Human Rights in relation to the decisions of the Seneschal and the Royal Court.

6. Rule 4 of the Court of Appeal (Civil Division) (Guernsey) Rules 1964 ("the 1964 Rules") required Mr Nordbo to apply to set down the main appeal within seven days after giving notice, and the Court of Appeal (Civil Division) (Costs and Fees) (Guernsey) Rules, 2012 ("the 2012 Fees Rules") required him to pay a fee of £270 on setting down. Mr Nordbo was informed of these requirements by email dated 15 September 2014 from the Senior Deputy Greffier ("the SDG") before he served the notice of appeal.

7. By email dated 8 October 2014 Mr Nordbo applied to set down the main appeal. He did not pay the fee. He was reminded of the need to do so by emails dated 8 October 2014 and 3 November 2014. On 19 March 2015 the SDG wrote to Mr Nordbo again drawing attention to the need to pay the fee and pointing out that the time for setting down the main appeal had expired and Mr Nordbo would have to seek leave to set it down out of time.

The request for information

8. By emails dated 13 and 29 September 2014 Mr Nordbo sought from the Guernsey Greffe, the Seneschal of Sark and the Bakers' advocate (in the words of the second of those emails) "all case file documents/evidence that is still unknown" to Mr Nordbo. The notice of appeal in the main appeal included as one of the grounds of appeal the complaint that "the appellant was deprived of his right, enshrined in article 6.1 of the Convention, to access case file evidence. … The Royal Court further deprived the appellant from his right, as enshrined in article 6.1 of the Convention, to comment on such case file evidence before the court". On 10 October 2014 Mr Nordbo emailed the Registrar, saying (among other things):

> "I have yet to receive any of the documents/evidence that I have applied for to the Sark and Guernsey Greffiers and Courts. If not all such documents/evidence have been received by me in a timely manner, I will have to apply to the Guernsey Court of Appeal for an extension to the four months (from the setting down of my appeal) that I have available to lodge documents/evidence to the Registrar".

9. On 11 March 2015 Mr Nordbo made an application in the Seneschal's court for provision by the court and the Bakers of "all case file documents/evidence that is still unknown to

him in the case file" at the Seneschal's court. The application listed documents that had been referred to in Part B of a statement of costs prepared on behalf of the Bakers. That statement was the basis of the indemnity costs order made by the Seneschal on 16 May 2104. The application also sought an adjournment of "any and all further legal proceedings until minimum 1 (one) month after [Mr Nordbo] has received any and all case file documents/evidence that is still unknown to him". No order appears to have been made on this application. It would in any event have been beyond the powers of the Seneschal to make an order adjourning further proceedings in Guernsey.

10. On 12 March 2015 Mr Nordbo sent to this court and to the Bakers a submission, framed as a "reminder" and setting out parts of his notice of appeal in the main appeal. Those parts included (a) what was described as an ex parte application to this court that the court and the Bakers communicate with Mr Nordbo in a secure way, since Mr Nordbo divides his time between Sweden and Thailand and "due to the sad fact that the Royal Court and the Court of the Seneschal of Sark has misused email communication with [Mr Nordbo], [he] will unfortunately not during any stage of the upcoming legal proceedings before the Guernsey Court of Appeal be able to accept or receive any communication from the court (or from [the Bakers]) by email"; and (b) an application to receive all case file evidence presently unknown to Mr Nordbo. The submission then stated that Mr Nordbo had not yet received any response to his applications for communication in a secure way and for the provision of documents, and concluded with an application to this court for an adjournment of all proceedings until one month after receipt by Mr Nordbo of the information he sought.

11. On 19 March 2015 the SDG sent the letter referred to in paragraph 7 above.

12. On 7 April 2015 Mr Nordbo produced an amended version of his submission of 12 March 2015. This made clear that his application for production of documents was addressed to the Bakers as well as to this court, and pointed out that he had still not received a decision as to how to communicate with the court. It then referred to the SDG's letter of 19 March 2015, and said this:

> "[Mr Nordbo] hereby claim that the interpretation of the Greffe that a consequence of Rule 4(1) of the Court of Appeal (Civil Division) (Guernsey), 1964 is that [Mr Nordbo] must now seek leave to have this appeal set down as out of time must indeed be incorrect plus in direct violation of amongst others article 6.1 of the European Convention of Human Rights. As stated by the Greffe a Court fee of £270 has to be paid by [Mr Nordbo] before setting down the matters. [Mr Nordbo] hereby claims that it must obviously be impossible that he is out of time setting down this matter due amongst other to the simple fact that he hasn't even received an invoice (for the now claimed £270.00) from the Guernsey Court of Appeal for setting down the matters. A very minimum and basic business requirement for obtaining payment for a service is as should be known to the Greffe/Guernsey Court of Appeal to issue a proper specified invoice."

The amended submission then applied for a minimum of one month (including time for postal service by recorded letter) to apply to set down the main appeal from the date of a proper specified invoice for the setting down fee.

13. On 12 June 2015 the SDG wrote to Mr Nordbo, referring to the applications made in the amended submission of 7 April 2015 and saying that in order for those applications to be considered Mr Nordbo would need to apply for leave to set down the main appeal out of time. Bank account details for payment of the setting down fee (by now increased to £285 by the Court of Appeal (Civil Division) (Costs and Fees) (Guernsey) (Amendment) Rules, 2015) were provided in the letter.

The application to set down out of time

14. On 17 July 2015 Mr Nordbo provided a further submission, responding to the SDG's letter of 12 June 2015. In it, Mr Nordbo maintained what he had said about the lack of an invoice in his submissions of 7 April 2015, and pointed out that he had still not received one; and he sought an order from this court directing the issue of an invoice and "to make known to [Mr Nordbo] the reason(s) why he has been held up for so long from applying for the setting down of the matters". The submission went on as follows:

> "However, in an act of good faith and as an initiative to try to finally move these legal matters at the Guernsey Court of Appeal forward (in spite of all the serious issues that I have experienced from the Greffe/Guernsey Court of Appeal and [the Bakers]), I yesterday transferred [the setting down fee].
>
> Although I am obviously not out of time for setting down these matters, I hereby apply to the court for the matters to be set down alternatively I seek leave for the appeal to be set down as out of time".

15. On 23 September 2015 the SDG wrote to Mr Nordbo listing his applications then before the court as those dated 17 July 2015 for leave to set down out of time, 7 April 2015 for provision of documents and 2 October 2014 (notice of appeal in the main appeal). The letter then said this:

> "If you wish to pursue your application for the Respondent to disclose documents before you proceed with your application for leave to set down and/or the substantive appeal, I should be grateful if you would confirm that you have served this application on the other side and have filed everything you need in order to assist the Court in identifying the issues involved in the disposal of this application. After that a timetable can be set for the other side to reply to your submissions before the matter is heard.
>
> It may be that this matter can be dealt with as a preliminary issue on the papers. I will revert to you due course confirming whether or not this is possible."

The letter also said that "Court staff are not able to act as unofficial legal advisors to the parties (although we are able to give limited assistance with basic procedure) nor are they able to assist parties with the direct day-to-day administration involved in the preparation of the paperwork for their respective cases".

16. On 26 November 2015 Mr Nordbo produced **a** further submission referring to the SDG's letter of 23 September 2015. It stated that Mr Nordbo had received none of his requested documents and had not heard at all from the Bakers. It said that this fact remained a sad but effective obstacle against proceeding to the substantive main appeal. It asked to be told if it would be possible to deal with the matter as a preliminary issue on the papers, in which case Mr Nordbo would respond to the court as well as adding any other comments he might have on the letter of 23 September 2015. It sought a substantive explanation from the Court/Greffe as to whether Mr Nordbo could indeed pursue his application for disclosure before proceeding with his application to set down; and it said that matters could not be dealt with in the Court of Appeal session starting on 7 December 2015.

17. On 14 December 2015 the SDG emailed Mr Nordbo, saying that he had nothing to add to his letter of 23 September 2015.

18. On 7 April 2016 Mr Nordbo filed another submission, running to 47 pages. From halfway down page 22 to the end the document is primarily concerned with the main appeal, starting with an application to adjourn the main appeal until after a decision has been obtained from the European Court of Human Rights on Mr Nordbo's complaint to that court. The nature of the earlier parts of the document is indicated by the table of contents, which is as follows:

    1. Introduction
    2. Request for verbal hearing at the Guernsey Court of Appeal
    3. Disclosure of case file evidence by the Respondents
        3.1 Arguments for the disclosing of case file documents/ evidence
        3.2 Disposal of the application to disclose case file evidence
    4. Regarding the application for leave to set down matters
        4.1 Disclosure prior to the setting down of the matters
        4.2 Application to set down matters not filed as out of time
    5. Applications lodged at the Guernsey Court of Appeal
    6. Further applications to the Guernsey Court of Appeal
        6.1 Applications for Declaration of Incompatibility
        6.1.1 Section 4 to Human Rights (Bailiwick of Guernsey) Law 2000
        6.1.2 Further applications for Declaration of Incompatibility
        6.1.2.1 Declaration of Incompatibility of the Seneschal his Deputy and the Court
        6.1.2.2 declaration of Incompatibility on the land laws/provisions (& lack of) of Sark.

    It is not necessary to amplify the majority of these matters at this stage. However, in paragraph 3.2 in relation to disclosure Mr Nordbo said that he "now first awaits a response from the Guernsey Greffe/Guernsey Court of Appeal as to whether or not it is possible for the Court to deal with the matter as a preliminary issue on the papers before any further legal proceedings can take place"; in paragraph 4.2 Mr Nordbo said "In a letter dated the 23rd of September 2015, the Guernsey Greffe finally confirmed that the Appellant can pursue his application for the disclosure of case file documents/evidence from the Respondents prior to proceeding with his application for leave to set down the matters and of course also before proceeding with his substantive appeal…. As a consequence, the deadline for the Appellant to apply for leave to set down the matters is obviously still not lapsed. The Appellant has therefore evidently not been out of time to apply for leave to set down the matters"; and in paragraph 5 Mr Nordbo listed the applications that "among the applications that have already been launched" were outstanding as being that his application for disclosure be processed prior to his application to set down, "application for leave to set down the matters following the disposal of the application for the Respondents to disclose case file evidence, which was launched based on earlier advice from the Guernsey Greffe before the he (sic) changed his advice to allow the disclosure of case file documents/evidence before applying for leave to set down matters", application for communication in a secure way, and application for adjournment until at least one month after receipt of the case file evidence.

19. On 21 April 2016 the SDG wrote to the parties with directions designed to lead to disposal of Mr Nordbo's interlocutory applications by a single judge of this court.

20. On 6 May 2016 Mr Nordbo filed a submission in relation to these directions. This document reiterated Mr Nordbo's request that his application for disclosure be disposed of before the other applications, including the application to set down out of time; objected to certain of the timings; and said that Mr Nordbo now required a verbal hearing for the disposal of the application to set down.

21. On 9 May 2016 the Bakers wrote to the SDG commenting on Mr Nordbo's submission of 7 April 2016. Among other things, the letter asked that before any further court hearing Mr Nordbo pay the £15,567 costs awarded to the Bakers by the Seneschal's order of 16 May 2014.

22. Mr Nordbo was given an opportunity to respond to this letter. On 1 June 2016 he filed a further submission, with supporting documents. Apart from referring again to his application to establish a secure method of communication with him and repeating his request for a verbal hearing, the submission was mainly concerned with disclosure and with questioning the Bakers' credibility on that matter.

Decision of the single judge

23. Mr Nordbo's applications for leave to set down the main appeal out of time and for production of documents were dealt with by Anderson JA as a single judge of this court. He also dealt with the Bakers' application, made by letter dated 9 May 2016, for any future progress in the main appeal to be conditional on payment of the balance of costs ordered by the Seneschal on 16 May 2014. On 26 October 2016 he ordered that setting down of the main appeal be conditional on payment by Mr Nordbo to the Bakers of the balance of the costs, and he extended the time for setting down the main appeal to the end of 2016. He made no order for disclosure.

24. The single judge's reasons were set out in a judgment of the same date. He summarised the history of the proceedings in Sark and Guernsey, and referred to Mr Nordbo's application to the European Court of Human Rights. Having recited the submissions of the parties, the single judge then dealt first with the Bakers' application for payment of the costs before the main appeal was set down. His reasons for acceding to that application were that the costs order was almost two and a half years old; that Mr Nordbo lived outside the jurisdiction; that Mr Nordbo had given no reason for non-payment, and in particular did not say that he had paid it, or could not pay it, or that paying it would prejudice his ability to pursue the main appeal; and that there had been no attempt to suspend the costs order pending the outcome of the main appeal. In the absence of any objection from the Bakers, he extended the time for setting down the main appeal to the end of 2016.

25. As to disclosure, he stated that parties to litigation were ordinarily entitled to see copies of the evidence and submissions filed at court that might potentially form a basis for the court's decision. Having cited authority, he said that the rule that no party may communicate with the court without simultaneously alerting the other party to that fact applied to any direct contact with the court in relation to the subject matter of a case before the court, as well as to any other contact that went beyond a routine administrative enquiry of the court office and that had the potential to influence a judicial decision, whether procedural or substantive. He referred to Part B of the Bakers' submission to the Court of the Seneschal, which Mr Nordbo had specifically identified as relevant, and identified it as an itemised statement of costs principally consisting of fees incurred by the Bakers' advocate. He noted that it appeared from Mr Nordbo's notice of appeal in the main appeal that the documents principally of interest to him were communications between the Bakers and the Sark Prevot, the Sark Greffier and the Seneschal, including emails and recordings or transcripts which it was alleged or assumed had been made of telephone calls. He then stated that the application had the look of a fishing expedition: it was likely that the communications referred to in Part B of the Bakers' submission contained neither evidence nor submissions and that, to the extent that they were more than routine administrative enquiries, reasonable steps had been taken to copy in or notify Mr Nordbo or his representatives at the time. Even if that were not so, it would not necessarily follow that

the decision of the Seneschal could be impugned: that would be a question to be examined in all the circumstances, and there was not on the evidence before him the slightest reason to question the propriety either of the Bakers' advocate or of the judicial authorities on Sark in relation to these matters. Nevertheless, it was Mr Nordbo's contention that he did not receive a fair hearing before the Court of the Seneschal. Finally, he said this:

> "I do not consider it appropriate in the circumstances to make any specific order in relation to disclosure of the documents or alleged recordings referred to by [Mr Nordbo]. I am mindful that the appeal has not been set down, and that its future progress will depend on the satisfaction of the condition which I have imposed. But when the time comes for the [Bakers] to answer the appeal, I have no doubt that they will wish to explain the nature of the communications referred to by [Mr Nordbo] and to support that application, if so advised, by affidavit evidence that it would be open to this Court to admit. Any further application could then be considered by this Court in the normal way."

Variation or discharge of the single judge's order

26. Section 21 of the Court of Appeal (Guernsey) Law 1961 ("the Court of Appeal Law") provides by subsection (1) that, in any appeal pending before the Court of Appeal, any matter incidental thereto not involving the decision of the appeal may be decided by a single judge of the Court; and subsection (2) states that every order (other than an order made on an application for leave to appeal or for an extension of time for appealing or for seeking leave to appeal) made by a single judge may be discharged or varied by the Court of Appeal. The matters dealt with by Anderson JA were matters incidental to the main appeal and did not involve deciding that appeal; and the order made by him is capable of being discharged or varied by the full Court of Appeal.

27. On 3 November 2016 Mr Nordbo made a further submission. It was in the following terms:

> "SUBJECT: Questions regarding appealing against the Judgment by the Guernsey Court of Appeal of the 26th of October 2016
>
> The Appellant has decided to appeal against the Judgment by the Guernsey Court of Appeal dated the 26th of October 2016, received by the Appellant on the 1st of November 2016. Please advice the appeal procedure including but not limited to within when an appeal must be filed as well as to which Court. The Appellant would also like to apply for the order of the Guernsey Court of Appeal dated the 26th of October 2016 to be suspended pending the resolution of his upcoming appeal. Please also advice to which Court(s) such an application can be filed."

28. On the same day the SDG send an email to Mr Nordbo in the following terms:

> "Thank you for your e-mail and attached appeal. I have referred it to the December bench of the Court of Appeal and will revert to you shortly in hard and soft copy with their directions.
>
> I am aware that you do not accept e-mails from the Court as formal communication. However you have not provided the Court with an address for service within the Island of Guernsey as all appellants are required to do under Rule 18 (1) of the Court of Appeal (Civil Division) (Guernsey) Rules 1964 and which you will need to do in order for this appeal to be properly set down."

29. Also on 4 November 2016 the SDG wrote to Mr Nordbo and the Bakers referring to Mr Nordbo's notice of appeal against the decision of the single judge and saying that he had been directed by the court to say that any further submissions by Mr Nordbo were to be lodged by close of business on 18 November with all relevant supporting material and that any reply by the Bakers should be lodged by close of business on 2 December, "so that this matter may be dealt with by the Court of Appeal bench listed to sit in the week beginning 12thDecember". A further letter to similar effect was sent to Mr Nordbo on 7 November 2016.

30. On 14 November 2016 Mr Nordbo responded with a submission in the following terms:

> "REMINDER: Questions regarding appealing against the Judgment by the Guernsey Court of Appeal of the 26th of October 2016
>
> On the 12th of November 2016 the Appellant received two letters from the Guernsey Greffe dated the 4th and the 7th of November 2016 respectively. Due to the fact that the Appellant has not yet appealed against the Judgment dated 26th of October 2016, the Appellant does indeed not understand those letters. In the submission by the Appellant to the Guernsey Court of Appeal dated the 3rd day of November 2016, hereby attached to this submission, the Appellant clearly submitted a few specific but important questions to the Court. The Appellant would kindly like to remind the Guernsey Court of Appeal that he has not yet received answers to his questions. It is obviously crucial that the Appellant receives timely answers from the Court, among others in order for him to be able to file his Notice of Appeal against the mentioned Judgment within any deadline for leave to appeal that may be in existence.
>
> In regards to the 2nd paragraph of the letter by the Guernsey Greffe dated the 4th of November 2016, which the Appellant does not really understand either, the Appellant would yet again like to remind the Guernsey Court of Appeal that the Court still has not considered his ex parte application under Rule 20 of the Court of Appeal (Civil Division) (Guernsey) Rules 1964.
>
> Since the Appellant filed his previous submission dated the 3rd of November 2016 to the Guernsey Court of Appeal, another potentially important question has come up. Please at your earliest convenience advice what was included in the attached invoice in the sum of £ 560;-? Was for example a setting down fee of £ 270;- included in that invoice?"

Rule 20 of the 1964 Rules, referred to in that submission, deals with substituted service.

31. On 18 November 2016 Mr Nordbo filed a 35-page document headed Notice of Appeal. It was addressed to "the appropriate Appeal Court, on appeal from the Guernsey Court of Appeal", and contained an application for leave to appeal the single judge's order and to stay it in the meantime. Mr Nordbo has subsequently been insistent that this document is not yet finalised, but it is nevertheless necessary to quote some of its contents. The first two sections concern Mr Nordbo's application for a secure means of communication and his contention that all previous judgments, including that of the single judge, are unlawful. Section 3 asks that the appeal court quashes the single judge's judgment and orders a rehearing that is fair and public and is conducted by an independent and impartial tribunal. Sections 4, 5 and 6 deal with disclosure; and section 7 asks for an adjournment until after provision of the information Mr Nordbo seeks. Section 8 is an application to suspend the single judge's order, partly on the ground that it imposes a condition of compliance with

the Seneschal's costs order, and "complying with the unlawful and Convention violating Judgment of the Court of the Seneschal of Sark dated 16 May 2016 would jeopardise not only my ability to pursue this Notice of Appeal but also the ongoing legal proceedings at the European Court of Human Rights where everyone must be represented by an advocate from a certain point in the legal proceedings". Section 9 is an application to replace or recuse Anderson JA in any future proceedings on the grounds (among others) that he expressed too strong opinions about applications that were not before him, that he "violated the Court instruction given to the Appellant by the Guernsey Greffe on behalf of the Guernsey Court of Appeal that the Appellant can pursue his application for disclosure of case file evidenced by the Respondents prior to proceeding with his application for the setting down of the matters". Section 10 complains of further systematic violations of the ECHR; section 10.1 asserts that the single judge "violated the fundamental legal principle of adversarial proceedings" by relying on information the court had itself sought from the Sark Prevot about the amount still outstanding on the costs order after a forced sale of items left in the building formerly tenanted by Mr Nordbo, and prevented Mr Nordbo from finalising his appeal documents. Section 10.2 complains that the single judge denied Mr Nordbo a verbal hearing and did not explain his reasons for doing so; and section 10.3 complains that the single judge did not consider Mr Nordbo's application for an adjournment and did not explain why not. Section 10.4 complains that the single judge dealt with the application to set down before dealing with the application for disclosure, and said that the single judge "also violated article 6.1 of the Convention because it did not consider the important plea/objection by the Appellant that he in fact was not out of time for the matters to be set down, and/or the Court gave no reason whatsoever in support of its conclusion that the Appellant had been out of time. The Appellant has also just discovered that he in fact was never out of time setting down the matters due to an additional reason. He had actually paid the setting down fee of £270 which is included in the attached invoice of £560, and which was paid on time by the Appellant". Section 10.5 complains that the single judge did not deal with Mr Nordbo's contention that the lengthy delay by the Bakers in providing documents itself amounted to a violation of the Convention, and did not give any reasons for not doing so. Section 10.6 complains that the SDG's letter of 23 September 2015 was an instruction by the Court of Appeal to Mr Nordbo "that he could pursue with his application for the disclosure of case file evidence by the Respondents prior to proceeding with among others his application for the setting down of the matters", and the single judge violated that instruction by dealing first with the Bakers' application for payment of the costs as a condition of proceeding, and did not give any reasons for doing so. Section 10.6.4 asserts that Mr Nordbo was given no notice that the Bakers' application would be dealt with, and was deprived of his right to a public hearing in relation to that application. Section 10.7 is headed "More on the aberrant outcome of the 26th of October judgment", and asserts the judgment was based on fundamentally false facts (in that Mr Nordbo had not consented to his application to set down being dealt with then or on paper, and had given many reasons why he had not complied with the Seneschal's costs order) and produced an aberrant outcome in relation to disclosure and setting down ("due to the fact that the Appellant evidently was not out of time"). Section 11 identifies the relief that Mr Nordbo was seeking in the main appeal; and section 12 states that Mr Nordbo would generally need about three weeks' notice of any hearing in order to attend, reserves his right to make further submissions, and "requires that any and all legal proceedings at the Appeal Court at any and all times are conducted 100% in accordance with the fundamental legal principle of adversarial proceedings".

32. On 23 November 2016 the SDG wrote to Mr Nordbo, referring to his submissions of 14 and 18 November 2016 and saying:

> "The Court of Appeal will consider at a hearing on 14th December, 2016, at 11.00 a.m. your application to vary or discharge the Judgment of David Anderson, Q.C.

of 26th of October, 2016, together with any matters arising from it or from the documents referred to above. The Court will also endeavour to set a procedural timetable for any appeal against the decision of Judge Finch of 5th September, 2014.

The hearing on 14 December 2016 is intended to be a hearing in the presence of the parties (and their legal representatives if they have them), not a hearing on the papers. You should therefore make every effort to attend."

33. On 8 December 2016 Mr Nordbo submitted a further document, saying that he had not yet applied to the Court to vary or discharge Anderson JA's judgment, but had applied (in his "not yet finalised" notice of appeal of 18 November 2016) to the appropriate appeal court for leave to appeal that judgment. He applied for an adjournment of the intended hearing on 14 December 2016 until after he had been given an opportunity to finalise his notice of appeal "as well as having been given the opportunity to appropriately prepare for any upcoming verbal hearing". He said that, "should the Guernsey Court of Appeal at any point in time on its own motion consider to vary and/or to discharge its own Judgment dated 26 October 2016", he applied for one month's notification "ahead of any Court consideration and/or verbal hearing on that subject including but not limited to adequately informing the Appellant of how the Court may consider to vary its Judgment, in order for that Court to allow the appellant to properly prepare for such a verbal hearing and/or for him to in a timely and adequate manner finalise his comments before the Court in regards to that, again in accordance with the fundamental legal principle of adversarial proceedings"; and he asked for any deadline for making an application to vary or discharge to be extended until one month after he had received the disclosure he had repeatedly requested.

The hearing on 14 December 2016

34. We sat at 11 a.m. on 14 December 2016, as Mr Nordbo had been told in the SDG's letter of 23 November 2016 we would. Mr Nordbo was not present, and did not appear after his name had been called in the court precincts. Mrs Baker was present, but did not make any submissions to us. We announced that we would refuse Mr Nordbo's application for an adjournment of the hearing, and would deal in writing with it and the other matters before us. This we now do.

Preliminary matters

35. The first question that arises is whether there was in fact anything before us. The purpose of the hearing was to consider Mr Nordbo's application to vary or discharge the order made by Anderson JA, but Mr Nordbo had asserted in his submission dated 8 December 2016 that he had not yet applied to vary or discharge that order. However, he had made very plain his intention to challenge the order: see his submission of 3 November 2016, which said in terms that he had decided to appeal against the order; his notice of appeal dated 18 November 2016, which sought to appeal the order; and his submission of 8 December 2016, which reiterated that he wished to appeal the order. As we have said in paragraph 26 above, the appropriate method of challenging an interlocutory decision of a single judge is by an application to the full court to vary or discharge the decision. Although Mr Nordbo describes his notice of appeal of 18 November 2016 as "unfinalised", it contains more than enough detail of the arguments he wishes to advance as to why the single judge's decision was wrong. Neither the Court of Appeal Law itself, nor the 1964 Rules, prescribes any time limit for the making of an application to vary or discharge an order of a single judge; but that does not mean that a litigant has an unfettered right to bring such an application at any time of his choosing. It is this court that is master of its procedure, not Mr Nordbo, and it is entitled to insist that an application to vary or discharge, if it is to be made at all,

is made timeously. The SDG's letter of 23 November 2016 gave ample notice (in fact, the three weeks' notice that Mr Nordbo claimed to need) that the application would be considered at the hearing on 14 December 2016, and that Mr Nordbo should make every effort to attend. In these circumstances, the challenge that Mr Nordbo had indicated he wished to mount to the order of the single judge was fairly before us.

36. The next question that arises is whether nevertheless the matter should be adjourned. Mr Nordbo asked for an adjournment in his submission of 8 December 2016, but – as we indicated we would at the hearing on 14 December 2016 - we refuse it. We take the view that Mr Nordbo has had adequate notice of the hearing, even having regard to the fact that he is resident out of the jurisdiction; that it is important that the matter should be disposed of at or soon after the scheduled hearing, partly because the time for satisfying the condition imposed by the single judge's order expires at the end of December 2016, and partly because it is already two and a half years since the Seneschal's order was made; that, given the particularity of the notice of appeal of 18 November 2016, Mr Nordbo does not reasonably need a further one month in which to prepare oral or written submissions; and that his application to be told in advance of the hearing how the court "may consider to vary its judgment" is misconceived, the burden being on him to persuade the court that the single judge's decision was in some respect unsatisfactory.

37. Having decided that the matter should proceed, we next have to consider whether Mr Nordbo was out of time to set down the main appeal. This is important, because if he was not the single judge had no ability to impose a condition of any sort on setting down, and the main reason for his not making a disclosure order (that the main appeal was not yet on foot, and there was nothing else which could found a disclosure order) would fall away.

38. In our judgment, it is clear that Mr Nordbo was out of time. Mr Nordbo's only reason for saying that he was not is that he had not been issued with an invoice for the setting-down fee. There is plainly nothing in this contention. The 2012 Fees Order says nothing about the issue of invoices: all it does (so far as relevant to this issue) is to provide by rule 2(1) that "on an appeal there shall be payable" the fee specified in the schedule, which on setting down an appeal is a fee (of £270, then by amendment £285) payable to the registrar. It was Mr Nordbo's business to familiarise himself with and satisfy this requirement; but in any event he was told of it in unequivocal terms by the SDG's email of 15 September 2014 (which was well within the time for setting down) and reminded of it subsequently on 8 October 2014, again within the time for setting down. The fact (if it be such) that the Sergeant issued an invoice for the service fee of £50 (which is not a fee prescribed by the fees order) is immaterial, as is the fact (again, if it be such) that the Greffe ultimately (and after the fee had been paid) issued an invoice for it: these were mere matters of record-keeping, and did not imply that there was an obligation to produce an invoice before payment need be made.

39. We note also that Mr Nordbo contends that by letter dated 23 September 2015 the SDG directed him to apply for disclosure before applying to set down, with the supposed consequence, as stated in the submission dated 7 April 2016, that "the deadline for the Appellant to apply for leave to set down the matters is obviously still not lapsed". We deal with the question whether there was any such direction later in this judgment; but on any footing the time prescribed by the 1964 Rules for setting down the main appeal had expired in October 2014, almost a year before the letter of 23 September 2015, so that the letter cannot have led to any conclusion that Mr Nordbo was not out of time at all.

40. We have also considered whether under the scheme of the rules payment of the setting down fee is a precondition of setting down. Rule 4(2) of the 1964 Rules merely states that an application to set down shall be made by leaving with the Registrar a copy of the notice

of appeal and a certificate of service; and rule 4(3) says that "upon application being made as aforesaid, the Registrar shall file the copy of the notice of appeal and shall cause the appeal to be set down in a list of appeals". The 1964 Rules were made under the power contained in section 22 of the Court of Appeal Law. However, section 18(2) of the Court of Appeal Law provides that "the Bailiff may, from time to time, by rules made under this subsection, prescribe the fees payable to the Court and to the officers of that Court in respect of proceedings in and in relation to that Court"; and the 2012 Fees Rules, and their precursor the Court of Appeal (Civil Division) (Costs and Fees) (Guernsey) Rules 1964, were made under that subsection. In our judgment, the two sets of rules, which are made under the authority of the one statute, are to be read together, so that the clear intention that the fee is paid at the time of setting down has effect as stipulating a further condition to be satisfied before the Registrar is obliged to accede to an application to set down the appeal in the list of pending appeals. Mr Nordbo did not comply with that condition within the time prescribed, and he was accordingly out of time to set down the main appeal.

41. The next matter to consider is whether or not Mr Nordbo had in fact applied to set down the appeal out of time when the matter came before Anderson JA. In our judgment it is plain that he had, albeit subject to his point about not being out of time at all. The wording of his submission dated 17 July 2015 is unequivocal in this respect: "Although I am obviously not out of time for setting down these matters, I hereby apply to the court for the matters to be set down alternatively I seek leave for the appeal to be set down as out of time". It was implicit in the single judge's judgment that he saw nothing in the argument that Mr Nordbo was not out of time, and that in consequence the application made in the submission of 17 July 2015 was before him. He was right to do so. But even if that had not been so, the single judge was faced with only three possibilities: to dismiss the main appeal on the ground that it had not been set down in time, to treat Mr Nordbo – who plainly had no intention of abandoning the main appeal – as having applied to set it down out of time, or to adjourn the matter so that Mr Nordbo could decide in the light of the decision that he was indeed out of time whether or not to apply to set down out of time. Although there is no time specified in the 1964 Rules for making an application out of time, Anderson JA was plainly entitled to take the view that the matter could not be allowed to continue until Mr Nordbo felt like making an application. Although it may seem ironic to say so, in view of the fact that the Seneschal's decision is now over two and a half years old, the Bakers are entitled to know that, if the main appeal is to proceed, it will be disposed of as soon as it properly can be. It is not up to Mr Nordbo to specify the terms on which and the time within which it will progress, save to the extent that the rules or the court allow him discretion. In our judgment, the single judge was correct to refuse an adjournment and treat Mr Nordbo's application as before him, as in fact it was.

42. Having determined, for the reasons we have so far given, that Mr Nordbo was out of time for setting down the main appeal, that he had applied to the single judge for leave to set it down out of time, that he has applied to us to vary or discharge the single judge's order, and that we should not adjourn his application, we now turn to consider his grounds for objecting to the order of Anderson JA. The order in which we do so is not necessarily the order in which Mr Nordbo says they should be dealt with.

Grounds of objection to the single judge's order

43. The first objection is that the single judge should have adjourned the matter. We have dealt with and rejected this in paragraph 41 above.

44. The second objection is that Mr Nordbo had not applied to set down the main appeal out of time. We have dealt with and rejected this, also in paragraph 41 above.

45. The third objection is that the judge should have directed an oral hearing, as Mr Nordbo had required in his submissions of 6 May 2016 and 1 June 2016. In our judgment, there is nothing in this point. The evident purpose of the procedure established by section 21 of the Court of Appeal Law is to enable matters incidental to an appeal to be dealt with less formally than the appeal itself. We see no reason why, consistent with that purpose, and as a matter of efficient case management, the court should not direct that matters be dealt with on paper in an appropriate case, whether or not the parties consent. In this case, Mr Nordbo had been given and had taken many opportunities to set out his case; in particular, his 47-page submission dated 7 April 2016 contained all that could reasonably be said in support of Mr Nordbo's contentions, and more, and there is no reason to suppose that in an oral hearing he would have been able to supplement his arguments or put them more favourably to his case. However, if – contrary to our view – there was any irregularity in this respect, it was cured by the opportunity given to Mr Nordbo to attend the hearing before us on 14 December 2016 and make his arguments to us in person. He was specifically encouraged to do so by the SDG's letter of 23 November 2016, but chose not to attend. In the circumstances, any complaint that he has been deprived of an oral hearing is misplaced.

46. The fourth objection is that Mr Nordbo was given no notice of the Bakers' application that he pay the costs as a condition of proceeding. This is obvious nonsense: the Bakers' letter of 9 May 2016, to which Mr Nordbo responded by his submission of 1 June 2016, made the application in unmistakable terms.

47. The fifth objection is that the single judge determined the applications in the wrong order, disregarding a direction that he should deal first with the application for disclosure. The direction is said to have been contained in the SDG's letter of 23 September 2015, the relevant parts of which are quoted in paragraph 15 above. It is not couched as a direction, but rather as an indication of the procedural steps to be taken if Mr Nordbo wished to pursue a particular course of action. Moreover, even if in form a direction, it would not on the face of it be binding on the Court of Appeal. We accept that there may be cases where it would be unjust to disregard an assurance given by a court officer that has been relied on by one or all parties to litigation; but this is not such a case. That is for two reasons. First, the letter was not initially regarded by Mr Nordbo as containing a direction or assurance: in his submission dated 26 November 2015 he sought a substantive explanation from the Court or the Greffe as to whether he could indeed pursue his application for disclosure before proceeding with his application to set down. He was told that the SDG had nothing to add to the letter of 23 September 2015. It was only in his submission of 7 April 2016 that he stated that the letter had "finally confirmed" that he could pursue his application for disclosure before proceeding with his application for leave to set down, although earlier in the same document he said that he was awaiting a response from the Court or Greffe as to whether it was possible for the court to deal with disclosure as a preliminary issue on the papers before any further legal proceedings took place. By the time of the notice of appeal dated 18 November 2016, the position had been elevated to a violation of an instruction given to the single judge. We reject the suggestion that Mr Nordbo regarded the letter in that light when he received it. However, even if he had done, - and this is our second reason for rejecting this objection – there is no magic in the order in which the applications were dealt with by the single judge. This can be demonstrated by supposing that the judge had had before him only Mr Nordbo's application for disclosure: it would still have failed for the same reason as the judge gave, namely that the appeal had not been set down. What the judge was pointing out was that there were no existing proceedings in this jurisdiction in which an order for disclosure could be made; and, even if he had not been dealing with an application to set down out of time, it would have been obvious that the only circumstance in which the appeal could arrive at a state capable of supporting a disclosure application would be if such an application was made.

Put in another way, Mr Nordbo needed to get the main appeal back on track if he was to have a foundation for his disclosure application, and the only way of doing that was by getting leave to set it down out of time.

48. This disposes also of the sixth objection, which is that the single judge was wrong to reject the application for disclosure. As we have pointed out, there were and are no extant proceedings to support it. We agree with the judge, however, that if the condition of payment is satisfied and consequently the main appeal is set down, the question of disclosure, which is plainly a matter of great concern to Mr Nordbo, will become relevant; and, although we do not regard it as being as fundamental to his appeal as Mr Nordbo seems to believe, it is very likely that the court will make a direction for disclosure in some form if the Bakers disregard the judge's clear hint that they explain the nature of any communications they have had with the courts in Sark and Guernsey.

49. The seventh objection is that complying with the requirement that Mr Nordbo pay the costs ordered by the Seneschal as a condition of proceeding with the main appeal would jeopardise Mr Nordbo's ability to pursue the main appeal and his complaint to the European Court of Human Rights. This betrays a misunderstanding of the effect of satisfying the condition. It does not involve an acceptance by Mr Nordbo that the Seneschal's order is right; and if in the end the main appeal or the complaint establish that the Seneschal's order was wrong then (subject to any order made at that time) the Bakers will have to repay the costs. In our judgment, however, the single judge was entitled to take the view that it was wrong that the Bakers should be kept any longer out of money to which, on the existing state of proceedings, they were entitled.

50. The eighth objection is that compliance with the judge's condition would prejudice Mr Nordbo's ability to procure representation for his complaint to the European Court of Human Rights. To the extent that this is not disposed of by the immediately previous paragraph, we take it to be a complaint about the judge's statements that Mr Nordbo had not said that he could not pay the costs or that paying them would prejudice his ability to pursue the main appeal. However, there is no evidence from Mr Nordbo about his financial status, and it is observable from his own documents that he is able to move between his bases in Sweden and Thailand. In these circumstances, we are not persuaded that Mr Nordbo could not meet the condition or that meeting it would prejudice his ability to pursue the main appeal.

51. The ninth objection relates to the information the single judge recorded as having been received from the Sark Prevot as to the amount still owing in respect of the costs, this being said to be yet another violation of the principle that the court should not act on information not available to the parties. We see absolutely nothing wrong with the judge's approach in this regard: the question was one of fact within the knowledge only of the Prevot, the judge recorded the information in his judgment, and the whole purpose of the exercise was to ensure that Mr Nordbo did not have to pay more to satisfy the condition than was still due to the Bakers by way of costs.

52. The tenth objection is that the single judge did not deal with Mr Nordbo's contention that the Bakers' long delay in producing documents amounted to a violation of the Convention. The short answer to this objection is that the contention was a matter for the main appeal, not for an application designed to establish whether and on what terms the main appeal could proceed.

53. The eleventh, and final, objection is that the single judge was not impartial, as evidenced by his strong expression of views and inaccurate statement of facts. We reject this objection also; nothing in the judge's expression of his views suggests in any way that he

had prejudged issues or was otherwise acting with partiality or unfairly, and we have not identified any statements of fact that are actually (as opposed to in Mr Nordbo's contention) inaccurate.

Disposition

54. For all these reasons we decline to discharge or vary Anderson JA's order, save in one minor respect – which is that, because of the impending public holidays and possible difficulty in transmitting this judgment, we will extend the time for compliance with the condition imposed by the single judge to 4 pm (Guernsey time) on 13 January 2017.

55. It is important that Mr Nordbo understands that the effect of this judgment is that, if he wishes to proceed with the main appeal, he must pay the Bakers the outstanding balance of the costs - which, as certified by the Sark Prevot following the single judge's direction, is £15,080.53 - on or before the time we have just specified. If he does not pay the outstanding balance of costs due, his appeal will be deemed to have been dismissed. Although he has the right to ask us or the Privy Council for leave to appeal this decision, it is very rare that leave is granted in an interlocutory matter with no public relevance.

56. If he does satisfy the condition within that time, the main appeal will be set down; and in that event we direct that it be listed for directions before the full court in the session fixed to start on 6 February 2017, when two of the present panel are due to be sitting. That hearing will consider whether directions should be made for disclosure; for dealing with Mr Nordbo's application for substituted service (apparently on himself) or otherwise for the establishment of a secure means of communication with him (although he will have to persuade the court that he cannot provide an address for service within Guernsey like any other litigant and as required by the 1964 Rules); for the progress of the main appeal, including whether proceedings should be adjourned until one month after any disclosure that is ordered; and for any other matters that the parties may raise. A precise date for the directions hearing, and a procedure for identifying the directions sought, will be provided by the Greffe if it becomes clear that the main appeal is to proceed.