

**COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 94 of 2015**

B E T W E E N

JOSEPH B. ELKIND

Appellant

AND

THE PRIVATE TRUST CORPORATION LIMITED

First Respondent

JOHN J. BENNETT. JR

Second Respondent

RICHARD J. CAHAN

Third Respondent

BEFORE: The Honourable Dame Allen, P
 The Honourable Ms. Justice Crane-Scott, JA
 The Honourable Mr. Justice Jones, JA

APPEARANCES: Mr. Carl Bethel, Q.C. with Mr. Michael Foulkes for the Appellant
 Mr. John Wilson with Ms. Krysta Moxey for the First Respondent
 Mr. Wayne Munroe, Q.C. with Mr. Darren Ellis for the Second
 Respondent
 Mr. Raynard Rigby with Ms. Magan Taylor for the Third
 Respondent

DATES: 27 October 2016; 4 November 2016; 6 April 2017

Civil appeal – Dismissal of appeal for want of prosecution – Rule 14(3) of the Court of Appeal Rules – Rule 13(3) of the Court of Appeal Rules - Non-compliance with the Registrar’s order – Substantial compliance with the Registrar’s order - Extension of time within which to comply with the order of the Registrar

The Appellant was ordered by the Registrar of the Court (the Registrar) to deposit a \$2,500 bond for the due prosecution of his appeal; and to prepare and file a Record of Appeal (the Record) within 30 days of 29 July 2015, i.e. 28 August 2015.

While the bond was deposited on 19 August 2015, within the 30 day period, the Record had not been so filed. Having not been served with an Affidavit of Compliance the First Respondent wrote to the Registrar on 22 February 2016, seeking a dismissal of the appeal, with costs, pursuant to Rule 14(3) of the Court of Appeal Rules (the Rules). The following day, namely, the 23 February 2016 the Appellant served the First Respondent with Volume I of the Record. A second letter was written by the First Respondent to the Registrar on 22 August 2016 indicating, inter alia, that the Record was incomplete and again sought to have the appeal dismissed pursuant to Rule 14(3). Thereafter, the First Respondent wrote the Appellant on 17 October 2016 to advise of 17 documents which were missing from the Record. Thereafter, on 20 October 2016, the First Respondent filed a summons for dismissal of the appeal relying on the Appellant's contumelious delay and non-compliance with the Registrar's order.

On 24 October 2016 a Cross-Summons was filed by the Appellant wherein they sought an extension of time to comply with the Registrar's order, pursuant to Rule 29(1)(e) of the Rules. Between hearing dates and to demonstrate its bona fides the Appellant re-filed the Record of Appeal which contained 16 out of the 17 missing documents. The Appellant submitted that their paying of the bond and the filing of the Record, notwithstanding the missing document, constituted substantial compliance with the order and therefore time should be extended.

Held: Cross-Summons to extend time dismissed; summons to dismiss the appeal under Rule 14(3) for want of prosecution acceded to. Costs of both summonses awarded to the First Respondent to be taxed if not agreed.

The Rules of the Court of Appeal require full compliance with the Registrar's order and nothing less. The Rules make no distinction between full or substantial compliance. Failure to satisfy the conditions of the Registrar's Order is non-compliance no matter how substantial a litigant may perceive his compliance with the Court's orders or Rules to be.

In this case, even at the conclusion of the hearing on 4 November 2016, a period then in excess of 14 months, the filed Record was still only partial and the Appellant and his Counsel were still in breach of rule 13(3) and unable (and continued to be unable) to complete the Record or to file the all-important Affidavit of Compliance required by Rule 13(5) without which the appeal could not be set down for substantive hearing.

We found the length of the Appellant's delay in these proceedings, as well as the absence of a proper excuse or explanation for the continuing delay and breaches of the Court's orders (and Rules) to be both unacceptable and inexcusable. The Appellant offered no

excuse for the lengthy delay of over 14 months; and the breach of the Court's order and the Rules were still continuing, with no end in sight.

C. M. Van Stille v. B. V. v. E. L. Carriers Inc [1983] 1 All ER 699 applied
Derek and Lenora Sands v. Finance Corporation of The Bahamas SCCivApp No. 29 of 2008 considered
Derek Turner et al v. Edward Turner et al SCCivApp, No. 170 of 2013 considered
Eric Antonio v. Insurance Company of The Bahamas Ltd SCCivApp. No. 11 of 2012 considered
Levine v. Barnett SCCivApp No. 140 of 2010 considered
Mallory v. Butler [1991] 2 All ER 889 mentioned
Norwich and Peterborough Building Society v. Steed [1991] 2 All ER 800 mentioned
Palata Investments Ltd. v. Burt & Sinfield Ltd. [1985] 2 All ER 517 mentioned
Revici v. Prentice Hall Incorporated [1969] 1 WLR 157 applied
Turner v. Turner SCCivApp No. 170 of 2013 considered
West Bay Management Limited v. The Registrar of Trade Unions and Bahamas Hotel Maintenance and Allied Workers Union SCCivApp No. 128 of 2013 considered
Yasmin Johnson v. Andrew Johnson SCCivApp No. 5 of 2015 considered

REASONS FOR DECISION

Delivered by The Honourable Ms. Justice Crane-Scott, J.A.

Background:

1. On 27 October 2016 three interlocutory applications came on for hearing before us. They were as follows: (i) a Motion filed by the Second Respondent on 18 June 2015 seeking Security for Costs of the appeal; (ii) a Summons filed on 20 October 2016 by the First Respondent pursuant to Rule 14(3) of the Court of Appeal Rules, 2005 ("the Rules") seeking dismissal of the appeal for want of prosecution by reason of the Appellant having failed to comply with a part of the requirements of Rule 13(3) of the said Rules; and (iii) a Cross-Summons filed by the Appellant on 24 October 2016 seeking an extension of time pursuant to Rule 29(1)(e) for full compliance with the Amended Order of the Registrar dated 29 July 2015 which, *inter alia*, fixed the time for the preparation and filing of the Record of Appeal.

2. We deferred the hearing of the Motion for Security for Costs pending the hearing and disposition of the issues raised on the Summons and the Cross-Summons respectively.
3. Following the hearing of the Summons and Cross-Summons which concluded on 4 November 2016, we dismissed the Appellant's Cross-Summons; acceded to the First Respondent's Summons and dismissed the appeal under Rule 14(3) for want of prosecution. We had promised to produce written reasons for the exercise of our discretion and we do so now.

The Summons and Cross-Summons:

4. When the hearing of the Summons and Cross-Summons commenced before us on 27 October 2016, the First Respondent's Summons (*for dismissal*) which was first in time, proceeded first. Counsel for the First Respondent, Mr. John Wilson relied on the affidavit of Lemarque Campbell filed on 20 October 2016 (the "Campbell affidavit") which identified instances of, what he described as, the Appellant's "contumelious delay and non-compliance" with the Registrar's Order.
5. Mr. Wilson submitted that the Registrar had ordered Counsel for the Appellant to prepare and file the Record of Appeal within thirty (30) days in accordance with his undertaking and had thereby effectively fixed the deadline for compliance as 28 August 2015. He stated that the deadline for compliance had expired without the First Respondent having been provided with a copy of the Record.
6. Additionally, having not been served with a copy of any Affidavit of Compliance, he pointed out that the attorneys-at-law for the First Respondent had written a letter to the Registrar on 22 February 2016 on the First Respondent's behalf seeking dismissal of the appeal with costs in accordance with Rule 14(3) by reason of the Appellant's failure to file the Record or to post or secure the required prosecution Bond within the stipulated deadline.
7. According to the Campbell affidavit, no response to the foregoing letter had been received from the Registrar, but on the following day, namely, 23 February 2016, the Appellant's attorneys-at-law had filed and served on Counsel for the First Respondent, a document purporting to be Volume I of the Record of Appeal which, according to the deponent, still did not fully comply with the Registrar's Order.

8. The Campbell affidavit stated that Counsel for the First Respondent had written a second letter to the Registrar on 22 August 2016 complaining about the still incomplete Record of Appeal, the non-payment of the Bond as well as the Appellant's failure to file an Affidavit of Compliance in accordance with the Rules. The letter once again sought action by the Registrar to have the appeal dismissed for want of prosecution pursuant to Rule 14(3).
9. In addition to writing to the Registrar on a second occasion about the perceived aspects of non-compliance with the Court's orders and Rules, the Campbell affidavit revealed that the First Respondent's attorneys-at-law had also written to Counsel for the Appellant directly on 17 October 2016 attaching a Schedule of the "missing" documents together with a request that the documents be included in a Supplemental Record to be filed by the Appellant.
10. Against the background of the foregoing facts, Counsel for the First Respondent, Mr. Wilson submitted that up to 20 October 2016 when the Summons (*for dismissal*) was filed, the Appellant had still not complied with the requirements of the Registrar's Order and further, that the First Respondent had still not been served with a filed copy of the required Affidavit of Compliance evidencing compliance with all the requirements of Rule 13(3) of the Rules.
11. Mr. Wilson relied on the decision in **Levine v. Barnett** SCCivApp No. 140 of 2010. He submitted that the incomplete Record had been filed on 23 February 2016, some 6 months beyond the deadline for compliance fixed in the Registrar's Order. He contended that the Appellant's breach was both egregious and contumelious and was, as he pointed out, twice as long as the delay which had transpired in the **Levine** case on which he relied.
12. Mr. Wilson submitted that the burden rested on the Appellant on both applications to convince the Court why the appeal should not be struck out for want of prosecution and further, why time should nonetheless be extended despite the delay in complying with the Court's orders and rules.
13. Addressing the prospects of success of the substantive appeal, Mr. Wilson explained that the substantive appeal arose from the Judgment of Milton Evans J., which had dismissed, on grounds, *inter alia*, of *res judicata*, estoppel and abuse of process, an action commenced by the Appellant in 2010 in the Supreme Court. He pointed out that the 2010 action had been instituted some 8 years after the initial partnership dispute first arose and followed proceedings instituted in 2002 and 2003 in the Supreme Court, as well as arbitration proceedings which had been

instituted under the Arbitration Act. The 2010 action, he submitted, had also been instituted some 6 years after the parties had entered into a Settlement Agreement and General Release which purported to settle and compromise the outstanding issues between them.

14. Mr. Wilson submitted that even if the appeal were permitted to proceed to a substantive hearing, it would be unlikely that the discretion of the learned judge would be disturbed. He urged that in view of the egregious delay and non-compliance with the Registrar's Order and Rules which had occurred, the Court should not accede to the Appellant's application to extend time but should instead, in all the circumstances, accede to the First Respondent's Summons and dismiss the appeal for want of prosecution.
15. Addressing both applications, Counsel for the Second Respondent, Mr. Wayne Munroe, Q.C. contended that although the Appellant had in fact filed Volume I of the Record some 6 months out of time, the length of the delay which had occurred in this matter was effectively a period of 23 months commencing with 29 August 2015 (i.e. the day following expiry of the deadline fixed by the Registrar) and continuing until the 24th October, 2016 when the Appellant eventually applied by Cross-Summons seeking an extension of time to allow full compliance.
16. Mr. Munroe, Q.C. pointed out that the affidavit of Michael Foulkes filed on 25 October 2016 ("the Foulkes affidavit") on which the Appellant relied, contained no reasons for the Appellant's non-compliance with the Registrar's order in the 6 month period until 23 February 2016 when the partial Record was filed. He further submitted that the Foulkes affidavit provided no excuse whatsoever for the Appellant's failure to file all the documents which had been ordered to comprise the Record and no explanation as to why documents were still missing from the Record.
17. As to prejudice to the Second Respondent which had arisen by reason of the delay, Mr. Munroe, Q.C. submitted that the Second Respondent had been adversely affected by the delay since he had been obliged to withdraw proceedings which he had commenced in the Broward County Court in Florida until after the outcome of the appeal.
18. After reviewing the various grounds of appeal set out in the Appellant's Notice of Appeal Motion, Counsel for the Second Respondent, Mr. Munroe, Q.C. contended that the appeal was hopeless and had no real prospects of success.

19. For his part, Counsel for the Third Respondent, Mr. Raynard Rigby adopted Mr. Munroe's submissions and joined with Counsel for the First and Second Respondents in urging that the Appellant's application to extend time be dismissed and that the Court accede to the First Respondent's Summons for the appeal to be struck out for want of prosecution.
20. In his response, Counsel for the Appellant, Mr. Bethel, Q.C. dealt with both applications together. He submitted that the Registrar's Order was not an 'unless order' and that the First Respondent's application for dismissal under Rule 14(3) had been made in the face of what he termed, "substantial compliance" with the Registrar's Order. He conceded that there had in fact been non-compliance with a part of the Registrar's Order and further acknowledged that the Appellant had not made a prior or timely application to the Court for an extension of time to facilitate compliance with the terms of the Registrar's Order.
21. During the course of his arguments, Mr. Bethel, sought leave to adjourn hearing of the Cross-Summons to facilitate the filing of an affidavit by the Appellant in further support of his Cross-Summons. The application for the adjournment was vigorously resisted by Counsel for all the Respondents and was ultimately withdrawn and Mr. Bethel relied on the Foulkes affidavit to address both applications.
22. When the hearing resumed on the 4 November 2016, Mr. Bethel, Q.C. informed the Court that the Appellant had, for the express purpose of showing his *bona fides*, since re-filed the Record of Appeal which, he said, now contained all but one of the documents which the Registrar had directed should comprise the Record of Appeal. The "missing" document, he said, was the affidavit of Sharmon Ingraham filed on 24 March 2014 and identified at item 6 of the Schedule to the Registrar's Order.
23. Turning to the prospects of success of the appeal, Mr. Bethel, Q.C. took issue with Mr. Munroe's characterisation of the strength of the Appellant's case on appeal and his views as to the viability of the grounds of appeal. He contended, in particular, that the first ground of the appeal sought to attack the correctness of the Judge's decision to determine, by striking out at an interlocutory stage, what he described as "a complex case" which involved questions of mixed fact and law.
24. He submitted that the Appellant's action would require, *inter alia*, the construction of two documents, namely, a Settlement Agreement and a General Release and entered into in February and March of 2004 respectively; the determination of

questions of fact as to the state of knowledge of all the Respondents at the time the documents were executed; and a consideration of whether the said documents had the effect of releasing each of the Respondents from future actions by the Appellant.

25. Mr. Bethel, Q.C. urged the Court to dismiss the First Respondent's Summons (*for dismissal*) and asked the Court instead, to accede to the Appellant's Cross-Summons and to grant the Appellant an order extending the time for compliance with the Registrar's Order for preparation and filing of the Record of Appeal.
26. In response, Counsel for the First Respondent, Mr. Wilson turned his attention to the Appellant's Cross-Summons. He cited the case of **Turner v. Turner** SCCivApp No. 170 of 2013 and the four factors which the Court of Appeal normally takes into account when deciding whether or not to extend time under Rule 9. He pointed out that the Appellant had filed no separate affidavit in support of his Cross-Summons. Mr. Wilson contended that the Foulkes affidavit relied on by Mr. Bethel had provided no good and sufficient excuse for the delays which had occurred over the period of 14 months since the expiration of the time-limit fixed in the Registrar's Order.
27. As to the prospects of success of the appeal, Mr. Wilson submitted that the Settlement Agreement presented an insuperable hurdle for the Appellant to surmount over and beyond the expert opinions which had been placed before the court below and which the learned Judge had accepted. Aside from this, Mr. Wilson submitted that the Appellant also had to surmount the cause of action estoppel issue and the Judge's finding that the underlying subject matter of the 2010 action was the same as that which had been raised in the 2002 action.
28. He submitted that the Appellant had no realistic chance of success on the appeal and asked that the Court dismiss the Appellant's Cross-Summons and to accede instead to the First Respondent's Summons to dismiss the appeal for want of prosecution.

Discussion:

29. It is undisputed that the Summons and Cross-Summons were both interlocutory in nature and were made against the background of the Appellant's Notice of Appeal Motion filed on 7 May 2015 and a Respondent's Notice filed on 21 May 2015.

- 30.** At the hearing, both applications provided us with the opportunity at an interlocutory stage of the proceedings, to examine the length of the delay which had occurred in complying with the court's orders; the reasons or excuses which had been proffered for the Appellant's non-compliance and the associated breaches of the Rules; and where appropriate, the prospects of success of the substantive appeal and any prejudice which might occur to the successful parties in the court below if time were extended and the appeal was not dismissed.
- 31.** Turning firstly to the First Respondent's Summons (*for dismissal*) we reviewed the several areas of non-compliance with the Registrar's Order and the breaches of the associated Rules outlined in the Campbell affidavit, referred to earlier, on which the First Respondent relied. We also examined the Foulkes affidavit which had, on its face, been filed for the dual purposes of opposing: (i) the Summons (*for dismissal*); and (ii) the Second Respondent's Motion for Security for Costs mentioned earlier.
- 32.** The Foulkes affidavit exhibited a statement of the Appellant, Joseph B. Elkind, sworn to in Florida before a Notary Public on the 21 October 2016 in which he, *inter alia*, refuted paragraph 10 of the Campbell affidavit as factually incorrect in relation to the \$2,500.00 Bond for due prosecution of the appeal ordered by the Registrar which he said had been lodged with the Court of Appeal on 21 August 2015. A copy of the cancelled cheque duly endorsed on the back with the name of the parties and the number of the appeal action was also exhibited.
- 33.** The Appellant's sworn statement further stated that he had been advised by his attorney that the Summons (*for dismissal*) was ill-founded due to the fact that there had been "substantial compliance" with the Registrar's Order and further, because Counsel for the First Respondent had, prior to the date of filing the Summons, already been served with the Appellant's Legal Submissions filed on 28 September 2016 in relation to the substantive appeal.
- 34.** The Appellant's sworn statement also adverted to a discussion which had taken place in the week of 21 October 2016 between Counsel for the First Respondent, Mr. Wilson and his Counsel, Mr. Bethel, Q.C. regarding the documents which were said to be 'missing' from the filed Record. The Appellant outlined his attorney's expectation that following the said discussion, Mr. Wilson would have sent him a list of the 'missing' documents to facilitate full compliance with the Registrar's Order.

- 35.** Ultimately, we were satisfied that contrary to what was alleged in the Campbell affidavit, the required Bond had in fact been deposited on 19 August 2015 well within the 30 day deadline for compliance fixed in the Registrar's Order.
- 36.** As to compliance with the portion of the Registrar's Order relating to the Record of Appeal however, we were satisfied that what had been filed on 23 February 2016 was only a partial Record. This essentially meant that as at that date the Appellant had been in breach not only of the 30 day time-limit fixed in the Registrar's Order, but also of a part of the requirements of Rule 13(3). This represented an initial delay of almost 6 months beyond the deadline. Additionally, we were satisfied that the breach in this case is a continuing breach which continued even after the filing of the partial Record on 23 February 2016 and continued up to the 4 November 2016 when the hearing concluded before us.
- 37.** We considered the fact that despite having filed the partial Record on 23 February 2016, the appellate proceedings remained in a state of abeyance and uncertainty in that the Appellant failed to take timely action to obtain an order (pursuant to Rule 9) extending the Registrar's time-limits to a date when the complete Record could be filed which would thereby have brought him into full compliance with section 13(3)(a) of the Rules.
- 38.** We also observed that having not filed the complete Record or obtained an extension of time, the Appellant remained even up to the 4 November 2016, unable to say when he would be able to file (as mandated by Rule 13(5)) the all-important Affidavit of Compliance which would have triggered the operation of Rule 16 and the setting down of the appeal for substantive hearing before the court. Nothing in the Foulkes affidavit sought to explain these delays or to give the Court an indication as to when the matter would be regularised.
- 39.** In short, it is undisputed that following the purported filing of the partial Record on 23 February 2016, the appeal effectively remained in a state of suspended animation for a further 8 months or until 20 October 2016 when the First Respondent appeared to have taken the proverbial 'bull by the horns' and filed its Summons (*for dismissal*).
- 40.** As we have gleaned from the Campbell affidavit referenced earlier, Counsel for the First Respondent notified Counsel for the Appellant of the defective Record by way of a letter dated 17 October 2016 to which is attached a Schedule identifying some 17 documents which had not been included in the filed Record.

- 41.** In his notarised statement attached to the Foulkes affidavit, the Appellant seeks to offer as an excuse for the delay the explanation that his Counsel, Mr. Bethel, had been waiting on Counsel for the First Respondent, Mr. Wilson to provide him with a list of the 'missing' documents to facilitate their inclusion in the incomplete Record.
- 42.** However, in our view, this excuse is woefully insufficient to explain the 14 month delay which occurred in this matter up to the 20 October 2016 when the Summons (*for dismissal*) was filed. Quite apart from the fact that on 21 October 2016 when the Appellant statement was sworn and notarised in Florida, the Schedule of 'missing' documents attached to Mr. Wilson's letter of 17 October 2016 had more likely than not already reached his attorneys-at-law, the Appellant offered no excuse or reason why a Record which ought to have been prepared and filed within 30 days of 29 July 2015, had not been filed for some 6 months. Nor in our view, was any explanation provided as to why, when the partial Record was eventually filed on 23 February 2016, some 17 documents were still missing from it and the Record was still not complete.
- 43.** There was also, in our view, absolutely nothing in the Foulkes affidavit which sought to explain why the Appellant had not sought in a timely manner to invoke Rule 9 of the Rules in order to obtain an extension of the time-limits which would have put him in a position to fully satisfy all the conditions of the Registrar's Order.
- 44.** Although we took note of Mr. Bethel's assurances to us on 4 November 2016 that 16 of the 17 'missing' documents had since been inserted in the filed partial Record, it was undeniable that even at that date, the breach of the Registrar's Order continued without proper explanation, indication or assurance to the Court as to when the missing document would become available for insertion in the as yet incomplete Record.
- 45.** In summary, having reviewed the facts which were laid before us, we were satisfied that on 20 October 2016, when the Summons to dismiss was filed, the Appellant had been in breach of the following Rules and had failed (without proper excuse or explanation) to comply with the following aspects of the Registrar's Order of 29 July 2015:
- (i) Although the Bond was paid on 19 August 2015 within the stipulated deadline, the Appellant was effectively in breach of Rule 13(3) in that the purported preparation and filing of the Record on 23 February 2016 was outside the 28 August

2015 deadline fixed for preparation and filing of the Record of Appeal;

- (ii) Additionally, although the Appellant purported to file the Record of Appeal 6 months beyond the 28 August 2015 deadline, the Record which was initially filed on 23 February 2016 was only partially compliant with the Registrar's Order and was still missing some 17 documents;
- (iii) Furthermore, even at the date of the hearing of the Summons on 4 November 2016, the Appellant was still not in compliance with the Registrar's Order since the Record was and remains effectively, incomplete with no indication when the final document would be forthcoming.

46. The principles governing the exercise of the discretions conferred on the Court of Appeal under Rule 9 (*to extend time*) and Rule 14(3) (*to dismiss an appeal for want of prosecution*) respectively, are discussed in numerous decisions of this Court, two of which were referred to at the hearing.

47. Almost four years ago in March 2013, in **Levine** this Court (differently constituted) considered the operation of Rule 14 and signaled what the Court's approach might be to the failure of litigants to adhere to the time tables provided by the Rules for the orderly conduct of business before this Court, particularly following the settling of the record before the Registrar in pursuance of Rule 13.

48. Accordingly, at paragraph 74 of **Levine**, this Court re-echoed with approval the sentiments expressed by Griffiths L.J., (albeit in relation to the English Rules of the Supreme Court) in a decision of the Court of Appeal in **C.M. Van Stillevoet B.V. v. E.L. Carriers Inc.** [1983] 1 All ER 699, the relevant portions of which are extracted below:

"It cannot be over-stressed that adherence to the time-table provided by the rules is essential to the orderly conduct of business in the Court of Appeal. The setting down of an appeal is a vital step because it is this step that informs the registrar's office that an appeal is in fact effective....." [Emphasis added]

49. In **Levine**, the Court adverted to dicta of the English Court of Appeal decision in **Revici v. Prentice Hall Incorporated** [1969] 1 WLR 157 and highlighted, in particular, the observations of Edmund Davies L.J. who, at p. 160, made the following observation with which we whole heartedly agree:

“...the Rules of the Supreme Court are there to be observed; and if there is non-compliance (other than the minimal kind), that is something which has to be explained away... if no excuse is offered, no indulgence is to be granted.” [Emphasis added]

50. Based on the foregoing, we were satisfied that the Appellant had failed to comply with a part of the requirements of Rule 13(3). Furthermore, even though the filed Record was late, it was and remains effectively, incomplete with no indication when the final document would be forthcoming. In such circumstances, we were satisfied that the First Respondent would, all things considered, have been entitled to an automatic order for dismissal of the appeal under Rule 14(3). However, in view of the Cross-Summons, we were obliged to consider whether notwithstanding the Summons, our discretion should be exercised in the Appellant’s favour to extend the time for the completed Record of Appeal to be filed.

51. We pause here to observe, as we have done in numerous decisions of this Court that in this jurisdiction, the settled approach of this Court to the exercise of its discretion under Rule 9 to grant (or deny) an extension of time for leave to appeal has been for the Court to have regard to the four factors identified in the judgment of Griffiths LJ in **CM Van Stillevoeldt BV v. El Carriers Inc.** The factors were subsequently applied in numerous pre-CPR English authorities, notably **Palata Investments Ltd. v. Burt & Sinfield Ltd.** [1985] 2 All ER 517, **Norwich and Peterborough Building Society v. Steed** [1991] 2 All ER 800 and **Mallory v. Butler** [1991] 2 All ER 889.

52. The approach is succinctly summarised in note 59/4/17 of the 1999 edition of the Supreme Court Practice in the following terms:

“It is entirely in the discretion of the Court to grant or refuse an extension of time. The factors which are normally taken into account in deciding whether to grant an extension of time for serving a notice of appeal are: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if time for appealing is extended; and (4) the degree of prejudice to the potential respondent if the application is granted (see

***C.M. Stillevoeldt BV v El Carriers Inc* [1983] 1 W.L.R. 297...)**...Where the delay in serving the notice of appeal is short and there is an acceptable excuse for it, an extension of time will not be refused on the basis of the merits of the intended appeal unless the appeal is hopeless: ***Palata Investments Ltd v. Burt & Sinfield Ltd* [1985] 2 All E.R. 517. In *Norwich & Peterborough Building Society v. Steed* [1991] 2 All ER 880, [1991]1 W.L.R. 449 and *Mallory v. Butler* [1991] 2 All ER 889n, [1991] 1 W.L.R. 458 the Court of Appeal held that...(4) The settled practice of the Court is to assess and take into account the merits of the proposed appeal in deciding whether or not to grant an extension of time for appealing (subject to the qualification in the *Palata* case (above))."**

53. The factors identified in the foregoing summary have also been considered and applied in numerous local cases including, **Derek and Lenora Sands v. Finance Corporation of The Bahamas** SCCivApp No. 29 of 2008; **Eric Antonio v. Insurance Company of The Bahamas Ltd** SCCivApp. No. 11 of 2012; **Derek Turner et al v. Edward Turner et al** SCCivApp, No. 170 of 2013); **West Bay Management Limited v. The Registrar of Trade Unions and Bahamas Hotel Maintenance and Allied Workers Union** SCCivApp No. 128 of 2013 and more recently, **Yasmin Johnson v. Andrew Johnson** SCCivApp No. 5 of 2015.
54. However, unlike the above authorities which all involved the exercise of the Court's discretion in the context of delays which occurred in meeting the deadline for the filing of an appeal from the court below, the delay with which we were here concerned involved non-compliance with portions of the Registrar's Order made at the settling of the Record, and the associated breaches of the Court's Rules designed to ensure the orderly progression of an appeal to substantive hearing before the Court.
55. With this in mind, we turned to consider the merits of the Cross-Summons. At the outset, we observed that although on its face the Cross-Summons sought to ground the Appellant's application under Rule 29(1)(e) of the Rules, the application proceeded before us on the basis that the Appellant was properly invoking the Court's jurisdiction and the powers conferred by Rule 9(1)(b) to extend the time fixed by order of the Registrar of this Court for preparation and filing of the Record of Appeal.
56. It was undisputed that the Appellant's Cross-Summons was not accompanied by the usual affidavit explaining the delay or proffering reasons for the delay. Instead reliance was placed, as we have already observed, on the Foulkes affidavit which

had been filed, for the dual purposes of opposing the Summons (*for dismissal*) as well as the Second Respondent's Motion for Security for Costs.

- 57.** This was unfortunate and was, in our view, ultimately fatal to the Appellant's Cross-Summons since as we have already found, no plausible explanation has yet been provided to this Court as to why the Appellant took no steps, following the expiry of the Registrar's deadline for filing of the Record, but more particularly in the period since 23 February 2016 to satisfy all aspects of the Registrar's Order.
- 58.** In his notarised statement attached to the Foulkes affidavit, the Appellant merely sought to draw our attention to the fact that he had "substantially" complied with the Registrar's Order; and to alert us to the further fact that Legal Submissions for use at the hearing of the substantive appeal had already been filed on his behalf on 28 September 2016. With all due respect to the Appellant and to Mr. Bethel, neither of these facts came anywhere close to providing the Court with the required excuse for the unacceptable delays which have occurred in this matter since 28 August 2015 when the deadline for compliance expired.
- 59.** As indicated earlier, on the resumption of the hearing on 4 November 2016 Mr. Bethel, Q.C. informed us that the Record of Appeal had been re-filed the previous day and assured us that the partial Record now contained 16 of the 17 'missing' documents. Despite his assurances, it was obvious that Mr. Bethel wanted us to overlook the simple fact that even with the inclusion of the 16 documents, the filed Record of Appeal was still a partial record and, even as late as 4 November 2016, was still missing one of the documents listed in the Schedule to the Registrar's Order. This effectively meant that the overall period of delay which we were considering on the Cross-Summons and the Appellant's failure to comply with Rule 13(3) was, in aggregate, in excess of an astounding 14 months and, the unacceptable delay was still continuing!
- 60.** What we found even more egregious and unacceptable, was the fact that even on the resumption of the hearing on 4 November 2016, no explanation was provided to the Court as to when the one 'missing' document would become available or when the Affidavit of Compliance required by Rule 13(5) was likely to be filed.
- 61.** Instead, Mr. Bethel, Q.C. sought to convince us, almost casually in our view, that notwithstanding the delay which had occurred we ought, nonetheless, exercise our discretion in favour of extending time since the Appellant had in fact demonstrated "substantial compliance" with the Rules and with the Registrar's Order.

62. We could not agree. The simple fact was that while the filed Record now contained all but one of the documents listed in the Registrar's Order of 29 July 2015, it was still incomplete and neither the Appellant nor Mr. Bethel, was able to explain why the still missing document was not available or when it would be included in the Record.
63. It need hardly be said that the Rules of the Court of Appeal require full compliance with the Registrar's Order and nothing less. The Rules make no distinction between full or substantial compliance. Failure to satisfy the conditions of the Registrar's Order is non-compliance no matter how substantial a litigant may perceive his compliance with the Court's orders or Rules to be.
64. We take this opportunity once again to endorse and re-issue the caution given to litigants and their solicitors by Griffiths L.J., who, in the course of delivering the decision of the English Court of Appeal in **C.M. Stillevoeldt BV v. El Carriers Inc** (*above*), stated at p. 212:

"... I take this opportunity now to warn the profession that the attitude of the court to the previous lax practices is hardening in order to ensure for the benefit of all litigants that the business of the Court of Appeal is conducted in an expeditious and orderly manner...." [Emphasis added]

65. In this case, even at the conclusion of the hearing on 4 November 2016, a period then in excess of 14 months, the filed Record was still only partial and the Appellant and his Counsel were still in breach of Rule 13(3) and unable (and continued to be unable) to complete the Record or to file the all-important Affidavit of Compliance required by Rule 13(5) without which the appeal could not be set down for substantive hearing.

Disposition and Order:

66. In all the circumstances, we found the length of the Appellant's delay in these proceedings, as well as the absence of a proper excuse or explanation for the continuing delay and breaches of the Court's orders (and Rules) to be both unacceptable and inexcusable. As the Appellant had offered no excuse for the lengthy delay of over 14 months; and as the breach of the Court's order and the Rules were still continuing, with no end in sight, we dismissed the Appellant's Cross-Summons, acceded to the First Respondent's Summons and dismissed the

appeal under Rule 14(3) for want of prosecution. We further awarded costs of the Summons and of the Cross-Summons to the First Respondent to be taxed if not agreed.

The Honourable Ms. Justice Crane-Scott, JA

The Honourable Dame Anita Allen, P

The Honourable Mr. Justice Jones, JA