IN THE COURT OF APPEAL OF BELIZE AD 2018

CIVIL APPEAL NO 15 OF 2014

DEON BRUCE Appellant/Respondent/Applicant

v

THE CHIEF MAGISTRATE Respondent/Applicant/Respondent

_____

BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal

T Young, Senior Crown Counsel (on date of hearing), for the Chief Magistrate.
A Matura Shepherd for Deon Bruce.

_____

8 April 2016 and 22 June 2018

SIR MANUEL SOSA P

Introduction

[1] These were two separate but interrelated applications which were heard together by the Court on 8 April 2016 and in which decisions were reserved.

[2] The notice of motion in respect of the first, in point of time, of these counter applications, that of the respondent in the appeal proper, viz the Chief Magistrate ("the CM"), was filed on 26 February 2016; and, in my view, such application was substantially made pursuant to Ord II, r 15(2) ("rule 15(2)") of the Court of Appeal Rules ("the Rules"). Though, in terms, it sought the striking out of the notice of appeal, it did so

mainly for non-compliance by the appellant Deon Bruce ("Mr Bruce") with the requirements of Ord II, r 13(1) ("rule 13(1)") of the Rules ("the requirements"), in other words, for want of prosecution. (I shall in the remainder of this judgment refer to this first application as "the CM's application".)

[3] The second of the counter applications was that of Mr Bruce, notice of which, in the form of a notice of motion, was filed on 6 April 2016, ie until after notification to Mr Bruce of the date fixed for the hearing of the CM's application, and which was made under r 13(1). In clear reaction to the CM's application, it sought extension of the time within which to comply with the requirements. (I shall in the remainder of this judgment refer to this second application as "Mr Bruce's application".)

The shape of the case

[4] It will be helpful to take due note at the outset of the overall shape of the case as constituted by the CM's application and Mr Bruce's application. The former application is primarily founded on that which, at the time of its filing and, as well, of its hearing, was said on behalf of the CM (in an affidavit sworn by Leonia Duncan, Crown Counsel, hereinafter to be called 'the Duncan affidavit') to be excessive and unexplained delay. It is, as such, an application resting principally on the undisputed, and indisputable, fact that a step which ought to have been taken by Mr Bruce no later than three months after 9 June 2014 (ie by 11 September 2014) had still not been taken just over 532 full days later on 26 February 2016, the swearing date of the Duncan affidavit. As of the last of those dates, there was, naturally, no affidavit yet in existence seeking to explain the delay in question of Mr Bruce. But, so goes the chief contention on behalf of the CM, even after the subsequent filing of such an affidavit on 6 April 2016, the delay remains unexplained. And, on another of the major submissions advanced on behalf of the CM, this extraordinarily lengthy delay is for the most part the result of Mr Bruce's foot-dragging with respect, initially, to the settlement of documents in the Registry and, thereafter, to the filing of Mr Bruce's application. The settlement of documents became an unduly protracted affair, according to the CM, because of Mr Bruce's tardiness, first, in preparing a list of documents and, secondly, in filing the so-called settlement order, coupled with his generally lackadaisical approach. As to the long delay in the filing of Mr Bruce's application, it is emphasised on behalf of the CM that a considerable part of it, a year almost, was incurred after counsel appearing for Mr Bruce at a case management conference held before the Registrar on 14 April 2015 effectively gave an undertaking to file.

[5] A single affidavit, sworn by Mr Bruce himself ('the Bruce affidavit'), was filed in opposition to the CM's application. On analysis, it is seen to have a twofold object viz to show (a) why Mr Bruce defaulted and (b) why, if granted the extension he seeks, he shall not again default. He seeks to carry out the first part of this object by directing attention to a total of seven matters falling under two readily discernible, if unstated, headings viz (a) the unfavourable status of his legal representation from time to time and (b) the contributory dilatoriness of the registry of the court below ("the Registry"). He relies on four matters which he plainly sees as substantiation of his claim that the default was, in large part, the result of the status of his legal representation from time to time. Chief amongst these is the alleged alteration of his relationship with Mrs Audrey Matura Shepherd, thitherto his counsel, following an application for judicial review and habeas corpus made to Abel J in the high court on 4 and 5 June 2014 ("the judicial review application"). Central to this claimed alteration is a remarkable agreement, whose date he only indirectly, nay by mere happenstance, provides, supposedly made between him and Mrs Matura Shepherd. That, he maintains, was an agreement (for him to seek the services of foreign counsel), upon the making of which, astonishingly, in my view, Mrs Matura Shepherd forthwith ceased to be his counsel. He further places reliance on three additional matters which he obviously regards as substantiating his claim that, in similarly large part, his default was caused by dilatoriness in the Registry. The principal additional matter on which he so relies is the undeniable delay of the Registry in preparing the transcript of the hearing of the judicial review application ('the trial transcript'). The second part of the Bruce affidavit's object is sought to be carried out by drawing the attention of the Court to three matters, of which the most noteworthy one, to my mind, is that Matura & Co Ltd ("the law company") will, if he should be granted an extension of time, assist him in the appeal, albeit only *quoad* applications and "preliminary matters" and only until such time as he obtains the services of another counsel.

[6] The Bruce affidavit, predominantly defensive in tone, goes on the offensive but once, notably to assert that Mr Buce's admitted delay is neither prejudicial to the respondent nor intentional.

[7] As regards Mr Bruce's application, the affidavit in support ("the Hernández affidavit"), sworn by a Miss Hernández, a legal secretary of the law company, has, as I see it, a single unitary purpose, viz to show why Mr Bruce defaulted. It concentrates on six matters, none of which has not previously been raised in the Bruce affidavit. This is not to say that in dealing with such matters it does not mention one or two details not to be found in the Bruce affidavit.

[8] No affidavit was filed on behalf of the CM in response to either affidavit filed on behalf of Mr Bruce, such omission, as will appear, being of decisive import in the case of the Bruce affidavit, Mr Bruce's answer, as already noted above, to the CM's application.

The relevant provisions of the Rules (with some pertinent introductory comment)

[9] The requirements and, as well, the provisions enabling Mr Bruce's application are contained in r 13(1), which reads:

> "The appellant shall within three months from the date when the appeal is brought or within such extended time as may be granted by the Court below or the Court-
>
> (a) file with the Registrar-
>
> (i) the record;
>
> (ii) an affidavit of service of the notice of appeal; and
>
> (b) leave four copies of the record for the use of the judges and the Registrar of the Court." (emphasis added)

It will be observed that these provisions, having (by the words therein which I have underlined) conferred on the Court the power to extend time, are silent as to, say, matters in respect of which the Court is to be satisfied before exercising such power. Conspicuously absent, in particular, not only from r 13(1) but from the Rules as a whole, is a provision such as was to be found in Ord 59, r 21(2) of the Rules of the Supreme Court formerly in force in Trinidad and Tobago, by which provision an application for extension of the time within which to file the record of an appeal was required to be supported by an affidavit identifying "good and substantial reasons" therefor: see *National Commercial Bank of Trinidad and Tobago v Pouchet and Another* (1999) 57 WIR 370, at 375.

[10] For its part, r 15(2), under which, as it seems to me (as already indicated above), the CM's application was substantially made, provides as follows:

> "If the appellant has failed to comply with the requirements of rule 13(1) of this Order or any part thereof, the respondent may apply to the Court to dismiss the appeal for want of prosecution and the Court, if satisfied that the appellant has so failed, may dismiss the appeal or make such other order as the justice of the case may require."

These provisions, in contrast to those of r 13(1), not only confer power on the Court but also require it to be satisfied as to something, viz the relevant failure on the part of an appellant, before exercising such power.

[11] It seems clear to me, furthermore, that, Mrs Matura Shepherd's bare submission to the contrary notwithstanding, the words "as the justice of the case may require" at the end of this rule, have no part to play on an application for extension of time made under r 13(1). The court which is by the language of the last quotation being required to take into account what the justice of the case requires is axiomatically the court which is empowered by r 15(2) to make "such other order". That, however, is the very same court which finds itself satisfied under r 15(2) of the relevant failure of the appellant. And, of course, the court which finds itself so satisfied is, and can only be, the one to which a respondent is permitted by r 15(2) to apply for the dismissal of an appeal for want of prosecution. In short, what brings the words "as the justice of the case may require" into play is, purely and simply, the making of an application for dismissal for want of prosecution. Mrs Matura Shepherd's insubstantial contention, taken to its logical conclusion, would mean that in a case of counter applications, such as the instant one, the words in question would apply (thanks to the seeming link to r 15(2) provided by the application for dismissal), whereas in cases where there was only an application for extension of time before the Court (with nothing to provide the illusion of a link to r 15(2)) they could not possibly do so, a wholly absurd and hence indefensible situation.

Manner of determination

[12] The CM's application and Mr Bruce's application were heard, and must be determined, together given that the former application seeks to have Mr Bruce

sanctioned for not having taken in time the very steps he is, by the latter application, asking to be permitted to take within an extended period of time.

Examination of the pertinent evidence

Introductory

[13] The Duncan affidavit was filed on 26 Feb 2016 whilst the Bruce affidavit and the Hernández affidavit were both filed on 6 April 2016.

(i) Miss Duncan's

[14] The Duncan affidavit seeks to establish the alleged non-compliance. Exhibited to it is what purports to be a copy of Mr Bruce's notice of appeal, on which the filing date 9 June 2014 appears. There is no direct allegation in the Duncan affidavit of failure on the part of Mr Bruce to meet the requirements. The allegation is made indirectly, at para 10 thereof.

[15] What it does, however, directly and expressly allege are serial failures by Mr Bruce, through his attorneys-at-law from time to time, to do the following, namely:

(a) produce a full list of documents for the purpose of, to adopt the language of Ord ll, r 8(1) of the Rules, the settlement of documents on 30 July 2014;

(b) reply to an email of 5 August 2014 from the Solicitor General's Chambers accompanied by a list of documents being put forward with a view to jump-starting the settlement of documents;

(c) honour an effective undertaking given at case management on 14 April 2015 to apply for an extension of the time within which to meet the requirements;

(d) timeously produce the list of documents for purposes of settlement of documents following the case management conference of 14 April 2015,

with the result that the so-called Order for Settlement of Record was not filed and served until 26 February 2016 (the date on which, as already noted at para **[1]**, above, the notice of motion in respect of the CM's application was filed); and

(e) apply for an extension of time to meet the requirements before 26 February 2016.

These alleged serial failures are undoubtedly singled out by Miss Duncan to show want of prosecution. It is for this reason that I (a) have expressed the view above that the CM's application is substantially made under r 15(2) and (b) am constrained to treat it as essentially one for dismissal of the appeal for want of prosecution.

(ii) Mr Bruce's

[16] Unable to deny the stark facts of failure to meet the requirements and lengthy delay in seeking an extension of time, not to mention the five ancillary serial failures listed at (a) to (b), inclusive, in the immediately preceding paragraph, Mr Bruce, in the Bruce affidavit, principally seeks, as already adumbrated above, to explain such failure and delay by reference to two broad-based factors, viz his position in terms of the alleged status of his legal representation over a period of time and alleged dilatoriness on the part of the Registry itself. In this connection, the Bruce affidavit stands out, alas, not so much for what it says as for what it leaves unsaid. Mr Bruce raises, as previously noted, seven matters.

• The legal representation factor

[17] With respect to this factor, Mr Bruce first points out that, whilst he had been represented by Senior Counsel in the extradition proceedings before the CM in February 2014, "upon the conclusion of that matter he [Senior Counsel] did not remain as my counsel". Whether that was because he did not want that Senior Counsel to continue representing him or because Senior Counsel did not want further to represent him, or for some other reason, he does not condescend to say.

[18] Secondly, he says that, whilst, in the judicial review application, which was heard by the court below on 4 and 5 June 2014, he had been represented by Mrs Audrey

Matura Shepherd of the law firm, the nature of his relationship with Mrs Matura Shepherd was subsequently significantly altered. Mrs Matura Shepherd having on 9 June 2014 filed a notice of appeal against the order made by Abel J on the judicial review application, attorney and client for some unexplained reason came thereafter to an agreement that the latter 'should retain the services of more senior members of the bar (*sic*) and with more experience in extradition case (*sic*)'. Mr Bruce is unhelpfully imprecise as to the time when this alleged agreement was reached. Indeed, it is far from clear that he wants it (the relevant time) to be known by the Court. Be that as it may, I consider that, assuming without accepting that there was an agreement as alleged, the time at which it would have been made can safely be inferred from other matters being alleged before this Court. Going straight to these matters, one notes first that Mr Bruce says in para 5 of the Bruce affidavit that he was informed, sometime after 9 June 2014, that a hearing for 'the settlement of records' was held; and that he adds in para 6 that the agreement in question was made at that "juncture". There is, fortunately, no dispute as to the "juncture" at which the so-called settlement of records took place. Both Miss Hernández and Miss Duncan depose that it was held on 30 July 2014. What would have driven Mr Bruce and Mrs Matura Shepherd to reach such an agreement so close upon the filing of a notice of appeal is a subject regrettably not touched upon at all anywhere in the Bruce affidavit. The omission is regrettable for the reason that the filing of the notice of appeal had the drastic effect of starting the running of time under r 13(1). And whilst Mr Bruce, as a layman, may not have known of such drastic effect, Mrs Matura Shepherd must be presumed to have known of it. Mr Bruce goes on to depose that not only did he and Mrs Matura Shepherd reach the ill-timed agreement in question: more than that, "[the law firm] and its attorney Audrey Matura Shepherd ceased being my counsel in my appeal".

[19] Further consideration of this supposed cessation raises more questions. There are the successive qualifications by Mr Bruce of the initial assertion of a supposed mutually agreed going in separate ways on or about 30 July 2014, which qualifications cumulatively drive one to wonder whether one is reading the truth. Mr Bruce's "former counsel" first enlists the assistance of Ms Christelle Wilson, attorney-at-law. Next, the former counsel accedes to a request from Mr Bruce for assistance in responding to the CM's application and filing and carrying through Mr Bruce's application. Thereafter, one hears, with some surprise, from Mr Bruce that "if I am not able to secure the services of a more senior and experience (*sic*) counsel, I will still proceed with my appeal and seek the services of <u>any</u> attorney willing to take on the matter". (emphasis added) That broad language seems to pave the way for anything, even the return of Mr Bruce's "former counsel" to, so to speak, the saddle. Later still, there is vague reference to possible involvement, going forward, of "the Death Penalty Project", a mere name out of nowhere

thrown at the Court, without so much as the exhibiting to the Bruce affidavit of a written communication from someone connected with such project. With such reference comes mention of possible further assistance from "local counsel", thus leaving the door open for continued involvement on the part of any local counsel, including Mr Bruce's "former counsel". One is left wondering how seriously this alleged parting of ways of 30 July 2014 or thereabouts is to be taken.

[20] Thirdly, Mr Bruce speaks vaguely of failed efforts to retain the services of an unnamed British barrister, attributing the alleged failure to lack of funds, a grave difficulty, if he can be believed, but one, from all indications, somehow unforeseen. The old adage that if wishes were horses beggars would ride comes forcefully to mind. Amidst the Bruce affidavit's deafening silence as to Mr Bruce's previous occupation and income, the question arises: how realistic was this supposed wish to retain counsel from the United Kingdom? Running off on what shows every sign of having been a sleeveless errand at a critical time when the ball is in one's court, so to speak, as regards the rudimentary and straightforward, but imminent, matter of settlement of documents under Ord II, r 8 of the Rules calls for detailed explanation. So, too, does the startling admission in para 7, to which it shall be necessary to return below, that, during this supposed quest, "I gave no further instructions to Matura-Shepherd Law Firm". But there is no such explanation in the Bruce affidavit.

[21] Fourthly, Mr Bruce tells the Court of a coincidence he seems to consider unfavourable to him. He deposes:

> "… [the law firm] is no longer operating and my former counsel requested that I instruct where to send my file as [the law company] has not agreed to take on the matter and has also streamlined its area of practice, and, as had been told to me earlier, my former counsel Audrey Matura-Shepherd had not agreed to nor been retained to conduct the appeal on my behalf." (emphasis added)

The coincidence is the claimed cessation of the operations of the law firm by which he had been represented in the judicial review application heard, as already noted above, on 4 and 5 June 2014, at a point of time not long, presumably, after the filing of notice of appeal on, as already noted above also, 9 June 2014. It is worth recalling, in this regard, the following assertion in the Hernández affidavit:

> "[The law firm] is no longer conducting business and is no longer counsel for the appellant and its attorney now operates under [the law company] …",

which assertion is corroborative of the claimed cessation. As can be appreciated from even a cursory reading of the penultimate quotation above (from the Bruce affidavit), the reference to this cessation of the operations of the law firm leads Mr Bruce to make the further assertion that the case here was that, as he had been told "earlier", Mrs Matura Shepherd had not (as distinct from "has not", the phrase preferred by the drafter of the Bruce affidavit two lines above, in speaking of the law company) agreed to represent him on the appeal. That assertion, however, smacking as it does of a unilateral decision, antedating some unidentified event, on the part of Mrs Matura Shepherd, does not resonate with Mr Bruce's earlier statement that it was agreed between him and her that he should seek the services of another attorney and that she then ceased being his counsel. In this connection, one is, I think, entitled to assume that Mrs Matura Shepherd either drew the Bruce affidavit and the Hernández affidavit or approved their respective wording (which wording gives rise to the inconsistency to which attention is here being drawn). The fundamental question raised by this fourth matter in the Bruce affidavit is whether it is in fact the case that he and Mrs Matura Shepherd ever agreed to end their attorney-client relationship.

[22] Also arising in the context of this fourth matter is the slightly different question whether the attorney-client relationship between Mrs Matura Shepherd and Mr Bruce ever ended at all, whether by agreement or otherwise. A court is entitled to consider the inherent probability or otherwise of anything deposed to in an affidavit submitted to it. Mr Bruce's description of the arrangement supposedly made in respect of the interim period during which he would be searching for another attorney is, to my mind, lacking in verisimilitude. It is more than a little strange to hear that 'my former counsel requested that I instruct where to send my file as [the law company] has not agreed to take on the matter'. If there has been a consensual parting of ways, it is to be expected that the former attorney will immediately hand over to the former client himself/herself all those papers to which he/she is entitled, not keep holding them until such time as the latter can find a new attorney, an event that may, after all, never in fact occur. Moreover, it is in keeping with good professional practice to inform the Court of Appeal in writing if one has ceased to act on behalf of a party to an appeal pending before it. There is nothing in either affidavit filed on behalf of Mr Bruce to indicate that such a step was taken in the present case. This, again, makes for a story low in verisimilitude. If there was no clean break between attorney and client, can it properly be said that Mrs Matura Shepherd ever ceased to be counsel for Mr Bruce?

[23] And finally, still on this fourth matter, even the alleged cessation of operations by the law firm is unsatisfactorily vague and gives rise to questions. The reader is entitled to wonder why the date of such supposed cessation is not disclosed. It does not assist this part of the case for Mr Bruce that there is exhibited to the Duncan affidavit an affidavit of service of notice of appeal, sworn by a William Reid on an unspecified date in April 2016 and filed on behalf of Mr Bruce on 8 April 2016, in which Mr Reid is described as "Legal Assistant and Process Server of [the law firm]". On one possible interpretation, that is a representation that Mr Reid was at the time of the swearing still a Legal Assistant and Process Server of the law firm. Such a representation implies that the law firm was still operating in April 2016. I acknowledge that other documents, eg the notice of motion filed for Mr Bruce on 6 April 2016, purport to be filed by the law company and thus point to a contrary interpretation. On the other hand, one is entitled to assume that a document prepared in a law office for use in a court of law will say what it means and mean what it says, all the more so when the document is an affidavit. Nor is this part of Mr Bruce's case helped by his above-noted admission, in an affidavit prepared, it must be underscored, in the office of the law company, that he never, in the course of his quest for the services of foreign counsel, gave further instructions to the law firm. This is, to my mind, an implied assertion that the law firm remained in operation throughout that period. It would be the height of idleness otherwise to speak of having given no instructions to the law firm during the quest in question.

• The dilatoriness in Registry factor

[24] In this regard, Mr Bruce first makes the claim that, through no fault of his, he heard nothing of his appeal for almost a year, ie until April 2015. This is akin to attempting to make virtue out of one's vice. It was, after all, Mr Bruce who was supposed to be, but was not, taking steps in the appeal, not the Registry. It can hardly be doubted that when he heard from the Registry in April 2015 (the notice being of coming case management) it was, in part if not entirely, because the state of deep sleep into which he had put his appeal had reached the point where the Registrar considered that it needed urgently to be disturbed. But, that aside, Mr Bruce's expressed concern with having heard nothing of his appeal during that period is, with respect, facetious. What really ought to be his concern is providing the Court with an answer to this burning question: who or what made him think he was entitled to put the appeal in abeyance until such time as he could find another counsel? And this question necessarily leads to two more pointed follow-ups, viz (i) did he ever ask his so-called former counsel whether that was an option open to him? and (ii) if so, what was her answer?

[25] Secondly, Mr Bruce speaks of having been told by some unidentified person sometime in October 2015 that the trial transcript was ready and that he needed to provide funds to pay for it. He omits, however, to say whether he, in fact, provided such funds, leaving the reader to wonder whether he did and, if so, how soon, or late. Is it to be expected, however, where a litigant has not only taken the momentous step of bringing an appeal and said he is desirous of retaining the services of counsel from the United Kingdom, but so acted and spoken with appropriate seriousness, that he will have to be asked at such a late stage to provide money for a disbursement as basic and foreseeable as the cost of a trial transcript? Was there no adequate deposit taken from him by counsel to ensure that he smoothly and uninterruptedly prosecuted the appeal from beginning to end and to rule out the possibility that he might merely be playing games with the courts? One is driven by a detail such as this to wonder whether the filing of the notice of appeal was a responsible act done in good faith or a mere device by which to buy time and delay the administration of justice.

[26] Thirdly, there is Mr Bruce's claim that "an inordinate delay to the filing of my records (*sic*) of appeal was as a result of the courts not providing [the trial transcript] in a timely manner". One sympathises with any litigant who is held up in his efforts to adhere to the prescribed timetable for litigation by a delay such as this one. A trial transcript is, in general, a necessary part of a record of appeal. And, unfortunately, this not the first time that one is provided with disturbing evidence of overly long delay in the production of a trial transcript in the Registry of the court below. But in the instant case, unlike some other cases with which I am familiar, the response of the litigant and counsel assisting him provokes this question: why was a record comprising all listed documents save the trial transcript not timeously filed? Had that approach, which other attorneys-at-law have been known to take in other appeals, been taken in the present case, application for an extension of time in which to file would have been necessary only in respect of a supplemental record made up of the trial transcript alone. The advantages which stand to be gained by practitioners who adopt this wise and prudent practice are instructively brought into focus in the case of *National Commercial Bank* already cited above.

(iii) Ms Hernández'

[27] Filed, as already indicated above, in support of Mr Bruce's application, the Hernández affidavit suffers from too many of the same defects found in the Bruce affidavit. Noteworthily, it cites the delay of almost nineteen months (from 30 July 2014 to 26 February 2016) in the settlement of documents, without vouchsafing any excuse therefor, as if it were somehow obviously the fault of someone other than Mr Bruce and

the person professionally assisting him. Thereafter, it seeks to make an issue out of the undeniable delay in the preparation of the trial transcript, as if that circumstance were enough to excuse the failure without delay to file the other documents mentioned in the list of documents. As already indicated above, the sensible practice, followed by some other practitioners, is timeously to file a main record made up of all documents other than the outstanding trial transcript and to follow it up with a supplemental record made up of the trial transcript alone as soon as such transcript becomes available, applying first, if needs be, for an extension of the time within which to file such supplemental record. Next, the Hernández affidavit makes the point about the supposed cessation of the relationship of lay client and counsel between Mr Bruce and Mrs Matura Shepherd, which point I have already considered above in examining the evidence given by the former in opposition to the CM's application. Finally, the Hernández affidavit introduces a matter not raised in the Bruce affidavit, viz the "written decision" (in fact the written reasons for decision, as was explained at the hearing before this Court) of Abel J, which it refers to as still outstanding. *Quoad* this final point, however, and as I noted in the course of oral argument, appeals have been heard time and again by this Court notwithstanding the absence of written reasons, two examples of relatively recent vintage being the appeals in *Forney v Bradley and anor*, Civil Appeal No 2 of 2003 (judgment delivered on 23 October 2003) and *Teck v Teck*, Civil Appeal No 3 of 2013 (judgment delivered on 18 March 2016).

Other relevant law

(i) In regard to the CM's application

[28] Neither side directed the Court to any authorities in the argument on this application. But that is not to say that the legal argument did not venture beyond the provisions of r 15(2).

[29] The CM, in applying to the Court to strike out the appeal on the ground of non-compliance by Mr Bruce with the requirements was, as it seems to me, acting essentially in accordance with the provisions of r 15(2), which I have already reproduced above. Those provisions enable a respondent to apply to the Court for dismissal of an appeal for want of prosecution. Admittedly, the legal advisers of, and counsel for, the CM, for reasons best known to them, studiedly avoided the well-known phraseology of rule 15(2). In their notice of motion and other documents, as well as in oral argument, they spoke puzzlingly only of an application to strike out the notice of appeal. But, as I have already pointed out above, the alleged serial failures of Mr Bruce listed in the Duncan affidavit all go directly to want of prosecution. The position, then, as

I see it, is that notwithstanding Ms Young's preferred description of the order sought as one for the striking out of the appeal, it (the order) remains the familiar one for dismissal for want of prosecution and may unapologetically be dealt with as such in the remainder of this judgment. To deal with it in that way is, however, effectively to attribute to the CM a submission that, notwithstanding the proper concession of Ms Young in oral argument that, as asserted in the Bruce affidavit, there is in the Duncan affidavit no evidence of prejudice caused to the CM, it is open to the Court in the present case to exercise the relevant power to dismiss. But there can be no legal basis for a submission along such lines: *Birkett v James* [1978] 2 AC 297. It is worth noting that that case was followed by this Court in *Forney*, in which, at para 5 of a judgment in which Rowe P and I concurred, Carey JA, having considered it (*Birkett*) and other English decisions, wrote:

> "What can therefore be said without equivocation is that it is settled that on an application to dismiss for want of prosecution there is an onus on the defendant (in the absence of special circumstances) to show that there has been inordinate and inexcusable delay and [that] this has resulted or will result in prejudice to him. The failure to show this will be fatal to his chances."

There were no such circumstances in *Forney* and there are none here.

[30] The CM's reliance on the ground of application that the delay on the part of Mr Bruce has been such as to amount to an abuse of the process of the Court affecting the just disposal of the matter also suggests a reliance on supposed legal principle, if not on duly cited authority. There is, however, no such legal principle upon which the CM may rely. Neither r 15(2) nor any other rule contained in the Rules confers on the Court jurisdiction to strike out an appeal as an abuse of its process. And the Court, unlike the court below, has no inherent jurisdiction: *per* Carey JA in *Attorney General v Prosser and others*, Civil Appeal No 7 of 2006 (para 43 of judgment delivered on 8 March 2007). Moreover, even in the case of a court which has such jurisdiction, it is well-settled law that default by itself does not amount to abuse of process. For default to amount to abuse of process there must be proof that it was both intentional and contumelious: see *Birkett's* case. In the instant case, however, (without even getting into the question whether the delay was contumelious) not only is there no allegation of intentional delay by Mr Bruce and/or Mrs Matura Shepherd in the sole affidavit filed on behalf of the CM: Ms Young has not sought to direct the Court to any evidence from which such intentional delay may reasonably be inferred. (As noted at para **[8]**, above, there was a crucial and glaring omission to file on behalf of the CM an affidavit responding to the

assertion in the Bruce affidavit that the delay was not intentional, an omission consistent with Ms Young's manifestly untenable contention in oral argument that prejudice was not material for purposes of the CM's application, only for purposes of Mr Bruce's application.) For my own part, I have to say that, even if the court had the necessary inherent jurisdiction, the CM would be faced with the insuperable difficulty that the evidential basis for finding an intentional and contumelious default in the present case is anything but visible.

(ii) In regard to Mr Bruce's application

[31] Unsurprisingly, neither counsel referred the Court with due and appropriate specificity to any relevant law other than that contained in the rules already set out above. As far as authorities are concerned, I, for my part, know of no written decision of a local court in this area of the law. I wish to add that, in my almost nineteen years on the Court, it was only during the presidency of my predecessor Mottley P that, on the strong recommendation of Carey JA, this Court began insisting on compliance by its Registrar with the duty imposed on him by Ord II, r 15(1) of the Rules. And the decisions given by the Court upon the references of the Registrar during that period were, as I recall, all orally rendered. As regards authorities from other jurisdictions, I know of only one, viz the oft-cited *Ratnam v Cumarasamy*, Privy Council Appeal No 41 of 1962 (judgment delivered on 23 November 1964) that can be of some assistance in the instant case, the main reason for this being that I have yet to come across a case, other than *Ratnam*, from another jurisdiction in which an enabling rule similar in all material respects to our r 13(1) is shown, or seems, to exist or to have once existed in isolation, so to speak. Thus, in the case of the rules formerly in force in Trinidad and Tobago to which I have already adverted above, there were the additional provisions in question requiring 'good and substantial reasons' for default, a circumstance which rendered it necessary for the court in *National Commercial Bank*, cited above, to consider whether the applicant for extension of time had satisfied it that such reasons in fact existed. There being no such additional provisions in the Rules, the value of decisions from Trinidad and Tobago in cases, such as *National Commercial Bank*, involving such former rules are of little more than academic interest in this jurisdiction. (The incidental points of interest in the case noted above are here being distinguished from the actual decision.) For this reason, I consider that it is entirely beside the point for Ms Duncan to depose at para 10 of the Duncan affidavit that the CM and her legal advisers are unaware of any 'good or substantial reason' for Mr Bruce's failure, up to 26 February 2016, to apply for an extension of the time within which to file the record of appeal. I shall consider the different approach taken in *Ratnam* later in this judgment.

Conclusions in summary

(i) The CM's application

[32] Notwithstanding the non-denial by Mr Bruce of any of the alleged series of failures on his part to prosecute his appeal, the CM's application, properly treated as one for an order for dismissal for want of prosecution, must fail, floundering on the immoveable rock of absence of prejudice. Treated as an application, also, for the striking out of the appeal as an abuse of process, its fate is the same, for the primary reason that this Court lacks the jurisdiction to grant such a remedy, such jurisdiction neither having been conferred on it by statute nor being inherent in it. The CM's application also fails for the alternative two-fold reason that, even a court having such jurisdiction, cannot strike out an appeal as an abuse of process in the absence of proof of intentional and contumelious default and there is here, to begin with, no evidence, let alone proof, of intentional default, in which circumstances the further question whether there is contumelious default does not arise.

(ii) Mr Bruce's application

[33] It is well-established practice in England and Wales, for which it would be sheer pedantry to cite authority, that the refusal of an application for extension of time does not automatically result in the grant, in cases of counter applications, of an application for dismissal for want of prosecution. That, together with the converse thereof, must, in my respectful view, also be sound practice in this jurisdiction. Mr Bruce's application is not to be guaranteed success by the failure, without more, of the CM's application. If found to be without merit, it, too, must fail. For my part, I can find no merit in it.

[34] It is convenient, in summarising one's conclusions on Mr Bruce's application, to take the two main planks of the argument in support of such application individually.

[35] Regarding the first plank, I am not satisfied on a balance of probability that Mr Bruce and Mrs Matura Shepherd went their separate ways, in any meaningful sense of that expression, at any time during this unfortunate saga. Indeed, I interpret the qualifications that Mr Bruce was at pains to introduce one after another in the Bruce affidavit, already noted at para **[19]** above, as part of a careful, then-ongoing effort to prepare the courts for an embarrassment-free announcement at some convenient future point in the litigation, in the event that an extension of time was secured, that his "former counsel" was no longer his "former counsel". I see this case as one where Mr Bruce wished to be perceived as suffering from the deprivations of an unrepresented litigant

whilst in fact enjoying the benefits of a represented one. (To this interpretation I shall, I fear, continue adhering even if, on a future appeal from this judgment, Mr Bruce's legal team, as is quite foreseeable, should not include Mrs Matura Shepherd.) I thus reject Mr Bruce's main explanation for his delay as unworthy of belief.

[36] As to the second plank, I regard as altogether inexcusable the failure of Mr Bruce to file long ago a record of appeal comprising all documents save the trial transcript, which was produced late, and the reasons for decision, which were still unavailable at the time of the hearing of these applications. Mr Bruce and his counsel cannot, in my opinion, have been more wrong in coming to this Court believing that the late production of the trial transcript by the Registry of the court below, and the non-production of written reasons for decision, would prove weighty factors in the former's favour. They have not so proven, given the undisputed assertions in the Duncan affidavit (a) that, within the period of three months from the filing of the notice of appeal on 9 June 2014, ie on Tuesday 5 August 2014, a list of documents was, in fact, made available by the CM's attorneys to Mr Bruce, no doubt through Mrs Matura Shepherd, and (b) that this positive and cooperative step on the part of the CM's attorneys failed to draw the response reasonably to be expected from, as it were, Mr Bruce's corner. Not only was the covering email of the CM's attorneys left to go unanswered: the list of documents which they had exemplarily taken time to prepare was not filed.

[37] Finally, I would respectfully decline the invitation of Ms Young to adopt the not unattractive (at first glance) formula from foreign decisions such as *National Commercial Bank*, none of which she in fact cited, to the effect that the applicant for extension has failed to provide good and substantial reasons for his default. Returning instead to *Ratnam*, as I earlier promised to do, I note that the broad and comprehensive language of Lord Guest, writing for the Board in that case, was that the "Court of Appeal [of the Supreme Court of the Federation of Malaya] were entitled to take the view that [the reasons for delay given in Mr Ratnam's affidavit] did not constitute material upon which they could exercise their discretion in favour of the appellant': see the 12th para of the judgment. Adopting that language with respect, I, for my part, consider that this Court is entitled to conclude that the reasons for delay and other matters urged upon it on behalf of Mr Bruce do not constitute material upon which it can exercise its discretion in his favour.

Disposal

[38] I would refuse both the CM's application and Mr Bruce's application. Regarding costs, the order I would make in respect of each application is that there be no order as to costs.

_____

SIR MANUEL SOSA P

HAFIZ BERTRAM JA

[39] I have read the judgment of the learned President, Sir Manuel Sosa, and concur in the reasons for judgment given, and the orders proposed, in it.

_____

HAFIZ BERTRAM JA