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

Claim No.
2015/CLE/gen/No.01451
2014/CLE/gen/No.01620

BETWEEN:

JUNKANOO ESTATES LTD

First Claimant

AND

YURI STAROSTENKO

Second Claimant

AND

IRINA TSAREVA-STAROSTENKO

Third Claimant

AND

UBS (BAHAMAS) LTD. (In Voluntary Liquidation)

Defendant

(Actions and Counterclaim consolidated by Order of the Judge dated 4 November 2015)

BEFORE: The Honorable Madam Justice Carla D. Card-Stubbs

APPEARANCES: Irina Tsareva Starostenko and Yuri Starostenko, Applicants/Intended Appellants/Claimants, pro se

Marco Turnquest and Chizelle Cargill, Respondent/Defendant

Application to reconsider interlocutory order - Application for Leave to appeal interlocutory Order - Test to be applied for leave to appeal – Reasonable prospect of success – Whether raises issue which should in the public interest be examined or which requires clarification

By way of Notice of Motion filed July 26, 2023 the Applicants/Intended Appellants sought "leave to appeal from or for reconsideration of the directions of a draft order dated 14 July 2023". By that order the court had timetabled the hearing of outstanding interlocutory applications. The Respondent objected to the application for leave to appeal and submitted that the filed grounds had no reasonable prospect of success.
HELD: The Notice of Motion is dismissed, with costs to the Respondent to be taxed if not agreed. An Application to reconsider a directions order setting a date for the hearing of an application when the application had already been heard is misconceived. For leave to appeal to be granted, the Applicants/Intended Appellants must demonstrate that they have some reasonable prospect of succeeding on the appeal and they failed to do so: *Maria Iglesias Rouco and another v Juan Sanchez Busnadiego and another* [2022] 2 BHS J. No. 160 applied. The Applicants/Intended Appellants failed to show that the judge wrongly exercised her discretion. It is not enough that the Applicants/Intended Appellants would have wanted a different direction made or that a different order could have been made: *Hadmor Productions Ltd v Hamilton* [1983] A.C. 191 (HL) applied.

RULING

Card-Stubbs J:

INTRODUCTION

1. This is the application of the Applicants/Intended Appellants for the reconsideration of an interlocutory order and for leave to appeal an interlocutory order, namely a directions order.

2. For the reasons set out below, the application for reconsideration of the order is refused.

3. For the reasons set out below, the application for leave to appeal is refused.

BACKGROUND

4. By way of Notice of Motion filed July 26, 2023 the Intended Appellants, herein referred to as Applicants, sought the following relief:

> "leave to appeal from or for reconsideration of the directions of a draft order dated 14 July 2023 (the "14 July 2023 directions"):

(1) to hear the Respondent's application to sell the Appellant's mortgaged property prior to the trial or the Applicants' application for a separate trial of the issues, the disposal of which would dispense with the need for a full trial, pursuant to Part 26.1(2)(i) of the Civil Procedure Rules, 2022 ("CPR"); and

(2) that further proceedings be heard in private without the consent of the Applicants, contrary to Part 2.4(c) of the CPR."

5. No affidavit accompanied the Notice of Motion filed.

6. On the hearing of the application, the Applicants did not pursue the relief at #2 i.e. in relation to proceedings being heard in private.

THE DIRECTIONS ORDER

7. On July 14, 2023, by way of a case management exercise where both parties were present, this Court made the following order:

THIS COURT DIRECTS AND ORDERS as follows:

1. The Hearing of all interlocutory matters and trial in this matter shall proceed under the Civil Procedure Rules 2022 (as amended) ("CPR").

2. On **December 8, 2023**, the Court will hear the following filed applications (referred to together as three (3) applications) in accordance with the further directions herein set out:

    i. Respondent's application to list and market property, filed July 27, 2021
    ii. Claimant's applications to permit entry and surrender benefits, filed July 7, 2023 and November 20, 2018 – as a joint application
    iii. Claimant's application for an interim injunction, filed September 9, 2020

Further Affidavits in support of the Applications

3. The Parties will file and serve any further supplemental affidavits in support of their own respective applications on or before **August 31, 2023**.

4. The Parties will file and serve any further affidavits in response to the other parties' applications on or before **September 15, 2023**.

5. The Parties will file and serve any further and final affidavits in response on or before **September 29, 2023**.

   A party will not be allowed to rely on any affidavit which has not been filed at the time specified, unless the Court otherwise orders.

   Disclosure

6. Subject to Part 28 of the CPR the parties shall disclose their documents relevant to any of the aforementioned three (3) applications on or before **October 13, 2023**, with inspection to follow as provided in Rule 28.11.

   Hearing Documents

7. Each party is to prepare and lodge a list of "Hearing Documents" to be relied on at the hearing of its particular application (of each of the three applications) – which list will include pleadings, affidavits and other documents – to be filed on or before **October 27, 2023**. For avoidance of doubt, the parties are at liberty to file a Hearing Bundle of Documents in addition to the List hereby required.

Evidence

8. The hearing of each of the afore-mentioned applications will proceed on the affidavit evidence filed in compliance with these directions.

9. On or before **November 17, 2023**, each party is to provide a copy of each of its affidavits to the Court submitted in electronic form (in both Word and PDF formats) by email to justicecardstubbschambers@gmail.com.

10. On or before **November 24, 2023**, the parties are to exchange skeleton arguments with authorities for all three (3) applications, and copies are to be lodged with the Court. In addition to the hardcopy, each party is to submit its skeleton arguments and authorities in electronic form to the

Court by email to justicecardstubbschambers@gmail.com. The skeleton arguments are to be submitted in both Word and PDF formats.

11. Hearing of the aforementioned three (3) applications is set for the **8th day of December 2023** and will be by way of an in-person hearing commencing at 10:00am.

12. A hearing for directions on the remaining filed and pending applications will take place on **December 11, 2023** commencing at 2:00 pm and will be by way of an in-person hearing.

8. In summary, the Court made timetabling directions for the hearing of several filed interlocutory applications together with a direction for the further processing and timetabling of other filed applications. It is accepted by both parties, and was brought to the attention of this Court, that a large amount of interlocutory applications had been lodged with the listing office. The directions order of July 14, 2023 provided for a first grouping of applications to be heard together. Paragraph 1 thereof provided for the following applications to be heard together:
    i. Respondent's application to list and market property, filed July 27, 2021
    ii. Claimant's applications to permit entry and surrender benefits, filed July 7, 2023 and November 20, 2018 – as a joint application
    iii. Claimant's application for an interim injunction, filed September 9, 2020

9. The Application before me concerns the exercise of this Court's discretion to give directions for the hearing of the first-listed application, that is, the Respondent's application to list and market property.

GROUNDS FOR RECONSIDERATION

10. The Grounds for "reconsideration of the 14 April 2023 [sic] directions" were stated as:

    1. The Court has the jurisdiction to hear and determine an application for reconsideration of its previous decision under the Re Barrell jurisdiction where there are strong reasons for doing so see In Re Barrell Enterprises [1973] 1 WLR 19 and the case of Belgravia International Bank & Trust

Company Limited Bretton Woods Corporation v Sigma Management Bahamas Ltd. And Frank R. Forbes SCCiv App. No. 75 of 2021. (*See* Notes to Part 42.10)

2. Madam Justice should have adopted the position of this Court expressed by the original trial Judge, then-Justice Mr. Evans, who, on 23 March 2015, at the same time with the grant of the possession to the Respondent of the Applicants' mortgaged property, directed that the payment may be held pending the resolution of the counterclaim and that this case must be set down for trial of the counterclaim, without any indication of sale. In particular, Evans J. stated:

> *"Now, what you two may have to figure out in terms of how the payment of the judgment and that it may be held pending the resolution of the counterclaim, that is a matter for you."* (*See* the transcript at page 5, lines 2 to 6) (Underline added)
>
> *"What I will recommend you to do while you are here is that you please discuss before coming, the directions which you seek relating very much to the trial date. This is my purview."* (*See* the transcript at page 8, lines 31,32 and page at 9, lines 1,2) (Underline added)

3. Madam Justice should have given the proper weight to the fact that the original trial Judge by the Order dated 4 November 2015 that *"1. Action CLE/gen/No.01451 of 2015 be consolidated with the Counterclaim in Action CLE/gen/No.01620 of 2014 and the said actions do proceed as one [consolidated] action" "2. . . . which is to be prosecuted under the [new common] title"* (*see* the Order, square brackets and ellipsis added); and that the said actions to proceed as one action and *"[t]he costs of all the parties to the above-mentioned actions including herein their costs of and incidental to this application be costs in the said consolidated action"*.

4. Once again, the original trial Judge, on 21 December 2017, confirmed the limited purpose of the possession granted to the Respondent, stating in His Lordship's Ruling delivered on this date:

> *"27. In these circumstances of this case and for the reason given above I grant leave to the Defendants to lodge an appeal but I refuse the application for a stay of the Order for possession. This would allow the Plaintiff [Respondent] if they so desire to take possession and carryout the necessary repairs/steps to safeguard the value of the*

> *premises. However, I further order that there be no sale of the premises without a further Order from this Court or from the Court of Appeal."* (See the Ruling at paragraph 27) (Square brackets and underline added)

5. Also, Madam Justice should have adopted the position of the Court of Appeal expressed in *Citibank, N.A. v. Major* - [2001] BHS J. No. 6 at paragraphs 17 and 23:

> *"[T]he Court did have an inherent jurisdiction, in a proper case to restrain both the improper, and in certain circumstances, any harsh and oppressive exercise of a mortgagee's power of sale",*

> in the circumstances of this case, where the Statement of Claim in the consolidated action contains claims in the equity jurisdiction of this Court for an infringement of the Applicants' equitable rights disclosing both the fraud and irregularity in respect of claimed relief from an unconscionable bargain, as a result of the Respondent acting in a way which prevented the Applicants from giving proper consideration to their independent interest in the mortgage transaction, and which involved substantial risk to them, making such conduct unconscionable the mortgage itself to the manifest disadvantage of the Applicants.

6. Pursuant to Parts 25.1(a), 25.1(f), 25.1(g), 25.1(k) and 25.1(l) of the CPR, the Court must further the overriding objective by actively managing cases including, (a) identifying the issues at an early stage; (f) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others; (g) deciding the order in which issues are to be resolved; (k) fixing timetables or otherwise controlling the progress of the case; (l) giving directions to ensure that the trial of the case proceeds quickly and efficiently. (*See* Part 25)

7. Part 25 of the CPR is directly aligned to the overriding objective of the rules which the Court must give effect to in the application of the rules. This requires a court's early involvement with the substantive issues and not merely an overseeing of procedural issues. And the Court's inherent jurisdiction must not be exercised in such a way to lay down a procedure that is inconsistent with the rules. (*See* Notes to Part 25)

11. The Applicants also relied on additional grounds casted as the grounds for the leave to appeal and set out below in addition to the foregoing grounds as grounds for reconsideration of the order. Those grounds are herein set out as Grounds 1M to 5M.

GROUNDS FOR LEAVE TO APPEAL

12. The proposed grounds for leave to appeal were said to be stated in both the Notice of Motion and the Skeleton Arguments/written submissions. I will ascribe numbers and will insert "M" for "Motion" in the numbering system of the following grounds which were set out in the Notice of Motion in order to distinguish them from the grounds set out in the submissions.

> Ground 1 M - The discretionary power of the Court was not exercised in furtherance of justice, to the end that this case should be disposed of upon its merits rather than upon technicalities or fortuitous circumstances, while, in the instant litigation, the Court was well aware that the Respondent had been attempting in its various ways to avoid the trial and was blamed for that in the Ruling dated 8 May 2023 (*see* paragraph 32 of the Ruling); the Court did not give proper weight to the facts that the Respondent is a bankrupt in voluntary liquidation and that there is a substantial imbalance between the financial position of the parties, where one is the family with still three minor children, for five years homeless and the other party is a subsidiary of a wealthy international institution. (*See* Part 72.10(5)(a))
>
> Ground 2 M - Madam Justice failed to introduce a court-managed process resulting in less delays and expense, in procedural certainty and in fair and equal treatment of parties in this case and to lay down a procedure that is consistent with the rules, in particular, failing to identify the issues to be disposed summarily and to give directions to ensure that the trial of this case proceeds quickly and efficiently, contrary to Parts 25.1(a), 25.1(f) and 25.1(l) of the CPR, providing for the Court's duty to further the overriding objective by actively managing cases.
>
> Ground 3 M - Madam Justice failed to give proper weight to the findings of this Court in the Ruling dated 8 May 2023 that the Applicants have already been prejudiced by another Respondent's application which was for further particulars and which caused *"the inordinate and inexcusable delay"* of

almost four years in proceeding to trial and *"has deprived the Plaintiffs of a trial date"* in this case being set down for trial by the original Case Management Order dated 6 July 2018.

Ground 4 M - Madam Justice failed to give proper weight to the fact that UBS Bahamas is wealthy international institution, one of the largest in the world, in voluntary liquidation in the Bahamas, while Starostenko are retail traders, homeless for five years as result of the eviction, directed by UBS, during which there was use of violence, and for the past ten years Starostenko are fighting for day-to-day survival with their six children and any procrastination of this case creates additional prejudice to them.

Ground 5M - If allowed to stand, the 14 April 2023 directions would expose this litigation to risks of further trial delays, undue expense and further prejudice to the Applicants, who have clearly been prejudiced, by being forced to proceed on a potentially deficient Respondent's application for further particulars in 2019, which has deprived them of a trial date.

13. Further grounds of appeal were advanced in the Applicants' Skeleton Arguments lodged on February 19, 2024. They were articulated as follows. I will insert "S" for "Submissions" in the numbering system of the following grounds to distinguish same from the grounds set out in the Notice of motion.

1. Ground 1S. The proposed appeal would raise some important points of principle or practice under the new rules of the CPR in Parts 25, 26 and 27 providing for the Supreme Court's jurisdiction over pre-trial and case management issues as management tools to achieve the overriding objective.

2. Ground 2S. The Intended Appellants have reasonable prospect of succeeding on the appeal because the following failures by The Honourable Madam Justice Carla D. Card-Stubbs (the "Judge") would lead an objective, disinterested observer fully informed of the relevant facts, entertain significant doubt that justice was done, and, if the Directions Order would be allowed to stand, would cause an inequitable result prejudicial to the Intended Appellants and expose the litigation to risks of further trial delays, undue expense and further prejudice, namely:

(a) the Judge failed to exercise the Supreme Court's jurisdiction over pre-trial and case management issues under CPR Parts 25, 26 and 27; but, on the contrary,

(b) the Judge exercised the Supreme Court's inherent jurisdiction "in such a way to lay down a procedure that is inconsistent with the rules" and "in breach of clear court rules" set forth in CPR Parts 25 and 27, when the Judge, without fixing a date for trial, resolved to hear the Intended Respondent's application to market for sale the Intended Appellants' house in Lyford Cay under Order 31 of the the Supreme Court's old rules, prior to the trial or a separate trial of issues, the disposal of which could dispense with the need for a full trial, in the Intended Appellants' case which is still in its very early stage and required to go to trial under both the Supreme Court's Ruling dated 8 May 2023 and CPR Parts 27.3(3), 27.5(3) and 27.5(4);

(c) the Judge failed to further the overriding objective by actively managing this case, to introduce a court-managed process resulting in less delays and expense after Winder CJ delivered the Ruling dated 8 May 2023 and to lay down a procedure that is consistent with the new rules, in particular, failing to identify the issues to be disposed summarily and to give directions to ensure that the trial of this case proceeds quickly and efficiently, contrary to CPR Parts 25.1(a), 25.1(f) and 25.1(l), providing for the Court's duty to further the overriding objective by actively managing cases.

(d) the Judge failed to give proper weight to the findings of the Supreme Court in the Ruling delivered by Winder CJ on 8 May 2023, which required affording deference to treating the issues of fairness and equity in the Intended Appellants' case, that they have already been prejudiced by the precedent Intended Respondent's application, which caused "the inordinate and inexcusable delay" of almost four years in proceeding to trial and "has deprived the Plaintiffs of a trial date" in this case being set down for trial by the original Case Management Order dated 6 July 2018;

(e) the Judge failed to give proper weight to the determination by Bowe-Darville J, which required affording deference to treating the issues of fairness and equity in the Intended Appellants' case, that after the hearing of the Intended Respondent's application for further and better particulars, filed 17 April 2019, the Intended Appellants'

application for striking out of impugned paragraphs of the Intended Respondent's Amended Defence, filed 29 January 2019, must be heard;

(f) the Judge failed to provide for that the case management conference take place not less than four weeks nor more than twelve weeks after delivery of the Ruling dated 8 May 2023 in this case, which can not be dealt with justly without a case management conference and should not be dealt with as a matter of urgency; and, consequently,

(g) the Judge failed to fix a date for a pre-trial review, the period within which the trial is to commence; or the trial date mandatorily required by the new rules (CPR);

(h) the Judge wrongfully exercised the Court's inherent jurisdiction over the sale of land under CPR Part 52.1, where nothing indicates that it is "necessary or expedient" that the Claimants' Lyford Cay house should be sold as well as no factors, to be taken into account, weigh for ordering sale, and the Court record reflects that this litigation is still in its infancy, as a mandatory Case Management Conference has yet to be held, the Second Case Management Order has yet to be issued and a Case Management Plan identifies issues still to be resolved, while no enforcement proceedings are pending;

(i) the Judge wrongfully did not adopt the position of this Court expressed by Evans J, which required affording deference to treating the issue of sale the Intended Appellants' Lyford Cay house:

on 23 March 2015, granting the possession of the Intended Appellants' Lyford Cay house to the Intended Respondent, directed that the payment may be held pending the resolution of the Intended Appellants' counterclaim and that their case must be expeditiously set down for trial, without any indication of sale; and the Intended Respondent has not appealed this determination by Evans J;

on 4 November 2015, that "1. Action CLE/gen/No.01451 of 2015 be consolidated with the Counterclaim in Action CLE/gen/No.01620 of 2014 and the said actions do proceed as one [consolidated] action" (Square brackets added);

on 21 December 2017, confirming the limited purpose of the possession granted to the Intended Respondent by saying: "if they so desire to take possession and carryout the necessary

repairs/steps to safeguard the value of the premises" and ordering, at paragraph 5 of his Order that: "5. The Property shall not be sold without further Order from [the] Supreme Court or the Court of Appeal" (square brackets added); and the Intended Respondent has not appealed this determination by Evans J; and

(k) the Judge did not give proper weight to the facts that the Intended Respondent is a bankrupt in voluntary liquidation and that there is a substantial imbalance between the financial position of the parties, where one is the family with still three minor children, for five years homeless and the other party is a subsidiary of a wealthy international institution.

3. Ground 3S. In "exceptional circumstances", there is an issue which, in the public interest, should be examined by the Court of Appeal because it is desirable in the public interest that judicial officers vigorously observe and follow the new rules (CPR) promoting the approach to pre-trial and case management as management as tools to achieve the overriding objective, while a disregard for these rules is unacceptable, and thus the leave to appeal is warranted on the ground of the general public importance.

4. Ground 4S. This case raises the Supreme Court's jurisdiction over pre-trial and case management issues under the new rules in CPR Parts 25, 26 and 27 where the law requires clarifying in the light of the new rules.

5. Ground 5S. There is some other compelling reason for the relevant appellate court to hear the appeal such as, for example, giving the required due deference to the precedent decisions, factual and legal findings of the Supreme Court.

SUBMISSIONS OF THE PARTIES

INTENDED APPLELANTS/APPLICANTS' SUBMISSIONS

14. The Applicants' submissions are as contained in what is also referred to as grounds of appeal which were set out in their skeleton arguments and which have been reproduced above.

15. The Applicants also submit that this court did not exercise the proper case management powers by failing to set a trial date or a date for a pre-trial review and

by failing to direct a separate trial of issues, the disposal of which could dispense with the need for a full trial pursuant to the CPR Parts 25, 26 and 27. They argue that this court's failure to do so will cause "an inequitable result prejudicial to the Intended Appellants and expose the litigation to risks of further trial delays, undue expense and further prejudice". The Applicants also submit that the Court ought to have had regard to decisions of other courts in the history of this matter that dictated that there ought to be "deference to treating the issues of fairness and equity in the Intended Appellants' case". They submit that there was no reason to give directions for the hearing of the listed application "where nothing indicates that it is *"necessary or expedient"* that the Claimants' Lyford Cay house should be sold…".

RESPONDENT'S SUBMISSIONS

16. The application for leave to appeal is opposed by the Respondent.

17. Initially, the Respondent made a preliminary objection that the application for leave to appeal was not properly constituted. The Respondent submitted that the Notice ought to have been filed by way of Notice of Application under the CPR and supported by affidavit.

18. This Court bore in mind that the Applicants, although not unfamiliar with the rules of court and court process, are pro se litigants. This Court considered that the Respondent was not taken by surprise by the application. This Court waived the irregularity and proceeded to hear the application.

19. Substantively, the Respondent submits that this Court had jurisdiction to make the order made and was entitled to exercise a discretion in making the order. (CPR Part 11, Rule 11.3 and Part 25, Rule 25.1). They submit that leave ought not to be granted to appeal as the appeal has no realistic prospects of success and does not raise an issue that in the public interest required clarifying. For this proposition, they relied on the case of *Maria Iglesias Rouco and another v Juan Sanchez Busnadiego and another* [2022] 2 BHS J. No. 160.

20. The Respondent submits that in this instance an appeal would have no realistic prospect of success because the Applicants have shown no reason for the interference with this Court's exercise of discretion. Citing the case of *Hadmor Productions Ltd v Hamilton*, [1983] A.C. 191, the Respondent submits that an appellate Court would not interfere with a lower Court's exercise of discretion, unless the appellate Court is satisfied that:

(i) the decision was plainly wrong;
(ii) Serious injustice would result; or
(iii) irrelevant matters were taken into account or relevant maters were not taken into account.

21. They submit that the Applicants have provided no evidence and cannot show that the exercise of the discretion was wrong or that it would result in serious injustice or that irrelevant matter were taken into account or that relevant matters were not taken into account. The Respondent submits that the July 14, 2023 Order was the Court's attempt "to find some middle ground between the parties, by making an order that would begin to address the outstanding applications." Relying on the case of *Broughton v Kop Football*, [2012] EWCA Civ 1743 the Respondent submits that this is what the judge is to do at a case management hearing and argue that an appellate court will not interfere in such circumstances and that, therefore, the Applicants have no prospect of success on an appeal.

LAW AND ANALYSIS

APPLICATION FOR RECONSIDERATION

22. The Notice of Application for leave to appeal also purports to be an application for a reconsideration of the directions order. The Applicants submitted that if this Court were to reconsider the order, that they would abandon their appeal. They submit without more, that there was "a fraud upon the court" and that the Court "was misled by the Submissions on behalf of the Defendant as to material circumstances, and therefore its process was abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair."

23. The application is worded as an application to reconsider the Court's order which appear, from the posited grounds and relief sought, is an application which straddles applications to vary the Court's order or to revoke the Court's order.

24. The Applicants rely on the case of *Belgravia International Bank & Trust Company Limited Bretton Woods Corporation v Sigma Management Bahamas Ltd. And Frank R. Forbes* and the notes in the CPR Practice Guide at Part 42.10. Those notes read:

The Court also has the jurisdiction to hear and determine an application for reconsideration of its previous decision under the Re Barrell jurisdiction where there are strong reasons for doing so see In *Re Barrell Enterprises* [1973] 1 WLR 19 and the case of *Belgravia International Bank & Trust Company Limited Bretton Woods Corporation v Sigma Management Bahamas Ltd. And Frank R. Forbes* SCCiv App. No. 75 of 2021.

25. The notes are a commentary on Part 42, Rule 42. 10 which provides:

> 42.10 Correction of error in judgment or order.
> (1) The Court may at any time, without an appeal, correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission.
> (2) A party applying for a correction must give notice to all other parties.

26. Rule 42.10 is inapplicable here.

27. I also do not think that the *Belgravia* case assists the Applicants. In that case, the Court of Appeal in dealing with the issue of a judge's discretion to grant relief from sanctions, dealt with the interplay of a Court's inherent jurisdiction, the Court's jurisdiction under the CPR and the exercise of a judge's discretion under the CPR. In delivering the judgment of the court, Honourable Sir Michael Barnett, P after reviewing a number of cases, came to the conclusion, at paragraph 55 that

> "inherent jurisdiction is a residual source of powers that is relied upon when rules do not address a situation. Further, it should be exercised only in exceptional cases…"

And again at paragraph 61 that the "inherent jurisdiction has to be subservient to specific statutory rules."

28. The principle in *Re Barrell Enterprises* [1973] 1 WLR 19 is that once an appeal is heard, it ought not be reopened save in the most exceptional circumstances. The court there also noted that any discovery of fresh evidence after a hearing had been conducted and a decision made, was usually a matter to be addressed by an appellate court by way of appeal.

29. It cannot be gainsaid that a court, in actively managing cases may make case management orders and has the power to vary or set aside those orders on the application of a party. Of course, there has to be a good reason for a court to interfere with its previous order. These reasons may be as set out in the CPR or,

in the absence of same, as may be determined under the court's inherent jurisdiction to prevent abuse of its process. Good reasons advanced by a party could be a material change in circumstances or evidence that the court was misled in a material particular such as to lead to the making of the particular order. A party alleging misrepresentation or fraud upon a court which misrepresentation or fraud induced the court to make the order that it did, ought to place that evidence before the court.

30. In this case, the order under review is a directions order. The Applicants allege "misrepresentation and fraud" in their grounds without more. That allegation is unsubstantiated.

31. On close inspection of the grounds, most of the matters advanced in support of a "reconsideration" are not matters relevant for the determination of a directions order. The Applicants have advanced factual and historical matters that may or may not be relevant at a substantive hearing. In my view those matters are irrelevant considerations in the context of an order directing that certain interlocutory applications be heard. In this respect, the application to reconsider the July 14, 2023 order is misconceived.

32. It is a court's duty to actively manage a case and fixing a timetable for the disposal of interlocutory applications is a part of that duty.

33. Part 25, Rule 25.1 provides for some of the activities that a Court may undertake in furthering the overriding objective by actively managing cases. It is not an exhaustive list. The activities include:

> Rule 25.1:
> (a) identifying the issues at an early stage;…
> (d) dealing with as many aspects of the case as is practicable on the same occasion; …
> (g) deciding the order in which issues are to be resolved;….
> (k) fixing timetables or otherwise controlling the progress of the case;…

34. The Applicants have sought leave to appeal only that part of the order as it relates to fixing a date for the hearing of an application to list and market the property. They have incorrectly represented that a judgment has been given. The directions order provide for the applications to be heard together. There is no existing judgment against the Applicants in relation to that application. The Applicants' argument seems to be that the listed application ought not to be heard and that a

trial date is to be set instead. The argument is that their application to order a separate trial of issues (filed subsequent to the setting of the date for the directions order) ought to take precedence and that a direction should issue providing for a separate trial of issues.

35. The Applicants argue that instead of hearing the Respondent's application, a trial date should be set or that a separate trial of the issues should be ordered. No reason or rationale or example of which issues should take precedence have been advanced. The Applicants have indicated their preferred directions but have not advanced any compelling reason as to why the current directions order ought not to have issued. Nor do their proffered and preferred directions address what a court is to do with the several filed applications for interlocutory relief which have not yet been timetabled or heard. The thrust of the Applicants' wish for reconsideration (and leave to appeal) is to prevent the hearing and the determination of the Respondent's application at this stage. This is not a good reason for the reconsideration of an order or for leave to appeal to be granted.

36. I do not deem it necessary to treat with each ground in relation to the application for reconsideration for the reasons above and for this main reason: the directions order already has been acted upon by this Court. The Court has already heard the application that is the source of the Applicant's complaint. The Applicants were present at, and made submissions, in respect of the application that the Applicants now wish this Court to revisit by way of reconsidering whether a direction to assign a date for its hearing should have been made. This Court has reserved a ruling in same pending the hearing of the other two applications which are lodged and are to be pursued by the Applicants. It is unclear what process so far has resulted 'in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair." Again, no judgment has been rendered in relation to the application. The Court is to hear the other applications listed which were filed by the Applicants, before rendering a judgment since the substance of the grouped applications, in some regard, touched and concerned each other. The Applicants have been given an adjourned date for the hearing of their applications. There is nothing before this court which justifies why those applications, which are not subject of the application for leave to appeal, would go forward but not the application filed by the Respondent.

37. The directions order has already been acted upon. A hearing was held in relation to the Respondent's application to list and market the property. The current application to "reconsider" comes late. It is inappropriate in these circumstances. The application to reconsider is refused.

APPLICATION FOR LEAVE TO APPEAL - TEST TO BE APPLIED ON LEAVE TO APPEAL

38. *Maria Iglesias Rouco and another v Juan Sanchez Busnadiego and another* **[**2022] 2 BHS J. No. 160, sets out the relevant test for a leave application in this jurisdiction. In dismissing an application for leave to appeal, the Honourable Mr. Justice Isaacs, JA, cited with approval the case of *Keod Smith v Coalition to Protect Clifton Bay* SCCivApp. No. 20 of 2017, which had adopted guidance from *Smith v Cosworth Casting Processes Limited* (1997) 4 All ER 840. At paragraph 55, Isaacs, JA noted:

> "55. In **Keod Smith v Coalition to Protect Clifton Bay** SCCivApp. No. 20 of 2017, Isaacs, JA, adopting the guidance from Lord Wolff in the case of **Smith v Cosworth Casting Processes Limited** (1997) 4 All ER 840, noted at paragraphs 23 through 27 of his judgment:
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> > "23. The test on a leave application is whether the proposed appeal has realistic prospects of success or whether it raises an issue that should in the public interest be examined by the court or whether the law requires clarifying: per Lord Woolf in Smith v Cosworth Casting Process Ltd [1997] 4 All ER 840.
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> > 24. In a Practice Direction issued by the Court of Appeal in the United Kingdom in 1999 Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments) 1999 WLR 2, the following appears:
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> > > 'The general test for leave
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> > > 10. There is no limit on the number of appeals the Court of appeal is prepared to hear. It is therefore not relevant to consider whether the Court of Appeal might prefer to select for itself which appeals it would like to hear. The general rule applied by Court of Appeal, and this is the relevant basis for first instance courts deciding whether to

grant leave, is that leave will be given unless an appeal would have no realistic prospect of success. A fanciful prospect is insufficient. Leave may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. Examples are where a case raises questions of great public interest or questions of general policy, or where authority binding on the Court of Appeal may call for consideration.

11. The approach will differ depending on the category and subject matter of the decision and the reason for seeking leave to appeal, as will be indicated below. However, if the issue to be raised on the appeal is of general importance that will be a factor in favour of granting leave. On the other hand, if the issues are not generally important and the costs of an appeal will far exceed what is at stake, that will be a factor which weighs against the grant of leave. (Emphasis added)

25 Also in those Practice Directions, the Court of Appeal dealt specifically with appeals from interlocutory orders:

> 'Appeals from interlocutory orders
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> 17. An interlocutory order is an order which does not entirely determine the proceedings: see R.S.C., Ord. 59, r. 1A. Where the application is for leave to appeal from an interlocutory order, additional considerations arise: (a) the point may not be of sufficient significance to justify the cost of an appeal; (b) the procedural consequences of an appeal (e.g. loss of the trial date) may outweigh the significance of the interlocutory issue; (c) it may be more convenient to determine the point at or after trial. In all such cases leave to appeal should be refused.'

> 26 The Notes to Order 59/14/7 of the White Book 1997 which provides guidance on civil procedure in England, outlines the test for the grant of leave to appeal to the Court of Appeal there -
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> > 'The Court of Appeal will grant leave if they see a prima facie case that an error has been made (see (1907) 123 L.T.J. 202) or if the question is one of general principle, decided for the first time (Ex p Gilchrist Re Armstrong(1886)17QBD 521 per Lord Esher MR at 528) or a question of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage (see per Bankes LJ in Buckle v Holmes[1926] 2 KB 125 at p. 127). Generally, the test which the Court applies is whether the proposed appeal has a reasonable prospect of success.'
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> 27 The approach of the English courts has generally been followed by the courts of The Bahamas when considering applications for leave to appeal and for leave to appeal out of time. I have been unable to find a local authority generally discussing the issue of leave to appeal to this Court but I am confident that the factors which call for consideration are much the same as those considered in leave to appeal out of time applications, of which there are many determined by the Court. …

39. As I understand it, this court must therefore determine whether the proposed appeal has realistic prospects of success or whether it raises an issue that should in the public interest be examined by the court or whether the law requires clarifying. What is before this court is an application for leave to appeal from an interlocutory order. Additional considerations may arise since this is not a final order – namely a) the point may not be of sufficient significance to justify the cost of an appeal; (b) the procedural consequences of an appeal (e.g. loss of the trial date) may outweigh the significance of the interlocutory issue; (c) it may be more convenient to determine the point at or after trial.

40. The Court of Appeal in *Maria Iglesias Rouco and another v Juan Sanchez Busnadiego and another* (cited above) also provided guidance on the test for

challenging the exercise of a court's discretion. At paragraph 56 Isaacs, JA opined:

> 56. In order to succeed in challenging the exercise of a judicial discretion an applicant must persuade the Court that the Judge exercised the discretion under a mistake of law; or in disregard of principle; or under a misapprehension as to the facts; or that she took into account irrelevant matters; or that she failed to exercise her discretion; or finally, that the conclusion which she reached in the exercise of her discretion was outside the generous ambit within which a reasonable disagreement is possible. See G v G [1985] 2 All ER 225 (HL); *Hadmor Productions Ltd v Hamilton* [1983] A.C. 191 (HL).

41. In *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343, [1948] 1 All ER 343 which concerned an appeal from a variation of a maintenance order, Asquith LJ considered whether the exercise of the discretion of the judge should be interfered with. He pronounced (page 345):

> "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."

Eveshed LJ agreed with the judgment of Asquith LJ and opined (page 346):

> "In these circumstances it would, as it seems to me, be quite wrong for this court to interfere with the conclusions both of the registrar and of the learned judge unless we were satisfied that, nevertheless, the order appealed from on some other grounds would result in what has been shown to be a miscarriage of justice…. It is sufficient, in my judgment, for us to say that we ought not to conclude, and cannot conclude, that, on any grounds, the order made involves anything which could fairly be described as a miscarriage of justice. It, therefore, follows that, in my view, this court ought not to interfere with the discretion of the court below…"

42. It is clear therefore that it is not enough for the Applicant to show that they would have preferred a different direction or that a different order could have been made. In order to succeed on an appeal they must show that the discretion was wrongly exercised or that the decision was plainly wrong. Could the directions order to direct the hearing of the Respondent's application as well as applications filed by

the Applicants be described as a miscarriage of justice? The Applicants have not advanced any argument or ground that would be persuasive in this regard.

43. On July 14 2023, this Court gave directions that 3 of a number of outstanding interlocutory applications would be heard. From a review of the several proposed grounds of appeal advanced, the Applicants' complaint at essence is that they are put at risk of having an order made in favour of the Respondent consequent upon the hearing. They complain that the directions order do not afford due deference to the protections that they say prior judgments have afforded them. Notably, an order directing a hearing does not overturn any ruling or order that the Applicants say effect some form of protection for them. The directions order does not adjust rights currently held, or to be determined, in the substantive hearing.

44. The Applicants do not seek leave to revisit or appeal that part of the directions order that concerns 2 of the Applicants' outstanding applications directed to be heard prior to trial. This is incongruous with any suggestion that the order was plainly wrong.

THE GROUNDS OF APPEAL

45. Ground 1 M

The Applicants assert that the matter is to be disposed of on its merits rather than technicalities. It attributes delay to the Respondent and makes other allegations that are irrelevant and/or unsupported. The directions order does not act as a disposal of the matter. The directions order does not even act as disposal of the application listed for hearing. This ground is without merit and has no prospect of success.

46. Ground 2M

The Applicants have wrongly represented that this court failed to introduce a case-managed process. Their complaint about identification of issues to be disposed of summarily relates to an application not then before the court and, which, on their arguments was filed after the case management process was in train. The Applicants complain that no trial date was set. Via a case management process, the directions order set a timetable for the several interlocutory applications that are outstanding and which are preliminary to trial. The Applicants have not sought leave to appeal that part of this Court's directions order which has timetabled two of the Applicant's applications for hearing. The same considerations taken into account in making the order to set a hearing date for the interlocutory applications

filed by the Applicants would have been taken into account in making the order to list the Respondent's application for hearing. In their arguments, the Applicants have indicated that they have since filed other interlocutory applications that they would wish heard. The concern about delay is not borne out. The representation that the court failed to introduce a case-managed process is incorrect.

This ground is without merit and has no prospect of success.

47. Ground 3M and Ground 4M

These ground advance that the court should have taken into account considerations irrelevant to a directions order which dealt with the time tabling of hearings. The grounds are ill-conceived in the context of a directions order. There is no merit in either ground and they have no real prospect of success.

48. Ground 5M

The Applicants have not demonstrated how the scheduling of interlocutory applications for hearing prior to trial exposes the litigation to risks. Conversely, not scheduling or hearing the outstanding matters that precede trial would expose the litigation to risks and further delay an opportunity to schedule a trial date. The directions order is a step in managing the case in order to arrive at a trial date. The concern about delay is not borne out.

This ground is meritless and has no prospect of success.

49. Ground 1S.

The Applicants have demonstrated no important points of principle or practice under CPR which need to be clarified on appeal. Under the CPR the court is empowered to determine a procedural timetable and the order in which applications are heard. This ground is without merit and has no prospect of success.

50. Ground 2S.

The Applicants have wrongly represented that this court failed to exercise jurisdiction over case management matters. Their very complaint is the nature of the exercise of such jurisdiction. What they contend is that the discretion should have been exercised in another manner preferable to them. This ground also advances that the court should have taken into account considerations irrelevant to a directions order which dealt with the time tabling of hearings.

51. This court has a duty to manage the process bearing in mind the overriding objective. This is a correct principle to bear in mind. This court must manage the process in a manner that deals justly with a case. The overriding objective is stated in the CPR Preliminary Part 1.1 thus:

> (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.

52. A court must bear these factors in mind on a case-by-case basis. The matter before this Court concerns consolidated proceedings initiated in 2014 and 2015 respectively. The matters have long been outstanding and the parties are to be dealt with fairly. That requires a court to schedule hearings for applications filed on both sides. This Court is mindful of the volume of interlocutory matters filed and that some attempt ought to be made in allotting to the matters an appropriate share of the court's resources. The intended grounds of appeal and written submissions of the Applicants show that they have filed, and continue to file, several interlocutory applications which are to be heard prior to trial. It seems to me that such applications have to be scheduled by the court and that a court is duty bound to schedule applications regardless of which party files them.

53. The Applicants advance that the court did not take into account prior rulings and factual evidence on the making of the directions order. Those matters, in my opinion, are not relevant considerations for a timetabling of the applications. In the exercise of a discretion, a court must be careful to not take into account irrelevant considerations. If a party wishes to advance a reason as to why an application should fail, then the legal and procedural course is for that reason to be advanced at the time of the hearing of the application. To ask a court to consider submissions on the substance of an application at the time of the making of an order to set a date for the hearing of the application is improper. To my mind then, this Court

did not take into account irrelevant considerations and did not fail to take into account relevant considerations when the directions order was made.

54. There is no merit in Ground 2S and it has no real prospect of success.

55. Ground 3S.
There is no issue of public interest demonstrated. There is no merit in this ground and it has no real prospect of success.

56. Ground 4S.
The Applicants have not demonstrated a rule requiring clarification under the CPR.

This court had the jurisdiction and power to make the order that it did as a case management exercise pursuant to Parts 25 and 26 of the CPR. No mistake of law or jurisdiction has been alleged nor is there any.

This ground is unsupported, it is without merit and has no real prospect of success.

57. Ground 5S.
No compelling reason has been advanced for the review of an appellate body. This ground is unsupported, it is without merit and has no real prospect of success.

ADDITIONAL CONSIDERATIONS

58. Having determined that there is no ground advanced for which there is a reasonable prospect of success, I consider whether there are any additional considerations that would favour this court granting leave to appeal. I have already considered and determined (particularly as raised in Grounds 3S and 4S) that there is no issue that arises which should be examined by the court in the public interest nor is there raised any law that requires clarifying.

59. Given that the order complained of has not been shown to be wrong and has not resulted in a substantive judgment or final order against the Applicants, it is my view that there is no point of sufficient significance to justify the cost of an appeal. Further, to allow leave to appeal an order that has merely timetabled the subject application in circumstances where that application has already been heard will serve no useful purpose and will result in further delay of the litigation process. The application has already been heard and judgment reserved. It seems to me that,

in relation to this case, any intended application for leave to appeal would be more appropriate after a decision is rendered.

CONCLUSION

60. Having examined the several proposed grounds of appeal, I find that there is no arguable basis for an appeal. I find that there is no ground of appeal raised which has a reasonable prospect of success.

COSTS

61. The Applicants have been unsuccessful in this application. The Respondent has successfully resisted the application. Taking into account the provisions of Part 71, CPR and in particular the provisions of Part 71, Rule 71.6, I find no reason to depart from the general rule that the unsuccessful party should pay the costs of the successful party. Therefore in this matter, the Applicants shall pay the Respondent's costs, to be taxed if not agreed.

ORDER

61. For the foregoing reasons, the order and directions of this Court are as follows.

IT IS HEREBY ORDERED THAT:

1. The Applicants/Intended Appellants' applications by way of Notice of Motion filed July 26, 2023 are dismissed.

2. The Respondent's costs of the application are to be paid by the Applicants/Intended Appellants, to be taxed if not agreed.

Dated this 1st day of March 2024

Carla D. Card-Stubbs, J