IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division

Claim No. 2023CLE/gen/00125

IN THE MATTER OF ***the Evidence (Proceedings in Other Jurisdictions) Act, Chapter 66***
AND
IN THE MATTER OF ***the Banks and Trust Companies Regulation Act, 2020 (Act No. 22 of 2020)***
AND
IN THE MATTER OF ***Order 65 of the Rules of the Supreme Court***
AND
IN THE MATTER OF ***a Request for Judicial Assistance by the Honourable Alicia M. Otazo-Reyes, Magistrate Court Judge of the United States District Court of the Southern District of Florida***
AND
IN THE MATTER OF ***an Application by the Competent Authority of The Bahamas i.e., the Attorney-General***

BETWEEN:

THE ATTORNEY-GENERAL

Applicant

AND

SECURITIES AND EXCHANGE COMMISSION

First Respondent

MINTBROKER INTERNATIONAL LIMITED (FORMERLY KNOWN AS SWISS AMERICA SECURITIES LIMITED AND DOING BUSINESS AS SURETRADER)

Second Respondent

GUY GENTILE A/K/A GUY GENTILE NIGRO

Third Respondent

Before: The Honorable Madam Justice Carla Card-Stubbs

Appearances: Ms. Deirdre Maycock of Counsel for the Attorney General
Mr. Philip McKenzie K.C., Counsel and Ms. Lenthera Culmer for the Third Respondent
Mrs. Tara A. Archer-Glasgow, Mr. Audley D. Hanna Jr. and Miss Oluwafolakemi Swain of Counsel for the Second Respondent

No Appearance for Edward Cooper, Applicant

Hearing Date: November 28 2023

Court's power to proceed with Application in the absence of an Applicant – Extent of Examination of a witness pursuant to a request under the Evidence (Proceedings in Other Jurisdictions) Act, Chapter 66 - whether witness may be cross-examined –The Supreme Court Civil Procedure Rules, 2022 (as amended)

RULING

Introduction

1. This ruling concerns the application of an interested party, a witness, to vary the Court's Order concerning the taking of evidence pursuant to a Letter of Request under the Evidence (Proceedings in Other Jurisdictions) Act, Chapter 66.

2. The Notice of Application was filed on behalf of a witness, Edward Cooper. For purposes of this ruling, Edward Cooper will be referred to as "the Applicant".

3. This Court gave its decision, including an order for costs, on November 28, 2023 and indicated that it would reduce it to writing with reasons therefor.

Background

4. On the 13th day February, 2023, the Attorney-General filed an Ex-Parte Originating Summons for Orders directing named persons to provide certain documents and as well as for Orders for named persons to be examined by the Registrar of the Supreme Court, or her designate, and for them to answer certain questions. The Originating Summons was supported by Affidavit of Nyanne Olander filed February 13, 2023 which averred that the Office of the Attorney-General had received letters from the Registrar of The Supreme Court and under cover were Letters Rogatory from the Magistrate Court Judge of the United States District Court of the Southern District of Florida for the production of documents and the examination of named persons. Such evidence was to be used in the matter of Securities and Exchange Commission v Mintbroker International Limited (Formerly Known As Swiss America Securities Limited And D/B/A SureTrader, and Guy Gentile a/k/a Guy Gentile Nigro) (Case No. 1:21-CV-21079-Bloom), a case pending before the Magistrate Court Judge of the United States District Court of the Southern District of Florida.

5. This Court, having reviewed the exhibits to the Affidavit, including the requests for International judicial assistance (Letters Rogatory), and upon being satisfied that there is a matter pending before United States District Court for The Southern District of Texas, that the evidence was required for same and that the request for judicial assistance was properly laid, made an order dated 10th March, 2023 in terms as requested.

6. The March 10, 2023 Order included an Order that:-

   'Edward Cooper in his capacity as the Chief Compliance Officer of SureTrader attend before the Registrar or her designate, who is appointed

as Examiner herein, at a place, and on such day and time as the Examiner may appoint and submit to be examined upon Oath or Affirmation and give answers to the following questions…'.

7. Some 74 questions were listed.

8. Now, it is to be noted that Edward Cooper is not a named party in these proceedings nor in the matter pending in the jurisdiction of the requesting authority. He was described as the Chief Compliance Officer of named parties. Edward Cooper and the other named persons who were to be deposed were also to "sign their respective depositions in the presence of the Examiner when it has been transcribed by the stenographer." In the Order, the group of named persons were also referred to and identified as 'witnesses'.

9. Although the filed Application by the Office of the Attorney-General was an Ex-parte Application, legal representatives of the 1st Respondent, were allowed to be present at the hearing of the application. With no objection from the Office of the Attorney-General, leave was given to Messrs. Higgs & Johnson to enter an appearance as local counsel for the 1st Respondent "and to participate in all proceedings, including being permitted to attend the deposition of the said witnesses."

10. The March 10, 2023 Order also provided:
    'Any person affected by this Order be at liberty within seven (7) days of the service of this Order on them to apply to discharge or vary the terms of this Order or to seek directions upon giving twenty-four (24) hours' notice to the Attorney-General, the Applicant herein'.
11. On March 28, 2023, Messrs. Davis & Co. filed a Notice of Application to vary the original Order and sought, inter alia, leave to enter an appearance as local counsel for the 3rd Respondent, to attend the deposition of the said witnesses and examine the witnesses.

12. On 16th May 2023, after hearing the parties who had arrived at a consent position, the Court varied the March 10, 2023 Order. The relevant variations are as follows:
    (a) By the addition of a new paragraph 11(b) as follows:
        "Messrs. Davis & Co., by its Attorneys Mr. Philip McKenzie, KC and Glenda Roker (or such other attorneys as it may designate from time to time), Counsel for the 3rd Respondent is hereby granted leave to enter an Appearance to this action as local counsel for the 3rd Respondent and to participate in all proceedings, including being permitted to attend the depositions of Antonio Collie, Chief Financial Officer, Edward Cooper, Chief Compliance Officer, Stephen Darville, Information Technology professional, Drameko Moore, Affiliates professional, and Janay Symonette Pyfrom, Chief Marketing."

    (b) By the addition of a new paragraph 14 as follows:

> "Messrs. Davis & Co., by its Attorneys Mr. Philip McKenzie, KC and Glenda Roker (or such other attorneys as it may designate from time to time), Counsel for the 3rd Respondent be permitted to cross-examine the said witnesses".

13. The Registrar's designate, the Deputy Registrar, in due course, proceeded to examine the named persons.

14. Subsequently, the deposition proceedings were halted when Counsel for Edward Cooper objected to Mr. Cooper being cross-examined.

15. On November 1, 2023, Amicus Chambers filed a Notice of Application on behalf of Edward Cooper to "vary the Amended Order (and consequently the Original Order) to exclude Counsel's ability to cross-examine the Applicant."

16. The ground of the Application is articulated as follows.

> "The ground upon which the Applicant relies to seek the foregoing order is that these proceedings being non-adversarial in nature, the relevant rules of court which govern these proceedings (namely Parts 33 and 69 of the CPR) do not contemplate witnesses being cross-examined by counsel for parties to these proceedings, on questions provided by a foreign court."

17. The Application is supported by the Affidavit of Elton L Gibson filed November 1, 2023. That Affidavit recites when and how the Applicant came to know about the May 16, 2023 and to learn that he would be subject to cross-examination.

18. Given that the depositions are being made pursuant to this Court's Order and in relation to pending proceedings, the Deputy Registrar indicated to this Court that an Application seeking a variation or clarification of the Order was to be heard and that the continuation of the deposition process would await the Court's clarification.

19. On November 9, 2023, Amicus Chambers emailed this Court indicating that a letter had been deposited on November 8, 2023 seeking a date for the hearing of the Application. The email expressed:-

> "The letter was sent pursuant to Registrar Toote's directive on the courts willingness to hear the said application on an urgent basis but subject to the court's availability. For ease of reference, I have attached the mentioned letter and application to this email."

That letter recited:-

> "We are informed by Mr. Toote, Deputy Registrar of the Supreme Court, that based on recent communication between Mr. Registrar and Her Ladyship, Her Ladyship is minded to hear this application on short notice should Her Ladyship's calendar so permit."

The attached letter offered November 16 and 17, 2023 as convenient dates for all parties.

20. The email and letter were not immediately seen by the Court. In due course, and on an urgent basis, the Court communicated by email on November 20,

2023 to all that the matter would be listed for hearing on the following day, viz, November 21, 2023. The Hearing would be convened remotely by Zoom.

21. Counsel for the applicant responded by email in the following terms:

> 'Please note that this date is not convenient for counsel from my office, and, as such, we are unable to attend tomorrow's proposed hearing.
>
> We would be grateful if you would permit us to communicate with counsel to confirm other convenient dates and submit the same to the court in accordance with the custom for obtaining dates for inter partes hearings.'

22. In the circumstances, the Court vacated that date. It is to be noted that due to an administrative error, a notice that the date was vacated was not sent to all concerned and therefore the representatives for the named parties attempted to attend that hearing by joining the issued Zoom link.

23. No further date was solicited from the other parties by Counsel for the Applicant by way of email communication copied to the Court. The parties to the action then sought to agree a date among themselves and, by way of email exchanges copied to the court, agreed the dates of November 27 and November 28.

24. Counsel for the Applicant's response by e-mail was short:

> Please note that I am available on Monday, 4 December 2023. Unfortunately, I am not available next week.

25. There appeared to be no attempt on the part of Counsel for the Applicant to find a mutually convenient date or to offer a range of dates.

26. In the effort to set a date on short notice, counsel for the First Respondent, reminded the parties that the US discovery deadline was November 30, 2023. That information was relevant for the purpose of the Court listing the matter with some urgency. The Court also observed that the Application had been filed on November 1, 2023 and that the Registrar's process had been put on hold pending the determination of this Court.

27. In any event, this Court's calendar could not accommodate a December 4, 2023 date and, in the circumstances, the Court issued a notice that the matter would be listed for hearing on November 28, 2023.

28. On November 24, 2023, the Court issued a notice, by email, to all relevant persons that "The Application will be called for hearing on Tuesday, November 28, 2023 at 9:30am and will be dealt with at that time….Any counsel wishing to lodge submissions in respect of the application must do so by return email to this address, by copy to all, on or before 3:00pm November 27, 2023."

29. Counsel for the parties sent formal acknowledgments of the email.

30. Counsel for the Applicant responded by email as follows:

> "Good morning,
>
> Please note that as I had previously indicated in my communication below, I am not available on Tuesday, 28 November 2023.
>
> As a reminder, the intended application is an application of my client. Therefore, I am uncertain as to how and on what basis the court intends to proceed on the said application despite my having communicated my non-availability on the date proposed.
>
> We will prepare and serve an Affidavit outlining all relevant facts for the court to consider and make whatever determination the court deems just and fair in the circumstances."

31. ISSUES

The issues here may be framed as:

(i) Whether a Court may proceed with an Application in the absence of the Applicant.

(ii) Whether an Order for Examination of a witness pursuant to a request under the Evidence (Proceedings in Other Jurisdictions) Act, Chapter 66 may allow for cross-examination and questions of clarification.

ISSUE 1

NON-APPEARANCE OF COUNSEL FOR THE APPLICANT

32. On November 27, 2023, the day before the matter was to come on for hearing, Counsel sent a letter to the Court by way of email. Counsel wrote:

> "As you are aware, we are instructed by the witness, Edward Cooper ("Mr. Cooper"), a person who is the subject of paragraph 4 of the Order of her Ladyship the Honourable Madam Justice Card-Stubbs dated 10 March 2023 and filed herein on 20 March 2023, in these proceedings.
>
> I write in response to Her ladyship's email dated Friday, 24 November 2023 in which Her Ladyship advised that the hearing of Mr. Cooper's Notice of Application has been scheduled for Tuesday, 28 November 2023 and that documents to be used at such hearing are to be filed and served by 3:00 pm today (the "Direction"), despite my having advised that I am not available to attend a hearing on such date.

Having regard to the following circumstances, I hereby confirm that regrettably no one from my Chambers would be able to appear at tomorrow's hearing, despite the Direction, for the following reasons:

1. I have an out-of-office meeting which commences early tomorrow morning with 4 other individuals, 2 of whom have made travel arrangements to attend this meeting. Further, this meeting materialized after consideration and coordination by the host of the invitees' availability to ensure that each invitee could be present at such meeting.

2. I had scheduled to use today to prepare for the meeting and to deal with other pressing matters. However, my obligation to respond to Her Ladyship's Direction has made such preparations impossible and now I have to borrow personal time which was previously scheduled for other matters to prepare for this meeting.

3. My firm is a team of 5 individuals and 2 key members of our team were on leave last week.

4. The Associate who is assigned to assist me with this matter requested and took leave suddenly – such leave commencing last week and continuing until next week.

5. The other Associate in my Chambers is involved in another Supreme Court matter tomorrow morning and is unable to appear at tomorrow's hearing and my partner is not a litigation attorney and therefore does not attend court hearings. The other member of our team is a paralegal and cannot appear on behalf of Mr. Cooper.

6. Our firm has a busy calendar which includes hearings, meetings, drafting deadlines and preparations for hearings and meetings etc. for which our clients require us to provide our best advice and service and pay us to do the same.

7. Last week was and this week is a hectic week for my practice area and last week I was the sole attorney in my practice area managing our case files.

8. In both instances when the court listed dates for the hearing of Mr. Cooper's application, the listing was provided with little notice and on dates that I was unavailable, with tomorrow's hearing being listed on a date that I had expressly advised was not convenient for me for the reasons stated above.

9. The Direction appears to disregard my lack of availability for tomorrow's hearing.

10. This experience of having to accommodate the Direction, in the circumstances, was inconvenient, unfortunate, disruptive to my

practice and not conducive to proper and considered preparation which is expected of a court hearing.

11. The management of my current workload, health reasons and my client's expectations do not permit me to make such last-minute changes to my calendar to accommodate the Direction and my other obligations, in the current circumstances.

I, therefore, pray that the court considers the foregoing when determining whether to proceed with tomorrow's hearing in my absence.

Should Her Ladyship decide to proceed with the hearing in our absence, we pray that the reasons for so deciding will be comprehensively provided in whatever form Her Ladyship deems most appropriate.

I trust that Her Ladyship treats my absence tomorrow as my inability to attend the hearing (as I had previously communicated before the date was set) and nothing more."

33. This Court has had to determine the purpose and effect of Counsel's letter and in the context of the foregoing correspondence. The letter served to indicate that Counsel would not appear before the Court on an inconvenient date.

34. Nowhere in that letter brought to the Court's attention is an application for an adjournment or an indication of an intention to apply for an adjournment.

35. As a matter of practice, it is understood that appearance before another court (especially a Superior court or Court of equal jurisdiction) may be treated as good reason for an adjournment of a matter. So too is immediate ill health. No such reason is offered here. Counsel explains, and remonstrates, that she had an important meeting, a hectic week, a current caseload, that all members of the firm were either occupied or unavailable, that personal time was being imposed upon and makes a vague reference to "health reasons".

36. While courts may, for practical purposes, attempt to set convenient dates for the hearing of matters before it, a Court cannot be constrained or hamstrung by any one party's diary. To allow such a state of affairs would be disruptive to the justice system.

37. In this case, an Applicant, not a party to the matter, has filed an Application before this Court. If this Court were to yield to the Applicant's unavailability, without question, then a non-party could, without explanation, delay in pursuing an Application that has resulted in the stay of one aspect of the matter and thus effectively obstruct the just disposal of the proceedings that the parties have pending against each other. That is an undesirable state of affairs.

38. Having examined Counsel's letter that followed Court fixing a date, the letter does not set out circumstances that would amount to, in this case, good reason for Counsel not appearing before a Court.

39. This may be a good juncture to note that a counsel and attorney-at-law is first, an officer of the Court and has certain duties to the court. Next, counsel and attorney-at-law has a duty to his client.

40. In considering Counsel's representations to the Court by email as it concerns whether the Court ought to proceed, I have also considered the Overriding Objective in taking account the relevant circumstances.

THE OVERRIDING OBJECTIVE

41. The Supreme Court Civil Procedure Rules, 2022 (as amended) ("CPR") sets out what is termed the "overriding objective" of the rules.

42. Part 1.1 provides:

> 1.1 The Overriding Objective.
> (1) The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost.
> (2) Dealing justly with a case includes, so far as is practicable:
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate to —
> (i) the amount of money involved;
> (ii) the importance of the case;
> (iii) the complexity of the issues; and
> (iv) the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly;
> (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; and
> (f) enforcing compliance with rules, practice directions and orders.

43. How the Overriding Objective is to be applied, is set out in Part 1.2.

> 1.2 The Application of overriding objective by the Court.
> (1) The Court must seek to give effect to the overriding objective when —
> (a) exercising any powers under these Rules;
> (b) exercising any discretion given to it by the Rules; or
> (c) interpreting these Rules.
> (2) These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits.

44. Parties are said to have a duty in furthering the Overriding Objective.

45. Part 1.3 provides:-

> 1.3 Duty of parties.
>
> (1) It is the duty of the parties to help the Court to further the overriding objective.
>
> (2) In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure keep his duty under paragraph (1).

46. The duties of the parties include the obligations of Counsel that represent them.

47. The overriding objective requires a court to take into account relevant circumstances. Dealing with a case justly includes saving expense and ensuring that the case is dealt with expeditiously and fairly and using no more than proportionate resources on a case. A court is required to make arrangements for a hearing that is fair and that does not place one party at a disadvantage. A fair hearing includes giving a party a reasonable opportunity to present its case. A party is also under a duty to further the overriding objective and, by extension, its legal representative. So, for example, Counsel are encouraged to cooperate with each other on procedural matters leading to a hearing. This includes cooperation in the fixing of hearing dates and in the advancement of the hearing once fixed – such as taking steps to meet a hearing date. To my mind, this duty to further the Overriding Objective reflects the duty of Counsel as an Officer of the Court.

48. By observation, this noble profession has over time recognized certain courtesies and practices designed to deal with the sort of situation in which Counsel indicates to have found herself. One such practice is to have other learned Counsel hold brief.

49. In this instance, it is Counsel for the Applicant that filed an Application to move the Application. However, what an Applicant cannot be encouraged to do is to derail proceedings by the filing of an Application which he does not proceed with in a timely fashion. "Timely fashion" is to be considered on a case-by-case basis.

50. In this instant matter, Counsel's first email correspondence noted Counsel's expectation that her matter would be heard "on an urgent basis" or "on short notice". The Application was not to be heard on an *ex parte* or "without notice" basis. To permit Counsel to dictate the diary of this Court in these circumstances would result in a process that would be unfair as it would prejudice the proceedings for the named parties given the time constraints. This is a matter that required the observation of time constraints. Counsel for the Applicant was well aware that the deposition was undertaken in the context of proceedings pending elsewhere. Counsel for the Applicant was also aware that the deposition process was stayed pending the hearing of the Application.

51. The Application filed was not a complex one and the Applicant had filed the Application some 4 weeks before the hearing date that ought to have taken place “on short notice”. The Notice of Application was filed on November 1, 2023 and supported by an Affidavit filed the same day. Unless there were new considerations arising, a ‘short notice’ date should not have taken her by surprise nor caused such grievous disruption to her practice as Counsel seems to suggest. I note too that the Application was set for a remote hearing at 9:30 am which would have allowed Counsel the option of appearing from a location of her choosing.

52. Counsel for the Applicant did not take advantage of the Court’s leave to lodge submissions in support of the Application. Lodging of the submissions was to be facilitated by email. The Court’s directive in the email notice was for Counsel for the applicant or for any party to lodge submissions. What Counsel sent in by email was an unfiled affidavit. That affidavit did not comply with that directive. To the extent that the Affidavit was unfiled and no one appeared before this Court to make representations on it or to give any undertakings regarding the filing of same, the Court did not consider it and did not have sight of it.

53. Having regard to the relevant circumstances of this case, including the absence of any application to adjourn the matter, it is this Court’s view that there was no good and sufficient reason proffered in any of the correspondence emanating from Counsel for the Applicant that would cause this court to vacate the Court fixture.

PROCEDURE IN THE ABSENCE OF AN APPLICANT

LAW and ANALYSIS

54. Part 11, CPR, provides general rules concerning Applications.

55. Rule 11.19 sets out the Power of a Court to proceed in absence of party. Rule 11.19 provides:

> If the applicant or any person on whom the notice of application has been served fails to attend the hearing of the application, the Court may *proceed in the absence* of that party.

56. Part 11.13 provides for the powers of the Court in relation to the conduct of applications. One such power is stipulated in Rule 11.13 (4) as:

> The Court may exercise any power which it might exercise at a case management conference.

57. Part 26 sets out the rules concerning the Court’s powers of case management.

58. For these purposes, the relevant rules are to be found in Rule 26.1 as follows:

> 26.1 Court's general powers of management.
>
> (1) The list of powers in this rule is in addition to any powers given to the Court by any other rule, practice

directions or any enactment.

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

(a) *adjourn or bring forward a hearing to a specific date;*

(b) …

(c) *deal with a matter without the attendance of any of the parties*;

59. There is no reason that a Court cannot, in a just case, proceed with the calling of a matter in the absence of the Applicant. One option is the dismissal of the application in the absence of the Applicant. The Court's rules of procedure are replete with instances where a Court will dismiss or strike out a matter where a party fails to advance or pursue it. The other is the power of the Court to proceed with the consideration of the Application in the absence of the Applicant.

60. Rule 11.19 and Rule 26.1 CPR explicitly vests a Court with the powers to deal with an application in the absence of a party. This was always a power that a Court had in managing its process and for preventing abuse to that process.

61. On this occasion, Counsel for the Attorney General and Counsel for the First Respondent submitted that the Application ought to be dismissed since the Applicant was not in attendance and had made no application for an adjournment. They also noted the running timeline and that the Applicant had made no attempt to confer with the parties for an alternative suitable date. Counsel were convinced that, given the sequence of events, there was no real intention on the part of the Applicant to pursue this Application in a timely manner.

62. Counsel for the First Respondent also indicated her intention to apply to strike certain portions of the Applicant's unfiled affidavit. As noted before, the unfiled affidavit of the Applicant was not properly before this Court and therefore was not considered in this Court's hearing of the Application.

63. While the submissions of Counsel for the Attorney General and Counsel for the First Respondent held much force, this Court was mindful that the Application sought a variation of the Order by questioning the nature of the proceedings before the Deputy Registrar. A dismissal of the Application without a consideration on its merits would not provide further direction as to the process. This Court therefore determined to consider the substance of the Application filed.

ISSUE 2

NATURE OF EXAMINATION QUESTIONS ON A DEPOSITION

64. The objection of the Applicant was to the leave given to the parties to cross-examine the witness on the ground that Parts 33 and 69 of the CPR "do not

contemplate witnesses being cross-examined by counsel for parties to these proceedings, on questions provided by a foreign court." Counsel for the Applicant filed no authorities to support that contention nor was any submission filed in line with the Court's direction that the Applicant and parties were at liberty to lodge and exchange submissions on or before November 27, 2023.

65. Counsel for the Third Respondent lodged his submissions and relied on provisions from the Evidence (Proceedings in Other Jurisdictions) Act, Chapter 66 and Parts 33 and 69 of the CPR to counter the Applicant's contention.

66. Counsel cited Section 5 of the Evidence (Proceedings in Other Jurisdictions) Act as making provision for the cross-examination of persons deposed in accordance with the Act. Counsel submitted that "The Act empowers the Court to make an Order relating to the way evidence is obtained in a similar way as if the evidence is being used in Civil Proceedings within the Bahamas." Counsel noted that this matter was commenced under the now-replaced Rules of the Supreme Court, 1978 which expressly provided for cross-examination of deponents. He submitted that the new CPR has not changed that position, and relying on the notes in the Practice Guide thereto, submitted that there has been no change in procedure. Counsel also noted that the new CPR provision (Part 33.8(1)) reflects the English position at Part 34.9(1) of their Civil Procedure Rules and relies on the practice note in the White Book Service 2015. He submitted that the provisions together "unequivocally permits [sic] cross-examination of witness[es] in proceeding[s] for the purpose of obtaining evidence for foreign Jurisdictions". In the premises, Counsel asked that "the Application made for the exclusion of cross-examination by the 3rd Respondent's Counsel be dismissed."

67. The submissions of the Third Respondent were supported by Counsel for the First Respondent.

LAW and ANALYSIS

68. The request for judicial assistance was originally made pursuant to the Evidence (Proceedings in Other Jurisdictions) Act 2000, Chapter 66 ('the Act'). It is an "Act to make new provision for enabling the Supreme Court to assist in obtaining evidence required for the purposes of civil proceedings in other jurisdictions; to extend the Powers of the Court to issue process for securing the attendance of witnesses; and for connected purposes."

69. Section 3 of the Act provides for an application to be made to the Supreme Court "by or on behalf of a court or tribunal ("the requesting court") exercising jurisdiction in a country or territory outside The Bahamas for an order for evidence to be obtained in The Bahamas."

70. Section 5 of the Act vests the Court with jurisdiction to make appropriate orders and s.5(2)(a) provides that such an Order may make provision "for the examination of witnesses, either orally or in writing".

71. Section 6 of the Act provides for certain privileges of such witnesses. Sections 6(1) and 6(2) provide:-

> 6. (1) A person shall not be compelled by virtue of an order under section 5 to give any evidence which he could not be compelled to give —
>
> 1. (a) in civil proceedings in The Bahamas; or
> 2. (b) subject to subsection (2), in civil proceedings in the country or territory in which the requesting court exercises jurisdiction.
>
> (2) Subsection (1)(b) shall not apply unless the claim of the person in question to be exempt from giving the evidence is either —
>
> 1. (a) supported by a statement contained in the request (whether it is so supported unconditionally or subject to conditions that are fulfilled); or
> 2. (b) conceded by the applicant for the order,
>
> and where such a claim made by any person is not supported or conceded as aforesaid he may (subject to the other provisions of this section) be required to give the evidence to which the claim relates but that evidence shall not be transmitted to the requesting court if that court, on the matter being referred to it, upholds the claim.

72. Section 8 of the Act provides for rules of court to govern the procedure.

73. This matter commenced in February 2023 when the Rules of The Supreme Court, 1978, (as amended) ('RSC') applied. It may be helpful to consider the provisions of the then-applicable RSC.

74. Order 65 of the RSC provided rules relating to "obtaining evidence for foreign courts, etc."

75. Order 65 Rule 4 made provision for the persons taking the examination and the manner of the examination. Specifically, Order 65 Rule 4 (2) provided:

> (2) Subject to any special directions contained in any order made in pursuance of this Order for the examination of any witness, the examination shall be taken in manner provided by Order 39, rules 5 to 10 and 11(1) to (3), and an order may be made under Order 39, rule 14, for payment of the fees and expenses due to the examiner, and those rules shall apply accordingly with any necessary modifications.

76. Order 39 made provisions for "Evidence By Deposition: Examiners Of The Court".

77. Order 39 Rule 8 provided for the conduct of Examinations. It stated:-

> 8. (1) Subject to any directions contained in the order for examination —
>
> (a) any person ordered to be examined before the examiner may be cross-examined and re-examined; and
> (b) the examination, cross-examination and re-examination of persons before the examiner shall be conducted in like manner as at the trial of a cause or matter.

(2) The examiner may put any question to any person examined before him as to the meaning of any answer made by that person or as to any matter arising in the course of the examination.
(3) The examiner may, if necessary, adjourn the examination from time to time.

78. The RSC was the regime in place at the time that this matter was filed and a hearing date assigned. However, the matter was heard subsequent to the coming in force of the CPR. An application to vary the Order was made after the coming into force of the CPR. The RSC was revoked and replaced by the CPR. The provisions concerning Examination of a witness by deposition in these circumstances are to be found in Part 69 of the CPR which deals with Obtaining Evidence for Foreign Courts.

79. Part 69.4 provides for the manner of taking examinations.

Part 69.4(2) provides:

(2) Subject to any special directions contained in any order made in pursuance of this Part for the examination of any witness, the examination shall be taken in manner provided by Part 33, and an order may be made under rule 33.12, for payment of the fees and expenses due to the examiner, and those rules shall apply accordingly with any necessary modifications.

80. Part 33 deals generally with court attendance by witnesses and depositions. Rules 33.8 (1) – (5) are relevant here and provide as follows.

33.8 Conduct of examination
(1) Subject to any directions contained in the order for examination, the examination must be conducted in the same way as if the witness were giving evidence at a trial.
(2) If all the parties are present, the examiner may, with the consent of the parties, conduct the examination of a person not named in the order for examination.
(3) The examiner may conduct the examination in private if he considers it appropriate to do so.
(4) The examiner must ensure that a full record is taken of the evidence given by the witness.
(5) If any person being examined objects to answer any question put to him or her, the ground of the objection and the answer to any such question must be set out in the deposition or in a statement annexed to the deposition.

81. Rule 34.9(1) of the English Civil Procedure Rules 1998, as amended, is in *pari materia* with our Rule 33.8(1) and provides:

34.9(1) Subject to any directions contained in the order for examination, the examination must be conducted in the same way as if the witness were giving evidence at a trial.

10. A practice note as to the interpretation and practice observed regarding that provision is found in the White Book Service 2015 at para. 34.9.1 which states:

> *"The main purpose of taking evidence on examination is to obtain the evidence of the witness as if the witness were giving evidence at trial. The examination takes place in the presence of the examiner, the parties and their counsel and solicitors. Modern trial practice is for a witness statement (if there is one) to stand as evidence in chief and the examiner will follow this practice if it is appropriate to do so.* Cross-examination and re-examination follow. *The examiner may allow a hostile witness to be treated as such by the party calling them (Ohlsen v Terrero (1874-75) L.R. 10 Ch."*

82. It seems to me that the law in relation to the conduct of the examination of a witness under this regime is that the examination conducted by the Registrar must follow the method known in this jurisdiction as obtains at trial. While the RSC specifically provided for examination, cross-examination and re-examination, viz, the phases of questioning known to trials in this jurisdiction, the current CPR provides merely for the examination to "be conducted in the same way as if the witness were giving evidence at a trial." In this jurisdiction, evidence at trial is adduced via examination, cross-examination and re-examination.

83. Therefore, in my opinion, the law allows for the examination, cross-examination and re-examination of a witness ordered deposed pursuant to a request under the Evidence (Proceedings in Other Jurisdictions) Act.

84. The issue was raised as to whether a witness may be asked specific questions outside of those contained in the Court's Order. To my mind, in the examination of a witness, there ought to be scope for clarifying questions. This dynamic is not unknow in trial. It could be counter-productive if follow-up questions were not allowed in cases where, for example, the question posed or the answer given was vague or ambiguous or, where the answer is obviously out of context - suggesting a misunderstanding of the question. I consider clarification questions to be contemplated in the conduct of the examination of a witness being deposed under the regime of the Evidence (Proceedings in Other Jurisdictions) Act.

85. I pause to note that the Act and CPR make provision for the protection of a witness in the event that a witness would wish to refrain from answering, or objects to answering, a question. Specifically, section 6 of the Evidence (Proceedings in Other Jurisdictions) Act and Part 33.8(5) of the CPR.

86. I find no merit in the Applicant's unsupported ground that the CPR does not contemplate cross-examination.

CONCLUSIONS

87. The following are my findings and conclusions in this matter.

88. A Court has jurisdiction to hear and dispose of Applications in the absence of an Applicant. A Court will have regard to the Overriding Objective in exercising its discretion to do so.

89. The relevant statute and rules of court allow for the examination, cross-examination and re-examination of a witness ordered deposed pursuant to a request under the Evidence (Proceedings in Other Jurisdictions) Act.

90. The Applicant's Application to vary the Court Order is dismissed.

91. Costs are ordered against the Applicant and in favour of the parties.

ORDER

92. The order and directions of this Court are as follows.

    1. The Notice of Application filed by Edward Cooper, Applicant, on 1st November, 2023 is hereby dismissed.

    2. Pursuant to Rule 33.8 of the CPR, the examination of a witness deposed pursuant to the request under the Evidence (Proceedings in Other Jurisdictions) Act, Chapter 66 must be conducted in the same manner as if the witness was giving evidence at trial. Pursuant to Rule 33.8 (5) of the CPR if any person being examined objects to answer any question put to him or her, the ground of the objection and the answer to any such question must be set out in the deposition or in a statement annexed to the deposition.

    3. The Applicant shall pay the costs of and occasioned by the Application to the Attorney General, the First Respondent, and the Third Respondent in relation to this application which costs are hereby respectively fixed in the sum of $2,000.00, $2,500.00, and $3,000.00.

Dated this 6th day of December, 2023

Carla D. Card-Stubbs, J