IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2017/CLEgen/01181

BETWEEN:

MATTHEW SEWELL

Claimant

AND

THE ATTORNEY GENERAL OF THE BAHAMAS

1st Defendant

THE MINISTER OF IMMIGRATION

2nd Defendant

THE COMMISSIONER OF POLICE

3rd Defendant

SUPERINTENDENT OF THE BAHAMAS DEPARTMENT OF CORRECTIONAL SERVICES

4th Defendant

DIRECTOR OF IMMIGRATION

5th Defendant

OFFICER IN CHARGE OF THE CARMICHAEL ROAD DETENTION CENTRE

6th Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Frederick Smith KC with R. Dawson Malone, Doneth Cartwright and Ian Cargill for the Claimant
Kayla Green-Smith with Adele Mangra and Lavado Frazier for the Defendant

Hearing Date 15 April 2025

DECISION

WINDER, CJ

This is the Application of the Defendants (the AG) for an extension of time, for leave to appeal and for a stay of judgments of Bowe-Darville J.

Background

[1.] The Claimant (Sewell), a Jamaican national, brought this claim alleging a lengthy period of unlawful detention (2006-2015) by the AG who are all organs of the state. He claims damages for assault and battery, unlawful detention, false imprisonment, malicious prosecution and for constitutional breaches.

[2.] On 19 August 2020, Bowe Darville J struck out the AG's Defence as they had failed to comply with the case managements directions, up to the date of trial. On 7 September 2020, upon hearing the evidence of Sewell, Bowe-Darville J entered judgment for Sewell with damages to be assessed. The assessment hearing was adjourned to 28 October 2020.

[3.] On 26 October 2020, the AG filed an appeal seeking to set aside the rulings given on 19 August 2020 and 7 September 2020 and for an extension of time within which to appeal both decisions.

[4.] Bowe-Darville J proceeded to hear the assessment on 28 October 2020.

[5.] The Court of Appeal heard the AG's appeal on 15 December 2020 and on 14 January 2021, in a written Judgment, refused the application for extension of time and struck out the appeal. According to **Barnett P,** who delivered the decision of the Court:

> 10. The order of 19 August 2020 is an interlocutory order, and the judgment of 7 September 2020 is an interlocutory judgment (see Thomas v Bunn [1991] 1 A.C. 362). No appeal can be made against either without the leave of the court.
> 11. Rule 11 of the Court of Appeal Rules provides:
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> > "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; 5 (b) in any other case, six weeks, calculated from the date on which the judgment or order of the court below was pronounced or made."
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> 12. The intended appellants had two weeks to appeal each order. They are clearly out of time.
> 13. They now seek leave to appeal out of time. The problem is that they have not sought, much less obtained, the leave of the trial judge to appeal these interlocutory orders.

14. There would be no basis for this Court to extend the time unless and until the court below grants them leave to appeal those interlocutory orders.

15. This procedure with respect to an appeal against an interlocutory order was dealt with by the Privy Council in Junkanoo Estates Ltd et al v UBS (Bahamas) Ltd (in voluntary liquidation) [2017] UKPC 8 where the appellant sought to appeal a judgment made on an Order 14 application. The appellants did not obtain the leave of the trial judge to appeal.

16. The relevant parts of the advice of the Board written by Lord Sumption are as follows:

> "5. Under section 11(f) of the Court of Appeal Act, an appeal to the Court of Appeal from an interlocutory order lies only with the leave of the Supreme Court or that of the Court of Appeal. Rule 27(5) of the Court of Appeal Rules provides: "Wherever under the provisions of the 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." It is common ground that for this purpose an order giving summary judgment is an interlocutory order. The English rule to this effect was stated in White v Brunton [1984] QB 570 and has been applied for many years in the Bahamas.
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> 6. On 20 April 2015, the defendants filed a notice of appeal against the order of Evans J, together with an application for a stay of execution of the judgment. They had not, however, sought leave to appeal from Evans J. Because of Rule 27(5), they were not therefore in a position to seek it from the Court of Appeal, unless the Court exercised its general power to dispense with compliance, which they had no reason to do. The matter was heard in the Court of Appeal over four days, on 20 May, 29 July, 14 September and 2 November 2015. Junkanoo and Mr Starostenko were each represented by Counsel. Mrs Starostenko appeared in person. UBS took the preliminary point that no leave had been sought or obtained, and in a judgment delivered on 2 November, the applications were dismissed and the Notice of Appeal struck out on that ground.
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> 7. There followed a period of some months in which the defendants, and in particular Mrs Starostenko, attempted to make further applications in the Supreme Court, including an application for a stay of execution of the possession order. According to Mrs Starostenko, the Supreme Court registry refused to accept any applications from her on the ground that the Supreme Court was functus and the matter had gone to the Court of Appeal. The Board is unable to determine exactly what happened between Mrs Starostenko and the court administration. She was apparently acting in person and seems to have made personal approaches to the court office rather than lodging applications in proper form. What seems, however, to be the position on the presently available evidence, including Mrs Starostenko's affidavit sworn 8 August 2016, is that the applications which she wished to make in the Supreme Court did not include an application for leave to appeal from Evans J's judgment of March 2015. Mrs Starostenko told the Board that this was because

she had been given to understand that until an extension of time had been obtained, she would not be in a position to seek leave to appeal. 8. If so, this was an error. The proper course would have been to apply first to Evans J, on notice to the plaintiff bank, for leave to appeal. … If leave had been given, the next step would have been to apply to the Court of Appeal for an extension of time for the appeal. If leave to appeal had been refused, application could then have been made to the Court of Appeal for leave to appeal and an extension of time. An application for a stay of execution could have been made at the same time as these applications." [Emphasis added]

17. As no leave to appeal has been obtained, we are unable to accede to the intended appellants' request to extend the period of time to appeal. There is no basis for us to dispense with the requirement to satisfy the Rule requiring the prior leave of the court below.

18. If the intended appellants obtain the leave to appeal these two interlocutory orders (notwithstanding that the assessment of damages has already taken place) then they are at liberty to apply for an extension of time. But unless and until that has been done, there is no basis for us to grant the application for an extension of time.

19. The application for an extension of time is refused and the appeal, filed on 26 October 2020, is struck out. The costs of the application to extend time and the costs of the appeal are to be paid by the intended appellants to the intended respondent, to be taxed if not agreed.

[Emphasis added]

[6.] The decision of Bowe-Darville-J (now retired) assessing the damages in Sewell's case did not occur until 2 August 2024. Bowe-Darville J. assessed Sewell's damages in the amount of $2,011,578.38 for his claim.

[7.] On 27 August 2024, the AG filed an appeal to the Court of Appeal (Amended on 15 October 2024) challenging the Judgments dated 7 September 2020 and 2 August 2024.

[8.] The AG has applied by Notice of Application filed on 15 October 2024 (Amended 15 April 2025) seeking the following relief:

1.1 An extension of time to apply for leave to appeal the interlocutory order dated 19 August 2020 and the interlocutory judgment dated 7 September 2020;

1.2 Leave to appeal the interlocutory order dated 19 August 2020 and the interlocutory judgment dated 7 September 2020, and

1.3 A stay of execution pending appeal of the judgments delivered by Bowe-Darville J on 7 September 2020 and 2 August 2024.

Application for an extension of time to appeal the decision of 7 September 2020.

[9.] The AG seeks an extension of time and leave to appeal the interlocutory decisions dated 19 August 2020 and 7 September 2020. The AG properly identifies the law as it relates to application for extension to appeal. They are to be found in the case of **Belgravia International Bank & Trust Co. Ltd and anor. v Sigma Management Bahamas Ltd. and anor.** Civil Appeal#: 75 of 2021. According to **Isaacs JA**, at paragraph 8:

> 8. The intended appellants have secured leave to appeal from the Judge but well after the time for appealing had passed. In the circumstances, an [extension of time] application must be made; and once made, is to be considered in the same manner as other applications of that ilk have been determined, to wit, what is the length of the delay, the reason for the delay, the prejudice to the respondent and the prospects of success. These factors are to be considered by the Court and it is an abrogation of the responsibility of the Court when considering the four factors in general and the prospect of success in particular to accept without analysis of the intended appellant's grounds, the view, expressed or assumed, of the court below.

[10.] The delay in this case is considerable and inordinate, it is a period of 4 years. The AG's stated reason for the delay is that:

> On 14 January 2021 the Court of Appeal refused the application for the extension of time and the appeal filed on 26 October 2020 was struck out because the Defendants did not obtain the requisite leave from the Supreme Court to appeal the interlocutory order and the interlocutory judgment. In the premises where the parties were awaiting the final judgment of the Court the Defendants took the position that they would wait for the completion of the entire matter before the appeal is submitted.

Respectfully, this is a wholly inadequate reason proffered for the delay. The Court of Appeal, having indicated that the interlocutory appeals could not be entertained, on the basis of a failure to secure the leave of the Court, the proper response could not lie in a decision to await the outcome of the entire action. While no one would have expected that the decision would have been rendered some 4 years later, the AG's circumstances could never have been expected to improve with the passage of time. What emerges however, is that the AG was aware that that they were out of time to apply for leave to appeal from a far back as 21 January 2021 and that they needed leave to appeal from the Supreme Court.

[11.] The AG also knew that they could not appeal the 19 August 2020 and 7 September 2020 decisions without leave, so they could not have been waiting for the completion of the entire matter. Having not obtained a stay of the proceedings whilst the appeal was afoot, the assessment proceeded following the making of the interlocutory order and the interlocutory judgment. In addition to the delay, which appear to be presumptively prejudicial, the fact that the proceedings proceeded has exacerbated the effects of the delay.

[12.] The AG says that it has good prospects of success on an appeal of these interlocutory decisions. One of the decisions was made in the context of a case management decision and the other in respect of the decision on liability, where the only witness to give evidence was Sewell.

[13.] **Isaacs JA** provides a useful discussion of appeals of interlocutory decisions, made within the context of the judge's case management powers, in the above-cited case of **Belgravia**. He stated at paragraph 23:

> 23. It is to be noted that the intended appeal is against an interlocutory decision made within the context of the Judge's case management powers under O. 31A. As such, it is, accordingly, limited only to a request for an appellate review of the correctness (or otherwise) of the Judge's exercise of discretion. This Court must be satisfied that the Judge failed to apply the correct principles, or that she took into account matters which should not have been taken into account, and left out of account matters which were relevant to the strike out application or that her ruling is so plainly wrong that it would be regarded as outside the generous ambit entrusted to a Judge: Walbrook Trustee (Jersey) Ltd & Ors v Fattal & Ors [2008] EWCA Civ 427 and Darlene Allen-Haye v Keenan Baldwin & Anr SCCivApp No. 186 of 2019.

[14.] The 19 August 2020 decision to strike out the Defence for failure to adhere to case management order is within the ambit of the judge's case management powers. The AG has not demonstrated that, *the Judge failed to apply the correct principles, or that she took into account matters which should not have been taken into account, and left out of account matters which were relevant to the strike out application or that her ruling is so plainly wrong that it would be regarded as outside the generous ambit entrusted to a Judge.* The 7 September 2020 decision is an interlocutory judgment on liability, given following a one sided trial, where the AG was without a defence and/or witness to advance a case. In the circumstance, I am therefore not satisfied that the AG has demonstrated that there is any real prospects of success in any appeal of the interlocutory order dated 19 August 2020 and the interlocutory judgment dated 7 September 2020.

[15.] In the circumstances, there being inordinate and unexplained delay with no real prospects of success on the appeal, I refuse to extend time and consequently leave to appeal.

Stay of execution

[16.] The AG seeks a stay of the execution of the 2 August 2024 decision. Sewell opposes the grant of a stay and says that if granted should be on conditions. Sewell argues that:

> Judgment was entered in his favor in 2020. Damages have been assessed, albeit this is on appeal. The Supreme Court is aware that a similar point to that which is raised at para 1 of Ds NOA Motion is to be considered by the Court of Appeal in May. It is an important point of general public importance. The Claimant has sustained unchallenged damages. The Claimant has been kept out of his damages for years. As this is a money judgement the Claimant should not be kept from it. Ds have provided no evidence of irreparable harm or irreversible consequences, relying solely on unsubstantiated assertions. Even if successful on appeal, Ds would still owe substantial damages to the Claimant. It will merely be a matter of assessing again.

[17.] The law relative to a grant of a stay is to be found in the Court of Appeal case of **Bahamas Real Estate Association v George Smith** Civil Appeal #: 109 of 2015. According to **Jones JA**, at paragraph 11-12 of the decision:

> 11. The principles which guide a court when considering applications for a stay may be found in Order 59, rule 13 of the 1982 English Rules of the Supreme Court which states inter alia that even though the court should not make a practice of depriving a successful party of his winnings, the court should ensure that in the event the appealing party succeeds his judgment on appeal is not rendered nugatory.
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> 12. Further guidance as to matters the Court must take into account may be derived from the authorities. Some have been helpfully set out in the appellant's submissions, for example, (a) whether the appellant is entitled to appeal as of right; see also Wilson v. Church (No.2) (1879) 12 Ch 454; (b) whether the appellant has an arguable case; see Mandeer Holidays Ltd v Civil Aviation Authority Official Transcripts (1980-1989); (c) whether the absence of the stay would render a successful appeal nugatory; See City Services Limited v. AES Ocean Cay Limited [2012] 1 BHS J. No. 85 at para. 15 at TAB 8; see also Wilson v. Church supra; (d) whether there is a risk of injustice to one or other of the parties if it grants or refuses a stay; see Hammond Suddards Solicitors v Agrichem Holdings Ltd [2001] EWCA Civ 2065; and (e) whether the appellant has given sufficient evidence by affidavit as to why a successful appeal could be rendered nugatory; see City Services supra at para. 16.

[18.] I am satisfied that the AG has an appeal as of right, has an arguable case, that the absence of the stay would render a successful appeal nugatory, that there is a risk of injustice to the AG if the Court refuses a stay.

[19.] While several grounds of appeal were advanced, a principal ground of appeal of the AG related to the delivery of the 2 August 2024 by the trial judge almost 3 years after she demitted office as a judge. In the case of **Clemenza Ltd. and anor. v The Attorney-General of The Bahamas and anor** Civil Appeal #28 of 2022, the Court of Appeal, by majority (Jones JA dissenting), found that the decision of a trial judge delivered following the judge's retirement, was not a nullity and that the decisions were valid under the de facto officer principles. The principle however is not absolute and open ended. According to **Evans JA**:

> 76. Firstly, I am not prepared to accept that either of the two Justices would knowingly deliver a judgment in circumstances where they knew that they had no authority to do so. There is nothing which would lead me to find that they were not acting in good faith. As noted by Saunders, P at paragraph 22 in Knox v Deane 2021 CCJ 5 AJ BB a case emanating from Barbados:
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> > "[22]... It is routine for judgments of the Court of Appeal to be pronounced and issued in the absence of a member of the hearing Bench who had since retired. Nothing is irregular about such practice..."
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> 77. It is accepted that in Barbados there is an express provision which allows for judgments to be delivered after a judge has retired or otherwise demitted office. However, the point is whether such a practice is proper, is different from the question as to whether it is or was a regular practice accepted by all. The fact that this issue has arisen in Jamaica, Barbados, Trinidad and now The Bahamas, (countries where no such specific legislation other than the constitutional provisions exist) is an indication as to how widespread and accepted the practice has been.
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> 78. As noted by Jones, JA in his judgment, the learned authors of Wade and Forsyth Administrative Law helpfully outlined the common law de facto doctrine in this manner:
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> > "The acts of the officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all. The logic of annulling his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so. In such a case he is called an officer or judge de facto, as opposed to an officer or judge de jure. The doctrine is firmly based on the public policy of protecting the public's confidence in the administration of justice."
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> 79. In the case of Gokaraju Rangaraju v State of Andhra Pradesh (1981) 3 SCC 132, Reddy, J. held that:
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> > "Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a judge de jure. Such is the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief..."

80. The English Court of Appeal, in the case of Fawdry & Company (a firm) v Murfitt [2002] EWCA Civ 643, stated:

> "22. ...the judge must not be a mere usurper who is known to have no such colourable authority. The doctrine depends upon his having been generally thought to be competent to act and treated as such by those coming before him."

81. I am satisfied that all parties concerned were of the view that it was permissible for the two justices to provide the decisions after their retirement date. The then Chief Justice, who actually delivered the decisions, had no issue. It is also significant that even during these hearings no counsel who appeared before us alleged that either Judge acted in bad faith.

82. It is for the above reasons that I join with the President in holding that in the circumstances of this case the judgments can be saved by the de facto officer doctrine.

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98. It is for these reasons that I cannot agree with the President that the judgments in this matter are saved by Article 96(3). What is clear is that, as shown above, there is an established practice in this and other jurisdictions where judgments prepared by retired judges are delivered after they have retired. It is this practice which, in my view, allows the Court to consider the de facto officer doctrine having regard to uncertainty as to the Constitutional foundation.

99. It ought to be noted that if it was clearly established that the Constitution permitted a judge to deliver an outstanding judgment after his retirement there would be no need for recourse to the de facto officer doctrine.

100. However, as conceded by Mrs. Rolle, KC in her oral submissions, subject to a more definitive decision from the apex court, with the determination in this matter any such judgments delivered post the date of this judgment cannot be afforded that protection. This must necessarily be so because it will no longer be possible for any party to reasonably contend that they held a belief that a judge who was no longer in office and was beyond his extension has the authority to deliver a valid judgment.

[20.] Bowe-Darville J. demitted office in December 2021. **Clemenza Ltd. and anor. v The Attorney-General of The Bahamas and anor** was a jointly heard appeal which related the decisions of Thompson J and Bowe-Darville J who both delivered judgments after they demitted office. At paragraph 100 of the decision, **Evans J** noted that *"any such judgments delivered post the date of this judgment cannot be afforded that protection. This must necessarily be so because it will no longer be possible for any party to reasonably contend that they held a belief that a judge who was no longer in office and was beyond his extension has the authority to deliver a valid judgment."* As **Clemenza Ltd. and anor v The Attorney-General of The Bahamas and anor** was determined on 3 May 2023, one year prior to the 2 August 2024 judgment, the AG has real

(as opposed to fanciful) prospects of success. I therefore did not agree with Sewell's assessment that the appeal was speculative and devoid of merit.

[21.] I accept the AG's evidence (albeit it may not be the most current) that the stay would render a successful appeal nugatory and that there is a risk of injustice if a stay is not granted. I am also cognizant of the fact that the successful result of the appeal of the AG will only result in a rehearing of the assessment, as liability has been found against the AG. I also therefore accept that an injustice will occur to Sewell who has waited for a considerable period without relief. In my view, a proper balance of these injustices could be achieved if the stay is granted on conditions.

Conclusion

[22.] I refuse the application for extension of time and consequently for leave to appeal the interlocutory decisions of Bowe-Darville J dated 19 August 2020 and 7 September 2020.

[23.] I will grant a stay of the execution of the 2 August 2024 judgment of Bowe-Darville J, pending appeal, on the condition that the AG makes a payment on the said judgment of $100,000. I make this determination taking into account an earlier payment made by the AG and their submissions during the earlier proceedings as to the value of any claim by Sewell. The sums are to be paid within 60 days, failing which the stay will be lifted.

[24.] As to the taxation of costs associated with the 2 August 2004 judgment, the same may proceed, however the payment of any sums found to be due are stayed pending the outcome of the appeal.

[25.] I shall hear the parties by written submissions within the next 14 days as to the appropriate order for costs.

Dated the 6th day of May 2025

Sir Ian R. Winder
Chief Justice