IN COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2021/CLE/gen/No.00863

BETWEEN

TYSON STRACHAN

Claimant

AND

ANTHONY SIMON

First Defendant

AND

YORKSHIRE HOLDINGS LTD

Second Defendant

AND

FIRSTCARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

Third Defendant

AND

MCKAY CULMER & ASSOCIATES

Fourth Defendant

Before:	**The Honourable Madam Senior Justice Deborah E. Fraser**
Appearances:	**Mrs. Yvette Rahming and Ms. Gabriel Rahming for the Claimant**
	Mr. Sidney Cambridge Jr. for the First and Second Defendants
	Mr. Ferron J.M. Bethell K.C. and Ms. Camille A. Cleare for the Third Defendant
	Mr. Norwood Rolle for the Fourth Defendant
Hearing Date:	**Heard on the Papers**

Leave to Appeal – Sections 11(e) and (f) of the Court of Appeal Act, 1965 – Realistic Prospect of Success – Public Interest – Appeal of Costs Ruling – Court's Discretion

RULING

FRASER, SNR. J

[1.] This is my decision on the leave to appeal and stay of execution applications lodged by the Claimant, Mr. Tyson Strachan ("**Mr. Strachan**") related to my decision on costs dated 01 March 2024 ("**Costs Ruling**").

Background

[2.] For completeness, I believe it is important to give the full history of the matter.

[3.] Mr. Strachan is the owner of ALL THAT piece parcel or lot of land being Lot Number 12 comprising Six thousand Seven hundred Fifty-two (6,752) square feet situate in the Western District of the Island of New Providence and being a portion of a larger parcel of land known as Crown Allotment Number Thirty-seven (37) and located approximately 547 feet South of Fire Trail Road and bounded Northeastwardly by Lot Number Seventeen (17) and running thereon Fifty (50.00) feet bounded Southwardly by land now or formerly the property of Janice Wallace and running thereon One hundred and Thirty-five and Sixteen hundredths (135.16) feet bounded Westwardly by a Thirty (30) foot wide road reservation and running thereon Fifty (50) feet and bounded Northwestwardly by land now or formerly the property of the Second Defendant, Yorkshire Holdings Ltd. ("**YHL**") and running thereon One hundred and Thirty-five and Sixteen hundredths (135.16) feet which said piece parcel or lot of land has such position boundaries, shape, marks and dimensions as are shown on the diagram or plan attached to an Indenture of Conveyance dated 07 September 2006 and made between YHL of the one part and Melinda T. Lockhart of the other part and is recorded in the Registry of Records situate in Nassau on the Island of New Providence one of the Islands of the Commonwealth of The Bahamas in Volume 10748 at pages 315 to 319 and is thereon coloured PINK ("**Property**"). His ownership of the Property is evidenced by an Indenture of Conveyance dated 18 September 2012 between Commonwealth Bank Limited and Tyson L. Strachan and recorded in the Registry of Records in the City of Nassau in Volume 11849 at pages 482 to 491 ("**Strachan Conveyance**").

[4.] The First Defendant, Mr. Anthony Simon ("**Mr. Simon**") has a conveyance of the Property dated 16 March 2020 between YHL and Mr. Simon and recorded in the

Registry of Records in the City of Nassau in Volume 13428 at pages 415 to 427 ("**Simon Conveyance**"). It is acknowledged by all Parties that this conveyance was recorded after the Strachan Conveyance.

[5.] HL is and was, at all material times, a company incorporated under the laws of the said Commonwealth with its registered office located at Ryan & Co. Nassau, The Bahamas. YHL purportedly conveyed the Property to Mr. Simon.

[6.] The Third Defendant, First Caribbean International Bank (Bahamas) Limited ("**FCIB**") is and was at all material times, a company incorporated under the laws of the said Commonwealth with its registered office at Shirley Street, New Providence, The Bahamas carrying on the business of banking and money lending services. FCIB entered into a mortgage with Mr. Simon over the Property by way of a Mortgage dated the 16 March 2020 from Mr. Simon to FCIB and recorded in the Registry of Records in the City of Nassau in Volume 13428 at pages 428 to 440 ("**Simon Mortgage**").

[7.] The Fourth Defendant, McKay Culmer & Associates ("**MCA**") is and was at all material times a firm of attorneys and counsel at law at Duffus House Annex, 36B Sears Road, Nassau, New Providence, The Bahamas.

[8.] In or about February 2021, Mr. Strachan noticed individuals on the Property, without his consent.

[9.] Mr. Strachan was informed by one of the individuals on the Property (who is said to be a contractor) that it was owned by an individual who engaged the contractor's services. Based on this information, Mr. Strachan believed that Lot Number 10 (a lot which was adjacent to the Property) belonged to him.

[10.] Mr. Strachan then engaged a surveyor to survey the land Mr. Strachan believed to be his. It was discovered by the surveyor, based on his review of the plan attached to the Strachan Conveyance that the land was not Mr. Strachan's.

[11.] After retaining attorneys, Mr. Strachan discovered that the Property was purportedly conveyed to Mr. Simon and that Mr. Simon had tenants on the Property, whom he was collecting rent from. Mr. Strachan brought the error to the attention of Ms. Rachel Culmer ("**Ms. Culmer**"), an attorney from MCA who acted for Mr. Simon and FCIB in the transfer of the Property by way of the Simon Conveyance. Ms. Culmer also prepared the Simon Mortgage.

[12.] On 17 June 2023, by a Re-Amended Writ of Summons, Mr. Strachan brought an action against all of the Defendants alleging negligence in the unlawful/wrongful transfer of the Property as well as nuisance.

[13.] In essence, Mr. Strachan claims the following reliefs:

- Special Damages in the amount of $5,572.00;
- An injunction against the Defendants and their agents preventing them from entering or otherwise dealing with the Property;
- Vacant Possession of the Property; and
- A Declaration that Mr. Strachan is the owner in fee simple of the Property.

Alternatively an order that:

- The Property be appraised by a reputable registered Real Estate Appraiser to be appointed by Mr. Strachan;
- Mr. Strachan is entitled to an equitable lien over the premises to secure the appraised market value of the Property together with interest pursuant to the Civil Procedure (Award of Interest) Act 1992;
- The Defendants pay to Mr. Strachan the sum equivalent to that quoted as the market value of the Property in the appraisal to be prepared by the appointed Real Estate Appraiser, such sum to be paid within a period of no more than six (6) months after the date on which a copy of the appraisal is delivered to the Defendants;
- Mr. Strachan upon receipt of the requisite funds from the Defendants, transfer title to the Property to Mr. Simon and/or FCIB by way of conveyance;
- The Defendants bear all costs associated with the appraisal and the transfer of the Property;
- In the event that the Defendants fail or refuse to compensate Mr. Strachan as provided above, Mr. Simon is ordered to vacate the Property upon receipt of reasonable notice from Mr. Strachan.
- Mesne Profits;
- Damages;
- Interest pursuant to the Civil Procedure (Award of Interest) Act 1992;
- Such further or other relief as the Court deems fit; and

- Costs.

[14.] Mr. Simon nor YHL filed a Defence against the claim. FCIB and MCA, however, filed their Defences on 18 July 2023 and 31 July 2023 respectively. Both FCIB and MCA appear to admit that the Property belongs to Mr. Strachan but deny the allegations of negligence and nuisance.

[15.] On 26 July 2023 Mr. Strachan filed an Urgent Notice of Application and Certificate of Urgency requesting the Court to grant several interim relief (the relief sought mirrored the relief prayed for in his pleadings).

[16.] After hearing that application, on 11 October 2023, the Court acceded to one of several relief Mr. Strachan requested (being an interim injunction), but dismissed all others ("**Interim Relief Ruling**"). Thereafter, the Court directed that the parties provide written submissions on the issue of costs.

[17.] On 01 March 2024, after having received and reviewed counsel's submissions on costs, the Court delivered its decision on costs in the following terms:

> *"31.In the exercise of my discretion under the CPR, I make the following Order:*
>
> *(a) Costs in relation to the interim injunction shall be costs in the cause.*
>
> *(b) The Claimant shall pay the First to Third Defendant's costs for sub-issues (ii), (iii) and (vii), in the amount of 40% of their total costs for this application, to be assessed, if not agreed.*
>
> *(c) In relation to sub-issues (iv), (v), and (vi), I make no order as to costs.*
>
> *(d) The Claimants shall pay 25% of the Fourth Defendants costs of sub-issues (ii), (iii) and (vii), to be assessed if not agreed.*
>
> *32. This is my decision on costs.*

[18.] On 14 March 2024, Mr. Strachan then filed this application for leave to appeal my Costs Ruling. Mr. Strachan also filed an application for stay of execution of the Costs Ruling.

Issues

[19.] The Court must determine: (i) whether it ought to grant Leave to Appeal the Costs Ruling; and (ii) whether a Stay of Execution should be granted?

Evidence

[20.] On 14 March 2024, Mr. Strachan filed the Affidavit of Christopher Rahming ("**Rahming Affidavit**") which states that: (i) on 18 August 2021 and on 02 September 2021, the parties appeared before Justice Indra Charles (as she then was) where then counsel for the First and Second Defendants, Mr. Damien Gomez K.C., under an order dated 18 August 2021 and 02 September 2021 made an undertaking on behalf of the First and Second Defendants that they, themselves or their directors or agents would enter upon, continue building upon, clear or allow to be cleared, sell or enter into any agreement to dispose of or lease; or otherwise deal with the land; (ii) Mr. Strachan was awarded costs and the First and Second Defendants were to pay his Costs; (iii) a Certificate of Taxation was obtained by Mr. Strachan on 14 April 2022, but remains unpaid; (iv) The First Defendant refused to adhere to the undertaking by continuing to rent out the units on the Property and continued making mortgage payments on the Property,; (v) the Third Defendant refused to see to the amendment of the illegitimate and invalid title defects affecting the Property; and (vi) Mr. Strachan's counsel sent communication by letter and by email regarding Mr. Cambridge's (counsel for the First and Second Defendants) behavior towards Mr. Strachan to the Court.

[21.] On 18 March 2024, Mr. Strachan filed the another Affidavit of Christopher Rahming ("**Second Rahming Affidavit**") which provides that: (i) Mr. Strachan's monthly income is $3,284.56 and his estimated monthly living expenses total $6,254; (ii) the Property is the only asset he holds which he intended to build apartment units; (iii) he is being prevented from using the Property and being deprived of any funds for the unlawful occupation of the Property; (iv) that due to breaches of the First and Second Defendants' undertakings and the Court Order of Madam Justice Indra Charles (as she then was) of 18 August 2021 and 02 September 2021, Mr. Strachan was before the Court with respect to an Urgent Application filed on 26 July 2023 and remains before the Court without any proper resolution of the admitted breaches; and (v) Should he not be granted a stay of execution of the Costs Ruling, he and his family would be

gravely affected (there are receipts of the monthly expenditure of Mr. Strachan exhibited to the Affidavit);

[22.] Further, the Second Rahming Affidavit provides that: (i) if a stay is refused and the appeal succeeds, Mr. Strachan is unlikely to receive monies paid; (ii) that the First Defendant has failed to comply with the terms of a Court order dated 11 October 2023 which required him to: (a) create an escrow account which was to hold all funds relating to the Property; (b) place all funds collected from the Property into said escrow account; and (c) has not provided Mr. Strachan's counsel with monthly records and accounting as ordered by the Court; and (iii) should the stay be refused, there is a great risk of injustice to Mr. Strachan, on the basis that: (a) he is being deprived of any access to the Property; (b) he has been prevented from carrying out any plans concerning the Property; (c) he is being deprived of payment for the unlawful occupation of his Property; and (d) his grounds of appeal have some real prospect of success.

Discussion and Analysis

[23.] I have read and considered all submissions laid over by counsel. I shall now apply the law to the case.

Leave to Appeal

[24.] This Court provided the relevant law with respect to applications for Leave to Appeal in the case of **MS Amlin Corporate Member Limited v Buckeye Bahamas Hub Limited** Claim No. 2020/COM/adm/00016. At paragraphs 6 to 8 of that decision, I stated:

> "Leave to Appeal
>
> Section 11(f)(ii) of the Court of Appeal Act, 1965 [CH.52] ("CAA") **(See at Tab 1)** provides as follows:
> " 11. No appeal shall lie —
> ….
> (f) without the leave of the Supreme Court or of the court from any interlocutory order or interlocutory judgment made or given by a Justice of the Supreme Court …
>
> In **Lucayan Towers South Condominium *Association* v H. Godfrey Waugh and another; Lucayan Towers South Condominium Association v Gregg Waugh and another; Lucayan**

Towers South Condominium Association v Julie Glover and another [2022] 1 BHS J. No. 128 (See at Tab 2), **Klein, J** provides the following discourse on the subject:

"Jurisdiction and Principles

4 Appeals to the Court of Appeal from interlocutory rulings or orders can only be done with the leave of the Supreme Court or, failing that, the leave of the Court of Appeal (s. 11(f) of the Court of Appeal Act). In this regard, Rule 27(5) of the Court of Appeal Rules provides that:

"Wherever under the provisions of this Act or of these Rules an application may be made either to the court below or to the court, it shall be made in the first instance to the court below."

5 There is no dispute that a summary judgment ruling is an interlocutory order. As the Privy Council had occasion to observe in Junkanoo Estates Ltd. v. UBS Bahamas (In Voluntary Liquidation) [2017] UKPC 8 [at para. 5]:
"It is common ground that for this purpose [leave to appeal] an order giving summary judgment is an interlocutory order. The English rule to this effect was stated in White v Brunton [1984] QB 570and has been applied for many years in the Bahamas."

Principles
6 The general approach of the court to the exercise of its power to grant leave to appeal are well known. Broadly stated, leave to appeal will only be given where: (i) the grounds have a real prospect of success, or (ii) there is a compelling reason that an issue raised should be examined in the public interest.

7 Many expositions of the principles start with the guidance given by Lord Woolf MR in Smith v Cosworth Casting Processes Ltd. [1997] 4 All ER 840, where he stated:

> *(1)"The court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. This test is not meant to be very different from that which is sometimes used, which is that the applicant has no arguable case. Why, however, this court has decided to adopt the former phrase is because the use of the word "realistic" makes it clear that a fanciful or an unrealistic argument is not sufficient.*

(2) The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying (emphasis added)"…

The test for leave to appeal was essentially adopted from **Practice Note (Court of Appeal: Procedure) [1991] 1 All ER 186, Smith v Cosworth Casting Processes Ltd. [1997] 4 All ER 840** and succinctly formulated in the Court of Appeal decision of **Keod Smith v Coalition to Protect Clifton Bay SCCivApp. No. 20 of 2017** at paragraph [23] as being *"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".*"

[25.] **Sections 11(e) and (f) of the Court of Appeal Act, 1965** provides:

"11. No appeal shall lie —

(e) without the leave of the Supreme Court or of the court, from an order made with the consent of the parties or as to costs only where such costs are by law left to the discretion of the Supreme Court;

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

[26.] I also wish to highlight the Bahamian Court of Appeal decision of **Rosamund Sandbrook v Susan Davis** BS 2021 CA 201. There, the Court of Appeal was tasked with considering whether a judge at first instance was right to dismiss an application for leave to appeal the judge's costs ruling. At paragraphs 10 and 11 of that decision, the Court provided the law relevant to leave to appeal a costs ruling in the following terms:

"10 In Jones v. McKie [1964] 1 W.L.R. 960, Wilmer L.J. citing Donald Campbell & Co. v. Pollak [1927] A.C. 732, said, at p. 966:

"What it comes to, I think, is that, in order to justify an appeal as to costs only, this court must be able to say that the judge in the court below, however much he may have been purporting to exercise his discretion, **has not really exercised his discretion at**

all. This court can say that, but can say it only, as I see it, **if it is satisfied that the judge in the court below has taken into consideration wholly extraneous and irrelevant matters**."

11 More recently, in Walsh v Ward [2016] 3 LRC 31 the Caribbean Court of Justice in considering an appeal against a refusal to award cost in favour of a successful litigant said;

"[72] **We adopt the principle that an appellate court should exercise restraint in interfering with the exercise of discretion on the costs, as expressed by Davies LJ in F & C Alternative Investments (Holdings) Ltd v Barthelemy. This consideration is based on the acceptance that decisions on costs are preeminently matters of discretion and evaluation based on knowledge and the feel for a case which a trial court should have. However, in an appeal on costs, we must consider whether the decision was based on a wrong principle, or took into account matters that should not have been taken into account, or failed to consider matters that should have been considered, or was just simply unsustainable**.

[Emphasis added]"

[27.] After considering the relevant law, the Court dismissed the appeal and made the following pronouncements at paragraphs 15 and 17:

"15 We see nothing in the judge's decision that suggest that he exercised his discretion wrongly. It essence his position was that when he rejected the adverse claim of Davis, on the state of the evidence at the time he would have dismissed the petition as well. The petitioner would not have been a successful party and therefore entitled to his costs. In such circumstances, he would have made no order for costs in favour of any party. He did not dismiss the petition but issued the section 7 notices. After further evidence and consideration he was satisfied that the petitioner had succeeded in establishing a right to a certificate of title as to part of the property in question…

17 We see no basis to finding that the judge erred in principle, took into account extraneous matters, did not take into account any material matter or was simply wrong."

[28.] Mr. Strachan listed a myriad of grounds of appeal (some of which are immaterial and unrelated to my Costs Ruling). I will distill the relevant grounds of appeal as follows:

"(i) The judge failed to make an order as to costs that reflected the overall justice of the case;

(ii) The judge failed to properly consider whether there were any reasons for departing from the general rule, in whole or in part and failed to make clear her findings of the factors justifying the departure;

(iii) The judge departed from long standing principles and settled principles of law as to costs thereby making it impossible for the Cour to fairly, justly and properly approach costs from the right perspective resulting in the judge making a costs order that was overall unjust, unreasonable and disproportionate;

(iv) In relation to paragraph 19 of the Ruling headed *"An Order authorizing a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under subparagraph h"*, the judge mistook Mr. Strachan as advancing an additional application for relief not included in his Urgent Notice of Application.

(v) In relation to paragraph 21 of the Ruling headed "*an order for in for interim payment under rules 17.14 and 17.15 for payment by a defendant on account of any damages, debt or other sum which the Court may find the defendant liable to pay"* the judge mistook and therefore mischaracterized authority cited by Mr. Strachan in his submissions as him advancing an additional application for relief not included in his Urgent Notice of Application

(vi) In relation to paragraph 22 Ruling headed *"a freezing order, restraining a party from – (i) dealing with any asset whether located within the jurisdiction or not"* the judge mistook and therefore mischaracterized authority cited by Mr. Strachan in his submissions as him advancing an additional application for relief which was not included in his Urgent Notice of Application

(vii) The judge erred in law, having made no order as to costs under the sub issue (i) headed "the interim injunction".

(xi) There are exceptional circumstances which, in the public interest, warrants a consideration of this Intended Appeal by the Court of Appeal as the judge has made a ruling that is not safe nor reliable, specifically as it is setting an unfair and dangerous precedent in a developing area of Bahamian Case Law."

[29.] I must point out that many of the grounds of appeal (which I have not listed above) relate to my Interim Relief Ruling and not the Costs Ruling. I also note that

several grounds relate to additional purported issues unrelated to my Costs Ruling (eg: grounds in relation to Mr. Cambridge's alleged conduct involving the police). I will not allow such grounds to be expounded upon as Mr. Strachan's application seeks leave to appeal my Costs Ruling, ***not the Interim Relief Ruling or any other ruling made by this Court***. Such unrelated grounds of appeal are therefore disallowed.

[30.] In relation to the alleged bias and impropriety, such grounds are baseless, and not substantiated by corroborating evidence. Based on both the Rahming and Second Rahming Affidavits, Mr. Strachan's counsel seeks to rely on hearsay evidence from opposing counsel regarding purported communication with him and the Court. Furthermore, such submissions related to any purported bias were not placed before this Court through a formal application. It was therefore, not properly canvassed before me. Counsel is reminded to conduct themselves with professionalism and respect when addressing the Court or providing any legal documents or evidence for the Court's consideration.

[31.] Not only that, but no formal application in relation to any alleged bias or impropriety has been placed before this Court. It appears that Mr. Strachan's counsel seeks to have the Court of Appeal consider matters that have not first been properly considered by this Court and, thus, irrelevant to an appeal of the Costs Ruling. Such accusations need to be formally placed before the Court in a separate and distinct application for consideration and investigation before the Court of Appeal may hear such matters. Such purported grounds of appeal are, in the circumstances, irrelevant and unsustainable.

[32.] I am comforted by this reasoning based on the Court of Appeal decision of **Smith v Coalition to Protect Clifton Bay** - BS 2017 CA 78. At paragraphs 28 and 29, the Court opined:

> "28 As I stated earlier, the applicant seeks to challenge Ruling No. 11 which only goes to, inter alia, extending the time for the applicant to pay costs. **Thus, all other issues or matters raised in the grounds of appeal not arising out of that Ruling may be discounted and ignored for the purposes of this application inasmuch as they are not relevant to the decision we have to make**.
>
> 29 **Unfortunately, the applicant did not appeal Ruling No. 11 within the appropriate time**. Further he participated, without objection, in the taxation of the

costs. By doing so, he may be said to have accepted his liability to pay the respondent's costs. **It was not now competent for him to raise in his grounds of appeal, issues which he did not argue before the learned Judge and to seek to canvass matters which, in any event, are not of any consequence to the ruling appealed against**.

[Emphasis added]"

[33.] Mr. Strachan is also out of time to pursue an appeal of my Interim Relief Ruling, as that ruling was made on 11 October 2023. He had fourteen (14) days from the date of the Interim Relief Ruling to appeal it. This is based on **Rule 11(1)(a) of the Court of Appeal Rules, 2005**. The rules states:

"11. (1) Every notice of appeal shall be filed and a copy thereof served by the appellant upon all parties to the proceedings in the court below who are directly affected by the appeal —

(a) in the case of an appeal from an interlocutory order, fourteen days…"

[34.] Thus, any grounds relating to the Interim Ruling cannot be pursued.

[35.] The unsubstantiated and uncorroborated accusations of impropriety of a sitting Senior Justice in an affidavit are not only meritless, but borderline contemptuous. I am concerned that counsel sought it proper to place same in an affidavit without first investigating the matter and ensuring counsel has cogent and compelling evidence of such impropriety.

[36.] I am compelled to admonish Counsel in relation to contempt and echo the words used by Charles J (as she then was) in the case of **The Contempt of Court of Mrs. Donna Dorsett-Major -** 2020/CLE/gen/0000:

"…in The Queen v. The Rt. Hon. Perry G. Christie et al BHS J No. 127 [2017], Bain J reiterated the law regarding the nature and scope of contempt. At para 75 to 79, the learned judge stated:

"75 In Halsbury Laws of England Fourth Edition Volume 9 at page 21 paragraph 27

"27. Scandalizing the Court

Any act or writing published which is calculated to bring a court or a judge into contempt or to lower its authority, or to interfere with the due course of justice or the

> lawful process of the court, is a contempt of court. This scurrilous abuse of a judge or court, are attacks on the personal character of a judge are punishable contempts…"
>
> 76 The authors of Halsbury Law gave examples of scandalizing the court. In R v Gray 1900 2 QB 36 Lord Russell CJ of Killowen described the offence of scandalizing the court as —
>
> "Any act done or writing published calculated to bring a court or judge of the court into contempt; or to lower his authority, is a contempt of court.""

[37.] Accordingly, I invite Mr. Strachan's counsel to withdraw all references of any purported inappropriate communication between this Court and counsel on record in these proceedings as such can be seen as scandalizing the Court.

[38.] In relation to the other purported grounds of appeal (as summarized above), I do not believe that there is any realistic prospect of success. This Court went into extensive detail on the relevant rules as to costs and my reasoning when I made my ruling (being Part 71 of the CPR, particularly Rules 71.6 and 71.10(1),(2) and (3) of the CPR). Furthermore, I considered the relevant principles of law, applied to the case and exercised my discretion within the ambit of such principles and rules.

[39.] It is also noted that my Costs Ruling does refer to costs relating to novel forms of interim relief in this jurisdiction (being the Interim Declaration and an order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under subparagraph (h) of the CPR). Though this is the case, the principles governing costs, in my view, has not substantially changed, thus I would not say that this is a developing area of law.

[40.] I am, therefore, of the view that this appeal would not likely succeed. Accordingly, I am not prepared to permit any leave to appeal of the Costs Ruling.

Stay of Execution

[41.] This Court delved into the relevant law in relation to Stay of Execution in **The Committee** to **Restore NYMOX Shareholder Value, Inc (CRNSV) et al v Paul Averback et al** - 2023/COM/com/00057. I made the following pronouncements in that decision:

> "35. A case which provides useful guidance on the applicable principles in a stay application (as the Claimants' counsel relied on) is Cheryl Hamersmith-Stewart

v Cromwell Trust Company Ltd et al BS 2022 SC 83 ("Cromwell Trust"). There, Charles Snr J (as she then was) made the following pronouncements:

> "16 In In the Matter of the Contempt of Donna Dorsett-Major on 3 June 2020 2020/CLE/gen/0000, Ruling delivered on 8 December 2020, this Court dealt with the applicable principles on stay pending appeal. For present purposes, I merely reiterate them as set out fully in Donna Dorsett-Major at paras 23 to 28:
>
> "[23] The starting point is that a judge has a wide discretion with regards to the grant of a stay. This is confirmed by the learned authors of Odgers On Civil Court Actions at page 460:
>
> > "**Although the court will not without good reason delay a successful plaintiff in obtaining the fruits of his judgment, it has power to stay execution if justice requires that the defendant should have this protection[…] [The] court has wide powers under the Rules of the Supreme Court**."
>
> [24] As to how that discretion ought be exercised in these circumstances, the court's considerations have only broadened with the developing case law, beginning, most notably, with the decision of Brett, LJ in the case of Wilson v Church No. 2 [1879] 12 Ch.D. 454 at 459 wherein he stated:
>
> > "This is an application to the discretion of the Court, but I think that Mr. Benjamin has laid down the proper rule of conduct for the exercise of discretion, that where the right of appeal exists, and the question is whether the fund shall be paid out of Court, the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory." [Emphasis added]
>
> [25] This was further developed in Linotype-Hell Finance Ltd. v Baker [1993] 1 WLR 321 wherein Staughton L.J. opined at page 323:
>
> "**It seems to me that, if the defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success that is a legitimate ground for granting a stay of execution**."
>
> [26] So, where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application if the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success. **This requires evidence and not bare assertions**.
>
> [27] Some additional principles that the Court should be guided by in considering an application for a stay pending an appeal is outlined in the case of Hammond Suddards Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065 at para 22 (per Clarke JL and Wall J):

> "By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. **Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay**…
>
> [28] Guidance was also given by the English Court of Appeal in Leicester Circuits Ltd v Coates Brothers plc [2002] EWCA Civ 474. At para 13, Potter LJ said:
>
> "**The proper approach is to make the order which best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay**…(emphasis added).""

36.Our Court of Appeal also addressed relevant principles to a stay application in the case of Esley Hanna and Eonlee Hanna v Brady Hanna SCCivApp No. 182 of 2017 ("Esley Hanna"). There, Crane-Scott J.A. opined:

> "Section 12 of the Court of Appeal Act mirrors the provisions of O 59. r. 13 of the former English Rules of the Supreme Court 1965. It is therefore useful to advert to the following portions of Practice Note 59/13/1 found at pages 1076–1077 of Volume 1 of The 1999 Edition of The English Supreme Court Practice:
>
> " Stay of execution or of proceedings pending appeal… Neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. **The Court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled,"**…the Court will grant it where the special circumstances of the case so require……
>
> "… **but the Court made it clear that a stay should only be granted where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour. The Court also emphasized that indications in past cases do not fetter the scope of the Court's discretion**… '
>
> [Emphasis added]."

[42.] Despite Mr. Strachan evidencing potential financial ruin through his affidavit evidence, I did not grant any leave to appeal as I do not believe his appeal has any

realistic prospect of success. In the circumstances, I will not grant a stay of the execution of the Costs Ruling.

CONCLUSION

[43.] Based on the principles of law and my application of same to the instant case, I refuse Mr. Strachan's requested leave to appeal and his requested stay of execution of the Costs Ruling.

[44.] Both applications are thus dismissed.

[45.] Mr. Strachan shall pay the reasonable costs of the Defendants, to be assessed by this Court, if not agreed.

Dated this 27th day of May 2024

Deborah E. Fraser
Senior Justice