COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2017/CLE/gen/00937

BETWEEN

(1) MARIA IGLESIAS ROUCO
(2) LUCIA MARIA IGLESIAS
(3) JAVIER JESUS IGLESIAS ROUCO
(4) FERNANDO IGLESIAS
(5) INDIRA IGLESIAS
(6) ALEJANDRO IGLESIAS
(7) PABLO IGLESIAS

Plaintiffs

AND

(1) JUAN JOSE SANCHEZ BUSNADIEGO
(In his capacity as Judicial Administrator of the Spanish Estate of Jesus Iglesias Rouco)
(2) SURF 'N' TURF LTD
(3) DELTEC BANK & TRUST LIMITED
(4) INGRID IGLESIAS ROUCO
(5) HOLOWESKO PYFROM & FLETCHER
(A law partnership)
(6) ALTUS LIMITED

Defendants

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Sebastian Masnyk of Lennox Paton for the Plaintiffs

Mrs. Gail Lockhart-Charles and Mrs. Lisa Esfakis of Gail Lockhart Charles & Co for the 2nd Defendant, Surf 'N' Turf Ltd.

Mr. Leif Farquharson and Mrs. Christina Davis-Justin of Graham Thompson for the 3rd Defendant, Deltec Bank & Trust Limited

Mr. Ryan Brown of RBO Advisors for the 4th Defendant, Ingrid Iglesias Rouco

Mrs. Tara Cooper-Burnside and Mr. Jonathan Deal of Higgs & Johnson for the 5th Defendant, Holowesko Pyfrom & Fletcher (a law partnership) and the 6th Defendant, Altus Limited

Hearing Date: 3 December 2021

Practice and procedure – Leave to appeal and stay pending appeal of Stay of Proceedings Ruling - Section 11 (f) of the Court of Appeal Act – Whether an application for leave to appeal and stay pending appeal by *inter partes* Summons is proper where there is no Affidavit in support and only a Notice of Motion of Appeal – Whether two clear days' notice must be given to the Defendants - Whether the Court wrongly exercised its discretion to refuse the Stay of Proceedings – Whether there is a realistic prospect of success on appeal against such refusal - Whether first instance judge is required to include every fact and consideration in written reasoning

Leave to appeal and stay of Unless Order – Whether the Court wrongly exercised its discretion to make Unless Order – Case management powers of court – Order 31A of the Rules of the Supreme Court, 1978, as amended – Order 31A r. 18(s) and r. 25

In July 2021, the Plaintiffs sought a stay of these proceedings to facilitate the joinder of the Judicial Administrator appointed in Spain in relation to the Spanish Estate of the Deceased as Plaintiff because they believe that he is better equipped to advance their claim that assets in this jurisdiction constitute part of the Spanish Estate.

On 1 September 2021, the Court refused the Plaintiffs' Stay of Proceedings application and gave an Oral Ruling. Also, by Written Ruling dated 1 September 2021, the Court acceded to the Second through the Sixth Defendants' application for the Plaintiffs to provide security for costs since they are all resident outside the jurisdiction and they do not have any assets in the jurisdiction. On 3 November 2021, the Court provided written reasons in relation to the Plaintiffs' Stay of Proceedings application.

The Plaintiffs now seek leave of the Court to appeal the Ruling refusing the stay on a myriad of grounds, most of which were assertions that the Court failed to consider certain factors. The grounds may be subsumed under the following broad heads:

1. Failure to give due consideration to the fact that the Judicial Administrator can better advance the Plaintiffs' claim;

2. Failure to consider that the Plaintiffs only became Plaintiffs by Interpleader (and not voluntarily);

3. The Court applied the wrong test to the Plaintiffs' Stay of Proceedings application;

4. The Court failed to give consideration to the applications made to the Spanish Court, which have not yet been heard, due to no fault of the Plaintiffs; and

5. Minor misstatements of facts.

The Plaintiffs also seek a stay pending the determination of the appeal.

Initially, at a hearing on 18 November 2021, the Court did not hear the Plaintiffs' application as the Court determined that it was improper before the Court since there was no supporting Affidavit and the Defendants were not given two clear days' notice.

Additionally, the Plaintiffs seek leave to appeal and a stay of the Unless Order made at the hearing on 18 November 2021. The Unless Order arose as a result of the Plaintiffs' failure and/or refusal to pay security for costs to the Defendants in accordance with the Court's Ruling on 1 September 2021. The gravamen of the Plaintiffs' complaint is that, had their application for leave to appeal and stay against the Stay of Proceedings Ruling not been improperly refused to be heard at the hearing on 18 November 2021, the Unless Order would not have been made. They also contend that the Unless Order was unfair in all the circumstances having regard to its draconian consequence: dismissing the claim in its entirety.

HELD: Refusing both applications for leave to appeal and stay pending appeal with costs awarded to the Defendants to be taxed if not agreed:

1. The Court has a discretion to grant or refuse an application to stay proceedings. Unless the Plaintiffs could show that the discretion was wrongly exercised or the Court failed to take relevant factors into consideration or took irrelevant factors into consideration, the judge has the discretion to refuse the stay. The test for whether leave to appeal ought to be granted is whether there is a realistic prospect of success: **Robert Adams (a beneficiary of the estate of Raymond Adams) v Gregory Cottis** 2018/PRO/cpr/00035 applied.

2. In refusing the stay application, the Court was cognizant of the fact that these proceedings would benefit from the Judicial Administrator being joined as a Plaintiff. The Court made its decision despite this determination. The Court considered that this was not such an exceptional circumstance as to justify granting an indefinite stay to the Plaintiffs and they had not otherwise shown special circumstances to justify same.

3. The Court did take into account that the Plaintiffs only came to become Plaintiffs by an Interpleader. However, in that Ruling, it was made clear that, notwithstanding that fact, the Plaintiffs voluntarily commenced the action upon serving the statement of claim. If they no longer wish to pursue their claim, they are at liberty to simply discontinue it. The Plaintiffs'

request for a stay of these proceedings is effectively a request to allow them to continue to maintain the action while taking no steps to progress it.

4. The special feature of the stay application was that it was brought by the Plaintiffs. As stated in the Ruling, the law applicable to stays sought by a plaintiff is different from the law relating to stays sought by defendants. The standard in the case of the plaintiff is higher than that of a defendant because it is the plaintiff who brings the action. Accordingly, the Court applied the correct law to the Plaintiffs' stay application. **Excalibur Ventures LLC v Texas Keystone Inc.** [2011] EWHC 1624 applied, **St George and others v Hayward and others** [2007] 4 BHS J No 10 distinguished.

5. Written Rulings should be read on the assumption that the Judge considered all of the evidence before him/her. A judge has not failed to consider factors merely because it was not included in the written reasons: **Pigowska v Piglowska** [1999] 3 All ER 632 and **Eagil Trust Co. Ltd. v Pigott-Brown and another** [1985] 3 All ER 119 applied.

6. Unless otherwise stated, a summons ought to be supported by an Affidavit to put before the Court evidence relevant to determining the application. Further, a summons must be served on all other parties at least two clear days before the hearing specified: RSC Order 32 Rule 3 applied.

7. Under RSC O. 31A r. 25, the Court has wide case management powers and discretion which are entrusted to the Judge as to the making of Unless Orders. The justification for the power of the Court to make Unless Orders is that "orders are made to be complied with not ignored": per Roskill LJ in **Samuels v Linzi Dresses Ltd** [1981] QB 115. See also **Belgravia International Bank and Trust Limited et al v Sigma Management Bahamas Limited** SCCivApp No. 75 of 2021 and **Darlene Allen-Haye v Keenan Baldwin & Anr** SCCIvApp. No. 186 of 2019.

8. The Court refuses to grant leave to appeal against the Unless Order as well as a stay of that Order as there is nothing to show that the Court applied the wrong principles or took into account matters which it should not have taken into account and/or left out of account matters which were relevant to the application: **Belgravia International v Sigma** –per Isaacs LJ at paras 23-25.

9. The hearing of the Stay appeal would not have prevented the making of the Unless Order because the Court would have determined the Stay Appeal in the same manner as it has now done: refusing both leave to appeal and the stay.

RULING

Charles J:

Introduction

[1] There are three extant applications before the Court, namely:

1. An application by the Plaintiffs by Summons filed on 17 November 2021 for an Order extending the time in which to apply for leave to appeal the Ruling of 3 November 2021 ("the Written Ruling") refusing stay of the proceedings, extending the time in which to appeal the Written Ruling and for a Stay of Proceedings pending the determination of the appeal ("Stay Appeal Summons");

2. An application by the Plaintiffs by Summons filed on 2 December 2021 for an Order extending the time in which to appeal the Ruling delivered orally on 18 November 2021 making an Unless Order against the Plaintiffs for leave to appeal the Ruling of 18 November 2021 and a Stay of Proceedings pending determination of the appeal ("Unless Order Appeal Summons") and;

3. A Summons dated 3 December 2021 by the Plaintiffs for leave to amend the two aforementioned Summonses to reflect that the applications are with respect to the Orders made (i) on 1 September 2021 (the date of the Oral Ruling refusing stay) as opposed to 3 November 2021 (the date of the Written Ruling refusing stay) and (ii) 18 November 2021.

[2] Each of the Second through Sixth Defendants (conveniently called "the Defendants") oppose the applications. In respect of the Stay Appeal Summons, in particular, in a nutshell, they assert that the Court correctly exercised its discretion to refuse the Stay of Proceedings since there were no exceptional circumstances to justify granting the stay. They say that there is no realistic prospect that the Plaintiffs would be successful on appeal and that it is part of the

Court's function in considering applications for leave to appeal to weed out hopeless appeals.

Salient facts

[3] The Court has, in previous Rulings, outlined some of the facts. Some salient facts will be helpful to have a better understanding of the case. Surf 'N' Turf was incorporated by the Fifth Defendant, Holowesko Pyfrom & Fletcher, a law partnership ("HPF"). The shares in Surf 'N' Turf Ltd ("the Company") are held by the Sixth Defendant, Altus, a nominee company of HPF, by and subject to the terms of a Declaration of Trust. Under the Declaration of Trust, Jesus Iglesias Rouco ("the Deceased"), a Spanish National, was expressed to be the beneficial owner of the shares in the Company during his lifetime and, after his death, the beneficial owner of the shares was to be the Fourth Defendant ("Ingrid"), the last of the Deceased's eight children. The Deceased passed away in February 2017.

[4] Initially, the Company commenced this action in August 2017 to compel the Third Defendant ("Deltec") to transfer certain assets owned by the Company to it. In response to correspondence from certain other claimants (being some of the other seven children of the Deceased) claiming that the assets were properly the property of the Deceased's Spanish Estate, Deltec filed an interpleader application in September 2017, which was granted in December 2018. This had the effect of making the seven children the current Plaintiffs. The Plaintiffs filed and served a statement of claim thereafter.

[5] The Spanish Court appointed the First Defendant in these proceedings, Juan Jose Sanchez Busnadiego, ("the Judicial Administrator") to determine the extent of the Deceased's Estate in Spain.

[6] The Plaintiffs applied to the Spanish Court for permission to have the Judicial Administrator become a Plaintiff in these proceedings. There is no indication when the Spanish Court will hear this application to grant or refuse leave for the Judicial Administrator to become a Plaintiff in these proceedings.

[7] By Summons filed on 7 July 2021, the Plaintiffs sought a stay of these proceedings pending the final decision of the Spanish Court "either permitting or directing the Judicial Administrator to take an active role in the Bahamian Litigation, or alternatively, directing that the Judicial Administrator shall not take an active role in the Bahamian Litigation". In support of their application, the Plaintiffs relied on the Sixth Affidavit of McFalloughn Bowleg Jr filed on 8 July 2021.

[8] The Plaintiffs say that the Judicial Administrator can effectively replace them in these proceedings since he is more appropriate to advance their positions as to their alleged interests in the shares in the Company. As things currently stand, the Judicial Administrator is the First Defendant in these proceedings but he has not submitted to the jurisdiction of this Court in that capacity or at all.

[9] On 1 September 2021, this delivered an Oral Ruling with brief reasons, dismissing the Plaintiffs' application to stay the proceedings. On that date, I notified all parties that time to appeal would take effect from today's date (1 September 2021) and that a Written Ruling would be delivered in a matter of days. This did not happen. The Court delivered its Written Ruling about two months after on 3 November 2021.

[10] The Stay of Proceedings Ruling dismissed the Plaintiffs' application to stay these proceedings pending the final decision of the Spanish Court to grant or refuse leave of the Judicial Administrator to take an active role in this litigation. The Plaintiffs sought the stay because they contended (as they still do) that the Judicial Administrator could effectively replace them in these proceedings since he is more appropriate to advance their positions as to their alleged interests in the shares in the Company. As things stood at that time (and still stood as of 3 December 2021 when these applications were heard), the Plaintiffs are unable to say to the Court when the application will be heard by the Spanish Court. It has been about 5 months since the Stay of Proceedings application was heard. As previously stated, the Judicial Administrator has not submitted to the jurisdiction

of this Court in that capacity or at all. He is sued as the First Defendant and no application has even been made for him to be served out of the jurisdiction. As I stated in the Stay of Proceedings Ruling, there has been much delay with the progress of this action. Two trial dates have already been vacated. Another trial date fixed for eight (8) days in July 2022 appears to be on the periphery of vacation. I also stated, in the Stay of Proceedings Ruling, that the Plaintiffs were unable to demonstrate the existence of "special", "rare" or "exceptional" circumstances justifying such a stay, which is the standard required of plaintiffs who seek a stay.

[11] Aggrieved by the decision in the Stay of Proceedings Ruling, the Plaintiffs filed the Stay Appeal Summons on 17 November 2021.

[12] Also on 1 September 2021, in a Written Ruling, I ordered that the Plaintiffs pay security for the Defendants' costs, as they are resident outside the jurisdiction and have no assets within the jurisdiction ("the Security for Costs Order"). They have not appealed that Ruling but have not paid the security for costs as ordered.

[13] On 28 September 2021, the Plaintiffs filed a Summons seeking an extension of time to comply with the Security for Costs Order.

[14] By letter dated 5 October 2021, the Defendants in correspondence from Deltec's Attorney, Mr. Farquharson gave the Plaintiffs an extension of time until 14 October 2021. By email of the same date, lead Counsel for the Plaintiffs, Mr. Jenkins acknowledged receipt of the letter. Notwithstanding the extension to 14 October 2021, the Plaintiffs failed to provide the Security for Costs.

[15] On 15 October 2021, Ingrid filed a Summons supported by the Second Affidavit of Jeleah Turnquest seeking a dismissal of the action on the ground that the Plaintiffs have defaulted in giving security for costs. Similar applications were filed on behalf of HPF and Altus as well as the Company and Deltec.

[16] As already mentioned, on 17 November 2021, the Plaintiffs filed the Stay Appeal Summons. It was not supported by an Affidavit but by a draft Notice of Motion of Appeal. The Defendants were not given two clear days' notice of the hearing of the application. Additionally, the Plaintiffs did not file any written submissions.

[17] On 18 November 2021, the Court proceeded to deal with the Summonses filed by the Defendants seeking relief in relation to the Plaintiffs' non-compliance with the Security for Costs Order including dismissal of the claim. Instead of dismissing the claim, the Court made an Unless Order to strike out the claim if the security for costs were not paid by 15 December 2021.

[18] Consequent on the Stay Appeal Summons not having been heard on 18 November 2021, the Plaintiffs filed the Eighth Affidavit of McFalloughn Bowleg Jr. on 24 November 2021 in support of the Stay Appeal Summons.

[19] On 2 December 2021, the Plaintiffs wrote to Mrs. Charmaine (sic) Archer in the Listing Office seeking an urgent hearing before myself or any other judge so that their applications for leave to appeal and a stay could be heard on an urgent basis before 8 December 2021. The Unless Order Appeal Summons was filed on 2 December 2021 and was supported by the Ninth Affidavit of McFalloughn Bowleg Jr. filed on the same date. A Certificate of Urgency accompanied the Unless Order Summons.

[20] When Mrs. Archer brought this matter to my attention, I was puzzled that the Plaintiffs would wish to saddle another judge with a matter which is being actively managed by me. Additionally, I had never indicated to any party that I could not hear any applications in this case. I say no more.

[21] That same day, Mr. Masnyk sent an email to me attaching the Summons and other correspondence which had been sent to Mrs. Archer. This Court promptly fixed a hearing for the following day: Friday 3 December 2021 at 2.30 p.m. The hearing ended after 5.00 p.m. and learned Counsel Mr. Masnyk, invited the Court to give a judgment there and then. Unfortunately, the Court was unable to do so.

Preliminary issues – Stay Appeal Summons

[22] There are a number of preliminary issues with respect to the Stay Appeal Summons.

[23] Although the Plaintiffs in their Summons requested extension of time to appeal the Stay of Proceedings Ruling, at the hearing, Mr. Masnyk expressed that he no longer seeks an extension of time as the application was not filed out of time. In the circumstances, the Court makes no order on this issue. The Defendants have expressly reserved their rights to challenge this issue in the Court of Appeal.

[24] Another issue with respect to the first Summons was that it was not supported by an Affidavit. At the hearing on 18 November 2021, the Court expressed the view that the application was not proper before the Court for hearing given the fact that there was no supporting Affidavit and that the Defendants were not given two (2) clear days' notice.

[25] In his written submissions, Mr. Masnyk submitted that there is no rule of law or procedure requiring an Affidavit where a draft Notice of Appeal is attached to the Summons. While I acknowledge that there is no rule of law which generally requires Summonses to be supported by Affidavits and that the draft Notice of Motion of Appeal sets out the basis on which the Plaintiffs sought this appeal, the evidence which the intended Appellants ("the Plaintiffs") contended supports their position ought to have been contained in an affidavit. The Summons initiates the application and makes the Court aware of the nature of the application. The draft Notice of Motion of Appeal sets out the grounds upon which the Plaintiffs seek an appeal of the Ruling. However, these ought to be supported by evidence, setting out the facts upon which such assertions are grounded. The proper way to put in that evidence is by filing an affidavit with evidence to support the assertions.

[26] In any event, two (2) clear days' notice for the hearing of the Stay Appeal Summons was not given. Order 32 Rule 3 of the Rules of the Supreme Court ("RSC") requires that Summonses must be served on every other party not less than two (2) clear days before the day so specified:

“A summons asking only for the extension or abridgement of any period may be served on the day before the day specified in the summons for the hearing thereof but, except as aforesaid and unless the Court otherwise orders or any of these Rules otherwise provides, <u>a summons must be served on every other party not less than two clear days before the days so specified.</u>” [Emphasis added]

[27] Whether an Affidavit to support the Stay Appeal Summons was required or not, two clear days’ notice was not given to the Defendants for the hearing of the application since it was filed the day before the date specified in the Summons for the hearing. Further, no submissions were filed. Accordingly, I opined that the application was improper before the Court at the time (18 November 2021). I did indicate to Mr. Jenkins that I will be prepared to hear the Stay Appeal Summons (i) when an affidavit in support is filed; (ii) the Defendants have been properly served and (iii) submissions have been transmitted to the Court and Counsel for the Defendants.

Law on leave to appeal

[28] In **Robert Adams (a beneficiary of the estate of Raymond Adams) v Gregory Cottis** 2018/PRO/cpr/00035, this Court succinctly set out the law applicable to the question of whether leave to appeal should be granted. The Ruling was upheld by the Court of Appeal on 7 October 2021: see Court of Appeal Judgment SCCivApp & CAIS No. 23 of 2021.

[29] The test is whether there is any realistic prospect of success. At paragraphs 14 and 15 of **Cottis**, this Court highlighted the importance of weeding out hopeless appeals and to deter parties from commencing frivolous appeals:

[14] As Mr. Jenkins correctly submits, the Court must consider whether the grounds put forward, or any of them have any realistic prospect of success. In this respect, part of the Court’s function is to weed out unmeritorious claims and to deter parties from commencing frivolous appeals. As stated by the English Court of Appeal in Practice Note (Court of Appeal: procedure) [1999] 1 All ER 186, it is a part of the Court’s function to weed out hopeless appeals. In this regard the Court of Appeal provided the following guidance:

> **"7. <u>The experience of the Court of Appeal is that many appeals and applications for leave to appeal are made which are quite hopeless. They demonstrate basic misconceptions as to the purpose of the civil appeal system and the different roles played by appellate courts and courts of first instance. Courts of first instance have a crucial role in determining applications for leave to appeal</u>."**

[15] The appeal systems and the requirement to obtain leave are imposed to avoid the expenditure of money and time on appeals which have no hope of success. The guiding principle in determining whether leave to appeal should be granted is set out in the Practice Note provided in the leading case of Smith v. Cosworth Casting Processes Ltd. (1997) 4 All ER 840 where Lord Woolf stated:

> **"The Court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why, however, this court has decided to adopt the former phrase is because the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient."** [Emphasis added]

[30] Relying upon submissions made by Mr. Jenkins, the Court stated that if there is any real doubt about whether leave ought to be granted, then leave should be refused:

"[17] If there is any doubt that leave ought to be granted, the safe course is to refuse leave to appeal, as set out at paragraph 8 of the 1999 Practice Note (Court of Appeal: procedure) where it was stated:

> **"[I]f the court of first instance is in doubt whether an appeal would have a real prospect of success or involves a point of general principle, the safe course is to refuse leave to appeal. It is always open to the Court of Appeal to grant leave."**

[31] The test for whether leave should be granted is whether there is a realistic prospect of succeeding on appeal or whether the intended applicant has an arguable case:

> **“[18] The principles set out in *Cosworth* were accepted and relied upon by Jon Isaacs J (as he then was) in Bethell v. Barnett and others [2011] 1 BHS J. No. 64. In Bethell, His Lordship stated, at paragraph 9:**
>
> > **“In Smith v Cosworth Casting Processes Ltd. [1997] 4 All ER 840 Lord Woolf, MR provides guidelines for applications for leave to appeal. I mention the first two of them: "36 The guidance is as follows:**
> >
> > > **1. The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word "realistic" makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.**
> > >
> > > **2. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying.”**

Law on stay pending appeal

[32] 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.

[33] 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.”**

[34] **In the Matter of Contempt of Donna Dorsett-Major on 3 June 2020** 2020/CLE/gen/0000, Ruling delivered on 8 December 2020, this Court dealt with the applicable principles on stay pending appeal. For present purposes, I merely reiterate them fully at paragraphs 23 to 28:

"[23] The starting point is 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, 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."[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. This requires evidence and not bare assertions.

[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."**

See also **Cottis** at paragraphs 22 to 24 as well as the Court of Appeal Judgment in **Cottis**.

[35] The Court considers the present applications on the basis of these well-established principles.

Stay Appeal Summons: examining the Grounds of Appeal

Ground 1: Failure to give due consideration to the fact that the Judicial Administrator can better advance the Plaintiffs' positions.

[36] Learned Counsel Mr. Masnyk submitted that the Court failed to justify its refusal of the stay application having regard to the fact that the Plaintiffs' primary reasoning for the stay was that the Judicial Administrator is best placed to

challenge the "Impugned Transactions". He said that the Court failed to give due consideration to the integral role of the Judicial Administrator with respect to the Plaintiffs' position. Considerations relevant to its suitability which he said the Court ought to have considered are that:

i. The Judicial Administrator will have the Spanish Estate Assets at his disposal to meet the costs of the action and potentially any orders for security for costs made herein;

ii. The Judicial Administrator is best placed to assist the Court in securing all relevant information and discovery from various parties in the course of the litigation, including relevant evidence from Spain where the Deceased was domiciled and where he died (with all other parties resident outside of Spain);

iii. It would make moot the issues of standing raised by the Defendants and thus reduce the number of interlocutory applications made before trial, allowing the Court to determine the primary issue in dispute, namely whether the Impugned Transactions should be set aside;

iv. The whole course of litigation will continue with greater dispatch and efficiency with the involvement of the Judicial Administrator, with the Spanish and Bahamian Proceedings harmonized.

v. The Plaintiffs from the outset of the litigation have advocated consistently that the Judicial Administrator is the most appropriate party to carry the Claim which was expressly accepted by the Court in its Ruling dated 12 January 2021.

[37] According to Mr. Masnyk, had the Court directed its attention to the aforementioned factors, the Court would have appreciated the many benefits to the whole of the litigation, both procedurally and materially, which would clearly assist it (the Court) in adjudicating this matter on its merits and doing justice between the parties, both in meeting interlocutory matters such as security for

costs and dispelling any possible query as to standing, and assessing the evidence in the case.

[38] This argument is untenable. Both Mrs. Lockhart-Charles and Mr. Farquharson correctly stated that it is plainly apparent from the Ruling that the Court did accept the Plaintiffs' contention that the Judicial Administrator could advance their position better than they could at paragraph 27:

> **"[27] Mr. Jenkins further submitted that the Judicial Administrator is the most suitable party to argue the Plaintiffs' position (that, collectively, they have a 7/8 interest in the shares in the Company)."**

[39] The Court was aware of the fact that these proceedings would benefit from the Judicial Administrator being joined as a Plaintiff. In fact, this Court actually agreed with the Plaintiffs that this action would be best served if the Judicial Administrator was a party. At paragraph 34, the Court stated:

> **"On 16 November 2020, I decided that this action may be best served if the Spanish Judicial Administrator is a party to these proceedings. However, there has been an inordinate delay by the Plaintiffs to put their house in order in Spain. Granted that Covid-19 had some part to play in the delay, many months have passed and nothing much has been done."**

[40] The Court made its decision *despite* this determination. The Court considered that this was not an exceptional circumstance to justify granting a stay to the Plaintiffs and they had not otherwise shown special circumstances to justify same. The fact that the Judicial Administrator could better advance their position was not sufficient to grant a stay in the face of what the law requires. Acceptance that the Judicial Administrator is better placed (than the Plaintiffs) does not surmount the underpinnings of the law which apply to stay applications. Acknowledgement that the Judicial Administrator was the proper party and the refusal of the stay were not mutually exclusive. Although the action would be best served, the Court determined that justice would not be served by 'warehousing' these proceedings until the Spanish Court's permission, the date of which was, at that time, and is still, unknown.

Ground 2: Failure to give due weight to the manner in which the Plaintiffs became Plaintiffs

[41] Mr. Masnyk contended that the Court did not give sufficient consideration as to how the Plaintiffs came to be Plaintiffs in this action. They only became Plaintiffs after the Interpleader Action and therefore did not commence the action. In failing to consider the facts of the manner and circumstances in which the Plaintiffs came to be the Plaintiffs, Mr. Masnyk submitted that the Court incorrectly applied **Excalibur Ventures LLC v Texas Keystone Inc.** [2011] EWHC 1624 as the test which should apply to granting a stay to a plaintiff. He submitted that **Excalibur Ventures** only applies where a plaintiff is applying to stay proceedings voluntarily brought by it. He next submitted that the Plaintiffs did not voluntarily bring the action since they only became Plaintiffs as a result of Interpleader, bringing the action outside the realm of **Excalibur Ventures**.

[42] This submission must fail for several reasons. The Court dealt with this case from the beginning and was conscious as to how the Plaintiffs became Plaintiffs. In fact, the Court in the Stay of Proceedings Ruling stated that the Plaintiffs had still voluntarily brought the proceedings when they filed and served a Statement of Claim. At paragraph 30, the Court stated:

> **"Learned Counsel Mr. Deal who appeared on behalf of HPF and Altus properly submitted that notwithstanding that this action was initially commenced by the Company against Deltec seeking to compel Deltec to transfer the assets belonging to the Company to it and the Plaintiffs only became Plaintiffs after they alleged an interest in the shares, they are taken to have initiated the litigation when they filed and served the Statement of Claim. They did so without the participation of the Judicial Administrator."**

[43] As Mrs. Lockhart-Charles correctly contended, the Plaintiffs are not being compelled to continue with this action. They are at liberty to withdraw it. The purpose of the Interpleader proceedings was to give the Plaintiffs an opportunity to pursue their claim to the assets held by Deltec. If they no longer wish to pursue this claim they can simply discontinue it. I agree that the Plaintiffs' request for a stay of these proceedings is effectively a request to allow them to continue to

maintain the action while taking no steps to progress it. Both Mr. Deal and Mr. Brown expressly stated that the Plaintiffs cannot be permitted to drag defendants along at their whim.

[44] As the Stay of Proceedings hearing, the Court was presented with two (2) authorities on the law applicable to stays namely: **St George and other v Hayward and others** [2007] 4 BHS J. No. 10 and **Excalibur Ventures LLC v Texas Keystone Inc and others**. Mr. Masnyk asserted that **St. George** should have been applied instead of **Excalibur Ventures**. However, Mr. Deal correctly submitted that **Excalibur Ventures** was the more appropriate authority to have applied since **St. George** did not primarily concern a stay and, more importantly, the application for a stay in that case had been brought by a defendant. The special feature of the Plaintiffs' stay application was that it was brought by them. As stated in the Ruling, the law applicable to stays sought by plaintiffs is different from the law applicable to stays sought by defendants. The standard in the case of a plaintiff is higher since it is the plaintiff would commences the action. In my judgment, the Court applied the correct law to the Plaintiffs' stay application.

Ground 3: The Court failed to give consideration to the applications made to the Spanish Court which have not yet been heard due to no fault of the Plaintiffs

[45] Part of the Court's reasoning for rejecting the stay pending the ruling of the Spanish Court on the Judicial Administrator's ability to join these proceedings was that there is no indication when or if the Judicial Administrator will be given such permission. Mr. Masnyk took issue with this and submitted that, in so saying, the Court failed to give consideration to the applications of the Judicial Administrator and the Plaintiffs filed on 9 July 2021 and 22 July 2021 respectively and that the Plaintiffs had done all they could do and have not caused any delay in that matter being heard.

[46] It is a fact that the time at which the Judicial Administrator will be given permission is unknown. Not even a timeframe can be identified by the Plaintiffs as to when the Spanish Court will grant permission for the Judicial Administrator to join, if at

all. The Court did not attribute the delay in the Spanish proceedings to the Plaintiffs. It is just a relevant consideration since its effect is that the Plaintiffs seek an indefinite stay. The fact of the matter is that the Plaintiffs asked this Court to halt proceedings until the Spanish Court grants permission for the Judicial Administrator to join these proceedings when they have no idea when or if the Court will grant such permission.

[47] The Notice of Motion of Appeal otherwise alleges several misstatements of facts in the Stay of Proceedings Ruling and is littered with assertions of matters that the Plaintiffs say the Court failed to consider in making its determination that the Plaintiffs had not demonstrated circumstances adequately exceptional to justify refusing the stay. As all Defence Counsel pointed out, the mere fact that a matter is not mentioned in a Written Ruling does not mean that it was not taken into account. The House of Lords in **Piglowska v Piglowska** [1999] 3 All ER 632 emphasised that first instance judges are not required to include every single fact and consideration in their written reasons. At pages 643 and 644, Lord Hoffmann stated:

> **"In *G v G* [1985] 2 All ER 225 at 228, [1985] 1 WLR 647 at 651–652 this House, in the speech of Lord Fraser of Tullybelton, approved the following statement of principle by Asquith LJ in *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343 at 345, which concerned an order for maintenance for a divorced wife:**
>
> > **'It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.'**
>
> **This passage has been cited and approved many times but some of its implications need to be explained. First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that.**

It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc v Medeva plc* (1996) <u>38 BMLR 149 at 165</u>:

> **'The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'**

<u>The second point follows from the first.</u> <u>The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the district judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account</u>. This is particularly true when the matters in question are so well known as those specified in s 25(2). <u>An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself</u>. The reason why I have taken some time to deal with the Court of Appeal's assertion that the judge did not realise that she was entitled to exercise her own discretion is that I think it illustrates the dangers of this approach. The same is true of the claim that the district judge 'wholly failed' to carry out the statutory exercise of ascertaining the husband's needs." [Emphasis added]

[48] This very point was restated in **Eagil Trust Co. Ltd. v Pigott-Brown and another** [1985] 3 All ER 119, where the English Court of Appeal expressed that a judge does not have to traverse each and every point made by Counsel:

> **"…Apart from such exceptions [to the duty to give reasons], <u>in the case of discretionary exercise, as in other decisions on facts or law, the judge should set out his reasons, but the particularity with which he is required to set them out must depend on the circumstances of the case before him and the nature of the decision he is giving. When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to</u>**

show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis on which he has acted, and if it be that the judge has not dealt with some particular argument but it can be seen that there are grounds on which he would have been entitled to reject it, this court should assume that he acted on those grounds unless the appellant can point to convincing reasons leading to a contrary conclusion (see Sachs LJ in Knight v Clifton [1971] 2 All ER 378 at 392–393, [1971] Ch 700 at 721)."[Emphasis added]

[49] The question was and still is whether there are exceptional circumstances to justify staying the proceedings (action). The Plaintiffs could not satisfy the Court that there were any exceptional circumstances to justify staying an action that they themselves have commenced. Plaintiffs who file actions must be prepared to prosecute and not warehouse it to suit their agenda. It would be unjust to drag the Defendants along indefinitely. While it would be ideal to have the Judicial Administrator joined in these proceedings as a Plaintiff, it would be unjust to indefinitely stay these proceedings. Though the Judicial Administrator can advance the Plaintiffs' positions more effectively, the Plaintiffs are still proper Plaintiffs. All factors were considered in coming to that determination. The Stay of Proceedings Ruling was a well-reasoned Ruling in which the Court considered the main reasons for refusing the stay. Accordingly, it is clear that this matter would not be successful on appeal.

[50] For all of the foregoing reasons, there is no realistic prospect that the intended appeal will succeed on appeal. In any event, as Mr. Jenkins correctly submitted in **Cottis**, if there is any doubt should leave be granted, the safe course is to refuse leave as it is always open to the Court of Appeal to grant leave. The Plaintiffs' application for leave to appeal as well as a stay of the Stay of Proceedings is refused.

Unless Order Appeal Summons

[51] Mr. Masnyk submitted that the Court was wrong to refuse to hear the Plaintiffs' Stay Appeal Summons at the 18 November 2021 hearing and to make the Unless Order since the Stay Appeal Summons was not improper. He next submitted that there is no rule of law to require an Affidavit to support a Summons. He further submitted that the Court should not have refused to hear their Stay Appeal Summons at that time because had they been successful, each of the Defendants' applications would have fallen away and the Court would not have made the Unless Order.

[52] He further submitted that the unfairness of the Unless Order is exacerbated by the impact that it has – to strike out the Plaintiffs' claim in its entirety. In support, he cited Atkin LJ in **Maxwell v Keun and others** [1928] 1 KB 645 at page 653:

> **"I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned Judge on such a question as an adjournment of a trial; and it very seldom does so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so." The Reporter at p. 659 adds a note that the Plaintiff succeeded in the action when it came on at the adjourned date."**

[53] Mr. Masnyk argued that the Court ought to have been slow to make the Unless Order since it had the effect of defeating the rights of the Plaintiffs who have informed the Court of their inability to pay, and of the Judicial Administrator who has requested that the Court stay the proceedings until he can become a Plaintiff.

[54] Alternatively, says Mr. Masnyk, the Court erred in not making the operative date of the Unless Order dependent on the outcome of the Stay Appeal Summons when the Court did consider that it was proper before the Court.

[55] In another Ruling in **Cottis** (dealing with Unless Orders) delivered on 29 December 2020, learned Counsel Mr. Jenkins submitted to this Court that the leading case in this jurisdiction on Unless Orders is **Mega Management Limited**

v Southward Ventures Depository Trust et al v E. Dawson Roberts and Lori Lowe SCCivApp No. 4 of 2007, a case decided after the introduction of RSC O.31A, but which did not consider the effect of that Order. However, the case is of some assistance in the following paragraphs:

Paragraph 39

"39. Where a party to an application before a court seeks to persuade that court to exercise its discretion in that party's favour and where the law requires that party to adduce cogent evidence on which the court may be invited to exercise that discretion, it is unacceptable to make general averments as the only evidence on which the court is expected to decide. This, I think, is particularly so, where the party is ex facie, in breach of a peremptory order of the court."

Paragraph 70

"70. The justification for [the power for the Court to make Unless Orders] was stated by Roskill LJ., in Samuels v Linzi Dresses Ltd [1981] QB 115 is the principle that "orders are made to be complied with not ignored" at page 126 – 127.

The learned authors of the Supreme Court Practice (cited above) go on to point out that the power is not as harsh as might be thought because –

"(a) mere failure to comply with a rule is not regarded as sufficient for its exercise; there must be disobedience of a direct peremptory order;

(b) it is unusual to make a peremptory order on the first occasion that the matter is before the court;

(c) if the defaulter has any reasonable explanation, he may obtain an extension of time even (though rarely) after the time expired;

(d) generally speaking, a defaulter can cure his default at any time before the order for dismissal is made (or, if postponed) takes effect."

In such circumstances, it is usually fair to conclude that a party who persists in his default either has no confidence in his case or has lost the desire to pursue it – at page 471 of the work cited."

Paragraph 87

"87. In this case, the order which had not been complied with was an "unless" order which is an order of "last resort" and which is usually only issued after there has been a history of a party failing to comply with the provisions of the rules of court or with peremptory orders issued by a court. In this case the history of the appellant's non-compliance with orders or rules of the court is not as extensive as in some other cases, which have come before this court; and if one looks only at the time when the appellant's counsel was put in funds in order to comply with the order of 2 March, 2006, it would be difficult to say that there was a history of deliberate disobedience to peremptory orders of the court in this case. The matter, however, did start or stop there because there had been an earlier written request for security of the Fenders' costs in the sum of $250,000.00 which had apparently been ignored and although the deposit of the sum of $100,000.00 ordered by the learned judge could have been done either by bond or cash, counsel for the appellant apparently was specifically instructed by the principal/s behind the appellant, to deposit a bond when it was clearly easier to deposit the money in court without the intervention of a bank. These facts, among others were to be weighed by the court when it was deciding whether the appellant intended to obey or intended to disobey the "unless" order even though it was made by consent at a time when counsel for the appellant already had the money in hand."

[56] As I have already determined, the Stay Appeal Summons was, in fact, irregular; if not by reason of the lack of an Affidavit in support, at least because it had not been served on the Defendants at least two clear days before the hearing. In any event, the Court's refusal to hear the Stay Appeal Summons is irrelevant to the Unless Order requiring payment for security for costs. I do not see how one affects the other. Even if the Court heard the Stay Appeal Summons on 18 November 2021, the outcome would have been the same: to refuse leave to appeal and a

stay when one considers the hopeless grounds. Mr. Masnyk's submission that the Defendants' application for security for costs would have fallen away upon the hearing of the Plaintiffs' Stay Appeal Summons is made on the basis that the Plaintiffs' Stay Appeal Summons would have been successful. The result of this Ruling shows otherwise.

[57] Further, the Unless Order was warranted. The Plaintiffs were ordered to pay security for costs since they are resident outside of the jurisdiction and they have any assets in the jurisdiction, which is probative evidence in favour of granting an order for security for costs.

[58] The justification for the power for the Court to make Unless Orders was stated by Roskill LJ. in **Samuels v Linzi Dresses Ltd** [1981] QB 115 at pages 126-127 to be the principle that "orders are made to be complied with not ignored". See also: **Belgravia International Bank and Trust Limited et al v Sigma Management Bahamas Limited** SCCivApp No. 75 of 2021 and **Darlene Allen-Haye v Keenan Baldwin & Anr** SCCIvApp. No. 186 of 2019 in which the Court of Appeal detailed the wide scope of the case management discretion entrusted to a judge under RSC O. 31A r. 25.

[59] The approach of appellate courts to the review of judicial discretions and case management decisions is well-established.

[60] An appellate court will not interfere with the discretion of a lower court unless it is satisfied that the discretion has been exercised on a wrong principle **and** should have been exercised in a different way **or** unless clearly satisfied that there has been a miscarriage of justice. In **Ratnam v Cumarasamy** [1964] 3 All ER 933, Lord Guest giving the advice of the Privy Council stated at page 934:

> **"The principles on which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion: *Charles Osenton & Co v Johnston* ([1941] 2 All ER 245 at p 257; [1942] AC 130 at p 148), per Lord Wright. The court will not interfere unless it is clearly**

satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice: *Evans v Bartlam*."

[61] As Mr. Deal correctly submitted, appellate courts will rarely allow appeals against case management decisions and will uphold robust and fair case management decisions. By its nature, case management is "quintessentially" a matter for the first instance judge seised of the proceedings. In **Wembley National Stadium Limited v Wembley (London) Limited** [2000] Lexis Citation 2361, Parker LJ said at paragraph 54:

> **"The issue whether to grant expedition, and if so how much and on what terms, was a matter essentially for the discretion of the judge. As is well-known, this court will not lightly interfere with the exercise of judicial discretion. That applies, in my judgment, with particular force to case management decisions. The whole purpose of case management would be frustrated if an appeal route against case management decisions were thought to be readily available to the dissatisfied party. The reality is quite the contrary, in my judgment. Case management rarely involve issues of principle, and the onus on a dissatisfied party to demonstrate that a case management decision is plainly wrong cannot be easily discharged. By its nature, case management is quintessentially a matter for the court in which the proceedings are being conducted, and the scope for intervention by an appellate court in relation to case management decisions taken by that court is necessarily limited, in my view. Only in the most compelling circumstances, as I see it, would intervention of that kind be warranted."**

[62] However, an appellate court may interfere with a case management decision if satisfied that the judge has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong. In **Broughton v Kop Football (Cayman) Ltd** [2012] EWCA Civ 1743, Lewison LJ said at paragraph 51:

> "**Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion**

> **<u>by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree</u>. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."**

[63] The breadth of the court's case management powers is self-evident in Order 31A itself but nowhere more than in O.31A, r. 18 (s). The wide terms of this open-ended section expressly states that the Court may "take any other step, give any other direction or make any other order for the purpose of managing the case and ensuring the just resolution of the case."

[64] In my judgment, the intended Grounds of Appeal in the Unless Order Summons are also hopeless in that the Plaintiffs have not demonstrated how the Court erred in law and in fact on 18 November 2021 when it heard and determined the Defendants' applications to strike out the Plaintiffs' Statement of Claim for non-payment of security for costs or, to alternatively make an Unless Order. The Plaintiffs were unprepared to have the Stay Appeal Summons heard on that day. In any event, the hearing of the Stay Appeal Summons would not have prevented the Court from making the Unless Order because the Court would have determined the application in the same manner as it has done now. In other words, refused it.

[65] Be that as it may, the Plaintiffs have not appealed the Security for Costs Order/Ruling. In that Ruling, the Court stated that it was satisfied that the Defendants had not made their applications merely to stifle the Plaintiffs' cause of action. The Plaintiffs cannot expect not to pay security for the Defendants' costs and at the same time delay the proceedings by seeking an indefinite stay. In my considered opinion, there is no reasonable prospect that an appeal of the Unless Order would be successful on appeal. Nor should a stay be granted. These are delaying tactics by the Plaintiffs simply because they refuse to pay the security for costs ordered by the Court.

Conclusion

[66] The Stay of Proceedings Ruling refusing the stay was a well-reasoned Ruling. The Plaintiffs could not prove that there were exceptional circumstances to justify granting an indefinite stay with a view to merely hoping that the Judicial Administrator, who has never appeared in these proceedings, will be granted leave to take their positions as Plaintiffs. Justice would not be served.

[67] The Stay Appeal Summons was not proper before the Court. Accordingly, the Court was justified in not hearing the application on 18 November 2021. In any event, the hearing of that application would not have rendered the Defendants' application to compel the Plaintiffs to comply with the security for costs order non-consequential. Further, I am satisfied that the Unless Order was reasonable in the circumstances. Consequently, leave to appeal as well as a stay of the Unless Order are refused.

[68] The Defendants, as the successful parties, are entitled to their costs to be taxed if not agreed.

Dated this 7th day of December, 2021

Indra H. Charles
Justice