IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

Claim No. 2022/COM/bnk/00031

IN THE MATTER of the International Business Companies Act, Ch. 309 (as amended by the International Business Companies (Winding Up Amendment) Act, 2011)

AND

IN THE MATTER of the Petition of **WIN BUSINESS ENERGY CAOFEIDIAN LIMITED (FORMERLY KNOWN AS KERR-MCGEE CHINA PETROLEUM LTD)**

AND

IN THE MATTER of a Statutory Demand under section 188 of the Companies Act (O.2, r. 2) The Companies Act, Ch. 308

BETWEEN

WIN BUSINESS ENERGY CAOFEIDIAN LIMITED
(FORMERLY KNOWN AS KERR-MCGEE CHINA PETROLEUM LTD.)

Petitioner

AND

ANADARKO PETROLEUM CORPORATION

First Respondent

AND

ANADARKO CHINA HOLDINGS 2 COMPANY

Second Respondent

Before:	The Honourable Madam Justice Simone Fitzcharles
Appearances:	Ms. Tara Cooper-Burnside, KC, with Mr. Rhyan Elliot of Higgs & Johnson for the Petitioner
	Mr. Sean Moree, KC, with Ms. Vanessa Smith and Ms. Alicia Gibson of McKinney, Bancroft & Hughes for the First and Second Respondent
Hearing Date:	9 January 2024

RULING

FITZCHARLES, J.

Introduction

1. This matter concerns an application made by Win Business Energy Caofeidian Limited (formerly known as Kerr-McGee China Petroleum Ltd.) ("the Petitioner") to strike out specific portions of the First Affidavit of Tee Su Mien ("the Tee Su Mien Affidavit"), filed on behalf of Anadarko Petroleum Corporation ("the First Respondent"), and Anadarko China Holdings 2 Company ("the Second Respondent") ("collectively, the Respondents") for, among other things, purportedly violating the self-witnessing rule, and being scandalous, irrelevant and/or otherwise oppressive.

2. The Petitioner seeks the following reliefs:

   (a) an Order that the following paragraphs of the Tee Su Mien Affidavit, filed on 3 July 2023, be struck from the record of these proceedings and/or that the Court refuse to admit them into evidence on the basis that the same are inadmissible, namely:

      i. the last sentence of paragraph 30, as it is irrelevant, contains opinion and conclusions and is an abuse of the process of the Court;
      ii. the first sentence of paragraph 35, as it is scandalous, contains argument, opinion, and conclusions and is an abuse of the process of the Court;
      iii. paragraph 37 as it is scandalous, contains argument, opinion, and conclusions, and is an abuse of the process of the Court;
      iv. paragraph 49 as it is scandalous, contains an argument, opinion, conclusions, law and submissions, and is an abuse of the process of the Court;
      v. the last sentence of paragraph 52, as it is scandalous, contains argument, opinion, conclusions, law and submissions, and is an abuse of the process of the Court;
      vi. paragraphs 60-69 as the deponent does not have personal knowledge of the matters stated therein and does not disclose the sources and grounds for her statements of information and/or belief. Further, they contain argument, opinion, conclusions, law, and submissions and the deponent is not qualified to prove the evidence stated therein and is an abuse of the process of the Court;
      vii. the first sentence of paragraph 70, as it contains argument, opinion, and conclusions and is an abuse of the process of the Court;
      viii. paragraph 71, as the deponent does not have personal knowledge of the matters stated therein and does not disclose the sources and grounds for her statement of information and/or belief. Further, it contains argument, opinion, conclusions, and submissions and the deponent is not qualified to prove the evidence stated therein, which offends the "self-witnessing" rule and is an abuse of the process of the Court;

ix. paragraph 72, as it is scandalous, speculative, irrelevant, and contains argument, opinion, and conclusions;

x. paragraph 74-76, as they are irrelevant and contain argument, opinion, conclusions, law, and submissions, and the deponent, is not qualified to prove the evidence stated therein, which offends the "self-witnessing" rule and is an abuse of the process of the Court;

xi. paragraph 77-79, as the deponent does not have personal knowledge of the matters stated therein and does not disclose the sources and grounds for her statements of information and/or belief. Further, they contain argument, opinion, conclusions, law, and submissions and the deponent is not qualified to prove the evidence stated therein, which offends the "self-witnessing" rule and is an abuse of the process of Court;

xii. paragraph 87 as it contains argument, opinion, conclusions, law, and submissions, and the deponent is not qualified to prove the evidence stated therein, which offends the "self-witnessing" rule and is an abuse of the process of the Court;

xiii. paragraphs 90-91 as they are scandalous, and contain argument, opinion, conclusions, law, and submissions;

xiv. paragraphs 92-94 as they are irrelevant, contain argument, opinion, conclusions, law, and submissions;

xv. paragraph 95 as it is scandalous and contains argument, opinion, conclusions, law, and submissions;

xvi. paragraphs 96 and 97, as the deponent does not have personal knowledge of the matters stated therein and does not disclose the sources and grounds for her statements of information and/or belief. Further, the penultimate sentence of paragraph 97 contains and refers to without prejudice and confidential communications between the parties;

xvii. paragraphs 98-100 as they are scandalous and contain argument, opinion, conclusions, law, and submissions and contain and refer to without prejudice and confidential communications between the parties;

xviii. paragraph 103 as it contains argument, opinion, conclusions, law, and submissions, and the deponent is not qualified to prove the evidence stated therein, which offends the "self-witnessing" rule and is an abuse of the process of the Court;

xix. paragraph 108 as it is scandalous and contains argument, opinion, conclusions, law, and submissions and contains and refers to without prejudice and confidential communications between the parties;

xx. paragraph 114 as it is scandalous and contains argument, opinion, conclusion, law, and submissions and offends the "self-witnessing" rule;

xxi. paragraphs 126-135 as they are scandalous and contain argument, opinion, conclusions, law, and submissions; and

(b) an Order that the costs of and occasioned by this application shall be paid by the Respondents to the Petitioner, on an indemnity basis, such costs to be taxed, if not agreed.

3. Apart from the grounds listed in the Petitioner's application as set out above, the Petitioner applies on the grounds that the above-specified portions of the Tee Su Mien Affidavit –

    i. offend Order 41, Rules 5 and 6 of the RSC;
    ii. offend the self-witnessing rule;
    iii. offend Practice Direction No. 1 of 1995;
    iv. are otherwise an abuse of the process of the Court and tend to embarrass and prejudice the proceedings; and/or
    v. are otherwise inadmissible.

4. The Court, having regard to the evidence, submissions made by the respective Counsel, and relevant law, is satisfied that this application ought to be dismissed with the costs of and occasioned by this application to be borne by the Petitioner to be taxed if not agreed. The Court's reasoning is set out below.

Factual Background

5. The Respondents claim that the Petitioner owes them the sum of $172,381,206.40 pursuant to certain arbitral awards granted the Respondents against the Petitioner before the London Court of International Arbitration on 13 October 2021. The Respondents served a Statutory Demand on the Petitioner on 20 April 2022 for the amount awarded in arbitration in accordance with their calculations.

6. By Petition filed on 19 May 2022, the Petitioner moved the Court seeking an Order to set aside the Respondents' Statutory Demand dated 20 April 2022 ("the Set Aside Petition"). The Set Aside Petition was not accompanied and/or supported by an Affidavit.

7. On 30 March 2023, the Petitioner made an application to amend the Set Aside Petition.

8. On 3 July 2023, the Respondents filed an Omnibus Application, which sought among other things, reliefs, that –

    i. pursuant to Order 31A, Rule 18(3)(a) and (4)(b) of the RSC and/or the Court's inherent jurisdiction that the undertaking agreed between the parties by email dated 2 June 2022 be drawn up as an Order of the Court by the parties and filed by the Petitioner for the Court's approval within two (2) days of the hearing of the Summons;
    ii. pursuant to section 21 of the Supreme Court Act, Chapter 53 and/or Order 30, Rule 1 of the RSC Edmund Rahming, Yeung Mei Lee, and Wesley Edwards be appointed as joint receivers over the affairs and shares of the Petitioner in aid of (a) contemplated winding up proceedings, and/or (b) contemplated proceedings for the recognition and enforcement of the Final Award on Quantum (save as to

undertakings) dated 13 October 2021 awarded in arbitration proceedings in London before the London Court of International Arbitration until the determination of the Petition filed by the Petitioner filed on 19 May 2022 or further order of the Court;

iii. pursuant to the inherent jurisdiction of the Court that the 'without prejudice' privilege attaching to the correspondence from the Chairman of the Petitioner's parent Company dated 14 November 2022 and 28 November 2022 be lifted and dispensed with so that the correspondences can be adduced into evidence by the Respondents to prove that the Petitioner has admitted that it is insolvent and should be consequently wound up if it fails to pay the Respondents' Statutory Demand dated 20 April 2022;

iv. pursuant to Order 15, Rule 4 of the RSC and/or the Court's inherent jurisdiction that Win Business Energy (Caofeidian) Limited, a British Virgin Islands company being number 1598023 be joined or added as an interested party to the proceedings;

v. pursuant to Order 11, Rule 8(3) of the RSC that the Respondents be granted leave to serve the Petition out of the jurisdiction along with the Summons, evidence in support and any Order the Court makes granting the Summons, and any other documents in these proceedings;

vi. pursuant to Order 20, Rule 6 of the RSC that leave be granted to the Respondents to amend the Petition in form exhibited to the Notice of Application filed herein on 17 March 2023;

vii. all costs incurred by the Respondents associated with the amendment be borne by the Petitioner;

viii. case management directions be made pursuant to Order 31A, Rule 1(g) and (l) or Order 31A, Rule 18(2)(c) and (s) and/or the Court's inherent jurisdiction, that –

a. the Petitioner file and serve on the Respondents the Affidavit in support of its Petition within four (4) days of the hearing of this Summons;

b. the Respondents file and serve Affidavit Evidence in response, if necessary, within seven (7) days of being served with the Petitioner's Affidavit;

c. the Petitioner and Win Business BVI, if joined, file and serve any Affidavit Evidence in reply, if necessary, within three (3) days after being served with the Respondents' Affidavit in response;

d. the Parties lodge and exchange written submissions within seven (7) days after the Petitioner files its Affidavit in reply and the hearing of the Petition be set down for the earliest date convenient for the Parties;

ix. the costs of and occasioned by this application be paid by the Petitioner to be taxed if not agreed;

x. the Court shall grant such further and other relief as it deems just and necessary; and

xi. the Parties shall be at liberty to apply.

9. The Respondents' Omnibus Application was supported by the following Affidavits –

i. First Affidavit of Tee Su Mien filed on 3 July 2023;

ii. First Affidavit of Craig Olsen filed on 3 July 2023;
iii. Affirmation of Wesley A. Edwards filed on 3 July 2023;
iv. Affidavit of Edmund L. Rahming filed on 3 July 2023;
v. Affidavit of Demi Pindling filed on 4 December 2023; and
vi. Second Affidavit of Tee Su Mien filed on 8 December 2023.

10. By a Consent Order filed on 14 November 2023, the parties agreed that the Petitioner be granted leave to amend the Set Aside Petition substantially in the same manner as shown on the draft Amended Set Aside Petition and that the costs of and occasioned by the application to amend the Set Aside Petition be borne by the Petitioner to be taxed if not agreed.

11. On 15 November 2023, the Petitioner filed an Amended Set Aside Petition. Between the filing of the Set Aside Petition and Amended Set Aside Petition, the Petitioner had yet to file an accompanying and/or supporting Affidavit.

12. On 8 December 2023, the Petitioner filed the present application to strike out the above-specified portions of the Tee Su Mien Affidavit.

13. On 12 December 2023, the Court heard the Respondents' Omnibus Application and made orders relative to the reliefs sought therein save for the issue relating to the waiver of privilege of certain without prejudice correspondence, which the Court directed would be heard on the papers on or before 8 February 2024. The issues raised on the application for waiver of 'without prejudice' privilege are disposed of in a separate decision of this Court.

14. On 21 December 2023, the Respondents filed a Receivership Order whereby the Court appointed Edmund Rahming, Yeung Mei Lee, and Wesley Edwards as interim receivers of the Petitioner until further order of the Court or the conclusion of these proceedings.

15. The Petitioner's application to strike out the above-specified portions of the Tee Su Mien Affidavit was stood down for non-compliance with Order 32, Rule 3 of the RSC. The Court indicated to Counsel for the Petitioner that the application would be heard at a later date once it is brought into compliance with the rules of the Court.

16. On 21 December 2023, the Respondents filed a Directions Order whereby the Court gave several directions relative to the Respondents' Omnibus Application and the Petitioner's application to strike out the above-specified portions of the Tee Su Mien Affidavit. The Court's directions relative to the Petitioner's application to strike out the above-specified portions of the Tee Su Mien Affidavit were as follows, that –

i. the Petitioner's Strike Out Application shall be heard on 9 January 2024 at 10:00 am;

ii. the parties shall lodge and exchange written submissions on the Strike Out Application on or before 4 January 2024;
iii. the costs of and occasioned by this application be reserved; and
iv. the parties shall have liberty to apply.

17. On 4 January 2024, the parties lodged written submissions with respect to the present application.

18. On 9 January 2024, the Court heard the parties on the Petitioner's application to strike out the above-specified portions of the Tee Su Mien Affidavit. The Court reserved its decision on the application and promised to deliver said decision at a later date. The Court does so now.

Petitioner's Case

19. The Petitioner's case is that the above-specified portions of the Tee Su Mien Affidavit are grossly defective and therefore inadmissible as evidence for the Court's consideration in these proceedings. Learned Counsel for the Petitioner, Mr. Elliot, contended that the above-specified portions of the Tee Su Mien Affidavit offended the provisions of Order 41 of the RSC and/or the general rules of evidence.

20. Mr. Elliot further contended that the above-specified portions of the Tee Su Mien Affidavit were scandalous, and the deponent of the Affidavit was not competent to provide evidence in the nature she did. The Tee Su Mien Affidavit, among other things, made serious allegations without basis, was improper in all the circumstances, and ought to be struck from the record, particularly to the extent the Respondents seek to rely on the Affidavit in the Omnibus Application or substantive Petition proceedings, with costs awarded to the Petitioner on an indemnity basis.

21. Mr. Elliot cited two Bahamian authorities to ground and/or substantiate the Petitioner's case, namely, **Owners and Other Parties Interested in the Vessel "Great Harbour Cay" v Freeport Harbour Company Limited (A member of the Hutchison Port Holdings Group) BS 2008 SC 65** and **Re Finethic Limited et al [2022] 1 BHS J. No. 179**.

Respondent's Case

22. The Respondents' case is that the Petitioner's strike out application ought to be dismissed with costs awarded to the Respondents as the application is 'obsolete'. In the alternative, the Tee Su Mien Affidavit did not offend the provisions of Order 41, Rules 5 and 6 of the RSC, and is not an abuse of the process of the Court. Learned Counsel Mr. Moree, KC, contended that the Tee Su Mien Affidavit, among other things, was primarily to be used for the Respondents' Omnibus Application, was not scandalous, irrelevant,

oppressive, or an abuse of the process; and did not offend the self-witnessing rule.

23. Mr. Moree, KC, in a preliminary point, contended that the Petitioner's application to strike out the above-specified portions of the Tee Su Mien Affidavit must fail for being obsolete, particularly, as it was filed too late. The strike out application was filed only one clear business day before the hearing of the Respondents' Omnibus Application, (in support of which the Tee Su Mien Affidavit was filed). This lateness was no fault of the Respondents or the Court, but of the Petitioner.

24. Mr. Moree, KC, argued that as the Tee Su Mien Affidavit was solely and specifically used to support the Respondents' Omnibus Application and the Court has already granted the reliefs sought therein save for the issue relating to the waiver of privilege of the without prejudice correspondence, it is difficult to understand how the strike out application can now be properly heard, or if it is heard what effect it could have.

25. Mr. Moree, KC, further submitted that the Tee Su Mien Affidavit comprehensively outlined the cross-border litigation history between the parties, namely in the British Virgin Islands ("BVI"), Hong Kong and the People's Republic of China ("PRC"). The Tee Su Mien Affidavit voluminously exhibited court orders, arbitral awards, and decisions of the courts in the various jurisdictions amongst other exhibits. Ms. Tee Su Mien is a solicitor with Kobre & Kim, who are the Respondents' Counsel in Hong Kong and BVI. As Counsel for the Respondents, Ms. Tee Su Mien would have had receipt of these various orders and decisions from her representation of the Respondents. Furthermore, she would have had sight of various correspondence and/or was expressly authorized to swear the Affidavit and endorsed the Affidavit as sworn.

26. Counsel argued, moreover, that the Court, in the exercise of its judicial function, would have fully considered the Tee Su Mien Affidavit and had the ability to disregard any statements contained therein that it deemed inappropriate. The above-specified portions of the Tee Su Mien Affidavit, if found to be in breach of Order 41, Rules 5 and 6 of the RSC, were not so egregious as to warrant being struck out.

27. Mr. Moree, KC, further stated that the Tee Su Mien Affidavit did not violate the self-witnessing rule as Ms. Tee Su Mien is not Counsel for the Respondents in The Bahamas and neither is she a member of the firm McKinney, Bancroft & Hughes, which has carriage of the matter in this jurisdiction. Consequently, Practice Direction No. 1 of 1965 and The Bahamas Bar (Code of Professional Conduct) Regulations, Chapter 64 do not apply to her.

28. Mr. Moree, KC, grounded and/or substantiated the Respondents' case with the use of several authorities, namely, **Savings and Investment Bank Limited v Gasco Investments (Netherlands) BV and Others [1984] 1 All ER 296**,

Wilmington Trust Company (as Trustees of the McMillen Trust) v Rawat et al [1991] BHS J. No. 42, Carla Outen-Minnis v The Insurance Commission of The Bahamas [2022]1 BHS J. No. 156, and **Re Finethic Limited et al (supra)**.

Issues

29. The disposal of this application required the Court to consider two primary issues, namely –

    i. whether the above-specified portions of the Tee Su Mien Affidavit out to be struck out for being scandalous, irrelevant, and/or otherwise oppressive, and

    ii. whether the above-specified portions of the Tee Su Mien Affidavit offended the self-witnessing rule.

Law and Discussion

Issue One – Whether the above-specified portions of the Tee Su Mien Affidavit out to be struck out for being scandalous, irrelevant, and/or otherwise oppressive.

30. Affidavits are means by which evidence is adduced in court proceedings. Consequently, with respect to any challenge made regarding the admissibility of material contained in an affidavit, the Court shall have regard to the general law of evidence and/or the rules of the Court. It matters not what stage the proceedings have progressed to – interlocutory or substantive. The Court must be satisfied at every stage of the proceedings that the evidence adduced to the Court for its consideration complies with the general law of evidence and/or the rules of the Court. Otherwise, the floodgates are open to allow affiants to inundate the Court with inadmissible material.

31. **Order 41, Rule 5 of the RSC**, which governs petition proceedings, provides procedural requirements for affidavits. It provides as follows –

ORDER 41
AFFIDAVIT
(R.S.C. 1978)

5. (1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

32. **Order 41, Rule 6 of the RSC** empowers the Court with the inherited jurisdiction to strike out of any affidavit any matter that is scandalous, irrelevant, and/or otherwise oppressive. It provides as follows –

ORDER 41
AFFIDAVIT
(R.S.C. 1978)

6. The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

33. The law on these provisions is well-settled and has been comprehensively considered by the courts and strictly interpreted.

34. The Court is also empowered with the inherent jurisdiction to strike out material of any affidavit for prolixity, particularly, where said material contains documents of oppressive length: **see commentary 41/6/1 of the Supreme Court Practice 1985 ("the White Book")**

35. Useful guidance on admissibility challenges to affidavit evidence was provided for in **Wilmington Trust Company Limited (as Trustees of the McMillian Trust) (supra)** wherein Lyons J at paragraph 30 adeptly summarized the following principles –

(a) an affidavit must comply with the ordinary laws of evidence; accordingly, it may exceptionally contain hearsay evidence only when the "sources and grounds" are disclosed;

(b) an affidavit must not contain no matter which is scandalous, and/or irrelevant and/or oppressive. "Irrelevant" material includes opinions, conclusions and submissions;

(c) where an affidavit which is filed contains any matter which it ought not to contain, the court need only ignore the offending matter unless the breach is egregious; and

(d) where an objection is taken by a party to material contained in an affidavit filed by another party, the court may instead of proceeding as at (c), order the offending material to be struck out, but should only do so in "plain and obvious" cases. If the matter objected to is inconsequential the court would still proceed as at (c).

(Emphasis added)

36. It is settled law that affidavit evidence used in interlocutory proceedings may contain statements of a deponent's information and belief provided the source of the information and belief is precisely and accurately disclosed. Even a

casual reading of Order 41, Rule 5 of the RSC would show this. A general word-processed assertion contained in the affidavit evidence is simply not good enough and will not suffice or survive an admissibility challenge to such affidavit evidence.

37. However, even if affidavit evidence is found to be non-compliant with the general rules of evidence and/or the rules of the Court, the Court's strike out jurisdiction will only be deployed in plain and obvious cases, particularly, where the breach is egregious. Otherwise, the Court would ignore the offending portions of the affidavit evidence as opposed to striking them out. Courts have long recognized that the strike out is a draconian measure and the jurisdiction relative thereto should be deployed only when necessary.

38. Reliance is placed on the decision of **Carla Outten-Minnis (supra)** wherein Sir Brian Moree CJ (as he then was) at paragraph 43 stated –

> **[43] ... Indeed, the authorities on Order 41 rule 5 indicate that the court <u>will only strike out the impugned evidence (as opposed to ignoring it) in plain and obvious cases when the breach is egregious</u>.** (Emphasis added).

39. In that decision, the Court, while finding that a deponent could not give direct evidence on what transpired in a meeting she did not attend, also found that the breach was not sufficiently egregious to warrant the exercise of the Court's jurisdiction to strike out the impugned portion of the affidavit evidence. Moreover, the affidavit was not for an interlocutory proceeding.

40. In the present application, the Court, having regard to the circumstances, submissions of Counsel, and the relevant law, is satisfied that this application ought to be dismissed. The Tee Su Mien Affidavit was solely and specifically used to support the Respondents' Omnibus Application. The Court, having granted the reliefs sought in the Respondents' Omnibus Application save for the issue relating to the waiver of privilege of the without prejudice correspondence, which was heard on the papers, can see no appreciable effect of the present application. That is so even if the Court were to find that the above-specified portions of the Tee Su Mien Affidavit did not comply with the general rules of evidence and/or the rules of the Court. The present application is therefore otiose.

41. In any event, even if the Court was satisfied that the above-specified portions of the Tee Su Mien Affidavit did not comply with the general rules of evidence and/or the rules of the Court, this is not the appropriate case for strike out. The Court, in the exercise of its discretion, could have ignored the above-specified portions of the Tee Su Mien Affidavit. The Tee Su Mien Affidavit comprehensively outlined the cross-border litigation history between the parties, namely in the British Virgin Islands ("BVI"), Hong Kong, and the People's Republic of China ("PRC"). Significantly, the Tee Su Mien Affidavit also

voluminously exhibited court orders, arbitral awards, and decisions of the courts in the various jurisdictions, amongst other exhibits. The Court, having studied the exhibits contained in the Tee Su Mien Affidavit and having read the Tee Su Mien Affidavit ignoring any portions of that document which it felt would offend rules of evidence or the rules of the Court, granted the reliefs sought in the Respondents' Omnibus Application. Consequently, even if the above-specified portions of the Tee Su Mien Affidavit were struck out, it would be inconsequential to the reliefs granted by the Court in the Respondents' Omnibus Application. In doing so the Court, although not exclusively, was largely informed by the exhibits in that Affidavit.

Issue Two – Whether the above-specified portions of the Tee Su Mien Affidavit offended the self-witnessing rule.

42. **Section 2 of the Legal Profession Act, Chapter 64** defines "counsel and attorney" as a counsel and attorney admitted to practice in The Bahamas under the Act.

43. **Rule VIII, Commentary 3 of The Bahamas Bar (Code of Professional Conduct) Regulations, Chapter 64 ("The Bahamas Bar Code of Professional Conduct")** admonishes Counsel from, in effect, making himself an unsworn witness in proceedings for which he acts as Counsel or putting his credibility into issue. If Counsel is a necessary witness, he should testify and the conduct of the proceedings should be entrusted to another Counsel.

44. **Practice Note 1 of 1995 (The Attorney as Witness)** equally admonishes Counsel from relying on affidavit evidence sworn by himself in contentious chamber matters and cites Rule VIII, Commentary 3 of The Bahamas Bar Code of Professional Conduct.

45. The decision of **Re Finethic Limited et al (supra)**, though distinguishable from the present application, is instructive on this issue. In that decision, Klein J discussed the self-witnessing rule and provided guidance for the Court on the applicability of the above-mentioned provisions relative to Counsel acting in a dual capacity as a witness and advocate. Klein J at paragraphs 117, 122, and 124 opined –

> **[117] With respect to counsel swearing the affidavit being from the same firm as counsel moving the application, I must admit that I find this a most troubling point. There are obviously many categories of affidavits, whether they are called technical or formal affidavits, in which it is obviously quite convenient and appropriate for counsel to swear the affidavit. In particular cases, for example matters dealing with settlement attempts during litigation, none other but counsel with carriage can swear the affidavits. But in my considered view, affidavits which seek to establish facts material to the application and which might have to be tested on cross-examination ought not**

> **to be sworn by counsel of the same firm presenting the application, and certainly not by the advocate appearing himself.**
>
> ...
>
> **[122] While Mr. Hanna might be right to point out that there is no rule of evidence or at common law precluding the adducing of evidence by counsel in the firm representing the party, or by the advocate himself, subject to the rule of election, there is very little in the law or practice to condone it. All of the cases and authorities speak with one voice in deprecating the practice and indicate that it is to be avoided at all costs. In my view, it amounts to something more than an undesirable or bad practice; it necessarily diminishes the probative value of the evidence before the court and always has the potential to embarrass and prejudice the proceedings.**
>
> **[124] I do agree that several of the breaches are significant and not trivial, but I would decline to exercise my discretion to strike it out, for the following reasons. Firstly, as indicated, the court has a discretion to ignore offending material in affidavits. Secondly, I have come to the conclusion in any event that the affidavit is of minimal evidential value, and did not satisfy the requirements of s. 199 (2). Thirdly, I would decline to strike out solely on the basis that the affidavit was sworn by a member of the firm appearing for the petitioner, as the dicta in the cases is directed mainly to the mischief of comingling duties as witness and advocate.**

46. Having regard to the circumstances of the present application and the relevant law, I am satisfied that the above-specified portions of the Tee Su Mien Affidavit did not offend the self-witnessing rule. Tee Su Mien is Counsel with Kobre & Kim, who are the Respondents' Counsel in Hong Kong and the BVI. Tee Su Mien is not a member of The Bahamas Bar nor is there evidence before the Court that she has made an application for special admission to The Bahamas Bar to act for the Respondents as Counsel in the Bahamian proceedings. Furthermore, Tee Su Mien is not a member of McKinney, Bancroft & Hughes, the firm that has carriage of the matter in The Bahamas. In the result, neither The Bahamas Bar Code of Professional Conduct nor Practice Note 1 of 1995 applies to her. In the result, the self-witnessing rule ought not to be extended to foreign Counsel in this case.

Conclusion and Disposition

47. In all the circumstances of this application and for the foregoing reasons, the Court is satisfied that this application ought to be dismissed. The costs of and occasioned by this application shall be paid by the Petitioner to the Respondents. If the parties do not agree costs, I direct that Counsel submit arguments as to costs within 30 days for the Court's consideration and decision.

48. The Court is grateful for the scholarship and assistance given by the respective Counsel relative to this application.

Postscript

49. It is a point of concern for the Court whenever parties choose to make interlocutory applications at the eleventh hour, particularly where they had ample time and opportunity to make such applications much earlier. Where this occurs and a party does not give an acceptable explanation for such action, it could reasonably perceived as tactical and/or an abuse of the process of the Court, warranting dismissal with appropriate costs implications. The Court jealously guards against allowing abuse of its process, and is armed with the inherited and/or inherent jurisdiction to prevent such abuse. Parties should be guided accordingly.

Dated 13 May 2024

Simone Fitzcharles
Justice