IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2023/CLE/gen/00856

IN THE MATTER OF the Status of Children Act, Chapter 130

of the Statute Laws of The Bahamas

AND

IN THE MATTER OF the Child protection Act Chapter 132

of the Statute Laws of The Bahamas

AND

IN THE MATTER OF S.A.C

A Minor

B E T W E E N:

S. M.

Claimant

AND

A.D.

Defendant

Before:	The Honourable Madam Justice C.V. Hope Strachan, Justice of the Supreme Court of the Commonwealth of the Bahamas.
Appearances:	Regina Bonaby for the Claimant
	Ramona Farquharson, Samuel Taylor and Shaquel McPhee for the Defendant
Hearing Dates:	27th February, 2025

RULING

Stay of execution – provisions of CPR – Whether a summons is the correct methodology for the application - does the applicant's summons and affidavit comply with the Civil Procedure Rules 2022 - failure to apply for relief from sanctions – should discretion be exercised for rectification of affidavit.

BACKGROUND:

[1]. By Summons filed 29th November, 2024 the Defendant ("the Applicant") applied for a hearing of an application for A Stay of Execution from the Order and/or Judgment of 6th November, A.D. 2024. By the order the Applicant was ordered to undergo a DNA test on or before 30th November, 2024 to provide evidence to the court to assist with determining the parentage of S.A.C. The application was made pursuant to Section 16 (3) of the Supreme Court Act, Chapter 53. The Summons was supported by the Applicants' Affidavit filed on the same day.

[2]. The Applicants' Affidavit stated:

i. I am the [Defendant] herein.

ii. I make this Affidavit in support of my Application for a stay against the Order and/or Judgment of this Honourable Court pronounced on the 6th day of November, A.D., 2024.

iii. On the 19th day of November, A.D. 2024 I appealed to the Court of Appeal.(Now produced and shown to me is a copy of my Notice of Appeal marked "Exhibit "AD-1").

iv. The Order from the Court is not of urgency for the Claimant. Furthermore, if the Stay is not granted it would thwart my appeal if I am successful.

v. I humbly believe that there is no prejudice against the Claimant if a stay is granted as the minor child has a named father.

vi. I verily believe that I have a good and arguable case in the Court of Appeal. As such, I humbly request that this Honourable Court grant my application for a stay.

vii. The contents of this Affidavit are made to the best of my knowledge, information and belief and are correct and true."

[3]. Counsel for the Claimant objecting to the Stay of Execution laid over written Submissions dated 26th February, 2025 which she presented to the court at the hearing, also supported by oral Submissions while Counsel for the Applicant responded orally.

[4] In her written submissions under the rubric Law and Procedural Impropriety the claimants counsel in support of her objection pointed out:

i. That the application is governed by the Supreme Court Civil Procedure Rules, 2022, (CPR) Part 2 (4) (b).

ii. That the [Defendant's] affidavit is not compliant with Part 3.8 in that the full name, address and qualification for the notary public is absent

iii. That the application should be in writing pursuant to Part 11.6 and the court should not exercise its' discretion to dispense with this requirement.

iv. That the grounds for why the order is sought are not included in the notice as required by Part 11.7.

v. That the [Defendant] has failed to initiate the proper application by way of Notice of Application supported by Affidavit but instead by Summons pursuant to Part 11.8.

vi. Part 26.1 (q) gives powers for stay. Stay and leave are Two (2) different terms. The [Defendants] stay is under the Supreme Court Act.

vii. That Appeals do not get stays automatically

xi. The record of Appeal has already been settled; unless any amendments allowed by the Court are in writing the Claimant may be prejudiced in her defense of the appeal.

x. The court is called upon to dismiss the Summons and Affidavit for non-compliance with the rules.

[5] Under the rubric Relief from Sanctions, the Claimant submits that:

i. The Applicant has failed to apply for relief from sanction notwithstanding that he has failed to obey the Court's order. Applications for Relief from Sanction fall under Part 26.8.

ii. That the [Defendant] has defaulted without justifiable excuse.

iii. That the court should dismiss the Summons and Affidavit for procedural impropriety.

[6] The Applicant's Counsel responds to the submissions as follows;

i. Their application was based in the provisions of s. 16(3) of The Supreme Court.

ii. That the CPR makes no specific rules for dealing with Stays of Execution.

iii. That the Court of Appeal Act speaks generally about the subject.

iv. The Court has jurisdiction and discretion to rectify matters pursuant to Part 26.9

v. That the discrepancy regarding the Statement of Truth and the issue raised regarding the notary can be rectified. They can provide the information.

vi. That on the point made that the Defendant is in contempt the response is that the application for stay was filed since 29th November 2024. The matter was pending and waiting for a date when the deadline expired.

THE ISSUES;

[7]

A) Does the Applicant's Summons comply with the applicable rules?
B) If not, should the Summons and Affidavit be dismissed?
C) Is the Applicant's Summons and Affidavit improper?
D) If so, should the Summons and Affidavit be dismissed?
E) What is the applicable legislation for the Stay of Execution application?
F) Did the Applicant need to apply for Relief from Sanctions? If so;
G) What is the result of the Applicants failure to apply to the Court for Relief from Sanction?
H) Should the Court exercise its discretion and allow the Applicant to rectify the Summons and Affidavit?

THE RELEVANT LEGISLATION;

[8] Reference shall be made to the relevant legislation throughout this ruling. The Supreme Court Act, Ch. 53 will be referred to as (SCA); the Supreme Court Civil Procedure Rule, 2022 will be referred to as the CPR; the Court of Appeal Act will be referred to as COAA. Legal authorities to support a particular finding will also assist the court's determination of the issues.

DISCUSSION AND ANALYSIS;

[9] A court may order a stay of proceedings which puts a halt or 'stay' on the conduct of the proceedings to either a part or whole of a claim. The order is generally to allow time for something to happen in accordance with the court's objective to ensure cases are dealt with in a just and reasonable manner (CPR 1.1(2)). In this circumstance, the rationale behind the application is to cause a suspension of the order for the Defendant to undergo the DNA test until his appeal is heard.

[10] It is important to note that decisions whether to grant a Stay of Execution of any proceedings is at the discretion and volition of the Court even without any person making an application:

s. 16 (3) SCA;

> "Nothing in this Act shall affect the power of the Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person whether or not a party to the proceedings."[Emphasis added]

[11] These proceedings have been brought pursuant to the Child Protection Act and are therefore governed by the CPR, more particularly Part 2 (4) (b) which states;

> "These Rules shall not apply to family proceedings except under the Child Protection Act Ch., 132."[Emphasis added]

[12] The objection taken by the Claimant under Part s.3.8 (1) is unsustainable as those provisions relate to Statements of truth in a statement of case not an Affidavit.

> "3.8 Statement of truth.
>
> (1) Every statement of case must be verified by a statement of truth."

IRREGULARITIES IN THE AFFIDAVIT

[13] Part 30 CPR is the appropriate provisions for the form and requirements for affidavits. Notwithstanding that the Defendant has argued the incorrect part of the CPR a review of the Affidavit does show that Part 30.5 (d) has been breached as the Affidavit failed to contain the full

name, address and qualifications of the person before whom it is sworn or affirmed.:[Emphasis added].

I find that there are irregularities in the Affidavit in support of the Summons filed.

[14] Irregularities in Affidavits submitted as evidence in proceedings may result in inadmissibility. Part 30.5 provides that the affidavit "must" contain certain information. Use of the word "must" connotes obligation, necessity or requirement which is the exact opposite of having an option. So when the section states that the details of the notary 'must' be included in the affidavit the Applicant has no choice in the matter. No license has been given for exercise of discretion in these provisions. I also see a distinct correlation between the subparagraphs of the provisions. The necessity to ensure there has been no breach of Part 30.5 (3) which provides;

> "An Affidavit may not be admitted into evidence if sworn or affirmed before an attorney of the party on whose behalf it is to be used or before any agent, partner, employee or associate of such attorney." [Emphasis added]

Non conformity with Part 30.5 (3) presents an issue for the court in determining whether the affidavit was sworn before any of the persons mentioned therein. I note however that there is the vague outline of the impression of a seal on the affidavit although not much else is visible. To that end I am willing to give the Applicant the benefit of the doubt that some effort was made to have the affidavit produced in conformity with the rules.

[15] In many instances the Affidavit is foundational, going to the very root of the case. In many instances its' very form determines its' admissibility in evidence. The Applicant's position that the Affidavit can be corrected by providing the missing information, may not apply in every circumstance. For instance;

[16] *Turner J* in Minnis v. The Attorney General [2012] 2 BHS J. No. 81 Copy Citation Bahamas Supreme Court, Criminal Side 2012 PUB/con which although derived from criminal proceedings opined that where an impugned affidavit is the foundation of the case it is unfit for hearing by the court he said;

> "I entirely agree with the submissions of the Director of Public Prosecutions on the point of the notarizing of the affidavit, and find it disappointing that counsel should continue to make such a basic and egregious error. The force and effect of the Scriven v Hanna should

be well known. Had the impugned affidavit been the affidavit in support of the Originating Notice of Motion, I would not have entertained the stay application as there would not have been a properly grounded Notice before the court. However, the applicant having availed himself of the opportunity occasioned by the adjournment of the application to 27 August 2012, to file a proper affidavit, I considered that for the just disposal of this application I would hear the matter, as to strike out same, without consideration of the merits of the application, would not have precluded the applicant from filing a subsequent application, as there was no limitation period within which such an application could be made, besides the limitation placed upon it, by necessity, by the impending decision. I therefore exercised my discretion to consider the affidavit filed 23 August 2012, as the affidavit in support of the summons for a stay."[Emphasis added]

It is clear that this irregularity can prove fatal to the application. However, I will not be so hasty in forming that opinion before evaluating the other provisions of the relevant statutes and authorities.

PROVISION FOR THE STAY APPLICATION

[17] By applying by Summons and Affidavit the Claimant has submitted that the Applicant has breached Part 11.6 which provides;

> "Subject to paragraph (2), an application must be in writing in Form G14 unless the court dispenses with the requirement for the application to be made in writing; s. 11.6 (2) (a) or (b) this [may be] permitted by a rule or practice direction."

The Applicant's position is that the CPR does not prescribe rules to follow for Stay of Execution proceedings. That is correct, the CPR does not directly provide rules for such an application and the provisions in the Court of Appeal Act provides;

> s. 9. - Where in any case no special provision is contained in this or any other Act, or in rules of court, with reference thereto any jurisdiction in relation to appeals in criminal and civil matters shall be exercised by the court as nearly as may be in conformity with the law and practice for the time being observed in England by the Court of Criminal Appeal and the Court of Civil Appeal (ECCA) respectively.

I have observed that the (ECCA) is similarly silent.

[18] A review of the ECCA reveals that the matters which need to be addressed in an application for a Stay of Execution resides in (Part 23.6). The requirement for verifying an application (Statement of Truth is in Part 22), and the fact that an appeal does not operate as a stay, (Part 52.16). These matters have parallels in our legislation. However, there are no specific rules prescribed for a stay application in the ECCA either. The focus on the contents of the Affidavit and the specifics provided for its' verification are the vital ingredients to the entire application in both jurisdictions. The irregularities in this document discussed before rears its ugly head again.

Part 11.7 – Speaks to the information that should be included in the application. The Claimant insists that the Applicant failed to comply with these provisions:

> (1) An application must state — (a) briefly, the grounds on which the applicant is seeking the order; and
>
> (b) what order the applicant is seeking.
>
> (2) The applicant must file with the application not less than three days before the hearing of the application a draft of the order sought and serve a copy on all respondents to whom notice is given.
>
> (3) If the application is made without notice, the draft order must be attached to the application when it is filed.

In my view this argument is unsustainable as the Applicant did state in his application that an appeal had already been filed, the Applicant had a good and arguable case, and that a refusal of the stay would thwart his appeal. I regard this as sufficient that the court and the Claimant understands the case which has to be met.

[19] The objection made by the Claimants to the application having been begun by summons instead of by way of Notice of Application, supported by Affidavit, as prescribed by Part 11.8, is answered by the same findings under Part 11.6. I accept the Applicant's submission that there are no specific provisions for an application for a Stay of Execution. I agree that the Summons failed to include the grounds as to why the order is being sought and that a Notice was more appropriate. However, I do not consider the use of a Summons in this instance to be fatal to the case.

[20] I accept counsels objection on the basis that Part 26.2 outlines the powers given when granting a stay as distinguished from an application for leave. Part 26.1 (q) gives the court power to stay the whole or part of any proceedings generally or until a specified date or event. Stays are not automatic, as is the right to appeal in certain circumstances in particular this circumstance.

RELIEF FROM SANCTIONS

[21] Parties are subject to sanctions whenever the time for complying with an order of the Court is allowed to expire without seeking leave from the court to either extend the time for complying or seeking relief from sanctions. The Claimant has submitted that since the time has expired for the Applicant to comply with the Court order in question, an application for Relief from Sanctions was necessary pursuant to Part 26.8. The failure to do so should cause the Application to be dismissed. Counsel for the Claimant urges the court not to allow the Applicant to put things right. However before this can be done attention must be had to the additional provisions of Part 26 CPR as there may be implications regarding the specific content of the court order on the remedy that is available to the Claimant.

[22] The Court's powers in cases of failure to comply with rules, etc.

> Part 26.8 (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or Court order, the Court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need —
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.
>
> 26.8 (2) An application for relief must be supported by evidence.
>
> 26.8 (3) The Court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.

The exercise of these powers are limited or conditional upon the existence of certain factors relative to the order in question.

[23] Part 26.7 (1) If the Court makes an order or gives directions the Court must whenever practicable also specify the consequences of failure to comply.

(2) If a party has failed to comply with any of these rules, a direction or any order, any express sanction for non-compliance imposed by the rule, direction or the order, has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 does not apply.

(3) If a rule, practice direction or order —

(a) requires a party to do something by a specified date; and

(b) specifies the consequences of failure to comply, the time for doing the act in question may not be extended by agreement between the parties.

(4) If a party has failed to comply with any of these rules, a direction or any order, where no express sanction for non-compliance is imposed by the rule, direction or the order the party in default may make an application under rule 26.9.

(5) If a rule, practice direction or order —

(a) requires a party to do something by a specified date; and

(b) does not specify the consequences of failure to comply, the time for doing the act in question may be extended by agreement in writing between the parties provided that the extension does not affect the date of any hearing or the trial. [Emphasis added]

[24] There has been no agreement by the Applicant and the Claimant regarding the issue of relief from sanction. The Applicant made an oral application that this court should relieve the Applicant from sanctions in failing to comply with the order. This may be superfluous given the fact that the order in question did not specify the consequences of failure to comply. However there are avenues for addressing even this situation and the court may nevertheless make an order to rectify matters.

[25] Part 26.9 - (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction, court order or direction.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the Court so orders.

(3) If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the Court may make an order to put matters right.

(4) The Court may make such an order on or without an application by a party.

Counsel for the Applicant is submitting that the Court has the ability to rectify any errors, or discrepancies in the pleadings. In doing so there was an inadvertent admission of those irregularities. This court is mindful that while the discretion exists certain authorities prescribe other considerations in exercise of that discretion.

[26] Incorporated in the application for relief from sanctions is an application to extend the time within which the Court order in question was to be performed. It is clear that the order in question did not specify the consequences of failure to comply as was mandated in the provisions. It is also obvious that the requirements of Part 5 (a) and 5 (b) work conjunctively and that the Two (2) pillars must be satisfied for the sanction to be possible. The Two (2) obligations are not mutually exclusive. The absence of terms specifying the consequence of non-compliance, in the order, invalidates the Defendant's argument that the application should be dismissed because of the Applicant's failure to apply for relief from sanctions formally or at all. I find that imposing sanctions upon the Applicant at this stage would be contrary to the relevant provisions.

EXTENDING THE TIME FOR COMPLIANCE

[27] The belated and informal application made by the Applicant on her feet at the hearing does not preclude the Court from extending the time for compliance of the order.

Part 26.1 (2) provides;

Except where these rules provide otherwise, the Court may:

(a) –

(i)-

(k) - extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed; [Emphasis added]

[28] I reject the argument made by the Claimant's counsel that the application for the stay was out of time. The Summons for the stay was filed within Thirteen (13) days of the date that judgment was given and simply awaited a hearing date.

[29] Part 26.2 (3) When the Court makes an order or gives a direction, it may make the order or direction subject to conditions.

(4) The conditions which the Court may impose include —

(a) requiring a party to give an undertaking;

(b) requiring a party to give security;

(c) requiring a party to pay all or part of the costs of the proceedings;

(d) requiring the payment of money into Court or as the Court may direct; and

(e) that a party permit entry to property owned or occupied by that party to another party or someone acting on behalf of another party.

(5) In considering whether to make an order, the Court may take into account whether a party is prepared to give an undertaking.

(6) In special circumstances on the application of a party the Court may dispense with compliance with any of these rules. [Emphasis added]

[30] This provision in the law gives options for the court to use several creative tools to send a message to the Applicant of the serious nature of complying with orders or directions by the court. I particularly note the fact that the court can put conditions on any order it makes including costs because of the circumstances under which the application was made.

RECTIFYING MATTERS

[31] The ability to amend or rectify mistakes made in pleadings has always been within the purview of the court. The discretion exists either by fiat of statute like Part 26 CPR or simply through the inherent jurisdiction of the court. There is a wealth of authority to assist the court in its determination.

[32] It has been held that the court is not wholly to set aside proceedings simply because the wrong form of originating process has been used. In previous proceedings under the Rules of the Supreme Court (RSC) there were many instances where the court held that where a mistake could be rectified without injustice the courts ought to allow rectification. Many of those instances of rectification were corrected under the slip rule and notwithstanding that the CPR did not become law until 2022 the principle was preserved. One of the pre-CPR 2022 cases which demonstrate the point is;

> Cartwright v. The Commissioner of Police [2006] 2 BHS J. No. 170 Copy Citation Bahamas Supreme Court, Civil Division -Isaacs, J. opined;
>
> It seems to me that, if a party proceeds in a matter in a way not authorized by the rules, then there has been in that respect a failure to comply with the rules. If the rules prescribe a particular way of raising a counterclaim, and a defendant uses a different way, it seems to me that in that respect there has been a failure by him to comply with the requirements of the rules within the meaning of rule 1 (1) of Order 2. Under rule 1 (2) the court may either set aside or give leave to amend if an amendment is appropriate. There is, however, one mandatory provision in rule 1 (3) of Order 2, and that is that the court is not wholly to set aside proceedings simply because the wrong form of originating process has been used.

[33] *Isaacs J*'s postulation is in keeping with the oft quoted precept to the effect that form should not eclipse substance. Like *Isaacs J* I am of the view that if the circumstances and the justice of the case demands it, the court should exercise its discretion to allow rectification of pleadings.

UNLESS ORDER

[34] Where the consequences of a failure to comply is included in an order it is usually referred to as an 'unless order." The treatment of failure to comply with an unless order was the ratio decidendi in **Nottage v. Bacardi & Company Limited** [2011] 1 BHS J. No. 12 Copy Citation Bahamas Supreme Court, Common Law and Equity Side CLE/gen/00514 of 2004 where *Bain J*

discussed the development of the law and the changed approach which must now be engaged when deciding the issue;

> "It is accepted that previously the courts held the position that, once there is failure to comply with an unless order the other side may move directly to enforce the sanction. **Whistler v Hancock** *3 QBD 83,* **Wallis v Hepburn** 1878 3 QBD 84 and **King vs. Davenport** 1879 4 QBD 402.
>
> These cases decided that when an unless order had been made but not complied with the action was dead or defunct and the court was therefore deprived of jurisdiction and the power to extend the time for doing a specified act within a specified time had been abrogated. Additionally the other side was able to move directly to enforce the sanction.
>
> The court in these cases held that the court had no jurisdiction to grant relief because once the condition had not been satisfied the action had come to an end and no longer existed.
> In ***Samuel v Linzi Dresses Ltd.*** 1981 QB 115 the Court of Appeal overruled the dicta of ***Whistler, Wallis and King*** and held that where the court makes an "unless" order or condition order that a party is required to do an act within a specified time but the order to do that act was not complied with within the time specified, the court nevertheless retains the power to extend the time within which such act should be complied with.
> In ***Samuel v Linzi Dresses Ltd.*** Roskill LJ stated at page 126: -
> "In my judgment therefore, the law today is that a court has power to extend the time where an "unless" order has been made but has not been complied with, but that it is a power which should be exercised cautiously, and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored. Primarily it is a question for the discretion of the master or the judge in chambers whether the necessary relief should be granted or not."
> ***In Re Jokai Tea Holdings Ltd.*** 1993 1 All ER 630 Sir Nicholas Browne-Wilkinson VC held that: -
> "In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an unless order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But, if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey

is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed." [Emphasis added]

[35] I accept that appeals do not get automatic stays and note that the Applicant has appropriately brought the stay application before this court. I reject the argument that the application for the stay was out of time given the fact that it was filed within Thirteen (13) days of the date that judgment was given and simply awaited a hearing date. These facts lead me to conclude that the Defendant's failure to obey the Court order was not intentional and/or contumelious.

GOOD AND ARGUABLE CASE

[36] The Applicant in his supporting Affidavit submitted that his appeal is a good and arguable case. This is meant to reinforce his argument that the stay is justified. I accept that the Applicant has a good and arguable case. But *Allen JA*, did not see that as sufficient in **Bimini Blue Coalition Limited v. Christie Prime Minister of The Commonwealth of The Bahamas (in his capacity as the Minister Responsible for Crown Lands) and others** [2014] 1 BHS J. No. 153. She expanded the considerations beyond just what is a good and arguable case:

> "Following the grant of conditional leave to appeal to the JCPC, the appellant applied for a stay of execution of our judgment, pending that appeal. The starting point in determining such an application is that the successful party should not be deprived of the fruits of his judgment. To succeed on such an application therefore the appellant must show that there are exceptional circumstances justifying the stay, namely, that a party will suffer serious injustice without the stay and any successful appeal would be rendered nugatory. Moreover, the appellant must have a good arguable case, and the evidence in support of the application must be clear. It is the court's duty in deciding whether to grant a stay, to balance these countervailing principles. [Emphasis added].

[37] **Oracle Fund Ltd. v. Fortis Fund Services (Bahamas) Ltd.** [2004] BHS J. No. 432 – per a *Small J.*

> He referred to **E.F. Hutton & Co v Mofarrij** [1989] 1 WLR 488, a decision of the Court of Appeal, in which the question was whether a claim on a foreign contract would affect a claim on an English contract for the purposes of jurisdiction under

Order 11 rule 1(1)(d). In the leading judgement, *Kerr LJ* at page 495 D to H stated that "the plaintiff can only rely on the concept of a good arguable case in situations that leave room for further investigation of issues of fact or mixed issues of fact and law as to whether or not some requirement of Order 11 is satisfied. Citing Lord Porter in **Tyne Improvement Commissioner's** case [1949] AC 326 at 341 and *Parker LJ* in **Islamic Arab Insurance Co v Saudi Egyptian American Reinsurance Co** [1987] 1 Lloyd's Rep 315 at 317 *Kerr LJ* held that the Court must decide the issue at this stage, even if it is difficult, as to whether the plaintiff can bring themselves within the letter and the spirit of Order 11." [Emphasis added]

[38] Every case will of course fall to be determined on its' own facts and circumstances. Some of the relevant considerations might be whether the case involves a person or entity within the jurisdiction, or whether the person or entity is a necessary and proper party to those proceedings. Ultimately it might come down to whether there is a serious issue to be tried or this may in fact be just a part of the consideration. In **E.F. Hutton**, *Small J* further stated;

> "I adopt the approach of *Lord Goff* in Seaconstar. I hold that where the complaint comprises the giving of negligent advice, the tort is committed in the jurisdiction in which the advice was received. (**Diamond v Bank of London** [1979] QB 333) I also hold that (a) the case at hand falls within Order 11 rule 1(1) (j), (b) the Third Party Statement of Claim was properly brought against Mr. Herman, a person within the jurisdiction and (c) that Seward & Kissel is a necessary and proper party to those proceedings for justice to be done in the contribution claim against Mr. Herman. I consider that they are a proper party in considering the extent to which Mr. Herman is liable to contribute to the liability incurred by Fortis, since there will be serious issues to be tried in the claim against Mr. Herman as to the extent to which Seward and Kissel provided advice to Oracle." [Emphasis added]

[39] Adopting *Small J's* guidelines in **E.F. Hutton** supra and applying them to the present case I find that the concept of good and arguable case is probable within the context of the provisions of s. 16.3 SCA; that it leaves room for further investigation of issues of fact or mixed issues of fact and law as to whether or not some requirement of the CPA or CPR has not been satisfied. There is no dispute that both parties are in the jurisdiction and despite the Applicant's protestations that the case should have been brought against a different individual whom he alleges is the father I

am of the view that the matter was brought against the necessary and proper party. Finally, and ultimately, doing everything possible to determine the true parentage of a child, is a paramount consideration for that child, the parents and society as a whole. This means that there is a serious issue to be tried.

THWARTING THE APPEAL

[40] The argument raised by the Applicant's counsel is that a refusal of the stay will "thwart his appeal" if he is successful. In other words, the refusal will render success in the appeal "nugatory." In **The Bahamas Real Estate Association v. Smith** [2016] 2 BHS J. No. 36 Bahamas Court of Appeal SCCivApp No. 109 of 2015 *Mr. Justice Isaacs, JA* as he then was did not depart from the principle stated in **Bimini Blue** supra but added that the appellant had to also give sufficient evidence as to why a successful appeal could be rendered nugatory.

> "The principles which guide the considerations of a stay application are: whether the appellant is entitled to appeal as of right; whether the appellant has an arguable case; whether the absence of the stay would render a successful appeal nugatory; whether there is a risk of injustice to one or other of the parties if it grants or refuses a stay; whether the appellant has given sufficient evidence by affidavit as to why a successful appeal could be rendered nugatory. In the present case, relative to the respondent's application for restoration, it cannot be said that a stay not being granted will render nugatory a successful appeal. Further, the prejudice which may be experienced by the respondent outweighs any prejudice which may inure to the applicant/appellant. The balance of convenience favoured the respondent and, therefore, the stay application was refused. [Emphasis added]

[41] In the Applicant's questioned affidavit he states that "the order from the court is not of urgency for the Claimant. Furthermore, if a stay is not granted it would thwart my appeal if I am successful. I humbly believe that there is no prejudice against the Claimant if a Stay is granted as the minor child has a named father." The question is whether this is sufficient in the **Bimini Blue** prescription to warrant the stay. I accept the Applicant's contention that in refusing the stay of execution he would be liable to undergo the DNA test immediately or to suffer other consequences. I am also of the view that the contention that the minor child has a named father is an issue worthy

of further adjudication. These are exceptional circumstances justifying the stay, namely, that the Applicant might suffer a serious injustice if he is obliged to undergo the test, should he win the appeal.

[42] Having considered all of the circumstances of the case, the statute, and case authorities I am invoking this court's discretion to put matters right. Pivotal to my decision is the fact that if the application for the stay is refused the Applicants case will be rendered nugatory. Therefore in in exercise of the powers conferred by the CPR part 26.9 I make the following order;

CONCLUSION:

1. The Applicant has leave to refile the Affidavit in support of the Summons to conform to the provisions of Part 30.5 CPR.

2. That the court grants to the Applicant a Stay of Execution of the Order until the determination of the Appeal, on the condition that the Affidavit is filed in conformity with Part 30.5 CPR and served within Fourteen (14) days of the date hereof.

3. Costs of the Application is granted to the Claimant to be taxed if not agreed.

Dated the 24th day of March, A.D., A.D., 2025

The Honourable C.V. Hope Strachan,

Justice of the Supreme Court Of the Commonwealth of the Bahamas