COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2020/CLE/gen/0000

BETWEEN

IN THE MATTER OF CONTEMPT OF COURT OF DONNA DORSETT-MAJOR ON 3 JUNE 2020

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Murrio Ducille with him Ms. Latia Williams of Ducille Chambers for the Contemnor, Donna Dorsett-Major

Mrs. Kayla Green-Smith, Assistant Director of Legal Affairs of the Attorney General's Chambers for the Amicus Curiae

Hearing Date: 27 November 2020

Civil - Contempt proceedings – RSC Order 31A Rule 18(2)(d) - Stay pending appeal - Grounds on which stay is granted - Allegation of risk of being financially ruined if stay is not granted - Need for full frank and clear evidence in support of application for stay- Whether some prospect of success –Principles on which discretion should be exercised – Whether application is to further delay fair hearing of "show-cause" summons - Process must be complete – Whether Amicus "friend" of court is entitled to costs

The Applicant seeks a stay of contempt proceedings which have commenced against her in this Court since early August 2020. Since then there have been a myriad of adjournments to facilitate her to bring a Constitutional Motion in the Supreme Court and a Stay Application in the Court of Appeal, both of which were dismissed.

The gist of the Applicant's application for a stay is that her appeal of the Ruling of Klein J. in the Constitutional Motion has a real prospect of success and that, if a stay is not granted, she will be prejudiced and face financial ruin, not only where her defence is concerned but personally as well, having been an upstanding member of the Bahamas Bar for approximately 16 years.

The Amicus opposes the application on three principal grounds namely (i) to grant a stay would not best accord with the interest of justice in these circumstances where there are proceedings in progress which guarantees the Applicant's constitutional right to a fair hearing, (ii) the Applicant's grounds of appeal does not disclose a reasonable prospect of success and (iii) the Applicant has not provided the Court with any evidence to support the grant of a stay.

HELD: Dismissing the Application for a stay pending appeal with costs to the Amicus of $5,000.

1. Order 31A rule 18(2) provides that the Court may stay the whole or part of any proceeding generally or until a specified date or event.

2. It is well-established that a judge has a wide discretion with regard to the grant of a stay. As a general rule, the court ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory: **Wilson v Church No. 2** [1879] 12 Ch,D. 454 at 459.

3. Where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application if the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success: **Linotype-Hell Finance Ltd. v Baker** [1993] 1 WLR 321 at 323, per Staughton L.J.

4. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case but the essential question is whether there is a risk of injustice to one or the other of the parties if it grants or refuses the stay: **Hammond Suddards Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 at [22] and **Leicester Circuits Ltd v Coates Brothers plc** [2002] EWCA Civ 474 at [13] applied.

5. The Applicant has failed to demonstrate that the interests of justice best accords with the granting of a stay. In addition, the Applicant's grounds of appeal are hopeless and have no reasonable prospect of success.

6. Further, the Applicant has not produced any evidence to demonstrate that if the stay is not granted, she faces financial ruin. Bald assertions do not amount to evidence.

7. The Court is entitled to give directions in a manner it sees fit to ensure that cases are dealt with effectively and efficiently in order to save time and expense. Giving directions to file affidavits and submissions is not unknown to the realm of criminal law. The Applicant is using this non-issue as a ploy to delay the continuation of the show-cause summons and/or to ambush the Court and Counsel for the Amicus. Hence, the reason why she had flouted at least five directions orders of this Court.

8. If the Applicant is dissatisfied with the findings of the Court after hearing the show-cause summons, there is an appeal available to her. But she ought not to stagnate the process by instituting a misconceived application.

9. The Applicant urges the Court not to award costs to the Amicus because an amicus is not a party but a "friend" of the court. In the present case, the Court invited the Amicus to participate. The Amicus has assisted the Court by providing sound, skillful and persuasive arguments and thus, entitled to costs. The South African cases of **Komape v Minister of Basic Education and others** [2020] 2 LRC 362 at para 7 and **Hoffmann v South African Airways** (CCT17/00) [2000] ZACC 17 are distinguishable and do not reflect the law on costs in The Bahamas.

10. Costs are discretionary: see section 30(1) of the Supreme Court Act. See also Order 59, rule 2(2), rule 3(2) and rule 7 of the Rules of the Supreme Court. Costs are also reasonable. The Applicant will pay costs of $5,000 to the Amicus.

RULING

Introduction

[1] By Summons dated 6 November 2020 and filed on 23 November 2020, Donna Dorsett-Major ("the Applicant") seeks a stay of the proceedings inclusive of any court orders in relation to the matter of the Contempt of Court of Donna Dorsett-Major dated 23 July 2020. This application is made pursuant to Order 31A, Rule 18(2) (d) of the Rules of the Supreme Court ("RSC") and/or the inherent jurisdiction of the Court and it is supported by an affidavit of the Applicant sworn to on 4 November 2020 and filed on 23 November 2020.

[2] The gist of the Applicant's application is that her appeal of the Ruling of Klein J. in the Originating Notice of Motion ("the Constitutional Motion") instituted against The Director of Public Prosecution and The Hon. Attorney General of the Commonwealth of The Bahamas ("the Respondents") has a real prospect of success and that, if a stay is not granted, the Applicant will be prejudiced and face financial ruin, not only where her defence is concerned but personally as well, having been an upstanding member of the Bahamas Bar for approximately 16 years.

[3] The Amicus Curiae ("the Amicus") opposes the application on three principal grounds namely (i) to grant a stay would not best accord with the interest of justice in these circumstances where there are proceedings in progress which guarantees the Applicant's constitutional right to a fair hearing, (ii) the Applicant's grounds of appeal does not disclose a reasonable prospect of success and (iii) the Applicant has not provided the Court with any evidence to support the grant of a stay. The Amicus also submits that the Application for a stay is misconceived and ought to be dismissed.

[4] For reasons given below, I will dismiss the Applicant's application for a stay pending appeal because of (i) the Applicant has not produced one shred of evidence to satisfy the Court that she will be faced with financial ruin and (ii) the

Constitutional Motion has no real prospect of success. Indeed the grounds of appeal identified in the Notice of Appeal filed on 13 October 2020 are doomed to fail as they are devoid of substance and they are nothing more than bald, vague and general assertions. Furthermore, to grant a stay would not best accord with the interest of justice where there are proceedings in progress which guarantees the Applicant's constitutional right to a fair hearing

Background facts

[5] Some background facts will put this case in its proper perspective.

[6] The Court with all the parties visited the *locus in quo* on 22 February 2019 in the case of **Alan R. Crawford et al v Christopher Stubbs et al** [2015/CLE/gen/00765]. On 1 May 2019, the Court resumed the hearing of this part-heard trial for Counsel to make closing submissions. The Applicant and her Counsel were present and participated in the trial. No complaint was made of any impropriety of the Court at the *locus in quo*. One year later on 1 May 2020, the Court delivered a written judgment and found in favour of the Plaintiffs. The Court found among other things that the First and Second Defendants had unlawfully done some acts and consequently, they are to pay the Crawfords damages to be assessed and costs to be taxed if not agreed. Further, the Court found that the Applicant (who was the Third Defendant sued by the Crawfords) was guilty of professional negligence and liable in damages to the Crawfords. The Court then ordered the assessment of damages and taxation of costs take place on 17 June 2020 at 11:00 a.m.

[7] Shortly after the delivery of the Judgment, the First and Second Defendants filed a Notice of Motion seeking my recusal from the hearing of the aforementioned outstanding matters. The application was supported by the affidavit of the First Defendant Christopher Stubbs sworn to on 26 May 2020 and the affidavit of the Applicant sworn to on 3 June 2020.

[8] On 6 July 2020, I dismissed the recusal application and, in a Revised Ruling solely to add Mr. Carlton Martin instead of the law firm of Martin & Martin (to which Mr. Martin had no objection), the Court found that:

> **"[37] For all of the reasons stated above, I hold that the recusal application is unfounded and without merit and is aimed at bringing the Court into disrepute. I would therefore dismiss the recusal application with costs to the Plaintiffs. If costs are not agreed, I will summarily assess on Monday 24 August 2020 at 10:30 a.m.**
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> **[38] Having found that Mrs. Major has fabricated the contents of her Affidavit, I will cite her for Contempt of Court. The appropriate charge is being prepared and will formally be read to her on 23 July 2020 at 12.00 noon or shortly thereafter in Open Court. Mrs. Major will have an opportunity to be heard and be represented by Counsel.**
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> **[39] In addition, Mr. Carlton Martin of the law firm of Martin & Martin drafted the Major Affidavit. Had Mr. Martin carry out a proper investigation into this matter, he would have discovered that the allegations in Mrs. Major's affidavit consists of untruths and fabrications".**

[9] On 23 July 2020, the Applicant and Mr. Carlton Martin were served with Summons issued by the Court to show cause why they should not be committed for contempt. The contempt proceedings involving Mr. Martin and the Applicant commenced on 4 August 2020. Mr. Martin offered an apology then and there and so, the contempt proceedings against him took a different course which is not germane to the present application.

[10] However, since 4 August 2020, this Contempt Proceedings against the Applicant have not ready gotten off the ground except that the motion to show cause and the particulars were read to the Applicant (who essentially stood by her affidavit). She was represented by Counsel. Since that date, the Court has given directions for the hearing of the contempt proceedings but the Applicant has not fully complied with the orders of the Court.

[11] Now, in the Supreme Court on 10 August 2020, the Applicant filed the Constitutional Motion which was supported by an affidavit sworn on the same date, seeking the following reliefs:

a) A Declaration that the rights afforded to the Applicant pursuant to Articles 19, 20, 23 and/or 28 of the Constitution of The Bahamas ("the Constitution") have been or are about to be infringed;

b) An Order that the contempt proceedings in relation to the Applicant be permanently stayed and therefore discontinued;

c) In the alternative, an Order transferring the contempt proceedings from the carriage of the Honourable Madam Justice Charles to another judge of the Supreme Court.

[12] On 19 August 2020, the Respondents filed a Summons pursuant to Order 18 Rule 19 (1) (a) (b) (c) and (d) of the RSC or alternatively under the inherent jurisdiction of the Court to strike out the Originating Summons on the grounds that it discloses no reasonable cause of action. Further that it is scandalous, frivolous and vexatious. Further that it may prejudice, embarrass, delay the fair trial of the action and is an abuse of the process of the Court.

[13] On 13 October 2020, Klein J delivered a comprehensive Ruling in the Constitutional Motion: **Donna Dorsett-Major and The Director of Public Prosecution and The Hon. Attorney General of the Commonwealth of The Bahamas** 2020/CRIM/Con/0005.

[14] In relation to the Applicant's claim for breach of the right to a fair hearing, the Court made the following findings at paras 59, 66 and 73:

> **"Has the applicant been assured the procedural protections for a fair trial and is there any basis for an apprehension that the hearing cannot be fair? In my judgment, and for the reasons briefly explained below, I do not think that the Applicant can make out a case for breach of the right to a fair hearing, whether as a result of the conduct of the proceedings so far, or prospectively.**
>
> **66. Secondly, the finding that the affidavit is false is not a finding of "guilt" of contempt although the Applicant erroneously asserts that there has been a finding of contempt, a point which I address later. Neither does the finding displace the presumption of innocence.**

> **Whenever the court issues a show-cause summons, it is predicated on a finding that the alleged contemnor has done something, i.e. that there is conduct constituting an *actus reus*, which if the requisite *mens rea* is established at trial and there is no available defence, may amount to contempt. Both must be present to constitute a criminal contempt and it appears that only an intention to interfere with or impede the course of justice will satisfy the mental element to commit for contempt.**
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> **73. Third, the Applicant contends that the judge has not only found her 'guilty' of filing a false affidavit without hearing her, but that in fact the Judge found her in *contempt* without a hearing. This is obviously incorrect. A citation for contempt is not a finding of contempt (see *Keod Smith et. Al v The Queen* (SCCivApp & CAIS No. 96 of 2015). As indicated in the authorities cited above, the standard for finding criminal contempt equates to the criminal standard of beyond a reasonable doubt…."**

[15] In relation to the right not to be deprived of personal liberty except by due process the Court noted the following at para 78:

> **"I agree with counsel for the respondents, however, that the allegation in this regard is wholly premature. The substantive hearing of the contempt charge against the applicant has not yet concluded and it would be futile and speculative to hypothesize that the process will be unfair or cannot be fair. These proceedings are pending and the Judge is able, even during the course of the hearing, to take measures to protect the due process rights of the applicant, if thought necessary. Further, despite the fears of the applicant, and not to state the obvious, it is not a foregone conclusion that she will be found guilty of contempt, and therefore potentially exposed to a deprivation of liberty. She is entitled to defend against the contempt charge and to appeal the outcome of the same, as well as to apply for bail pending any appeal in the event of a custodial sentence".**

[16] In relation to availability of the appeal process, the Court noted inter alia the following at paragraph 107:

> "**I agree with the Respondents that the availability of an appeal both with respect to the recusal hearing (for which proceedings have already been started) and any decision on the contempt charges would provide adequate alternative redress…."**

[17] In relation to a stay, the Court observed at para 118:

> **"In any event, there is nothing on the facts of this case that would remotely come near to justifying a stay, based on the most recent statement of the law as to the circumstances in which the court might exercise its jurisdiction to stay criminal proceedings for abuse of process. A stay is only justified where (1) it would be impossible to give the accused a fair trial; or (ii) where it is necessary to protect the integrity of the criminal justice system (for example, from the executive misconduct): *Warren v Attorney General of Jersey* [2011] UKPC [2012] 1 A.C. 22. Obviously, to the extent that the principles apply to contempt hearing - which analogically they must since such a hearing is assimilated to a criminal hearing– it is only the first limb that would be relevant and, as has been indicated, there is no basis on which it can be said that the applicant cannot be accorded a fair hearing."**

The Application before the Court of Appeal

[18] The Applicant filed a Summons pursuant to Order 29 (1)(c) and or the inherent jurisdiction of the Court for a stay of proceedings in relation to the matter of Contempt of Court of Donna Dorsett-Major: **Donna Dorsett-Major v. The Director of Public Prosecution et al SCCrApp. No. 113 of 2020.**

[19] On 11 November 2020, the Court of Appeal dismissed the Applicant's application for a stay and awarded costs to the Amicus to be taxed if not agreed. In dismissing the Applicant's application for a Stay, the Court of Appeal held:

> **"The Rules of the Supreme Court Order 31 Rule 18 (2) (d) makes provision for a stay of the whole or part of any proceedings generally or until a specified date or event. Rule 27 (5) of the Court of Appeal Rules provides that an application should be made in the first instance to the court below.**
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> **In the present case the applicant did not apply to Charles, J pursuant to Order 18 Rule 18 (2) (d) and therefore there was no ruling handed down by Charles, J from which an appeal can emanate. As such the Court's discretion pursuant to Rules 24 and/or 29 could not be invoked.**
>
> **Further, the Urgent Summons was filed in the applicant's appeal against the decision of Klein, J. The Court cannot be moved to stay a hearing not the subject of an appeal before this Court."**

The present application for stay of proceedings

[20] As already stated in paragraph [1] (above) the Applicant applied for a stay of the contempt proceedings pursuant to Order 31A Rule 18(2)(d) of the RSC and/or the inherent jurisdiction of the Court.

The law on stay pending appeal

[21] Order 31A Rule 18(2)(d) provides that the Court may stay the whole or part of any proceedings generally or until a specified date or event.

[22] 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."**

[23] 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."**

[24] 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** [1879] 12 Ch.D. 454 at 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, <u>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</u>."**[Emphasis added]

[25] This was further developed 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]

[26] So, where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application if the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success.

[27] Some additional principles that the Court should be guided by in considering an application for a stay pending an appeal is outlined in the case of **Hammond Suddards Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 at para 22 *(per Clarke JL and Wall J):*

> ***"*By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. <u>It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay.</u> In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"**

[28] Guidance was also given by the English Court of Appeal in **Leicester Circuits Ltd v Coates Brothers plc** [2002] EWCA Civ 474. At para 13, Potter LJ said:

> **"The proper approach is to make the order which best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice**

of that approach is in doubt, the answer may well depend on the perceived strength of the appeal."

Grounds of appeal

[29] The Grounds of Appeal of the Ruling of Klein J is contained in the Applicant's (Appellant in the Appeal – for consistency "the Applicant")) Notice of Appeal filed on 13 October 2020. I shall fully set out the seven grounds of appeal as appear in the Notice of Appeal.

1. That the Learned Judge erred in fact and/or law when he dismissed and struck out the Applicant's Constitutional Motion;

2. That the Learned Judge erred in fact and/or in law when he ruled that the Declarations sought by the Applicant were bound to fail;

3. That the Learned Judge erred in fact and/or in law when he ruled that he had no jurisdiction to transfer the matter to another Judge of concurrent jurisdiction;

4. That the Learned Judge erred in fact and/or law when he ruled that there were alternative remedies of redress;

5. That the Learned Judge erred in fact and/or law when he ruled that the Constitutional Motion was an abuse of process;

6. That the Learned Judge erred in fact and/or law when he ruled that the Appellant's claims were not made out; and

7. The decision was unreasonable and cannot be supported having regard to all the circumstances of the Appellant and his case.

[30] In her affidavit in support of the application for a stay of these proceedings, the Applicant states that her appeal of the Ruling of Klein J raises five critical issues which ought to be fully addressed by the Court of Appeal namely:

1. Jurisdiction
2. The right to a fair hearing
3. The right not to be deprived of personal liberty
4. The right of freedom of expression and
5. The transfer of the matter to another Court of the Supreme Court.

[31] As learned Counsel for the Amicus correctly pointed out, the Applicant has not demonstrated how the learned judge erred in fact and/or law when he struck out the Constitutional Motion; ruled that the declarations sought by the Applicant were bound to fail; he had no jurisdiction to transfer the matter to another judge of concurrent jurisdiction; that alternative remedies of redress were available to the Applicant; the Constitutional Motion was an abuse of process and that the Applicant's claims were not made out. In my considered opinion, the seven grounds of appeal are bald, vague, general and devoid of substance.

[32] That being said, I now turn to the Contempt Proceedings which is part-heard and which the Applicant is seeking to have stayed pending the appeal of Klein J's Ruling.

Contempt Proceedings

[33] The principal statutory framework governing contempt proceedings is RSC Order 52. As Mrs. Green-Smith correctly pointed out, these rules clearly outline the provisions for contempt proceedings and guarantees due process and the principles of Natural Justice in that provisions are made for the hearing of these matters in open court except in certain circumstances. Further, if during the hearing the contemnor expresses a desire to give oral evidence on his own behalf, he/she shall be entitled to do so.

Whether judges can initiate contempt proceedings on their own motion

[34] Order 52 of the RSC deals with contempt. Order 52 Rule 4 preserves the common law right of a judge to make an order of committal of his own motion against a

person guilty of contempt: see also the judgment of Gonsalves-Sabola J in **Caves Co. v Higgs Estate** [1988] BHS J. No.122 which is sound authority for this principle.

[35] Additionally, in the case of the **Matter of the Contempt of Maurice Glinton Q.C., In the Face of the Court on 28th September, 2015 and In the Matter of the Contempt of Court of Maurice Glinton QC on 9th October, 2015** No. 1 and 2 of 2015, our Court of Appeal affirmed the decision of Gonsalves-Sabola J in **Caves Co. v Higgs Estate** in relation to jurisdiction of the Court to hear an order for committal of its own motion. At paras 17 to 18 of the Judgment, Allen P stated:

> **"17. The second assertion made by Counsel under the head of Recusal was that the panel ought not to be a judge in its own cause, in as much as the alleged acts of contempt occurred in proceedings before the panel. In this regard, the decision of Gonsalves-Sabola, J in Caves Co. v. Higgs Estate [1988] BHS J. No. 122, is illuminating. Justice Gonsalves-Sabola, J. at paragraph 8 of his decision stated:-**
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> > **"8. Where a Court must rise to the protection of its own authority and integrity, it is wholly inappropriate for the judge contemned to abdicate his responsibility by saddling another judge of the Court with the duty of dealing with the contempt committed. The historical development of the common law power of a judge to punish for contempt has proceeded independently of any consideration of the nemo judex rule of natural justice. Conceptually, the judge is not a "party" to a cause nor is the contempt he deals with his cause. It is the highest attestation to the character expected in a judge that the law as developed has never encouraged question of his capacity and inclination to balance with objectivity the multiple roles he plays where a contempt is committed within his cognisance."**
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> **18. In as much as the alleged behaviour was in the face of the Court, there is no tribunal more eminently placed to hear the matter in our view, than the panel before which the behaviour occurred. Indeed, as Holyroyd J. commented so long ago in R v Davison (1821) 4 B & Ald 329:**
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> > **"In the case of an insult to the judge, it is not of his own account that he commits, for that is the consideration which should never enter his head. But, though he may despise the insult, it is a duty which he owes to the station to which he belongs, not to suffer those things to pass**

> **which will make him despicable in the eyes of others. It is his duty to support the dignity of the station, and uphold the law, so that, in his presence at least, it shall not be infringed.**"" [Emphasis added]

[36] The above cases affirmed that the judge is not a "party" to a cause nor is the contempt he deals with "his" cause. Further, the law has developed and has never encouraged question of his capacity and inclination to balance with objectivity the multiple roles a judge plays where contempt is committed within their cognizance.

The Scope and Nature of Contempt

[37] Regarding the nature and scope of contempt, Bain J in **The Queen v The Rt. Hon. Perry G. Christie et al** [2017] BHS J No. 127 at paras 78 -79 had this to say:

> "**78 In Barrie and Lowe in the Law of Contempt the author stated --**
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> > **"It is a well established principle that publications that are considered to be scurrilously abusive of a judge amount to contempt by scandalizing the court. As a number of decisions emphasise, the rule of contempt do not exist to protect a judge personally but operate to protect the public interest in the administration of justice. Bowen LJ said in *Helmore v Smith* No. 2 1886 36 Ch. D. 449.**
> >
> > > **"The object of discipline enforced by the court is not to vindicate the dignity or the person of the judge, but to prevent undue influence with the administration of justice."**
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> **79 Dodds CJ in R v Fowler 1905 1 Tos LR 53, a case from Tasmania, stated-**
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> > **"These powers [to commit for contempt] are given to judges in order to keep the course of justice free. [They] are of great importance to society, for by their exercise of them law and order prevail. They have nothing to do with the personal feeling of the judge, and no judge would allow his personal feelings to have any part of the matter; the powers are exercised simply for the good of the people and wherever judges have exercised these powers they have done so from a sense of duty ad [sic] under pressure of some grave public necessity."** [Emphasis added]

[38] Further, in **Caves Co. v Higgs Estate** [supra], Gonsalves-Sabola J. succinctly noted the following in relation to the nature of contempt and historically the approach of the courts in addressing this issue:

> **"11 Persons who lose cases can always appeal to a higher court. Bringing an appeal is the remedy for any grievance felt at the hands of the tribunal of first instance. Scurrilous abuse of the judge in reprisal is not a remedy. The former is lawful, the latter criminal. A quick study of some of the cases down the years would show the consistent attitude of the courts in upholding respect for their authority.**
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> **12 In R v Almon [1765] 97 E.R. 94, 100, Wilmot, J., in the quaint diction of his generation, expounded the societal need to maintain public respect for the impartiality of judges. He said:**
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> > **"The arraignment of the justice of the Judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and in-disposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction ... whatsoever; not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth."**
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> **13 In modern times an echo of that exposition was sounded by Lord Denning in The Road to Justice, 1955, when he said at p 73:**
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> > **"The judges must of course be impartial: but it is equally important that they should be known by all people to be impartial. If they should be libelled by traducers, so that people lost faith in them, the whole administration of justice would suffer. It is for this reason that scandalising a judge is held to be a great contempt and punishable by fine and imprisonment."**
>
> **14 I adopt these words of experience and wisdom and can think of no reason why their substance should not apply in The Bahamas.**

> **15 In Skipworth's Case, L R 9 Q B, 230, a barrister-at-law was committed for contempt of court. His offence consisted of allegations made by him at a public meeting that there was no chance of justice being done by the four Queen's Bench judges who had sat in a certain case, that the judges' minds were made up to convict, that in particular, the Lord Chief Justice was not a fit person to have tried anything in connection with the case because of his lack of impartiality through prejudgment of the case. Speaking for the bench of judges who sat, Blackburn, J., made certain observations. At p 232 he said:**
>
> > **"The phrase "contempt of Court" often misleads persons not lawyers, and causes them to misapprehend its meaning, and to suppose that a proceeding for contempt of Court amounts to some process taken for the purpose of vindicating the personal dignity of the judges, and protecting them from personal insults as individuals. Very often it happens that contempt is committed by a personal attack on a judge or an insult offered to him; but as far as their dignity as individuals is concerned, it is of very subordinate importance compared with the vindication of the dignity of the Court itself; and there would be scarcely a case, I think, in which any judge would consider that, as far as his personal dignity goes, it would be worth while to take any steps."**

[39] Accordingly, in the extant contempt proceedings the court is required to determine whether the affidavits were intended to demean a judge of the Supreme Court and bring the Court into disrepute and prejudice the due administration of justice.

[40] Further the burden and standard of proof is beyond reasonable doubt. See **The Queen v The Rt. Hon. Perry G. Christie Et al BHS J** No. 127 of [2017].

Summons for contempt to show cause ("the show-cause summons")

[41] The summons issued requires the Applicant (alleged contemnor) to show cause why she should not be committed for contempt. There is no presumed guilt in the Summons because it is asking the alleged contemnor to show cause. After service of the summons the alleged contemnor is given an opportunity to respond to the allegations. It has been several months and this Summons cannot even get off the ground.

[42] In **Major and another v The Government of the United States of America and others** [2008] 2 BHS J. No. 45. At para 9, the learned Chief Justice, Sir Burton Hall said:

> "**On these preliminary objections, I was satisfied, adopting in their entirety the reasoning in Higgs that I had both the jurisdiction and the duty to cause this matter to be begun by the court of its own motion and any suggestion that the form of notice presumed guilty in the alleged contemnor was, in my view, cured by reading the notice as a whole which invited the alleged contemnor "show cause" and by the fact that he was offered a period of seven days to do so".**

[43] The Learned Assistant Director, Mrs. Green-Smith correctly submits that the procedures and principles governing contempt procedures guarantees a fair hearing.

Whether the contempt is civil or criminal and whether the Court may give directions

[44] The Applicant seems to have a criticism with the directions that the Court has given. In paragraph 10 of her affidavit in support of a stay, the Applicant states:

> "**Also, of extreme importance is whether or not this contempt is civil contempt or criminal contempt. This Honourable Court holds fast to the belief that it is civil and has thereby dealt with the proceedings like civil proceedings issuing orders for witnesses' affidavits to be filed *inter alia*. However, my Counsel and I hold fast to the view that this is a matter of Criminal Contempt and as such, criminal law and procedures ought to be followed."**[Emphasis added]

[45] Generally speaking, at case management conferences, judges of the Supreme Court, be it on the criminal or civil side, give directions in preparation for a trial or hearing. Both divisions of the Supreme Court have their own rules of which I am very familiar. The overriding objective of both sets of rules is to deal with cases actively by managing them properly. Put differently, both the civil and criminal case management rules are aimed at dealing with cases effectively and efficiently in order to save time and expense. So, it is within the remit of the judge to determine how a particular case is going to be dealt. In civil cases, viva voce evidence has

been replaced with witness statements and oral submissions with written submissions. In criminal cases, for example, a constitutional motion to stay proceedings, a judge may follow the same format. There are no hard and fast rules.

[46] In criminal trials with a jury, case management conferences are routinely done to ensure that the parties are ready for trial so that the trial takes place on the trial date. The Prosecution provides the Court as well as Defence with the Voluntary Bill of Indictment which usually contains the Charge, the Witness Statements of the Witnesses for the Prosecution, Notice of Alibi, Statement under Caution and the Record of Interview of a Defendant. Sometimes, legal issues are dealt with ahead of the trial date so that the trial proceeds uninterrupted.

[47] However, in this case, it appears that the Applicant and her Counsel wish for the court not to give any case management directions and for the show-cause summons to proceed "their" way. This can be gleaned from what follows below.

[48] The contempt proceedings commenced remotely (In Open Court) on 4 August 2020 when the show-cause summons was read to the Applicant. In a nutshell, the Applicant stated that she stands by her affidavit. Thereafter, learned Counsel Mr. Ducille began to make oral submissions but the Court reporter, Counsel for the Amicus and the Court could not hear Mr. Ducille properly. Thereupon, the Court invited Counsel to agree to directions and to provide same to the Court. Ultimately, on 4 August 2020, the Court gave the following directions ("the Directions Order"):

> **IT IS HEREBY ORDERED AS FOLLOWS:**
>
> 1. **Mrs. Donna Dorsett-Major should file affidavits of witnesses to show cause why she should not be held in contempt of court. Such service should be done by email to the Court at indra.charles@courts.gov.bs and all parties by the 9th September 2020.**
>
> 2. **All parties are to lay over any written submissions with respect to the show cause hearing on or before 23rd September 2020. Submissions are to be emailed to the Court at indra.charles@courts.gov.bs and exchange between the parties.**

3. **The parties shall present oral submissions. Mrs. Dorsett-Major is allowed half an hour to present their submissions and the Amicus Curiae is allowed half an hour to present their submissions.**

4. **All Affiants must appear on the adjourned date and thereafter. Liberty to the parties to cross-examine the Affiants.**

5. **The hearing to show cause date of the 2nd September, 2020 at 1.30 p.m. is vacated and the new hearing to show cause date is 25th September, 2020 at 10.30 a.m."**

[49] On 25 September 2020, the show-cause summons did not proceed as by then, the Applicant had filed the Constitutional Motion before Klein J which was heard 18 and 19 August 2020 and while this Court did not stay the show-cause summons, the Court adjourned it to 6 October 2020. The Applicant did not comply with the Directions Order.

[50] On 6 October 2020, Counsel for the Applicant sought an adjournment since the ruling of Klein J was imminent. The application was supported by the Amicus. At the same time, the Court inquired whether the Directions Order had been complied with by the Applicant as the Amicus had already provided her written submissions.

[51] The Applicant still had not comply with the Directions Order so the Court gave further directions extending time for compliance. The Court reminded the Applicant that the directions order must be complied with as there was no stay of the show-cause summons. The Court then extended time to 9 October 2020 for the Applicant to comply and adjourned the show-cause summons to 14 October 2020 at 2:30 p.m. This Order was drawn-up by Murrio D. Ducille & Co.

[52] By the time the show-cause summons came back before me on 14 October 2020, Klein J had already delivered his Ruling dismissing the Constitutional Motion and the Applicant had already filed an appeal against the Ruling of Klein J. The Applicant still had not comply with the Directions Order. The Court again extended

time to 16 October 2020 for the Applicant to comply. The Court then adjourned the show-cause summons to 12 November 2020.

[53] In the intervening period, the Applicant had approached the Court of Appeal to stay the show-cause summons. As indicated earlier, the Court of Appeal dismissed her application.

[54] By the time the matter came back before me on 12 November 2020, the Applicant had filed a stay of the show-cause summons that same morning. That application had not reached the Court. Counsel for the Amicus was not served with a copy. Nonetheless, the Court fixed 27 November 2020 for the hearing of the stay application. The Applicant still had not comply with the Directions Order. It was at that stage that Mr. Ducille stated that the Applicant will subpoena several witnesses including two of her previous lawyers. To date, the Applicant has not filed any written submissions in the show-cause summons. On the other hand, Counsel for the Amicus has fully complied with the Directions Order and is patiently awaiting the hearing of the show-cause summons.

[55] The Applicant complains that the Directions Order is an order that a court issues when dealing with civil proceedings and does not reflect an order which is governed by criminal law and procedures. However, the Applicant does not go any further to express what a directions order given in the criminal court is supposed to look like. Given her stance, she has failed to and/or refused to comply with the Directions Order on at least five previous occasions thereby flouting an order of the Court.

[56] In my considered opinion, this is nothing but a ploy to continue to delay the hearing of the show-cause summons and perhaps also, to ambush the Court and Counsel for the Amicus at the hearing with evidence of witnesses who are subpoenaed.

[57] Now, to say that it is of extreme importance that the Court of Appeal decides whether this is a civil contempt or criminal contempt begs the question. The show-cause summons arose out of civil proceedings. Criminal contempt can arise

before, during or after criminal proceedings or in the course of any civil proceedings, as in the instant case. The burden of proof is the criminal standard.

[58] It is perhaps worth reiterating what Gonsalves-Sabola J said in **Caves Co. v Higgs Estate** [supra]: "*Persons who lose cases can always appeal to a higher court. Bringing an appeal is a remedy for any grievance felt at the hands of the tribunal of first instance. Scurrilous abuse of a judge in reprisal is not a remedy. The former is lawful.* ***The latter is criminal.****"* [Emphasis added]

[59] In my opinion, this is a non-issue which has no prospect of success at an appeal.

The application is seeking to further delay the fair hearing of the Summons for Contempt

[60] Mrs. Green-Smith contends that given the nature of contempt proceedings it is critical that the Court moves expeditiously to hear the matter and ensure that there is a fair hearing. In **James Fleck v. Pittstown Point Landings Limited** SCCiv App No. 131 of 2019, the Court of Appeal noted the following in this regard:

> **"We recognise that at common law, particularly in the case of a contempt committed in the face of the court, a superior court of record has power to proceed in an almost peremptory fashion to cite, hear and punish a contemnor for contempt thereby demonstrating the court's authority and vindicating the administration of justice. However, in the light of the Privy Council's decision in Dhooharika v. Director of Public Prosecutions [2014] 5 LRC 211, it is now clear that the constitutional guarantee of the right to a fair trial applies where the court is proceeding to sentence a contemnor having first found him in contempt of court on the merits. Procedurally, a court will always need to hear and consider submissions that go to mitigation of the sentence before sentence is pronounced; and this is so whether the contempt is criminal or civil. See paragraph [60] Dhooharika per Lord Clarke."**

[61] See also Gonsalves-Sabola J in **Caves Co v Higgs Estate.**

If the Applicant is dissatisfied with the findings of the Court there is also an appeal available to her

[62] Learned Counsel for the Amicus submits that it is critical to note that in cases of this nature in order for an appeal to be heard, the process must be complete. In other words, there must be some finding of contempt or an imposition of a

punishment for contempt. The appeal must not be premature. In **Keod Smith et al v. The Queen** SCCIvApp & CAIS No. 96 of 2015 the Court of Appeal had this to say:

> **"We find that the appeal before us is premature. It is therefore not a proper appeal. <u>While the learned Judge has cited the Appellants for contempt and required them to show cause why they ought not to be committed for contempt, that is not a finding of contempt, nor has there been the imposition of any punishment for contempt. The parties should allow the process to finish, then have their right of appeal, based on whatever the allegations are; be they unfairness, bias, irregularities, for example.</u> Those options still remain open to the intended appellants in this matter, but certainly there is no finding that we can see that is appealable at this point."** [Emphasis added]

Conclusion

[63] For all these reasons, the Applicant has failed to demonstrate to the Court that the interest of justice best accords with the granting of a stay.

[64] To grant a stay would not best accord with the interest of justice in these circumstances where there are proceedings in progress which guarantees that the Applicant would have a fair hearing. Furthermore, the Applicant's Grounds of Appeal are hopeless and have no reasonable prospect of success.

[65] Further, as Klein J found in the case of **Donna Dorsett- Major v The Director of Public Prosecution et al [supra]**, the Applicant's apprehension that she might be deprived of liberty by a failure to observe due process apart from being inherently speculative and premature. Klein J also found that there is nothing on the facts that would remotely come near to justifying a stay. There is no basis on which it can be said that that the Applicant cannot be accorded a fair hearing.

[66] I agree with Counsel for the Amicus that the Application for a stay pending appeal is misconceived and ought to be dismissed with costs to the Amicus.

Costs

[67] Both Counsel were ordered to prepare and submit submissions in relation to costs in the event that they are successful.

[68] The Applicant submits that an amicus appears not as a party, but as a friend of the court and it is trite law that it is not entitled to costs. She quoted from two South African cases namely **Komape v Minister of Basic Education and others** [2020] 2 LRC 362 at para 7 and **Hoffmann v South African Airways** (CCT17/00) [2000] ZACC 17.

[69] That is the position in South Africa which is not binding on this Court.

[70] An amicus is indeed a "friend of the court" and is not a party to the proceedings. Its role has traditionally been limited to drawing the Court's attention to points of law or irrelevant fact which may assist the court and may not otherwise have been drawn to its attention. The level of participation by an amicus in proceedings is determined at the direction of the court. An amicus may even be liable for the costs to the other parties of their intervention in proceedings but this is rarely the case particularly in the case like the present, where the Court invited the Amicus to assist.

[71] In the present case, the Amicus was invited by the Court to assist in these proceedings. The amicus has played a vital role in presenting arguments which are skillful and illuminating. The Amicus was the successful party in these proceedings and, as a general rule, a successful party is entitled to its costs. I can see no reason to depart from the general rule particularly since the Amicus has had to appear on myriad occasions to provide guidance to this Court as well as other courts to assist with this show-cause summons which has dragged on for months now. Normally, these applications are heard expeditiously since the administration of justice is at risk.

The law on costs

[72] Costs are discretionary. Section 30(1) of the Supreme Court Act provides:

> "**Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge**

and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid."[Emphasis added]

[73] The principle that costs are discretionary is further fortified in Order 59, rule 2(2) of the Rules of the Supreme Court ("RSC") which reads:

"**The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order.**"[Emphasis added]

[74] Order 59, rule 3(2) of the RSC is helpful. It provides:

"**If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."**

[75] Order 59, rule 7 provides that:

"(1) Where in any cause or matter anything is done or omission is made improperly or unnecessarily by or on behalf of a party, the Court may direct that any costs to that party in respect of it shall not be allowed to him and that any costs occasioned by it to other parties shall be paid by him to them.

(2) Without prejudice to the generality of paragraph (1) the Court shall for the purpose of that paragraph have regard in particular to the following matters, that is to say –

(a) the omission to do anything the doing of which would have been calculated to save costs;

(b) the doing of anything calculated to occasion, or in a manner or at a time calculated to occasion, unnecessary costs;

(c) any unnecessary delay in the proceedings.

(3) The Court may, instead of giving a direction under paragraph (1) of this rule in relation to anything done or omission made, direct the Registrar to inquire into it and, if it appears to him that such a direction as aforesaid should have been given in relation to it, to act as if the appropriate direction had been given.

(4) The Registrar shall, in relation to anything done or omission made in the course of taxation and in relation to any failure to procure taxation, have the same power to disallow or to award costs as the Court has under paragraph (1) to direct that costs shall be disallowed to or paid by any party.

(5) Where a party entitled to costs fails to procure or fails to proceed with taxation, the Registrar in order to prevent any other parties being prejudiced by that failure, may allow the party so entitled a nominal or other sum for costs or may certify the failure and the costs of the other parties."

[76] Costs must be reasonable. There are certain factors that the Court must consider in determining what are reasonable costs. In **McPhee (as Administrator of the Estate of Thelma Mackey) v Stuart** [2018] 1 BHS J. No. 18 [unreported] at para 8, this Court enumerated the factors as:

> **"In deciding what would be reasonable the Court must take into account all the circumstances, including but not limited to:**
>
> **a) any order that has already been made;**
>
> **b) the care, speed and economy with which the case was prepared;**
>
> **c) the conduct of the parties before as well as during the proceedings;**
>
> **d) the degree of responsibility accepted by the legal practitioner;**
>
> **e) the importance of the matter to the parties;**
>
> **f) the novelty, weight and complexity of the case; and**
>
> **g) the time reasonably spent on the case."**

Analysis and conclusion

[77] Learned Counsel for the Amicus submits that it is critical to note that this action is misconceived in that the Applicant has failed to establish on what authority she is asking the Court to stay these proceedings.

[78] Further, with respect to the conduct of the parties, it is noteworthy that this is the third application made by the Applicant for a stay of these proceedings. Additionally, because of the nature of contempt proceedings, the Court should move expeditiously in addressing this matter while ensuring that the Applicant has a right to a fair hearing.

[79] Further, says Counsel for the Amicus, this matter is of great importance because the Alleged Contemnor ("the Applicant") is required to show cause why she should not be committed for swearing to the Affidavit of Donna Dorsett-Major which contained untruths and fabricated statements which were intended to demean a judge of the Supreme Court, bring the Court into disrepute and prejudice the administration of justice.

[80] Further and, at all times, the Amicus acted in full accordance with the Orders of this Court and the Rules of the Supreme Court.

[81] Taking all matters into account, Counsel for the Amicus urges that the Court grant costs to the Amicus. As I already stated, Counsel for the Amicus has greatly assisted the Court with sound, skillful and persuasive arguments.

[82] In the circumstances, I will award costs to the Amicus in the amount of five thousand dollars ($5,000.00) which is reasonable in the circumstances.

Dated this 8th day of December, 2020

Indra H. Charles
Justice