COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2019/CLE/gen/00127

BETWEEN

OPAC BAHAMAS LTD

Plaintiff

-AND-

DUANE BENNETT PARNHAM

-AND-

LEIGH MAGDALENE PARNHAM

Defendants

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Kevin A.C. Moree and Mr. Andrew Smith of McKinney Bancroft & Hughes for the Plaintiff
Mr. Audley Hanna Jr. with him Mrs. Tara Archer-Glasgow and Mr. Jonathan Deal for the Defendants

Hearing Dates: 9 and 21 December 2020

Practice - Variation of Order – Re Barrell jurisdiction – Exceptional circumstances

Leave to appeal – Test to be applied – Reasonable prospect of success – Whether there are issues which need clarification – Stay of ruling pending appeal - Financial ruin – Bald allegation will not suffice – Fixed costs

On 29 October 2020, the Plaintiff's application for judgment made pursuant to a Consent Order filed on 2 December 2019 to carry into effect the terms of compromise set forth in the Schedule to that Consent Order was heard. Prior to that hearing, counsel for the parties laid over written submissions and full oral submissions were made at the hearing.

The Ruling on the Plaintiff's application was delivered in open court on 2 November 2020 ("the Ruling") and a draft of the written Ruling was circulated to counsel for the parties later that same day. Minor amendments associated with typographical errors were proposed by counsel for both parties after which the Ruling was finalised, signed and provided to counsel for the parties. Shortly thereafter, the Ruling was posted on the website of the Judiciary of The Bahamas.

Counsel for the Plaintiff drafted an Order which reflected the terms of the Ruling and counsel for the parties initialled the draft Order indicating that it had been approved by the parties. The initialled Order was sent to be perfected.

Prior to the Order being perfected, the Defendants applied to vary or, alternatively, for leave to appeal the Ruling and a stay of execution of the Ruling. The Plaintiff oppose the orders sought.

HELD: The Defendants' applications to vary or, alternatively, for leave to appeal the Ruling and a stay of execution of that Ruling are dismissed. The Defendants are to pay the Plaintiff's costs which are fixed at $18,000 together with costs of $1,500 for the challenge to the Plaintiff's costs.

1. The Defendants approved the draft Order associated with the Ruling delivered by this Court on 2 November 2020. Consequently, they are estopped from reneging on such approval and seeking a material variation to the Ruling which would result in a material variation to that Order.

2. This is not a case of an oral ruling. Prior to the Defendants' application to vary the Ruling under the *Re Barrell* jurisdiction, the written Ruling was signed, sealed and issued to the parties. Further, the Ruling was posted on the Court's website. In the circumstances, when the Defendants applied to vary the Ruling it was too late to invoke the *Re Barrell* jurisdiction.

3. In any event, even if the *Re Barrell* jurisdiction could be invoked, this discretionary jurisdiction is restricted to "*the most exceptional circumstances.*" There must be finality in litigation and "*the doing of justice requires justice to both parties in litigation, not merely one.*": **Re Barrell Enterprises and others** [1972] 3 All ER 631, CA, **Compagnie Noga D'Importation et D'exportation SA v Abacha** [2001] 3 All ER 513, **RTL v ALD and others** [2015] 1 BHS J No. 82 and **Stewart v Engel and Another [2000]** 1 WLR 2268 applied.

4. In the present case, there were no exceptional circumstances to justify varying the Ruling. The Defendants seek to have the Ruling varied based on legal submissions and evidence which were available at the Hearing but the Defendants chose not to present them at that time. The Defendants' desire to have a "*second bite of the cherry*" does not qualify as an exceptional circumstance. **Robinson v Fernsby and another** [2003] EWCA Civ 1820 applied.

5. Where an order or judgment is interlocutory, leave to appeal is required. The test on a leave to appeal application is whether the proposed appeal has a realistic prospect of success or whether it raises an issue that should in the public interest be examined by the court or whether the law requires clarifying: **In the Matter of the Petition of Scott E. Findeisen and Brandon S. Findeisen (as Trustees of the Stephen A. Orlando Revocable Trust)** (2016/CLE/qui/01564), unreported, 15 June, 2020. The only relevant reason to grant leave in this case is if the Defendants have a realistic prospect of success on appeal.

6. The Defendants' proposed grounds of appeal consisted of both legal and factual grounds.

7. With respect to the legal grounds, the Defendants contended that certain clauses in the Terms of Compromise were unenforceable under the common law as well as the Unfair Terms in Consumer Contracts Act. However, the Defendants never alleged that any of the clauses in the Terms of Compromise were unenforceable. As such, it cannot be said that the Court misdirected itself or erred with respect to the entirely new submissions which were never considered by the Court or addressed by Counsel for the Plaintiff. The Defendants are the authors of their own misfortune and the Plaintiff should not be prejudiced by their omission. Further, the Unfair Terms in Consumer Contracts Act is not applicable in this case because the relevant clauses had been individually negotiated by the parties.

8. The factual grounds of appeal relate to the calculation of the Judgment. The allegation that the quantum should have been determined on evidence is simply wrong because it was determined on evidence. Further, there was no need for quantum to be determined on assessment because the parties has agreed to the formula to be used to calculate the judgment debt.

9. In the circumstances, the Defendants do not have a realistic prospect of success on appeal and therefore the application for leave to appeal is dismissed.

10. The application for a stay is dismissed. The Plaintiff should not be deprived of the fruits of its litigation. A liquidated amount of damages has been ordered against the Defendants and the Defendants do not suggest that payment of the judgment amount would render the Defendants' proposed appeal nugatory. The Defendants would not suffer loss which could not be compensated in damages.

11. The Plaintiff, being the successful party is entitled to its costs. Upon reviewing the Bill of Costs provided by the Plaintiff, $18,000 appears fair and reasonable and costs are fixed in that amount. Further, the Defendants are to pay the Plaintiff's costs associated with the Defendants' challenge to costs, such costs to be fixed in the amount of $1,500.

RULING

Charles J:

Introduction

[1] By three Summonses, two filed on 16 November and one on 30 November 2020, the Defendants seek:

(i) an Order for leave to appeal the Written Ruling rendered by this Court on 2 November 2020 (the "Ruling"), in so far as it relates to quantum; alternatively;

(ii) an Order made pursuant to the inherent jurisdiction of this Court retained prior to the perfection of an Order for a variation of the Ruling in so far as it relates to quantum; and

(iii) an Order pursuant to section 16(3) of the Supreme Court Act and/or the inherent jurisdiction of the Court for an Order staying the Ruling pending the outcome of the Defendants' intended appeal.

[2] The Defendants rely on two affidavits; one of Erycka Hall filed on 26 October 2020 ("the Hall Affidavit") and the affidavit of Duane Parnham filed on 10 December 2020 ("the Parnham Affidavit").

[3] The Plaintiff opposes the orders sought and relies on the affidavit of Knijah Knowles filed on 14 October 2020; the Second affidavit of Knijah Knowles filed on 28 October 2020 and the Third affidavit of Knijah Knowles filed on 29 October 2020 (collectively "the Knowles Affidavits").

[4] On 29 January 2021, this Court dismissed the Defendants' summonses to vary or alternatively, for leave to appeal the Ruling and a stay of the Ruling pending appeal. The Court gave oral reasons which are now reduced to writing.

Background facts

[5] The background facts are largely not in dispute. On or about 29 March 2018, the Plaintiff and the Defendants entered into a Construction Agreement (the "Construction Agreement") whereby the Defendants engaged the Plaintiff to construct a single-family dwelling house and certain other structures (including landscaping) on Lot 2, Blocks 19 and 20 in the Rockwell Island Subdivision in the Bimini Bay Development.

[6] By these proceedings, the Plaintiff brought an action to recover from the Defendants US$385,000 alleged to be due and owing representing US$231,000 for the "Stage One Work" (Foundation & Floor Slab) (pleaded to have been completed on or about 30 August, 2018) and US$154,000 for the "Stage Two

Work" (Exterior Walls, Belt Course Trusses & Sheeting) (pleaded to have been completed on or about 15 November, 2018) together with a daily penalty of US$500 and interest (including interest at the rate of 1.5% per month on the sum of US$385,000).

[7] Mr. Lesley Johnson issued the following certificates of completion ("Architect Certificates"):

1. Architect Certificate dated 30 August, 2018 – Stage One – Foundation & Floor Slab;

2. Architect Certificate dated 30 November, 2018 – Stage Two – Exterior Walls, Belt Course Trusses & Sheeting;

3. Architect Certificate dated 28 December, 2018 – Stage Three – Roof Completion, Doors, Windows, Plumbing & Electrical rough-in, internal partitions; and

4. Architect Certificate dated 31 January, 2019 – Stage Four – Drywall and insulation, tiling and cabinetry, fixtures & fittings,

[8] It is the Defendants' position that they did not receive these Architect Certificates until October 2019.

[9] The parties agreed to a global settlement position which was enshrined in the terms of a compromise (the "Terms of Compromise") which were scheduled to a Consent Order dated 22 November, 2019 (the "November Consent Order").

[10] Pursuant to the November Consent Order, which was in a common form of a Tomlin order, all further proceedings herein were stayed except for the purposes of carrying into effect the Terms of Compromise as set out in the Schedule with liberty to the parties to apply.

[11] Prior to entering into the November Consent Order, the Defendants say that they believed that the construction had been completed up to stage 4 (see paragraphs 2.a and 2.b of the Terms of Compromise). However, according to them, on a subsequent visit to the site during the weekend of 10 October, 2020, that belief turned out to be untrue as they identified a number of inadequacies and deficiencies in the construction works carried out by the Plaintiff.

[12] In the events that transpired, as at 29 October, 2020, the Defendants paid sums totaling US$839,000 to the Plaintiff pursuant to the November Consent Order. In particular:

1. On 6 December 2019, the Defendants paid $550,000.
2. On 21 January 2020, the Defendants paid $50,000.
3. On 14 August 2020, the Defendants paid $25,000; and
4. On 24 September 2020, the Defendants paid $214,000.

[13] The Plaintiff allocated the payments received by it as between principal, interest and penalties as follows:

1. 6 December, 2019 payment: $19,000 applied to penalties; $103,959.19 applied to interest and $427,040.81 applied to principal.

2. 21 January, 2020 payment: $23,000 applied to penalties; $10,562.40 applied to interest; and $16,437.60 applied to principal.

3. 14 August, 2020 – $25,000 applied to interest; and

4. 24 September, 2020 – $98,500 applied to penalties, $54,713.28 applied to interest and $60,786.72 applied to principal.

[14] As a result, according to the Plaintiff's records, the Defendants owed $356,934.93 as at 29 October, 2020.

[15] On 16 March 2020, the Plaintiff issued a Summons seeking leave to enforce the Terms of Compromise. This was *circa* the eve of the Declaration of the State of Emergency and Emergency Powers (Covid 19) Order in The Bahamas.

[16] The Summons was not heard until 29 October 2020. Following a contested hearing, a Written Ruling was delivered on 2 November 2020 whereby it was ordered that Judgment be entered against the Defendants in the sum of $356,934.93 as at 29 October 2020, with costs to the Plaintiff on an indemnity basis and statutory interest on the Judgment until payment.

[17] The Ruling was signed and sealed and a hard copy given to the attorneys representing the parties. The Ruling was also posted on the Court's Website on or about 2 November 2020: see Bahamas Judiciary website.

[18] An Order reflecting the Ruling was initialed by Counsel for the parties on 9 November 2020 confirming the parties' approval (the Defendants now have new Counsel). The Order was sent to me for my approval and signature. Through inadvertence, I did not initial that Order.

The law
Variation

[19] Mr. Hanna Jr. appearing as Counsel for the Defendants submitted that, under the "Barrell" jurisdiction, it is open to a Judge pursuant to the inherent jurisdiction of the Court to reverse a decision that he or she has made up to the point in time that the Order made in consequence of the decision is perfected. A court is *functus officio* only when its judgment has been formally entered and perfected; until such time the Court may even permit amendments to the claims made and fresh evidence. However, it is necessary to demonstrate "strong reasons" or "exceptional circumstances" to justify the exercise of the jurisdiction to reconsider.

[20] Learned Counsel Mr. Hanna Jr. referred to the case of **Compagnie Noga D'Importation et D'Exportation SA v Abacha and another** [2001] 3 All ER 513 and submits that Rix LJ heard a complex commercial dispute and handed down a

reserved judgment. The unsuccessful plaintiff contended that he had ignored binding authority and applied to Rix LJ to reconsider his judgment. Rix LJ said at paragraphs 41 to 43:

> **"[41] Nevertheless, in my judgment, I am bound by the decision in *Stewart v Engel*, following the spirit, if not the letter, of the decision in *Re Barrell Enterprises* in the light now of the requirements of the overriding principle, to regard the need for exceptional circumstances as a requirement for the proper exercise of the jurisdiction to reconsider a decision….**
>
> **[42] Of course, the reference to exceptional circumstances is not a statutory definition and the ultimate interests involved, whether before or after the introduction of the CPR, are the interests of justice. On the one hand the court is concerned with finality, and the very proper consideration that too wide a discretion would open the floodgates to attempts to ask the court to reconsider its decision in a large number and variety of cases, rather than to take the course of appealing to a higher court. On the other hand, there is a proper concern that courts should not be held by their own decisions in a straitjacket pending the formality of the drawing up of an order. As Jenkins LJ said in Re Harrison's Share [1955] 1 All ER 185 at 188, [1955] Ch 260 at 276: 'Few judgments are reserved and it would be unfortunate if once the words of a judgment were pronounced there were no locus poenitentiae.'**
>
> **[43] Provided that the formula of 'exceptional circumstances' is not turned into a straitjacket of its own, and the interests of justice and its constituents as laid down in the overriding principle are held closely to mind, I do not think that the proper balance will be lost. Clearly, it cannot be in every case that a litigant should be entitled to ask the judge to think again. Therefore, on one ground or another, the case must raise considerations, in the interests of justice, which are out of the ordinary, extraordinary, or exceptional. An exceptional case does not have to be uniquely special. 'Strong reasons' is perhaps an acceptable alternative to 'exceptional circumstances'. It will necessarily be in an exceptional case that strong reasons are shown for reconsideration."**

[21] Mr. Hanna Jr also refer to a Ruling of this Court in **Richard Anthony Hayward & Others v Striker Trustees Limited & Others** 2010/CLE/gen/01137 (unreported, 5 November, 2019) and particularly at paragraphs 54 to 57.

[22] Conversely, learned Counsel Mr. Moree who appeared for the Plaintiff, submits firstly, that the Defendants are seeking a material variation of the Ruling which

would result in a material variation to the draft order which they have already approved. According to Mr. Moree, the Defendants are estopped from reneging on their approval of the draft order and seeking a variation of the Ruling. I agree.

[23] In my judgment, the circumstances of this case are not such as to invoke the *Re Barrell* jurisdiction to vary the ruling of the Court. This is not a case of an oral ruling. As iterated, a written Ruling was signed, sealed and issued to both parties. On or about 2 November 2020, the Ruling was posted on the Court's website. It seems to me that, at this point, it is too late to invoke the *Re Barrell* jurisdiction. There is an avenue for appeal which the Defendants are pursuing as they are also applying for leave to appeal. The appeal, if brought to fruition, can, in certain circumstances, raise grounds which were not before this Court, although there are limits to that. That said, it is not a matter for this Court but the Court of Appeal.

[24] In the event that I am wrong to state that the *Re Barrell* jurisdiction cannot be invoked at this point, I shall carry on to consider whether or not, this discretionary jurisdiction should be exercised.

[25] In this regard, Mr. Moree also refers to **Richard Anthony Hayward** (supra). In paragraph 56, this Court quoted paragraph 13 of another ruling of this Court in **Hong Kong Zhong Development Company Limited v Squadron Holdings SPV016HK, Ltd.** 2016/CLE/gen/01295 which reads:

> "**In RTL v ALD and others [2015] 1 BHS J No. 82, Winder J affirmed that the Re Barrell jurisdiction is the law of the Bahamas. He stated at para 37:**
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> > **'The Bahamas however, has not as yet introduced any CPR changes and therefore I find the Barrell jurisdiction remains the state of our law. This position has been confirmed by Barnett CJ in the case of Re: Petition of Henry Armbrister 2007/CLE/qui/01438 & 2008/CLE/qui/845. I accept therefore that it is only the most exceptional circumstances that I ought to revisit a decision made by me…'"**

[26] Paragraphs 40 to 42 of **RTL** are also instructive. Winder J stated:

> **"40 I have no hesitation in holding that this failure of the Plaintiff (assuming for the moment that there was such a failure) ought not to be considered a most exceptional circumstance, having regard to my delivery of a considered ruling and the preparatory steps taken by the Respondents to appeal it.**
>
> **41 I am not moved by *Re Hanover*, not only because the case is not binding on me or that it was a decision made upon an uncontested matter, but also because this argument, which the Respondent says is disclosed in the *Re Hanover Trust* case, was not put before me and was not the focus of the hearing on the 27 August 2014. The focus at the 27 August 2014 hearing was the issue of service and whether the affidavit provided to the Registrar and upon which leave was granted was deficient in that it did not show a good case on the merits as required under Order 11(4). The Respondents never made the argument they now make, that there is no *in personam* jurisdiction in the Court over the Respondents on the basis that there is no power to grant leave to serve out of the jurisdiction. Nowhere in the Respondents 8-page skeleton argument is a reference to Order 11(1)(2) or a question as to jurisdiction. This fact is clearly demonstrated in the extract below taken from the transcript of the 27 August 2014 hearing….**
>
> **42 As the circumstances which the Respondents say warrant a review are not the most exceptional, I find that my jurisdiction is at an end. I take the view of *Sir Christopher Slade* in the case of *Stewart v Engel* that there has to be some finality in litigation and litigants not permitted repeated bites at the cherry. There has to be a point where the parties move to the next stage and challenge the decision if they desire. Whilst the Order has not been perfected I have put my reasons in writing and in fact the Respondents have file a motion for leave to appeal".**[Emphasis added]

[27] In addition, in **Compagnie Noga D'Importation** (supra), a case relied upon by the Defendants, it was held:

> **"The court's jurisdiction to reconsider its judgment before its order had been perfected could only be exercised in a case which raised considerations, in the interests of justice, which were out of the ordinary, extraordinary or exceptional. An exceptional case did not have to be uniquely special, and 'strong reasons' was perhaps an acceptable alternative to 'exceptional circumstances'. It would necessarily be in an exceptional case that strong reasons were shown**

> **for reconsideration. In the instant case, there were no such reasons. It was a case where it was said that the judge had got it wrong, on points which had been argued. The appeal process would be subverted if the application were granted. There were, of course, cases where an error of fact or law might be too plain for argument, and it was better that the error was corrected without imposing on the parties the need for an appeal. It was wrong, however, for a judge to be treated to an exposition such as would be presented to a court of appeal. If in such circumstances a judge should be tempted to open up reconsideration of his judgment, an appeal would not be avoided: it would be made inevitable. Every case would become subject to an unending process of reconsideration, followed by appeal, both on the issue of reconsideration and on the merits. Accordingly, the application to reconsider the judgment would be dismissed."** [Emphasis added]

[28] It goes without saying that the Court should only exercise its inherent jurisdiction to vary an order after pronouncement but before perfection in "*the most exceptional circumstances.*"

[29] By their own admission, the Defendants seek to have the Ruling varied based on legal submissions and evidence which were not presented at the Hearing (see paragraph 5.2.2 of the Defendants' Submissions). The legal submissions and evidence that the Defendants now seek to rely on were available at the Hearing but they chose not to rely on them. The Defendants' desire to have a "*second bite of the cherry*" as Mr. Moree aptly puts it, does not qualify as an exceptional circumstance.

[30] Further, in **Robinson v Fernsby and another** [2003] EWCA Civ 1820, May LJ at paragraph 94, stated:

> "**…The cases also acknowledge that there may very occasionally be circumstances in which a judge not only can, but should make a material alteration in the interests of justice. There may for instance be a palpable error in the judgment and an alteration would save the parties the expense of an appeal. On the other hand, reopening contentious matters or permitting one or more of the parties to add to their case or make a new case should rarely be allowed. Any attempt to do this is likely to receive summary rejection in most cases. It will only very rarely be appropriate for parties to attempt to do so. This necessarily means that the court would only be persuaded to do so in exceptional circumstances, but that expression by itself is no more**

> **than a relatively uninformative label. It is not profitable to debate what it means in isolation from the facts of a particular case.**" [Emphasis added]

[31] In addition, there must be finality in litigation and consequently, there are stringent limits to the exercise of the discretion conferred by the court by the *Re Barrell* jurisdiction. In **Stewart v Engel and Another** [2000] 1 WLR 2268. At page 2275, the English Court of Appeal had this to say:

> "**Since there must be some finality in litigation and litigants cannot be allowed unlimited bites at the cherry, it is not surprising that, according to the authorities, there are stringent limits to the exercise of the discretion conferred on the court by the Barrell jurisdiction. In that case itself [1973] 1 WLR 19, Russell LJ, delivering the judgment of the Court of Appeal, said, at pp. 23-24:**
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> > **'When oral judgments have been given, either in a court of first instance or on appeal, the successful party ought save in the most exceptional circumstances to be able to assume that the judgment is a valid and effective one.'**
>
> **Russell LJ went on to say, at p. 24: 'The cases to which we were referred in which judgments in civil courts have been varied after delivery … were all cases in which some most unusual element was present.'**
>
> **This principle must apply a fortiori where the judgment is a formal written judgment in final form, handed down after the parties have been given the opportunity to consider it in draft and make representations on the draft. The principle recognizes that the doing of justice requires justice to both parties in litigation, not merely one.**" [Emphasis mine]

[32] In my judgment, the Defendants' application to invoke the *Re Barrell* jurisdiction is unsustainable and ought to be dismissed.

Leave to appeal

[33] The requirement for a party to an action to obtain leave to appeal a determination of this Court is set out at section 11 (f) of the Court of Appeal Act, Chapter 52 of the Revised Laws of the Commonwealth of The Bahamas (the "CAA"). To the extent relevant, that section provides:

> **"No appeal shall lie –**

(a) …

(f) without the leave of the Supreme Court or of the court from any interlocutory order or interlocutory judgment made or given by a Justice of the Supreme Court except…"

[34] The general test for determining whether an order is interlocutory or final was explained by the Bahamian Court of Appeal in **Elecia Verneta Outten and Another v The Attorney General & Another** SCCivApp & CAIS No. 37 of 2019 as follows:

> **"…the law, as we understand it, makes it quite clear that in determining the question as to whether an order is interlocutory or final, we do not look at the results of the order but we are required to look at the nature of the application which is being made, and where the application, depending on the results, may or may not result in the disposition of the action, the order is considered interlocutory. In order for it to be final, the application must be one whereby no matter which way the judge makes a decision, he disposes of the action".**

[35] It seems to me that the Ruling is interlocutory and leave to appeal is therefore required. The Defendants have properly applied for such leave. The more pressing question is whether leave should be granted.

Test to be applied

[36] The general principles governing whether leave to appeal should be granted are well settled and both parties agree with the legal principles. The relevant legal test is whether the intended appeal has a realistic (as opposed to fanciful) prospect of success. These principles were explained by this Court in **In the Matter of the Petition of Scott E. Findeisen and Brandon S. Findeisen (as Trustees of the Stephen A. Orlando Revocable Trust)** (2016/CLE/qui/01564), unreported, 15 June, 2020 where in its Ruling, commencing at paragraph 9, the Court set out the well-known guidance of Lord Wolff in **Smith v Cosworth Casting Processes Limited** (1997) 4 All ER 840. Specifically that:

(i) Leave to appeal will only be refused if the applicant has no realistic prospect of succeeding; and

(ii) Leave to appeal may even be granted where there is no realistic prospect of success but where there is an issue that is of public interest or the law requires clarification.

[37] At paragraph 11 of **Findeisen**, the Court stated:

> **"Our courts have consistently followed the guidance given by Lord Wolff. In *Keod Smith v Coalition To Protect Clifton Bay* (SCCivApp No. 20 of 2017), Isaacs JA succinctly summarized the test to be applied by a court when determining whether to grant leave. At paragraph 23 of the Judgment, he stated:**
>
> > **"The test on a leave application is whether the proposed appeal has realistic prospects of success or whether it raises an issue that should in the public interest be examined by the court or whether the law requires clarifying: per Lord Woolf in *Smith v Cosworth Casting Process Ltd* [1997] 4 All ER 840."**
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> **[12] Additionally, in *AWH Fund Limited (In Compulsory Liquidation) v ZCM Asset Holding Company (Bermuda) Limited* [2014] 2 BHSJ No. 53, the Court of Appeal held:**
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> > **"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."**

[38] To be succinct, the only relevant reason to grant leave in this case is if the Defendants have a realistic prospect of success on appeal.

The merits of the Defendants' intended grounds of appeal

[39] Six grounds of appeal are raised in the Notice of Appeal attached to the Summons for leave to appeal filed on 15 November 2020. Grounds 1, 2 and 6 are primarily factual grounds and grounds 3, 4 and 5 are legal grounds. Like the Defendants, I also opine that the legal grounds warrant consideration first.

Grounds 3, 4 and 5: the alleged penalty clause

[40] Learned Counsel for the Defendants, Mr. Hanna Jr. argue that the provision for the payment of "penalty fees" in paragraph 4 of the Terms of Compromise was unlawful and/or contrary to public policy as a penalty either taken singly or taken together with the provision for the payment of interest in paragraph 4 of the Terms of Compromise.

[41] According to him, the schedule to a Tomlin order does not form a part of the court's order. It is, instead, a binding settlement agreement – a contract – that may be enforced through an expedited procedure within the precincts of an existing proceeding. In that regard, Counsel relied on the case of **Community Care North East (a partnership) v Durham County Council** [2010] 4 All ER 733.

[42] He next submits that the common law generally respects the principle of freedom of contract. However the parties' freedom to agree terms and conditions is not unlimited – restraints are imposed by public policy and overriding rules found in statute, the common law and equity.

[43] Counsel further submits that the $500.00 daily penalty fee contained in Article 1.6 of the Construction Agreement and incorporated into paragraph 4 of the Terms of Compromise is a remedy for breach that is entirely exorbitant and unconscionable when regard is had to the Plaintiff's interest in the performance by the Defendants of their obligations under the Construction Agreement and the Terms of Compromise, respectively. It is therefore unenforceable as a penalty.

[44] Learned Counsel also submits that the penalty and interest provisions contained in the Construction Agreement were unfair terms within the meaning of the Unfair Terms in Consumer Contracts Act ("UTCCA") and were therefore unenforceable. Consequently, the corresponding provisions in the Terms of Compromise were unenforceable.

[45] While Counsel's submissions as contained in 5.4.2 to 5.4.30 of the submissions of the Defendants are comprehensive, the Defendants never alleged that any of the

clauses in the Terms of Compromise were unenforceable. As such, it cannot be said that the Court misdirected itself or erred with respect to the entirely new submissions which were never considered by the Court or addressed by Counsel for the Plaintiff.

[46] As Mr. Moree properly alluded to, the common law position on whether a term of a contract is unenforceable because it is disproportionate and lacked any compensatory element depends on the facts and circumstances of each case. The Defendants' failure to raise this issue has resulted in the Plaintiff not proffering any evidence to oppose the allegation. The Plaintiff has not had the opportunity to provide evidence to demonstrate that the terms in question are not disproportionate or unfair and that they are in essence a quantification of liquidated damages related to a genuine pre-estimate of loss. In addition, the Court is now being put in the precarious position of being asked to determine whether a proposed appeal has any prospect of success when evidence relevant to the grounds of appeal has not been presented due to the Defendants' failure to properly and fully put forward their case. In my opinion, the Defendants are the authors of their own misfortune and the Plaintiff should not be prejudiced by their omission.

[47] With respect to UTCCA, in my view, it is not applicable in this case.

[48] In my judgment, the relevant agreement to be considered is the Terms of Compromise, not the Construction Agreement. The Terms of Compromise were individually negotiated by the parties as evidenced by paragraph 10 of the Terms of Compromise which reads:

> **"The parties acknowledge and agree that this Agreement has been jointly drafted by Counsel for the parties pursuant to independent legal advice and accordingly it should not be construed against either party."**

[49] Further, Counsel for the parties initialled each page of the Consent Order (see Tab 2 of the Parnham Affidavit) and the Terms of Compromise indicating that the entire

document had been reviewed and approved by the parties. The Consent Order was also approved by the Court.

[50] In any event, these issues seem to be afterthoughts as they were never argued before the Court. It is just too late to do so now.

Grounds 1, 2 & 6 - Quantum of the judgment debt

[51] These grounds of appeal are in connection with a finding of fact: the quantum of the judgment debt based on the formula provided in paragraph 4 of the Terms of Compromise. The judgment debt was calculated in accordance with what the parties agreed in paragraph 4 of the Terms of Compromise; the same paragraph under which judgment was entered against the Defendants.

[52] As Mr. Moree correctly stated, the method of the calculation of the judgment debt was set out in detail in the schedules attached to the Knowles Affidavits. That evidence was not disputed at the Hearing. The allegation that the quantum should have been determined on evidence is simply unacceptable because it was determined on evidence. Further, there was no need for quantum to be determined on assessment because the parties have agreed to the formula to be used to calculate the judgment debt.

[53] The Court specifically indicated that consideration was given to the Affidavit filed on behalf of the Defendants at paragraph 16 of the Ruling where it was held:

> "**However, the Defendants now allege that, in October 2020, they discovered incomplete and improper work. <u>If that is the case, then they are not without remedy but that does not absolve them from complying with the Terms of Compromise.</u> They are bound by the Terms of Compromise which are unequivocal with respect to the consequences associated with the Defendants' failure to make payments in accordance with the agreed payment schedule as well as cost consequences.**" [Emphasis added]

The law on stay of proceedings

[54] It is beyond dispute that the court has an inherent jurisdiction to stay further proceedings at any stage and for a wide variety of reasons, including pending an

appeal to a superior court. Section 16(3) of the Supreme Court Act expressly preserves the Court's inherent jurisdiction to stay proceedings where it thinks fit to do so.

[55] In **Turtle Creek Investments Limited v Daybreak Holdings Limited** (SCCivApp No. 234 of 2018), unreported, 18 December, 2018, our Court of Appeal considered whether to grant a stay of execution pending the outcome of an appeal from a judgment on admissions which apparently included, *inter alia*, an Order that the appellant pays $249,159.00 to the respondent in respect of arrears. Jones JA mentioned the relevant principles governing the exercise of the Court's discretion at paragraph 10 of the Ruling:

> **"10. This court recently considered an appeal against the refusal of application for stay of proceedings after judgment in the Supreme Court. In Esley Hanna v Bradly Hanna SCCivApp No. 182 of 2017 [Delivered 7 August 2018] in a judgment delivered by Madam Justice Crane-Scott we said at paragraph 11 on page 5:**
>
> > **"Section 12 of the Court of Appeal Act mirrors the provisions of O 59. r. 13 of the former English Rules of the Supreme Court 1965. It is therefore useful to advert to the following portions of Practice Note 59/13/1 found at pages 1076- 1077 of Volume 1 of the 1999 Edition of The English Supreme Court Practice:**
> >
> > **"Stay of execution or of proceedings pending appeal…Neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The Court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled," pending an appeal (The Annot Lyle (1886) 11 P.D. 114, p.116, C.A.; Monk v. Bartram [1891] 1 Q. B. 346); and this applies not merely to execution but to the prosecution of proceedings under the judgment or order appealed from - for example, inquiries (Shaw v. Holland [1900] 2 Ch. 305) or an account of profits in a passing-off action (Coleman & Co. v. Smith & Co. Ltd. [1911] 2 Ch. 572) or the trial of issues of fact under a judgment on a preliminary question of law (Re Palmer's Trade Mark (1883) 22 Ch. D. 88).**
> >
> > **But the court is likely to grant a stay where the appeal would otherwise be rendered nugatory (Wilson v. Church (No.2) (1879) 12 Ch. D. 454, pp. 458, 459, C.A.), or the appellant would suffer loss which could not be compensated in damages. The question whether or not to grant a stay is entirely in the**

> **discretion of the court. (Becker v. Earl's Court Ltd. (1911) 56 S.J. 206; The Retata [1897] P. 118, p. 132; Att.-Gen. v. Emerson (1889) 24 Q.B.D. 56, pp. 58, 59) and the Court will grant it where the special circumstances of the case so require…… 6 "Where the appeal is against an award of damages, the long established practice is that a stay will normally be granted only where the appellant satisfies the court that, if the damages are paid, then there will be no reasonable prospect of his recovering them in the event of the appeal succeeding (Atkins v. G.W. Ry. (1886) 2 T.L.R. 400, following Barker v. Lavery (1885) 14 Q.B.D. 769 C.A.;……Nowadays the court may be prepared (provided that the appeal has sufficient merit) to grant a stay, even where that test is not satisfied, if enforcement of the money judgment under appeal would result in the appellant's house being sold or his business being closed down. But if such a stay is granted the court should impose terms which (so far as possible) ensure that the respondent is paid without delay, if the appeal fails, and that appellant is prevented from depleting his assets in the meantime, except for any and necessary expenditure. This approach was endorsed in Linotype-Hell Finance Ltd v. Baker [1992] 4 All E.R. 87 (Straughton L.J., sitting as a single Lord Justice). It was also endorsed in Winchester Cigarette Machinery Ltd v. Payne (No. 2) (1993) The Times, December 15, but the Court made it clear that a stay should only be granted where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour. The Court also emphasized that indications in past cases do not fetter the scope of the Court's discretion."**

[56] The relevant principles as stated in **Turtle Creek Investments Limited v Daybreak Holdings Limited** (SCCivApp No. 234 of 2018) are:

(i) "The Court does not 'make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled,' pending an appeal".

(ii) "But the court is likely to grant a stay where the appeal would otherwise be rendered nugatory … or the appellant would suffer loss which could not be compensated in damages. The question whether or not to grant a stay is entirely in the discretion of the court".

(iii) "The court will grant it [a stay] where the special circumstances of the

case so require … 'Where the appeal is against an award of damages, the long established practice is that a stay will normally be granted only where the appellant satisfies the court that, if the damages are paid, then there will be no reasonable prospect of his recovering them in the event of the appeal succeeding.'"

(iv) "Nowadays the court may be prepared (provided that the appeal has sufficient merit) to grant a stay, even where that test is not satisfied, if enforcement of the money judgment under appeal would result in the appellant's house being sold or his business being closed down. But if such a stay is granted the court should impose terms which (so far as possible) ensure that the respondent is paid without delay, if the appeal fails, and that the appellant is prevented from depleting his assets in the meantime, except for any necessary expenditure".

[57] **In the Matter of Contempt of Court of Donna Dorsett-Major on 3 June 2020** [2020/CLE/gen/0000], this Court expounded similar principles at paragraphs [23] to [28] as follows:

> **"[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</u>**

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."[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 he has an appeal which has some prospect of success, 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. 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. 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."**

[58] The Defendants submit that there are good grounds upon which this Court may exercise its discretion to grant a stay of execution vis-à-vis the Ruling namely:

1. The Defendants paid the overwhelming majority of the settlement sum prior to the date of the Ruling.

2. The Defendants have suffered considerable hardship as a result of the Plaintiff's actions in that: (i) the Plaintiff has failed to properly complete the required construction works; and (ii) the Plaintiff's prevarication on whether it would enforce the Terms of Compromise caused the Defendants to detrimentally change their position.

3. The Defendants have an arguable appeal with quite a reasonable prospect of success; and

4. The Defendants would be greatly prejudiced if the Plaintiff were allowed to enforce the Ruling. The Defendants are currently in between permanent accommodation and are not in a position to part with the sum of US$356,934.93 even if they could recover it.

[59] In my judgment, the Plaintiff should not be deprived of the fruits of its litigation. A liquidated amount of damages has been ordered against the Defendants and the Defendants do not suggest that payment of the judgment amount would render the Defendants' proposed appeal nugatory.

[60] Further, as Mr. Moree correctly submitted, the Defendants would not suffer loss which could not be compensated in damages. If the proposed appeal is successful then the Plaintiff would simply have to return the funds as there is no claim made by the Defendants against the Plaintiff.

[61] Further, the Defendants have not averred that they are in financial hardship but only that they "*are not in a position to part with the sum of US$356,934.93 even if* [they] *could later recover it*" (paragraph 34 of the Parnham Affidavit). It is not clear what exactly is meant by "*not is a position to part*" but it is not too presumptuous to suggest that most, if not all, unsuccessful litigants would characterise themselves as "*not being in a position to part*" with hundreds of thousands of dollars.

[62] In paragraph 32 of the Parnham Affidavit, the Defendants state that they have been left without permanent accommodation and incurring costs as a direct result of the Plaintiff's conduct. First, the Defendants were well aware that under clause 1.5 of the Construction Agreement they would not have access to the property until payment had been made in full for the entire project so the decision to sell their property in the US prior to making payment in full is the real reason they have been left, according to them, without permanent accommodation. Secondly, the costs being incurred by the parties are solely due to the Defendants' conduct. It is the Defendants who have defaulted in making the payments as set out in the Terms of Compromise.

[63] In my considered opinion, the proposed grounds of appeal, most of which raised matters which were not ventilated before this Court, are untenable and weak. In the exercise of my discretionary powers, I will refuse a stay.

Conclusion

[64] In my judgment, the Defendants' application to vary the Ruling by adducing fresh evidence is simply an attempt to take a second bite at the cherry. These are not exceptional circumstances. The Defendants presented their case as they saw fit at the Hearing. They presented written as well as oral submissions. They had their day in court. There must be finality in litigation. The Defendants' application to vary the Ruling is therefore dismissed.

[65] Further, the proposed grounds of appeal in the Defendants' Notice of Appeal have no prospect of success. Therefore the application for leave to appeal is dismissed. Additionally, the Plaintiff ought not to be deprived of the fruits of its litigation and if a stay is not granted the Defendants would suffer no loss which could not be compensated in damages. The application for a stay pending appeal is also dismissed.

Costs

[66] Both parties presented their respective Bill of Costs prior to the Ruling. The Plaintiff claimed $18,000 for professional fees and disbursements and the Defendants $27,803.22.

[67] The Plaintiff, being the successful party, is entitled to its costs. The Court opined that $18,000 appears fair and reasonable but Counsel for the Defendants vehemently objected to that award. He was given an opportunity to present written submissions on his objection and the Plaintiff was also given an opportunity to respond.

[68] The starting point is that, in civil proceedings, costs are entirely 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]

[69] 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.**"

[70] The Court's jurisdiction to fix costs, rather than have them taxed, is derived from Order 59, rule 9(4) which reads:

> "**The Court in awarding costs to any person may direct that, instead of taxed costs, that person shall be entitled –**
>
> **(a) To a proportion specified in the direction of the taxed costs or to the taxed costs from or up to a stage of the proceedings so specified; or**
>
> **(b) To a gross sum so specified in lieu of taxed costs.**"

Rate

[71] The Defendants contend that the hourly rate charged by Counsel for the Plaintiff, Mr. Moree, is unreasonably high. He suggests that an appropriate rate for Counsel of just over 8 years standing at the Bar is $350.00 per hour.

[72] According to Mr. Moree, using the method relied upon by the Defendants, Mr. Hanna's reasonable rate would be $425.00 per hour.

1. Mr. Hanna was called to the Bar of the Commonwealth of The Bahamas on 11 June 2010, making him an attorney of 10.5 years standing.

2. According to the scale rates provided by the Bahamas Bar Association in 1984, Mr. Hanna's suggested hourly rate would have been $150.00 at that time.

3. Adjusting that rate using i) the US Department of Labour CPI Inflation Calculator, Mr. Hanna's suggested 1984 hourly rate would be $383.43 as at December 2020 and ii) the Bank of England Inflation Calculator, Mr. Hanna's suggested 1984 hourly rate would be £493.06 as at December 2020.

[73] Nevertheless, Mr. Hanna's rate in the Defendants' Bill of Costs is $500.00/hour which, presumably, the Defendants would suggest is reasonable.

[74] Mr. Moree submits that this illustrates that the suggested scale is outdated and does not reflect the realities of the present rates charged by attorneys in The Bahamas. I agree.

[75] Further, says Mr. Moree, Mr. Hanna worked on this matter with another partner at his firm, Mrs. Tara Archer-Glasgow, while he (Mr. Moree) was the sole partner who had carriage of this matter in his firm. The fact that he (Mr. Moree) was capable of handling this matter without the assistance of any other partners must entitle him to a rate which is at least commensurate with Mr. Hanna's. I also agree.

Time Spent

[76] The Defendants' argue that the time spent by Mr. Moree in reviewing the extensive submissions and authorities relied upon by the Defendants in connection with the Summonses filed on their behalf was excessive. The Defendants' submissions and authorities totalled 585 pages and included 18 different authorities addressing the relevant principles associated with 3 different areas of the law.

[77] Mr. Moree argues that, in the circumstances, the equivalent of one day's work is plainly reasonable. I agree.

Defendants' Authorities

[78] The Defendants rely on **Wilmott v. Barber** (1881) 17 Ch.D. 772 at page 774 to support the assertion that where a party's costs are fixed, as opposed to taxed, it is generally accepted that the party would be awarded a lesser sum than on taxation.

[79] Mr. Moree points out that this is not so. The relevant portion of what Jessell MR said is (page 774):

> **"Or he may follow the course which I sometimes adopt, and I generally find that the parties are grateful to me for doing so, namely, fix a definite sum for one party to pay to the other, so as to avoid the expense of taxation, taking care in doing so to fix a smaller sum than the party would have to pay if the costs were taxed."**

[80] Mr. Moree correctly asserts that Jessell MR was simply pointing out that by fixing costs the parties avoid incurring additional costs associated with a taxation and consequently, the fixed costs would be a smaller sum as it would not include the amount associated with the taxation.

[81] In addition, I also agree with Mr. Moree that the postscript in **Dickson v Old Fort Educational Foundation** [2017] 2 BHS J No 83, A v. D. [2012] 2 BHS J. No. 70 and **Colebrooke v. Fergie's Food Store t/a Golden Gates Super Market Ltd.** [2017] 2 BHS J. No. 130 has nothing to do with the general principles associated with the fixing of costs as opposed to having them taxed. Rather, they appear to indicate that the bill of costs submitted in certain cases are unreasonably high.

[82] Furthermore, the appropriate amount of costs will depend on the facts and circumstances of each individual case.

Conclusion

[83] There ought to be no gainsaying that the judge who presided over a matter is in a better position to fix costs rather than sending the parties to have them taxed before a taxing master. Besides saving further costs and judicial time, the presiding judicial officer is more familiar with the issues involved, the conduct of the parties, the novelty, weight and complexity of the case and the time reasonably spent on the case in order to exercise his/her judicial discretion.

[84] Having scrutinized the Bill of Costs of the Plaintiff, I found it to be very reasonable and consequently, I will make an award of costs to the Plaintiff in the amount of $18,000. I will make a further award of $1,500 representing the Plaintiff's costs of and associated with the Defendants' challenge.

Dated this 5th day of February, A.D., 2021

Indra H. Charles
Justice