COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law Side and Equity Division

2013/CLE/gen/01615

BETWEEN:

LOUIS M. BACON	**Plaintiff**
AND	
CARVEL FRANCIS	**Respondent**

Before: The Honourable Mr. Justice Keith H. Thompson

Appearances: Messrs. Robert Adams and Samuel Brown for the Plaintiff
Attorney Gregory Moss for the Defendant

Hearing Dates: 22nd January, 2019
04th March, 2019
26th March, 2019

R U L I N G

[1] This is an application for leave to cross examine two (2) witnesses on their respective affidavits, which were filed on behalf of the Plaintiff. The affidavit of Kenneth Lightbourne was filed on June 26th, 2014 and the affidavit of Jenny Afia was filed on September, 26th, 2017.

[2] Counsel for the Defendant puts the position that the two affidavits stem from the fact that there are applications on both sides to strike out each other's respective claims. As a part of these applications to strike out, affidavits have been filed and

the Defendant is applying for leave to cross-examine on the two affidavits filed by and on behalf of the Plaintiff.

[3] The Defendant's summons to strike out the Plaintiff's statement of claim was filed on June 02nd, 2014. This was referred to by counsel for the Defendant as the substantive summons to dismiss.

[4] However, what falls to be heard are the notices for cross-examination of Kenneth Lightbourne and Jenny Afia both filed on November 06th, 2018, by and on behalf of the Defendant.

BACKGROUND:

[5] The Plaintiff by way of summons filed on 02nd, June, 2014 made an application to strike out the Defendant's counterclaim. In support thereof - the Plaintiff filed two (2) affidavits, namely;

1. The affidavit of Kenneth Lightbourne (filed on 26th June, 2014) and
2. The affidavit of Jenny Afia, (filed on 26th, June, 2014.)

DEFENDANT'S POSITION:

[6] The Defendant asserts that if the Plaintiff's summons to strike out the Defendant's counterclaim is successful then the result would be final and not interlocutory as it relates to the Defendant's counterclaim.

[7] In this regard, the Defendant relies on several authorities and avers that there is a right to confront the evidence and the only way to do so in reference to the Plaintiff's summons to strike out is to confront the evidence.

[8] The Defendant has also laid over Supplemental written Submissions in support of his application to cross-examine the deponents of the two affidavits. The Supplemental Submissions are in response to the Plaintiff's submissions, which were received by counsel for the Defendant on 22nd January, 2019 in opposition

to the Defendant's application to cross-examine the two deponents on their affidavits in support of the Plaintiff's Summons to strike out the Defendant's counterclaim.

[9] The Defendant asserts that his application to cross-examine should be viewed by the court as an application by the Defendant to avail himself of a right to confront the evidence against him.

[10] In this regard, the first authority cited by the Defendant is **BHP International Market Limited v. Wason Holdings Limited [2016] 2 BHS J. No. 97** commencing at paragraph 29 where Winder J states;

> **"29 Whilst Order 38 rule 3 of the RSC would not impose a bar on the use of Ndlovu's affidavit it is clear that the common law would permit me to consider the affidavit as relatively useless. Halsbury's Laws of England, 4th Ed. Vol. 17, page 193, para. 277 sets out the general principles as it relates to the importance of a party to be able to test the evidence of his opponent by cross-examination.**
>
> > **"277. Any *party is entitled to cross-examine any other party who gives evidence and his witnesses, and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination.*"**
>
> **This is a principle, which has been universally accepted in the common law world and is reflected in the oft-cited quote of Lopes L.J. in the case of *Allen v Allen (1894). L.R.P.D. (C.A.) [1894], p. 253,* where he said**
>
> > **"It appears to us contrary to all rules of evidence, and opposed to natural justice, that the evidence against another party, without the latter having an opportunity to testing its truthfulness by cross-examination."**

Further, in the Canadian decision of H.B. Haina & Associates (Receiver-Manager of) v. H.B. Haina & Associates, Inc. 1978 B.C.J. 281 (BCSC), Anderson J. reiterated the significant consequences to an affiant who refuses to be cross-examined on her affidavit:

> **"In my opinion, the affidavit of Haina should not be admitted because the respondent has not had an opportunity to cross-examine Haina. While Haina is not a party to these proceedings, the principles applicable in those cases where a party fails to submit himself for cross-examination are applicable. The basis for rejecting the affidavit is that there is no means of confronting the deponent or of ascertaining the truth of the statements contained in the affidavit or the context in which the statements were made. Even if the affidavit is technically admissible, evidence of this nature is of so little weight that it cannot materially assist the party relying on it." (emphasis added).**

I accept that this as an appropriate statement of the legal position in The Bahamas." (our emphasis).

[11] The Defendant puts forth an alternative position. What counsel for the Defendant says in this regard is that even if the application of the Defendant to cross-examine the two deponents is one of discretion and not of right, then the discretion should be exercised in favor of the Defendant. The Defendant further asserts that the Plaintiff, in reliance on the dicta of the Irish High Court in the case of THE ESTATE OF SEAN DUNNE V. DUNNE [2016] IEHC 96, is a misplaced position as the decision is based on Irish Rules of Court and Irish statutes, which he asserts have no counterpart(s) under Bahamian Law. It is the further position of the Defendant that the court should not accept the affidavits unless the Deponents are cross-examined.

[12] In support of this position, counsel cites three authorities, the first being THE PARISIAN (1887) 13 PD 16. This is an extremely short decision and as such we take the liberty to set it out.

"THE PARISIAN

"Under Order xxxvii., r. 2 – which enables the evidence in references in Admiralty actions to be given by affidavit – it is in the discretion of the registrar to refuse, if he thinks fit, to give weight to such evidence unless and until the deponent has been cross-examined on his affidavit, and where the deponent is a party to the action, he may, though resident abroad, be required to attend in this country for such cross-examination.

SPECIAL CASE stated by the district registrar at Liverpool A reference had been appointed in an action, in which one Villars, who resided at Granville in France, and who was the sole owner of the vessel *La Marie*, was the plaintiff, and the owners of the steamship *Parisian* were the defendants. The order appointing the reference also directed that Villars should attend to be cross-examined on his affidavit, which had been lodged with his claim. The defendants also gave notice that they desired to cross-examine the plaintiff. After the reference had been opened the plaintiff's solicitor stated that Villars was not in attendance, and he contended that if it were desired to cross-examine him, this should be done in France under a commission. The registrar was of opinion that it was desirable that the plaintiff should be present and be cross-examined. The questions for the opinion of the Court were whether the affidavit of Villars ought to be used at the reference as he had failed to appear, and whether if he were to be cross-examined, it should be done under a commission or before the registrar.

***Hall, Q.C.* (*Stubbs*, with him), for the plaintiff. In no case where an affidavit is tendered can the registrar insist on further evidence, for by Order xxxvII., r. 2, evidence at a reference may**

be given by affidavit. In the present case if the plaintiff ought to be cross-examined, it should be under a commission.

J. Walton, for the defendants. Order xxxvIII. r. 28, allows a deponent to be cross-examined, and applies to Admiralty references. The registrar has a discretion in the matter: *Concha v. Concha.* (1)

Hall, Q.C.., in reply.

BUTT, J. I am of opinion that the proper course in this case is for the registrar to receive the affidavit of the plaintiff in the action. But I also think that he is perfectly within his right if he refuses to give the statements in it any weight unless and until there has been a cross-examination of the deponent here or abroad. It may be doubtful whether, under the rules, the registrar has power to order the cross-examination of the plaintiff either in this country or in France. But the course I have stated is in accordance with the general practice, for the registrar may well say that he is not satisfied with the affidavit, and desires to have the evidence of the plaintiff in person. The next question is how the registrar is to exercise his discretion, whether by the issue of a commission, or the cross-examination of the plaintiff here. In my opinion there is a material difference between a party to an action and an ordinary witness. One reason of that difference is that if the deponent is resident abroad and is only a witness it may be absolutely impossible for a party to produce him, and a great injustice may be done by ordering his production here. But there is a difference when the deponent is a party, for he may come or stay away at his own peril. Another consideration to be kept is sight in exercising this discretion is the question of convenience and expense. While it may be unreasonable to require the attendance here for cross-examination

of a man resident in Brazil, it may be right to compel that of a party resident in France. Here the party resides at Granville in France, there is no evidence that he is ill, and no statement on oath giving a reason why he should not come here. That being so it is perfectly within the registrar's discretion to demand that the plaintiff shall be produced for cross-examination. I may add that my decision does not, I think, conflict with the opinion of the Court of Appeal in Concha v. Concha (1), more especially as the House of Lords regarded the matter as one of discretion."

[13] The second authority put forward by the Defendant is **RE BOTTOMLEY (1915) 84 LJKB 1020**, the short principle of which is;

> "(1) Where notice is given of intention to cross-examine on an affidavit, that affidavit cannot be read in the absence of the deponent.
>
> (2) The exhibits to an affidavit ought to be served with it."

[14] The third authority is RSC Commentary, 38/2/6. It is the further argument of the Defendant that the authority relied on by the Plaintiff, **BULA UNITED V CROWLEY No. 4 [2003] 2 IR 430** was based upon the provisions of **040 r 31 of the Irish Rules of the Superior Courts 1986**, (which have no counterpart under Bahamian Law) and therefore has no relevance to, or application under Bahamian Law.

[15] The Defendant in his submissions says that the application to cross-examine should be viewed by the Court as a matter of right and not one of discretion and should therefore order the deponents of both affidavits to appear to be cross-examined on their respective affidavits.

PLAINTIFFS SUBMISSIONS IN OPPOSITION TO THE DEFENDANT'S APPLICATION TO CROSS-EXAMINE:

[16] Before assessing the Plaintiff's arguments we make it clear that this is an action for libel in respect of defamatory allegations published in three articles online on the Bahamas Press website.

[17] Pleadings were filed, and two affidavits were sworn by two deponents on behalf of and in furtherance of the Plaintiff's case. The Defendant then filed a summons seeking to have the two deponents cross-examined. This would obviously be an interlocutory hearing.

[18] Further, a summons was filed seeking to strike out the Defendant's defence and counterclaim, which if successful would bring finality to the instant action. There is also a summons which seeks to strike out the Plaintiff's statement of claim, which if successful will also bring finality to this action.

[19] It is the position of the Plaintiff that the basis for objection starts with Order 38 (2) rule 3 of the Rules of The Supreme Court, which provides;

> **" (3) In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence made by or given by affidavit, unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may on application of any party order the attendance for cross-examination of the persons making any such affidavit, and where, after such order has been made, the person does not attend, his affidavit shall not be used as evidence without leave of the Court."**

[20] The Plaintiff says that the Court is vested with a discretionary power to order the attendance of a person who has sworn an affidavit that is intended to be used in connection with a proceeding commenced by originating summons, originating motion or an application made by summons or motion.

[21] The Plaintiff's further position is that on an interlocutory application and proceeding, there is no absolute right to cross-examine a deponent, even if the relief being sought is the dismissal of the proceedings. In support of this position, the Plaintiff relies on the case of **LEHANE as OFFICIAL ASSIGNEE IN BANKRUPTCY IN THE ESTATE OF SEAN DUNNE V DUNNE [2016] IEHC 96 @ paras. 10 – 14.** Neither counsel pointed out that this authority was appealed to the Irish Court of Appeal [2017] IECA 304, where the issue of cross-examining on affidavits was further expounded upon.

[22] However, counsel for the Defendant takes issue with the use of the Irish Rules of Court in particular ord. 40 r 1, which he says has no counterpart in our rules of court.

THE LAW:

[23] It is accepted that the affidavits of Kenneth Lightbourne and Jenny Affia were filed in opposition to the Defendant's application to strike out, thus the danger in cross-examining at this point in the litigation. In the Supreme Court Practice 1976, in the notes of Order 38/2/3 it states;

> **"There is a discretion as to ordering cross-examination on affidavits filed on interlocutory applications."**

[24] This statement in the notes as mentioned above confirms the position of the Plaintiff.

[25] In this regard the court should take into consideration the thrust of the writ of summons in the first instance and whether or not it is necessary at this stage for the cross-examination of the deponents. The Defendant relies on the case of **BHP INTERNATIONAL MARKETS LIMITED V WASON HOLDINGS LIMITED [2016] 2 BHS J No. 97** among others. He relies on paragraphs 26 – 31 where Winder J. states;

Evidence of Gregory Ndlovu:

26. **"The only evidence of the Company consisted of the Affidavit evidence of Mr. Ndlovu confirming the particulars of the Petition. The evidence was confined to challenges on technical grounds and there was no evidence to dispute:**

a) **The Award of the Arbitrator and the findings against the Company.**
b) **That the Company is indebted to Wason;**
c) **The expert evidence that interest is due at a rate of 8%;**
d) **That the registered agent and office of record rejected its connection to the Company and says that another agent, BCS of Cumberland Street, represents it.**

27. Order 38 Rule 3 of the Rules of the Supreme Court provides that;

(3) "In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance

for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court."

28. Whilst there was no order made for Ndlovu to appear he was served with notice by Wason that he was required to attend. As noted Mr. Evans QC, indicated that he had never met Ndlovu and had only conversed with someone purporting to be him via telephone. Mr. Evans QC also indicated to the Court that Ndlovu, had been advised of the Notice to cross-examine and was told to attend court for this purpose. At no time did Mr. Ndlovu present himself whether on the 22nd July, 2016 or 25th July, 2016. Further no offers or any reasons for Ndlouv's absence on the 22nd July, 2016 has been advanced, on the day or at any time thereafter.

29. Whilst Order 38 rule 3 of the RSC would not impose a bar on the use of Ndlovu's affidavit it is clear that the common law would permit me to consider the affidavit as relatively useless. Halsbury's Laws of England, 4th Ed., Vol. 17, page 193, par. 277 sets out the general principles as it relates to the importance of a party to be able to test the evidence of his opponent by cross-examination;

> "277. Any party is entitled to cross-examine any other party who gives evidence and his witnesses, and no evidence effecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination."

This is a principle, which has been universally accepted in the common law world and is reflected in the oft-cited quote of Lopes L.J. in the case of Allen v Allen [1894], p. 253, where he said,

> **It appears to us contrary to all rules of evidence, and opposed to natural justice, that the evidence of one party should be received as evidence against another party, without the latter having an opportunity of testing its truthfulness by cross-examination."**

Further, in the Canadian decision of H.B. Haina & Associates (Receiver-Manager of) v. H.B. Haina & Associates, Inc. 1978 B.C.J. 281 (BCSC), Anderson J. reiterated the significant consequences to an affiant who refuses to be cross-examined on her affidavit:

> ***"In my opinion, the affidavit of Haina should not be admitted because the respondent has not had an opportunity to cross-examine Haina. While Haina is not a party to these proceedings, the principles applicable in those cases where a party fails to submit himself for cross-examination are applicable. The basis for rejecting the affidavit is that there is no means of confronting the deponent or of ascertaining the truth of the statements contained in the affidavit or the context in which the statements were made. Even if the affidavit is technically admissible, evidence of this nature is of so little weight that it cannot materially, assist the party relying on it." (emphasis added)***
>
> **I accept that this as an appropriate statement of the legal position in The Bahamas.**

30. Even without Ndlovu's failure to attend to be cross-examined, his evidence would otherwise have been suspicious and discredited due to inconsistencies and inaccuracies. Firstly, Ndlovu swears the affidavit in the capacity of director of the company, however, according to Wason's evidence, the public record doe4s not support this. Secondly, Ndlovu swears that BSC of Cumberland Street was the registered office and agent however, Wason's evidence, confirmed by Mr. Evans QC on 25 July 2016, was that BCS had no such engagement and were only then considering the engagement subject to its due diligence being concluded.

31. I must find that the evidence of Ndlovu is wholly discredited and should be incapable of sustaining the Petition filed. The absence of any evidence to support its Petition ought to render the Company's application stillborn. However, notwithstanding my view as to the weakness of the evidence to support the Company's Petition, I must consider the technical issues raised by the Company in the course of considering the efficacy of the statutory demand and ultimately whether the Company would be deemed insolvent."

[26] We agree with Winder J., however, this is not the case in the instant matter. This is an interlocutory application where the Defendant is seeking to cross-examine two deponents who have not indicated that they do not intend to appear to be cross-examined. In fact the Plaintiff has advised the court that arrangements would be made for the affiants to present themselves for cross-examination (during the trial but that summonses filed for striking out ought to be heard first).

[27] The Court has not indicated that this is a trial on affidavits alone. One of the affiants resides outside the jurisdiction and the other resides within.

[28] The Rules of The Supreme Court (Amendment) Rules 2004 which we refer to as Order 31 A or the case management rules under PART I state;

> **"The Court shall deal with cases actively by managing cases, which may include:-**
>
> **(a) .....**
>
> **(h) considering whether the likely benefit of taking a particular step will justify the cost of taking that step.**
>
> **(i) dealing with as many aspects of the case as is practicable on the same occasion.**
>
> **(m) ensuring that no party gains an unfair advantage by reason of that party's failure to give full disclosure of all relevant facts prior to the trial or the hearing of any application."**

[29] We repeat for the sake of clarity what is stated in the notes of the White Book 1976, Supreme Court Practice;

> **"There is a discretion as to ordering cross-examination on affidavits filed on interlocutory applications."**

[30] In Black's Law Dictionary, Eight Edition Judicial Discretion is defined as;

> **"The exercise of judgement by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."**

[31] Further, in the notes of the White Book 1976, under Order 38/2/3 it states that the affidavit may be allowed to be used in court though the cross-examination is

pending. **(LEWIS V JAMES 1889 32 CHD 331).** In this case under **COTTON, L.J's** contribution to the decision it states;

> **"His Lordship then considered a question which had been raised as to postponing the application until the cross-examination of one of the Plaintiffs had been concluded, and gave his reasons for holding that there should be no postponement, but said that an opportunity ought to be given to the Defendant of questioning the amount, and that the appeal would stand over till the 31st, when the sum to be paid into court would be determined."**

[32] Further, in the very same case in **BOWEN L. J.'S** contribution it states;

> "His Lordship then stated his reasons for agreeing with Lord Justice Cotton that making an order ought not to be postponed till the conclusion of the cross-examination. It seems to me that what the Lord Justice has said is right, that we ought to deal with this motion and deal with it per-emptily next Wednesday."

[33] There was never any indication from the court or otherwise that cross-examination on the two affidavits would not be allowed. As was stated earlier, the court must take into consideration the best ways of actively managing its cases inclusive of costs, practicality, and justice fairness to all parties.

[34] Therefore, in light of the foregoing and in all the circumstances we do hereby deny the defendant's application to cross-examine at this stage. Costs to the Plaintiff on this application to be taxed if not agreed.

Dated this 22nd day of May A.D., 2019.

Keith H. Thompson
Justice