COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2010/CLE/gen/01137

BETWEEN

(1) RICHARD ANTHONY HAYWARD
(2) SUSAN JANE HEATH
(3) GILES EDWARD HAYWARD
(4) RUPERT CHARLES HAYWARD
(5) FRANCESCA ROSE CHELSOM
(6) EMMA LOUISE CAMERON
(7) ALEXANDER JAMES WROUGHTON HEATH
(8) NICHOLAS CHARLES EDWARDS HEATH

Plaintiffs

AND

(1) STRIKER TRUSTEES LIMITED
(2) PROMETHEUS SERVICES LIMITED
(3) RICHARD W DEVRIES
(4) KEITH GRIFFITHS
(5) SIR JACK ARNOLD HAYWARD (died 13 January 2015)
(6) LADY JEAN MARY HAYWARD (died 12 May 2015)
(7) FREDERICK ARTHUR LEBLANC CAMERON (a minor) by PRESTON RABL his Guardian ad Litem
(8) IAN BARRY
(9) PATRICIA RUTH BLOOM
(10) AMY BLOOM CLOUGH
(11) TREVOR BETHEL
(12) JONATHAN MICHAEL HAYWARD

Defendants

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Lawrence Cohen QC with him Mr. Ferron Bethell and Ms. Camille Cleare of Harry B. Sands, Lobosky & Co. for the Plaintiffs
Ms. Meryl Glinton of Maurice O. Glinton & Co. for the 11th Defendant/Applicant

Hearing Date: 26 September 2019 and also on written submissions

Practice – Appeal – Application for leave to appeal and stay of proceedings – Test to be applied

The intended 11th Defendant, Trevor Bethel ("the Applicant") has applied for leave to appeal and stay of all proceedings of two decisions made on 2 July 2019 and 11th July 2019 respectively. The Respondents object to leave being granted and for stay of proceedings on the ground that the appeal is hopeless and there is no reasonable prospect of success as the factual findings of the Court are incapable of any sensible challenge.

HELD:

1. Leave to appeal and stay of proceedings are refused. Costs to the Plaintiffs to be summarily assessed by the Court on 6 February 2020 at 2:30 p.m.

2. In order for a court to grant leave to appeal, an applicant has to demonstrate that he has some reasonable prospect of succeeding on the appeal. The fact that a court has reached a clear view is not decisive of whether a challenge to its reasoning is arguable.

3. The court should also consider whether it is appropriate in all the circumstances of the case for the discretion to be exercised to grant leave. Discretion can only arise if there is some arguable basis of appeal.

4. In certain "exceptional circumstances", the court may grant leave even where the case has no real prospect of success, but there is an issue which, in the public interest, should be examined by the Court of Appeal: **see Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments) [1999] 1 WLR 2 at pages 10-11.**

5. The Applicant's intended grounds of appeal have no merit and there is no reasonable prospect of success on appeal. There are no issues of general public importance raised by the Applicant's intended grounds of appeal. Making a bald statement that the appeal raises issues of general public importance will not suffice in law.

6. It is well-established that a judge has a wide discretion with regards to the grant of a stay. A stay of proceedings is refused. The appeal of the Applicant is an attempt to stall the progress of the matter before the Court.

RULING

Charles J

Introduction

[1] By Summons and Affidavit filed on 17 July 2019, Julius Trevor Bethel ("the Applicant") applies for:

(i) An Order seeking leave to appeal two decisions of this Court made on 2 and 11 July 2019 respectively ("the Decisions"); and

(ii) A stay of all proceedings under and/or furtherance of the Court's Orders of 2 July 2019 and 11 July 2019 pending determination of the appeal.

[2] The Applicant advances 20 grounds of appeal and submits that leave ought to be granted because the issues raised on appeal on the face of it:

(i) have substantial merit and prospect of success; and

(ii) are of general public importance.

[3] The Plaintiffs oppose the application for a grant of leave to appeal and a stay of proceedings. Simply put, they say, among other things, that an appeal is hopeless and there is no reasonable prospect of success as the factual findings of the Court are incapable of any sensible challenge. They also say that the abuse of process, which the recusal application was, as it was an attempt to manipulate the judge who hears the applications is a good reason to decline leave. It will then be up to the Court of Appeal.

Brief Background

[4] In a written judgment delivered on 11 July 2019 ("the Judgment"), I held that the Applicant's application seeking my recusal is unmeritorious as there is not an iota of evidence to substantiate any of the bald allegations made against me. I also found that Mr. Glinton QC could not continue to act as Counsel (paragraph 83 of the judgment). At paragraph 92, I also ordered that since Mr. Glinton QC is a joint complainant with the Applicant before the Ethics Committee of The Bahamas Bar

Council, he cannot effectively be a litigant and a lawyer at the same time. Therefore, it is only fit and proper that he withdraws his services to the Applicant.

[5] Subsequently, I attempted to clarify paragraphs 83 and 92 of the Judgment and also, to give Mr. Glinton QC an opportunity to be heard. The Applicant resisted on the basis that the Court was *functus officio* even though the Order had not been perfected. On 5 November 2019, I re-issued another Judgment ("the Re-issued Judgment") clarifying the inadvertences I made in paragraphs 83 and 92 of the Judgment.

[6] The Applicant now applies for leave to appeal and stay of proceedings of the Judgment as well as an Order which I made on 2 July 2019.

Test to be applied on leave to appeal

[7] The test to be applied on an application for leave to appeal is whether the applicant has a "*realistic prospect of succeeding on the appeal…the use of the word "realistic" makes it clear that a fanciful prospect or an unrealistic argument is not sufficient*": per Lord Woolf MR in **Smith v Cosworth Casting Process Ltd.**[1997] 4 All ER 840.

[8] In addition, in certain "exceptional circumstances" the Court may grant leave even though the case has no real prospect of success but there is an issue which, in the public interest, should be examined by the Court of Appeal: See: **Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments)** [1999] 1 WLR 2 at paras. 10 to 11 where the following is stated:

> **"The general test for leave**
>
> **10. …<u>[T]he general rule applied by Court of Appeal, and this is the relevant basis for first instance courts deciding whether to grant leave, is that leave will be given unless an appeal would have no realistic prospect of success. A fanciful prospect is insufficient. Leave may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal.</u> Examples are where a case raises questions of great public interest**

> **or questions of general policy, or where authority binding on the Court of Appeal may call for consideration.**
>
> **11. The approach will differ depending on the category and subject matter of the decision and the reason for seeking leave to appeal, as will be indicated below. However, if the issue to be raised on the appeal is of general importance that will be a factor in favour of granting leave. On the other hand, if the issues are not generally important and the costs of an appeal will far exceed what is at stake, that will be a factor which weighs against the grant of leave."** [Emphasis added]

[9] See also: Isaacs JA in **Keod Smith v Coalition To Protect Clifton Bay** (SCCivApp No. 20 of 2017) at paras. 23 to 27 and **The Town Planning Committee v The Queen and The Coalition To Protect Clifton Bay et al** (SCCivApp No. 63 of 2017) at paras.15 to 17.

[10] In the latter case, at paragraph 17, Isaacs JA stated:

> **"The authorities plainly show that where leave is granted exceptionally on this basis the case raises issues of overwhelming and far-reaching import. Examples of this have been suggested to include "questions of great public interest or questions of general policy, or where authority binding on the Court of Appeal may call for reconsideration": See Practice Direction above. The English Court of Appeal when setting out the practice and procedure for dealing with applications for leave to appeal stated:**
>
> > **"12. Leave should not be granted unless the judge considers that there is a real prospect of the Court of Appeal coming to a different conclusion on a point of law which will materially affect the outcome of the case. An appeal on the grounds that there is no evidence to support a finding is an appeal on a point of law, but it is insufficient to show that there was little evidence."** [Emphasis added]

[11] The approach of the English courts has been followed by our courts. In **AWH Fund Limited (In Compulsory Liquidation) v ZCM Asset Holding Company (Bermuda) Limited** [2014] 2 BHSJ No. 53, the Court of Appeal held:

> **"The Court will refuse an application for an extension of time if satisfied that the applicant has no realistic prospect of succeeding on**

the appeal. Further, the court can grant the application even if it [sic] not so satisfied where the issue raised may be one which the court considers should in the public interest be examined by the court or where, the court takes the view that the case raises an issue of law which requires clarifying."

[12] To sum up, in order for a court to grant leave to appeal, an applicant has to demonstrate that he has some reasonable prospect of succeeding on the appeal. The fact that a court has reached a clear view is not decisive of whether a challenge to its reasoning is arguable. On the contrary, it is a matter of judgment on an all-encompassing approach which is exercised without thorough re-argument of the same points as led to the judgment. The proposed grounds of appeal need to be considered by the court in exercising this judgment. However, it goes without saying that if there is no ground of appeal raised which has a reasonable prospect of success, leave to appeal must be refused. The court should then consider whether it is appropriate in all the circumstances of the case for the discretion to be exercised to grant leave. Discretion can only arise if there is some arguable basis of appeal.

Grounds of appeal – Prospect of success and general public interest

[13] As previously expressed, the Applicant advances 20 grounds of appeal in its Notice of Appeal Motion (No. 2) dated 16 July 2019. The grounds, in my opinion, raise the following issues:

(i) Should the judge sought to be recused hear the Recusal Application? (Ground 1);

(ii) Did the Court summarily dismiss the Stay Application without a fair hearing and without giving reasons? (Ground 2);

(iii) Should the Court have halted the cross-examination of the Applicant to permit him to appeal the Order of 18 June 2019 and to stay the proceedings? (Grounds 3 - 7);

(iv) Did the Judge apply wrong and improper procedure and law in dealing with the Recusal Application? (Grounds 8 - 11, 17- 20); and

(v) Issues surrounding the Decision of Her Ladyship for Mr. Glinton QC to withdraw his services as Counsel/Advocate to the Applicant (Grounds 12-16) ("the withdrawal issues")

Ground 1 – Should the judge sought to be recused hear the Recusal Application

[14] In Ground 1, the Applicant is aggrieved that another judge did not hear the Recusal Application which sought my recusal. This argument is fatally flawed as it is settled law that where a recusal application is made, it is for the judge sought to be recused to decide the application: see **Caves Co. v Higgs Estate** [1988] BHS J. No. 122 at para. 8 and **Re the Contempt of Maurice Glinton QC in the face of the Court on 28 September 2015** as well as paragraph 44 of the Judgment.

[15] In addition, the mere fact that Mr. Glinton QC and the Applicant are making an allegation against me to the Ethics Committee of the Bahamas Bar Association could not be a ground for recusal. Judges cannot yield to manifestly improper threats by litigants or advocates of consequences if they do not decide a question in their favour, whether carried out or not. It was necessary to investigate what facts were founded in relation to the Recusal Application which might lead the informed observer to conclude that there was a reasonable possibility of bias. The answer is plainly none. Further, it is generally undesirable that hearings be aborted unless the reality or appearance of justice requires such a step: **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 45.

Ground 2 – Stay Application

[16] The complaint by the Applicant is that the Court summarily dismissed the Stay Application by improper procedure and without a fair hearing of the said application and without giving reasons.

[17] The Stay Application was made by Summons filed on 26 June 2019. The Applicant relied on his affidavit filed on 17th June 2019 to support this application. The application was not given a date to be heard.

[18] The Stay Application is formulated in this manner:

> **"LET ALL PARTIES CONCERNED attend before a Judge of the Supreme Court in Chambers, at the Supreme Court (Annex), Andsbacher Building, Bank Lane, Nassau, The Bahamas, on ----------the ----------day of ----------, A.D., 2018 (sic) at 10:00 o'clock in the forenoon, or as soon as Counsel can be heard by Counsel on an application by Julius Trevor Bethel ("the Applicant") pursuant to R.S.C., (1978), Ord. 32, r. 6 and under the Court's inherent jurisdiction, for an ORDER that the Order for directions on case management dated 8th May 2019 and the Case Management Order made on 18th June 2019, and the proceedings in which the Orders were made by Her Ladyship Madam Justice Indra Charles may be set aside, *on the ground of miscarriage of jurisdiction* by the said Judge; and that pending the determination of the substantive application herein and/or the application for recusal of the learned (sic) by Summons filed on 17th June 2019, all further proceedings under or in execution of the said Orders be stayed, until further order."**

[19] It seeks a stay of operation of the Orders which I made on 8 May 2019 (essentially fixing 18 June 2019 as a date for case management and fixing trial dates for the substantive action) and the Case Management Order made on 18 June 2019 (fixing a date for the hearing of the Recusal Application and giving some directions for the hearing of the Recusal Application on 2 July 2019 including leave to cross-examine the Applicant on his affidavit made on 17 June 2019). The Summons also seeks a stay of all further proceedings until after its determination or determination of the Recusal Application.

[20] As learned Queen's Counsel for the Plaintiffs, Mr. Cohen correctly pointed out, the Stay Application, even on the terms sought, would have lapsed because the Recusal Application was determined.

[21] It is also correct that I did not express any reasons but, in my opinion, they are obvious. The Order is not yet sealed and, in the exercise of the well-known **Re Barrell Enterprises** jurisdiction [1973] 1 WLR 19, the Court is fully entitled to

revise its judgment by adding reasons –even to the point of reversing its judgment if it though fit: see also **The Queen v Gilbert Henry** [2018] CCJ 21 (AJ).

[22] I am in agreement with the Plaintiffs that the implied reasons are to be found in Order 31A of the Rules of the Supreme Court ("RSC") which requires the Court to actively case manage including acting on its own initiative to avoid protracted delays especially in fixing dates for case management conferences and trials. In fact, if this is not done, litigants sometimes have to wait for years before their matter is heard particularly if it is a three-week trial as is in this case. The 8 May 2019 date was fixed after Counsel for the Applicant failed to respond to a request for available dates either that week or soonest. Counsel for the Applicant was notified of the case management order of 8 May 2019. By 9 May 2019, Counsel was aware of 18 June 2019 but abstained from taking the action required by Order 31A to seek to vary that date. On 18 June 2019, the Court, in the presence of all other Counsel, telephoned the office of the Applicant's Counsel but to no avail. As learned Queen's Counsel Mr. Cohen suggested, such action not to respond was deliberate. Neither Mr. Glinton QC nor Ms. Glinton have explained their unavailability or suggested available dates. For Counsel to simply say to another Counsel and to the Court that "I am not available" and nothing more, exhibits, in my view, disrespect. That said, the case management order of 18 June 2019 gave some directions for the hearing of the Recusal Application to be heard on 2 July 2019. The Recusal Application was heard and determined.

[23] I observe that the Stay Application seeks a stay of the Orders on the ground of miscarriage of jurisdiction –whatever that means - but provides no other reason: cogent or otherwise – why the Court should grant leave to appeal and/or stay the proceedings. As I see it, the only reason for even filing such an application was to thwart the hearing of the Recusal Application. There could be no sensible reason why any applicant would wish to appeal a judge's order fixing hearing and trial dates. An obvious reason is that the Applicant has, to date, stubbornly refused to accept the well-settled principle that the judge who is sought to be recused ought to hear the Recusal Application.

[24] In my opinion, ground 2 lacks merit.

Grounds 3 to 7 – Cross-examination of the Applicant

[25] Grounds 3 to 7 could be subsumed under the sub-heading of cross-examination of the Applicant. Learned Counsel for the Applicant, Ms. Glinton says that the Applicant was forced to testify without being given an opportunity to apply for leave to appeal the Order made on 18 June 2019 insofar as the Order purported to grant the Plaintiffs leave to cross-examine the Applicant on his affidavit and to seal a Writ of Subpoena *ad testificandum* (yet another Order that was made whilst the Recusal Application was pending).

[26] Learned Counsel Ms. Glinton submits that the Court did not appreciate the nature of the application before her which she treated as an application on behalf of the Plaintiffs rather than an application on behalf of the Applicant. She next submits that the Court subverted the rights of the Applicant to due process of law by ordering him into the witness box, acknowledging that he has a right to apply for appeal but nonetheless refusing to hear such an application with the obvious consequence that any appeal therefrom would be rendered nugatory as the Recusal Application would have already gone on to consider such an application.

[27] The Applicant further submits that the primary objection of the Plaintiffs was that the evidence in support of the application was unsustainable insofar as the Applicant failed to properly identify the source of his beliefs. The Applicant also submits that, in such circumstances, the proper course of action is to strike out or disregard the offensive paragraphs or the affidavit in its entirety. Learned Counsel Ms. Glinton argues that to allow the Applicant to be cross-examined on an affidavit to which objection was taken for non-compliance with the RSC was improper in law and procedure.

[28] The Applicant also submits that the Court should not have permitted Mr. Cohen QC to cross-examine him on private and privileged communications with his Counsel and to be cross-examined on matters which were irrelevant to the

application before the Court and which could only be seen as an attempt to undermine the Complaint of the Applicant (and Mr. Glinton QC) made to the Bar Council which was not an issue before the Court and which was not a matter on which the Court could make any determination.

[29] The Applicant contends that the cross-examination issues have merit and are also of general public significance insofar as he challenges a Judge's capacity to act on an Order even whilst aware of an application for leave to appeal the said Order and a Stay pending appeal, particularly in circumstances where to do so would subvert the purpose of such appeal.

[30] Learned Counsel Ms. Glinton submits that the Applicant seeks to clarify the purpose and appropriateness of applications for issuance of subpoenas, the limits of cross-examination on an affidavit, the extent to which the Applicant may be questioned as to his private instructions to Counsel and the propriety of the Court having made an order for his attendance and cross-examination whilst there is a pending application for her recusal and where the only logical purpose of the application was to cross-examine the Applicant on the contents of the exhibited Complaint to the Bar Council which complaint clearly referred to circumstances which implicated her in her judicial capacity.

[31] The complaints by the Applicant boil down to the following: (i) the failure of the Court to give the Applicant an opportunity to apply for leave to appeal and to set aside the Order of 18 June 2019; (ii) there was no valid reason for the issuance of a subpoena for the Applicant; (iii) limits to cross-examination of a deponent; and (iv) permitting the Plaintiffs to ask questions seen as "privileged" between Counsel and Client.

[32] As I stated above, there is no good reason why any applicant would wish to appeal a judge's order fixing dates for the hearing of outstanding applications especially when Counsel for the Applicant chose not to show up in Court. All attempts including telephone attempts to reach his Counsel failed.

[33] With respect to the Applicant being subpoenaed to attend Court, this arose because the Applicant and his Counsel have failed to show up in Court on two prior occasions. Counsel for the Plaintiffs wished to cross-examine the Applicant who swore an affidavit and the only sensible way to bring him to Court was to issue a subpoena. Some might consider it to be an overreaching judgment call but at the end of the day, the Applicant came and was cross-examined. Much was made that the Applicant's affidavit could have been amended rather than him being subjected to cross-examination. As I understand the law, a deponent who swears an affidavit or a witness statement subjects himself to cross-examination. The duty of the Court is to investigate and establish the facts which enables the Court to test the veracity of what is contained in the affidavit. In my view, it was important for me to determine whether the assertions contained therein came from the Applicant or from any other source. At the end of the day, the Court found that the evidence of the Applicant consisted of what Mr. Glinton QC had told him: see: paragraphs 74 to 83 of the Judgment.

[34] With respect to the Applicant being compelled to answer questions which are privileged, this is a far cry from the truth. The single question referred to the 10 May 2019 letter in which Mr. Glinton QC stated to Charles J: "I am instructed that…." In relation to the question asked of whether the Applicant had so instructed Mr. Glinton QC, there could be no privilege because the statement had been freely and overtly made by Mr. Glinton QC.

[35] There is no merit in these grounds and they ought to fail.

Grounds 8 - 11, 17- 20 - The recusal issues

[36] The Applicant submits that the recusal issues raised in the Intended Notice of Appeal are both of substantial merit and of general public importance. Firstly, there is nothing in this Recusal Application that is of general public importance and making a bald statement will not suffice in law.

[37] On the issue of reasonable prospect of success, the Applicant relies on the Court of Appeal decision in **Sir Jack Hayward v Lady Henrietta St. George et al** [2007/SCCivApp. No. 51] where the Court held that a Supreme Court Judge ought to **thoroughly consider the application for recusal before proceeding with <u>any other hearing</u> in the matter.**

[38] Learned Counsel Ms. Glinton argues that my judgment and indeed the procedure which I followed, are directly at variance with the Court of Appeal decision insofar as I heard applications even in the face of the Applicant's then pending Recusal Application filed on 17 June 2019.

[39] She submits that if I am correct, the Court of Appeal decision may need to be amended as it would mean that faced with an application for recusal, a judge is capable of hearing certain kinds of applications which she must have been able to pre-determine were of such insignificance as to operate outside the Court of Appeal's direction that the recusal application be heard before the judge proceeds with any other hearing; the language of which is unequivocally mandatory and not discretionary.

[40] Further, Ms. Glinton contends that whilst the Applicant has always accepted that the general rule is for the judge whose recusal is being sought to hear the application, the facts of this case present otherwise as the Court had already gone on to hear other applications, including the Judicial Trustee's application for extension of time, also filed on 17 June 2019, in which to comply with an *ex parte* Order of 18 March 2019 even whilst she had knowledge of pending applications for the Judicial Trustee's removal and for an Order setting aside the *ex parte* Order.

[41] Ms. Glinton submits that the Court determined that it was capable of hearing the extension of time application either because of its urgency or because she deemed such application to be trivial in its nature that it could be determined regardless of the Recusal Application.

[42] Ms. Glinton further submits that there is substantial merit under this sub-head which is also of general public importance insofar as the Applicant seeks to clarify whether there are exceptions to the Court of Appeal decision that a judge properly considers an application for recusal before proceedings with any other applications.

[43] Some brief facts on this issue are that on 17 June 2019, the Applicant filed his Recusal Application. The application had no hearing date and no indication before whom it was to be heard. It became obvious that the Applicant did not wish that I hear the Recusal Application. In fact, Mr. Glinton QC has expressly stated to Winder J on 4 April 2019 that "*I won't be seen in that Court:*" paragraph 86 of the Judgment. So, to now complain that the Court proceeded to hear other applications before the Recusal Application is untruthful, to say the least.

[44] And what other applications has the Court heard before the Recusal Application? On the said day that the Applicant filed his Recusal Application, the Judicial Trustee filed a Summons seeking an order pursuant to Order 31A Rule 18 (2) (b) of the Rules of the Supreme Court 1978 and/or the inherent jurisdiction of the Court for an extension of time to 31 August 2019, to deliver to the Court, the results of the audit of the trust accounts of the Settlement under the Order dated 18 March 2019. So, the truth of the matter is that both applications were filed on the same day. The Court is not privy to which application was filed first.

[45] The Judicial Trustee's application was of an urgent nature. It sought an extension of time for the submission of trust accounts audited by Mr. Igal Wizman of Ernst & Young. Previously, by order of Winder J dated 30 March 2019 and filed on 10 April 2019, the Judicial Trustee was given liberty to engage Mr. Wizman and to submit the audit by 30 June 2019.

[46] In any event, the Court cannot be crippled because there is a pending Recusal Application. It is a fact that Counsel for the Applicant, Mr. Glinton QC has publicly indicated that he will not appear in my Court. In my opinion, the Firm of Maurice O.

Glinto & Co. has deliberately absented themselves from this Court when they were duly notified of both hearings of 8 May and 18 June 2019 respectively.

[47] In Ground 11, the Applicant complains that the Court failed or refused to properly consider all of the grounds for recusal before her, especially those as to her former dealings with this action, insofar as I have previously made Orders appointing the Joint Judicial Trustee and Sole Judicial Trust of the Trust on *ex parte* applications made by persons with no interest in and under the Discretionary Trust, which cannot be sustained in law.

[48] As the Plaintiffs correctly pointed out, the fact that I granted an *ex parte* application for the appointment of a Judicial Trustee is no basis for the criticism of my impartiality. Judges commonly hear applications to discharge and/or vary their own *ex parte* orders and have done so. The objection raised that the Plaintiffs had no interest in the Settlement is a fundamental issue in this action – the Plaintiffs contend that their exclusion was void or voidable. If they are right, the inclusion of the Applicant as a beneficiary as part of the same exercise or discretion must also be void or voidable. There was obviously sufficient interest to maintain the application. It is important to point out that Mr. Glinton QC has described to the Court of Appeal his application to remove the Judicial Trustee as an application **to replace him** so it is purely the candidate rather than the appointment which is in issue.

Grounds 12 -16 –the withdrawal issues

[49] The Applicant submits that the decision by the Court in the Judgment that Mr. Glinton QC ought to withdraw his services as Advocate/Counsel for the Applicant due to lack of independence is subject to challenge because of (i) the Decision having been made without a Summons moving the Court or an Affidavit in support thereof; (ii) The Decision having been made, consequently, on an interlocutory application without proper or any prior notice to the Applicant or his leading Counsel ; (iii) the Decision having been made without Mr. Glinton QC being afforded an opportunity to give any evidence in response thereto; and (iv) the

Decision being entirely wrong in law and as a matter of substantive procedure, given that Mr. Glinton QC has absolutely no personal interest in the subject matter of the claim which could affect his impartiality as to the issues raised.

[50] The Applicant submits that the withdrawal issues have substantial merit and are of general public importance insofar as the Applicant raises questions as to (i) the inability of a Supreme Court Judge to sanction Counsel as opposed to the Bar Council; (ii) the matters to be considered when questioning the independence of Counsel; (iii) the proper procedure to be followed where a question is raised as to the independence of Counsel (i.e. whether such matters ought to be referred to the Bar Council, and whether an Order can be made removing Counsel without a Summons and *ex parte* the Counsel proposed to be removed).

[51] Making an Order that Mr. Glinton QC withdraws his services as Advocate/Counsel for the Applicant without giving him an opportunity to be heard was a slip/mistake on the part of the Court. The Court has since corrected that slip: see Judgment dated 5 November 2019. Since that date, Mr. Glinton QC has been given an opportunity to be heard. He should avail himself of that opportunity.

[52] The withdrawal issues are therefore moot.

Stay of proceedings

[53] Having refused leave to appeal, the next question is whether the proceedings should be stayed.

[54] In her written submissions, learned Counsel Ms. Glinton has comprehensively and properly set out the law on Stay of Proceedings. I largely adopt them for purposes of this Ruling.

The Law

[55] Order 31A r. 18(2)(d) provides:

"(2) Except where these Rules provide otherwise, the Court may —

> **(d) stay the whole or part of any proceedings generally or until a specified date or event;"**

[56] Further, rule 12(1)(a) of the Court of Appeal Rules, 2005 provides:

> **"(1) Except so far as the court below or the court may otherwise direct:**
>
> > **(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below."**

[57] It is well-established that a judge has a wide discretion with regards to the grant of a stay. This is confirmed by the learned authors of **Odgers On Civil Court Actions** at page 460:

> **"Although the court will not without good reason delay a successful plaintiff in obtaining the fruits of his judgment, it has power to stay execution if justice requires that the defendant should have this protection[…] [The] court has wide powers under the Rules of the Supreme Court."**

[58] As to how that discretion ought be exercised in these circumstances, the court's considerations have only broadened with the developing case law, beginning, most notably, with the decision of Brett, LJ in the case of **Wilson v Church No. 2** [1897] Ch. 12 459 wherein he stated:

> **"This is an application to the discretion of the Court, but I think that Mr. Benjamin has laid down the proper rule of conduct for the exercise of discretion, that where the right of appeal exists, and the question is whether the fund shall be paid out of Court, the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory."**

[59] This was further amplified in **Linotype-Hell Finance Ltd. v Baker** [1993] 1 WLR 321 wherein Staughton L.J. opined at page 323:

> **"It seems to me that, if the defendant can say that without a stay of execution he will be ruined and that <u>he has an appeal which has some prospect of success</u>, that is a legitimate ground for granting a stay of execution."**[Emphasis added]

[60] Learned Counsel Ms. Glinton submits that if the stay is not granted, the appeal will be rendered nugatory and the Applicant faces potential ruin insofar as (i) the Court will no doubt continue to make Orders, which Orders will either have to be set aside (thereby occasioning a waste of the Court's time and resources) or the Orders will not be set aside and the Applicant will not have the benefit of the Orders he originally sought; (ii) the Applicant will be required to engage new Counsel who will require a new retainer and will also need sufficient time to become familiar with the entire history of this action, which having been commenced in 2010, is quite extensive; (this is not entirely correct as Ms. Glinton herself has argued many applications in this Court and may continue to do so) and (iii) the Applicant's evidence given in cross-examination may be used against him.

[61] Anderson J rightly noted in **Wilbert Walker v The Jamaica Public Service Company Limited et al** (Claim No. C.L. W 186 of 1995 in the Supreme Court of Judicature of Jamaica).

> **"Halsbury's Laws of England 4th Edition, Volume 17 and paragraph 455 states the following proposition, which I adopt:**
>
> > **The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will as a rule, only grant a stay if there are special circumstances, which must be deposed to on an affidavit unless the application is made at the hearing.**
>
> **Before Linotype, the better view was that the only "serious injury" which would allow the court to exercise its discretion in favour of granting a stay of execution pending an appeal was the likelihood that if the appeal were successful, the victory would be Pyrrhic and rendered nugatory because of the inability of the litigant who had received his award to repay the sums so received. Linotype-Hell made it clear that where execution would ruin the debtor, this would be sufficiently "serious injury" to allow for the court to grant a stay."** (Emphasis Added.)

[62] The Applicant submits that, for all the reasons above, as detailed in his Affidavit, he risks "serious injury" if a stay is not granted pending appeal, which appeal may be, and ought to be, heard expeditiously by the Court of Appeal given the nature of the Order appealed from and the implications therein.

[63] The Applicant submits that such a stay may be subject to the condition that the Applicant file alongside his Notice of Motion a Certificate of Urgency, alerting the Court to the particular issues arising therein and the fact that the action has been stayed pending such appeal.

[64] The Plaintiffs vehemently object to a Stay of Proceedings. They say and quite correctly, that no less than 10 applications for a stay have been made before the Supreme Court and/or the Court of Appeal since 4 April 2019 and the stay which is now sought is to stop the progress of the proceedings outright pending a determination by the Court of Appeal of an appeal. According to the Plaintiffs, it would be entirely inappropriate to grant a stay pending appeal in the circumstances of abuse of process found in the Judgment of the Court.

[65] The Plaintiffs also submit that the deliberate and improper obstruction by Mr. Glinton QC on behalf of the Applicant of the proper progress of this action has already continued for far too long. They say that there was a deliberate failure to respond to requests for dates including by the Court itself, culminating in the refusal to consent to a hearing before Charles J. The Plaintiffs also refer to what appear to be nothing short of deliberate lies told by Counsel to the Listing Officer in the letter written by Mr. Glinton QC dated 29 April 2019 with a view to altering the 18 June 2019 date. Although unavailability for that date was subsequently alleged, it was not alleged to the Listing Officer on 29 April 2019. The alleged lack of availability and when it occurred has never been explained. I agree.

[66] The consequences of the deliberate obstruction are not only the very large costs which the Applicant will have to pay to the Plaintiffs, the Judicial Trustee and the other Defendants but also the damaging effect on the progress of both the action itself and the actions by the Judicial Trustee in respect of recovery of misappropriated assets of the Settlement.

[67] For all of the reasons advanced by the Plaintiffs which I agree with, I will refuse to stay these proceedings as the appeal of the Applicant is nothing but a hopeless

attempt to stall the smooth progress of this long outstanding matter before this Court.

Conclusion

[68] In the premises, I will refuse Leave to Appeal as well as a Stay of these Proceedings. The Plaintiffs, being the successful party in this application, are entitled to their costs which will be summarily assessed by this Court on Thursday, 6 February 2020 at 2:30 p.m. Counsel for the Plaintiffs is to submit their Bill of Costs for this application within 21 days hereof.

Dated 31st day of December, A.D. 2019

Indra H. Charles

Justice