

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
Claim No. 2019/CLE/gen/01051

IN THE MATTER OF a Deed of Settlement made on 3rd day of March, A.D., 2017 between Nassau Airport Development Company Limited of the first part and Olde Nassau Holdings Ltd., and LPI Concessions Ltd., and Patmor Investments Limited of the second part;

AND IN THE MATTER OF threatened abrogation of certain commercial rights and interests in and to various leasehold spaces located in Lynden Pindling International Airport the subject of the said Deed of Settlement;

AND IN THE MATTER OF sects. 3, 6, 7, 8, 9, 20, 25 and 29 of The Airport Authority Act, AND The Airport Authority (Amendment) Act, 2016 AND The Airport Authority (Fees and Charges) Regulations, 2009;

AND IN THE MATTER OF a certain Transfer Agreement dated 1st April 2007.

BETWEEN:

(1) **OLDE NASSAU HOLDINGS LTD.**
(2) **REMITROM ENTERPRISES LIMITED** (formerly **LPI CONCESSIONS LTD.**)
(3) **PATMOR INVESTMENTS LTD.** (Trading as “The Patmor Group” of Companies) Plaintiffs

AND

NASSAU AIRPORT DEVELOPMENT COMPANY LIMITED First Defendant

AND

THE AIRPORT AUTHORITY Second Defendant

Before: The Hon. Mr. Justice Loren Klein
Appearances: Mr. Maurice Glinton KC, with Meryl Glinton for the Plaintiffs
Mrs. Tara Archer-Glasgow, with Ms. Theominique Nottage, for the Defendants
Hearing dates: 21 February, 3 March, 3 July, 25 August, 24 September, 2020; Notice of Additional Evidence filed 24 August 2023

RULING

Writ of Summons—Commercial Leasehold Agreement—Retail shop space at Lynden Pindling Airport—Threat of abrogation of lease—Specific performance—Legal relationship between Airport Authority and company running airport (Nassau Airport Development Corporation)—Statutory undertakings—Whether transfer of statutory powers valid—Whether NAD an Independent Contractor—Practice and Procedure—Interlocutory injunction—Quia timet

injunction—Principles—Discovery—Ord. 24, r. 1(1) RSC 1978—Automatic discovery—Affidavit evidence—Interlocutory Proceedings—Affidavit allegedly containing argument and opinion—Affidavit sworn by counsel and attorney of the firm representing the parties, and not officer of defendant Company defendant—Striking out—Representation of Parties—Representation of both defendants by same Law Firm—Conflict of interest—Restraint of Counsel Acting for both defendants—Landlord and Tenant Relations—Tenancy by Estoppel—Option to renew lease—Whether superseded by subsequent Deed providing for extension of lease on different terms—Declaratory relief—Principles—Summary Judgment—Principles—Specific Performance—Interpretation—Construction of Commercial Documents—Sealing Order—Confidentiality of Documents—Further Evidence—Notice of Application for Leave to Adduce

INTRODUCTION AND BACKGROUND

1. The various applications dealt with in this Ruling arise out of a dispute over the lease of valuable commercial space within the Lynden Pindling International Airport (“LPIA” or “the airport”) and concern the intersection of statutory authority, contractual rights and commercial expectations in the context of airport property management.

2. The Plaintiffs belong to a group of companies that lease retail space in the airport, in which they operate a restaurant, news-stand and souvenir businesses. The first Defendant is the Nassau Airport Development Company (“NAD”), a company created to operate the airport, and the second Defendant is the Airport Authority (“Authority” or “AA”), the body with statutory authority for the Airport.

3. It appears that the catalytic events for the litigation took place during July of 2019, when the first Defendant indicated that it would not renew one of three leases held by the Plaintiffs following its expiration, citing various concerns about the performance of that business. Fearing removal from the demised premises occupied by that business, the Plaintiffs filed a Writ of Summons on 31 July 2019 (“the Writ”) seeking various Orders and Declarations, including specific performance of the Agreement, and in the alternative damages for breaches. They also sought to have the claim determined pursuant to the summary procedure available under *Order 75, R.S.C. 1978*, where specific performance is sought in relation to the “*grant or assignment of a lease of any property, with or without an alternative claim for damages.*”

4. Pending hearing of the action, the Plaintiffs filed a battery of procedural and interlocutory applications, seeking interim injunctive and other ancillary relief. The Defendants likewise filed a number of cross-applications. However, when the procedural and other points are disposed of, the real issue on which the Plaintiffs seek specific performance is within a narrow compass.

Factual and Procedural Background

5. The Plaintiffs are a group of companies (“The Patmor Group of Companies”) who have been lessees of commercial spaces in the airport premises for several decades, stretching back to the old (now closed) domestic and international terminals of what was the Nassau International Airport, and continued within the new airport terminal (the LPIA).

6. On 1 May 2000, the *Airport Authority Act* (“the Act”) came into effect. Among other things, it placed the LPIA under the statutory “ownership” of the Authority and granted it various powers and functions in connection with the operation of the airport.

7. These included the power to contract out the operation of the airport to an independent contractor, and it is those provisions which the Plaintiffs say have not been observed in connection with the execution of the leases and Deed. Acting (presumably) pursuant to its statutory authority, the Authority delegated the management of the airport property to NAD, a company which it apparently incorporated for that purpose. The Authority holds the shares in NAD in trust for the Government of The Bahamas.

8. The tenancies which are in dispute relate to a Deed of Settlement dated 3 March 2017 (“The Deed”) between NAD and the Plaintiff companies, which is supplemental to the following leases: (i) Lease No. NAD-SR-10-230 dated 31 March 2010, made between NAD and the 1st Plaintiff (the “News Stand Lease”); Lease No. NAD-FB-08-004 dated 26 January 2008, made between NAD and the 2nd Plaintiff (the “Parma Lease”); (iii) and Lease No. NAD-SR-10-230 dated 31 March 2010, made between NAD and the 2nd Plaintiff (the “Restaurant Lease”). The Deed was executed by NAD as Landlord for itself and “*all its predecessors, successors, assigns, subsidiaries, and affiliates and its and their present and past officers, directors, employees, legal representatives, and agents (the “NAD Affiliates”)*”. As will be seen, the main point of dispute involves the Parma Lease.

9. It appears that during the years of their operation in the airport, the Plaintiffs accrued significant arrears in connection with the rent for the Parma Lease, and the primary purpose of the Deed was to restructure the debt of the Plaintiff companies on the terms stipulated in the Deed. The Plaintiffs allege that the indebtedness was caused largely by the fact that under the Parma Lease, the Plaintiffs’ monthly rent formula was calculated at between 35% to 38% of gross sales, when other tenants’ monthly rents were pegged at 10%. The formula used to determine the rent was apparently linked to NAD’s estimated weekly enplanements of 3,000-4,500 passengers on Tuesdays through Thursdays, and 4,500-6,000 passengers on Fridays to Monday. These were said to be “overly optimistic” and apparently were never realized. Nevertheless, based on these estimates, the Plaintiffs allege that they undertook additional expenses associated with building out the leased spaces to meet the technical requirements, and the rent kept accruing “*at a gross sales rate tied to a mistaken enplanement estimate*”.

10. After some time had passed, it appears that NAD agreed to reduce the monthly rental payments to 10% of gross sales. However, the arrears had by then ballooned to “**X amount**” (the “owing accounts receivable”) at the time of the execution of the Deed.

11. Prior to the execution of the Deed, the parties had on 20 December 2016 executed a Term Sheet whereby they agreed the principal terms for the restructuring of the Plaintiffs’ debt to NAD. Recital 4 of the Deed provided that NAD had agreed to restructure the debt provided the Plaintiffs complied with (a) the Term Sheet; and (b) the terms and provisions of the Deed, with respect to

payment and otherwise. Recital 5 stipulated that NAD had agreed to write off “**X amount**” from the account receivables as “inducement” for the Plaintiffs agreeing to execute the Deed, provided that the provisions in the Term Sheet and Deed were adhered to in their entirety. Clause “iv” required the Plaintiffs to pay upfront “**X amount**” within 90 days of the execution of the Deed.

12. It is not necessary to examine the Deed in any great detail, but several of the provisions are important to the applications. For example, Clause “v” provides for how the outstanding balance was to be liquidated, and the parties calculated that the “*...payments would be made and concluded within the period prescribed in the relevant Lease Agreements*”. Several of the other important clauses provide as follows:

“xi. NAD hereby agrees to consider in good faith a five (5) year extension of each of the Lease Agreements extensions (the “Lease Extension”). As a condition precedent to this Lease Extension, The Patmor Group must meet, on a timely basis, all of its financial obligations to NAD under the Lease Agreements and pursuant to the Term Sheet, and this Deed and abide by all rules, regulations and policies of NAD.”

“xiv. Non-compliance with the terms of the agreed payment plan and/or the terms of this Deed will result in NAD terminating any relevant Lease Agreement and proceeding with legal action to recover any and all outstanding monies owed.

“xvi. That save as expressly provided for herein, the Lease Agreements in all respects, and every clause thereof, shall be of full force and effect and binding on the parties thereto as therein intended.”

13. It appears from the evidence that, as promised, NAD wrote off the **specified amount** and the Plaintiffs paid the **amount** required to be paid by them pursuant to Clause “iv” within the stipulated ninety-day period. It is also represented that the Plaintiffs complied with the Term Sheet and the terms and provisions of the Deed with respect to its financial obligations to NAD.

14. Things came to a head, however, when the Plaintiffs received several letters from NAD, and later from its attorneys, indicating that a decision had been reached not to renew the Parma Lease. The position indicated to the Plaintiffs was set out at paragraph 13 of the Mortimer affidavit as follows:

“13. NAD’s 31st January 2019 letter to me stated that due consideration was given to renewal of Lease number NAD-FB-08-004 then set to expire on 31st March 2019 and it had been determined that “**an automatic renewal of the Lease would not be in the best interest or even reasonable**”, whilst identifying five (5) reasons summarized as follows: (1) the concession “**relative to other food and beverage concessions within proximity...is well below the average revenue generated by other concessions within the food court**”; (2) a full review of the concessions programme in 2018 by Pragma Consulting, confirm that the concessions should be yielding more revenue and the recommendation is that the Lease should not be renewed upon expiration; (3) because of circumstances (1) and (2) upon expiration of the lease, “**NAD will seek proposals for the location through a transparent and open Request for Proposal (RFP) process**”; (4)

Considering The Patmor Groups' **"steady payment history since the execution of the Deed of Settlement, [Olde Nassau Holdings Ltd.] will be invited to participate in the RFP, notwithstanding that we do not allow entities that have defaulted on any agreement with NAD to participate in an RFP process";** (5) in the interim, Olde Nassau Holdings Ltd. is to remain in the space **"throughout the RFP process and the Lease will be extended on a month to month basis at the current payment terms, as per lease clause 18.9 until such time as an award is made."** [Boldface in the original.]

15. There was some back-and-forth correspondence between counsel for the Plaintiffs and counsel for the Defendants on the issue. A letter from the Defendants' attorneys setting out a position similar to what was indicated in the 31 January 2019 letter was said to be "...*our client's final response on the issue*". Another letter dated 6 June 2019 was said to be "*the final communication on the matter*". The RFP was published in one of the daily newspapers, requesting bids from interested persons to be submitted by 26 July 2019.

16. Against this background, the Plaintiffs filed their Writ on 31 July 2019 seeking a variety of Orders and Declarations as follows:

- (i) specific performance of the Deed of Settlement, in particular the provisions providing for extensions of the Leases (or Lease Agreements);
- (ii) damages in the alternative for the wrongful repudiation of the Deed and the "Parma Lease", and for breach of contract;
- (iii) a declaration that the Deed ripened into an accrued right which could not be lawfully abrogated as long as the Plaintiffs were compliant with its terms;
- (iv) a declaration declaring invalid the Transfer Agreement dated 1 April 2007 between the Authority and the Company to the extent that it purports to vest in or delegate or assign to the Company the Authority's statutory functions, on the grounds that it is *ultra vires* the Authority;
- (v) a declaration that a right or option to renew the Plaintiffs' leases amounts to property which cannot be expropriated without lawful compensation;
- (vi) orders for disclosure and delivery up of the said Transfer Agreement and any subsequent Agreements between the Authority and the Company relating to the exercise of the Authority's statutory functions and powers;
- (vii) an interlocutory injunction to prevent interference with the Plaintiffs' quiet enjoyment of the area or spaces ("The Property") pending trial of the writ or delivery of copies of the Transfer Agreement;
- (viii) a permanent injunction to prevent interference with the Plaintiffs' possession and enjoyment of the leased premises; and
- (ix) exemplary/vindictory damages, interest and costs.

17. The statement of claim ("SOC") was filed on 17 July 2020, which repeated the claims for relief in the Writ. The Defendants filed their defences on 30 July 2020.

18. There are at some seven applications before the Court, mostly interlocutory, but as noted the Plaintiffs seek summary judgment on the main claim. Several of these applications can be dealt with conjointly, and as noted, one of the strike-out applications was compromised by the parties prior to the hearing. They are:

- (1) the Plaintiffs' application by summons filed 31 July 2019 for delivery up of the "Transfer Agreement" or other Agreements between the AA and NAD relating to the exercise of the Authority's functions, and an interim injunction pending delivery up or trial (whichever is later);
- (2) the Plaintiffs' summons filed 15 October 2019 to strike out the affidavit of Nia B. Rolle filed 10 October 2019;
- (3) the Plaintiffs' application by summons filed 4 December 2019 to strike out the affidavit of Milo Butler filed 28 November 2019;
- (4) the Plaintiffs' application by summons filed 15 October 2019 for summary judgment under *Ord. 75, r. 2* in respect of the claim for specific performance;
- (5) the Plaintiffs' application by Notice filed 4 December 2019 to have the Firm of Higgs & Johnson, Counsel and Attorneys-at-Law, removed from the record as acting for both the first and second Defendants, on the basis of an alleged conflict of interest;
- (6) the first Defendant's application, by summons filed 7 September 2020, to strike out portions of the main Mortimer affidavit (filed 31 July 2019) as offending *Ord. 41*; and
- (7) the first Defendant's application by summons filed 22 October 2019 to strike out certain exhibits in the Pat Mortimer affidavit on the grounds of confidentiality (the lease agreements and Deed of Settlement).

19. These applications were supported by a battery of affidavits and skeleton submissions from the parties. From the Plaintiffs, the court received the following evidence via affidavits from Patricia Mortimer, the President and managing director of the Plaintiff companies: (i) an affidavit filed 31 July 2019 in support of the application for the interim injunction and ancillary relief; (ii) an affidavit filed 15 August 2019, in further support of the injunction application; and (iii) an affidavit filed 15 October 2019 in support of the summary judgment application. The evidence was supported by three sets of skeleton submissions along with authorities directed to (i) the claims for an interim injunction, summary judgment and an order for specific performance; (ii) the strike-out applications; and (iii) the objection to the representation of the Defendants by the same Firm of counsel and attorneys-at-law (Higgs & Johnson).

20. For their part, the Defendants filed some seven affidavits as follows: (i) three affidavits from Nia Rolle, counsel and attorney-at-law of the Firm of Higgs & Johnson, as follows—(a) an affidavit filed 10 October 2019 in opposition to the claim for delivery up of documents and interim relief, (b) an affidavit filed 22 October 2019 in support of the first Defendant's application to strike out portions of the main Mortimer affidavit on the grounds of breach of confidentiality, and (c) an affidavit filed 14 February 2020, opposing the Plaintiffs' summons to strike out the whole or portions of the 10 October 2019 Rolle affidavit; (ii) the affidavit of Milo Butler III, the General Manager of the Airport Authority, filed 28 November 2019 on behalf of the Authority, opposing

the injunction and summary judgment applications; (iii) two affidavits of Sharmon Y. Ingraham, counsel and attorney at Higgs & Johnson, as follows—(a) an affidavit filed 19 November 2019, exhibiting the unsworn affidavit of Milo Butler III (later sworn and filed), and (b) an affidavit filed 16 March 2020, exhibiting an Indenture of a Lease between the Authority and NAD (“Head Lease”); and (iv) an affidavit of David J. Hanna, also counsel and attorney at Higgs & Johnson, filed 7 September 2020, in support of the Defendants’ summons to strike out portions of the main Mortimer affidavit. These were supported by some five sets of skeleton submissions between the two Defendants directed to the Plaintiffs’ strike-out applications, in response to the summons objecting to the representation of the Defendants, and in support of their application to strike out affidavit evidence.

21. I also received, subsequent to the hearings, a Notice for Leave to Adduce Further Evidence by the Plaintiffs, filed 24 August 2023, and supported by an affidavit of Patricia Mortimer filed the same date. The purpose of the application was to put before the Court a circular issued by NAD to its lessees in respect of Real Property Tax (“RPT”) being assessed on the LPIA, and notifying lessees that they would be required to pay a *pro-rated* share based on the square footage of the demised premises they occupied. This, the Plaintiffs contended, constituted further evidence in support of the preliminary issues raised in its claims as to “*whether NAD or LPIA owns LPIA and therefore the landlord in whose name and on whose behalf the Claimant’s Leases in LPIA should [be] granted*”. It was not necessary to hear or determine this application, for the conclusions I have come to in this Ruling, but I considered this material *de bene esse*, as it had been brought to the attention of the Defendants, and their response was exhibited in the Mortimer affidavit.

22. It is also important to note that the parties, by Consent Order dated 4 December 2019 before Bowe-Darville, J., agreed to the sealing of the Court’s File in relation to the contents of the Deed of Settlement and Release between the Plaintiffs and the First Defendant dated 3 March 2017 and the Lease No. NAD-SR-10-230 made between the First Plaintiff and the First Defendant dated 31 March 2020 (called the “Confidential Agreements”). The apparent *quid pro quo* for this sealing order was that the First Defendant agreed to withdraw its application to strike out the Mortimer affidavit exhibiting the Confidential Agreements, and the Nia Rolle affidavit in support of this application. I shall have more to say about this sealing Order in due course.

23. I must say that the effort expended on interlocutory applications by the parties was disproportionate to the nature of the claim, and during the hearings, the Court disparaged the multiple applications to strike out affidavit material and other procedural applications which bedevilled the claim. However, as the Plaintiffs were seeking summary judgment, the court reserved its Ruling on the main claim. Further, the Court accommodated the parties’ attempt to pursue alternative dispute resolution during the hearing, which continued subsequent to the hearings. Indeed, the Court understands that the parties are still in a posture of trying to find a negotiated settlement to their differences.

(i) ***Interim Injunction***

24. The application for the injunction was made pursuant to *R.S.C. (1978) Ord. 29, r. 1* and said to be “*in virtue of sect. 19 of the Supreme Court Act, 1996*”, or under the inherent jurisdiction of the Court. It sought two-fold relief: (i) the delivery up of the Transfer Agreement or other relevant Agreement between the Authority and NAD relating to the delegation of the Authority’s functions and powers; and (ii) an interim injunction to restrain the Authority and the Company from taking any steps to deny the Plaintiffs access to and from interfering with their quiet enjoyment of “...*any specific areas or spaces “the Property”) the subject of unexpired or expired Leases and Sub-Leases in Lynden Pindling International Airport that the Plaintiffs hold or have options to renew or have extended by the Authority/and or the Company*” pending the delivery of the documents sought or trial of the action (whichever was the later).

Submissions

25. Mr. Glinton argued that the circumstances and substance of the Plaintiffs’ complaint justify the grant of the injunction to “hold the ring” pending the resolution of the issues in dispute. He submitted that the court should approach the application based on the traditional test derived from the House of Lords’ decision in **American Cyanamid Co. Ltd. v Ethicon** [1975] AC 369], as analysed by Laddie J. in **Series 5 Software v Clarke** [1996] 1 All ER 853 [at 865] as follows:

“(1) The grant of an interim injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interim relief, the Court should rarely attempt to resolve complex cases of fact or law. (4) Major factors the court can bear in mind are (a) the extent to which damages are likely to an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties’ cases.”

26. He submitted further, however, by reference to **Cambridge Nutrition Ltd. v BBC** [1990] 3 All ER 523, that the Court had a wide power to grant injunctions where it was “*just and convenient to do so*” and that the **American Cyanamid** principles were useful guidelines but not a “straitjacket”.

27. The relevant evidence in support of the injunction claim was stated in the main affidavit sworn on behalf of the Plaintiffs as follows:

“(3) The application is necessary out of a realistic fear of the First Defendant Nassau Airport Development Company Limited (“the Company” or NAD), sooner rather than later, acting on notifications conveyed to the Plaintiffs that it will not renew a Lease to Olde Nassau Holdings Ltd. of the space (“the Property”) in The Lynden Pindling International Airport (“the LPIA”), notwithstanding that Clause 3.4 of that Lease gives a renewal option [...]. That it is a near certainty to happening, appears from a 6th June 2019 letter from NAD’s attorneys denying the Plaintiffs’ request by a letter of 30th May 2019 for NAD to reconsider its final decision. ...

29. ...The Patmor Group [of] Companies which are and have been good tenants in the LPIA, are victims of a Government-owned unlawfully operated private Company, NAD, part of a coordinated conspiracy with others to appropriate and then dispose of the Property and the business. Therefore, unless this Honourable Court intervenes by granting interim relief pending trial of the Writ Action, such unlawfulness will have worked a grave injustice, causing me and them irreparable loss of reputation in the business community having eliminated our business in the LPIA.

30. The most profitable of their businesses in the LPIA are a restaurant and retail souvenir and concession shop that previously operated in the older (now demolished) section of the LPIA over the last Thirty (30) years in leased spaces covering an area of about 8,900 square feet. The business employ some One Hundred (100) persons primarily in the International Airport locations, all of whom along with the businesses will be adversely and immediately affect were the leases upon expiration not renewed as provided therein or not extended as the Deed contemplates, and NAD continues the RPF process unrestrained by a Court Order.

32. [Failing intervention by the Court, the Defendants will] "...suffer financial loss and be put to great expense and be irreparably damaged....".

28. In her further affidavit filed 15 August 2019, the Plaintiffs exhibited an email from NAD dated 30 July 2019 which stated, in relevant part, as follows:

"We have given you the opportunity to submit a proposal for the space and we note that, notwithstanding your notification that you would participate, to date you have not participated in any of the pre-proposal information meetings. If you do not submit a proposal and another proposer is successful in the process, you will be required to vacate the space within a reasonable time frame which will be communicated to you. Please note that since you are a month-to-month tenant the timeframe would usually be 30 days unless otherwise agreed."

29. The Plaintiffs further submit that the application discloses a serious issue to be tried (in keeping with the **American Cyanamid** formulation), and that the injunction should be granted even though the Patmor Group is not financially able to give a satisfactory undertaking as to damages (if the Defendants succeeded at trial). Further, it is contended that granting the injunction does not cause any injustice to the Defendants, and that failure to do so "*encourages and fosters unlawful conduct on the part of the AA and NAD both*".

30. Counsel for the Defendants takes several points in objection to the injunction application. The first is a procedural one. They allege that the Plaintiffs have invoked an improper jurisdiction by stating that the injunction application, although said to be made pursuant to *Ord. 29, r. 1* of the *R.S.C.*, ostensibly invokes s. 19 of the Supreme Court Act 1996 ("SCA"). It is pointed out that the provision governs applications for judicial review, and contains a cross-reference to s. 18, which relates to actions to restrain a person from acting in any office in which he is not entitled to act. As the Plaintiffs also appear to be seeking to restrain NAD from acting as and/or carrying out the functions of the Authority, the Defendants submit further that these are reliefs "*which sound in the realm of judicial review*", and in this regard, the Plaintiffs have not made a proper (or any) application for judicial review.

31. Secondly, they submit that the Plaintiffs have no standing to seek relief either by way of discovery or for an injunction. This is because, at the time of the litigation, the lease to which the first Plaintiff is a party (the News Stand Lease) was not due to expire until on or about 11 March 2021, and the first Defendant had not indicated any intention not to renew it. Secondly, while the second Plaintiff is a party to both the Restaurant Lease and the Parma Lease, the Restaurant Lease also had an expiry date of 11 March 2021, and had not been impugned. On the other hand, it was pointed out that the Parma Lease expired on or about 20 March 2019, without being renewed. As a result of the expiration of the Parma Lease, the Defendants submit that there is no justiciable matter between the parties on which the Court's determination is required, as there is no "contractual relationship" between the parties. However, it is common ground between the parties that the second Plaintiff holds under a monthly tenancy, pursuant to Clause 18.9 of the Parma Lease. The third Plaintiff is said to be a holding company that holds shares in the first and second Plaintiff, and which is not itself a party to any lease. As a shareholder company, it is contended that it has no independent right to seek to make claims in respect of leases held by the first and second respondents.

32. As to the substance of the claim, the Defendants submit that the Plaintiffs have not surmounted the first threshold of establishing that there is a "*good arguable claim*" to the right which it seeks to protect, which is the right of renewal/extension of the Parma Lease. Firstly, it is said that as the Parma Lease had expired, the Plaintiffs are only holding under a monthly tenancy and therefore NAD had a right to enter upon the premises "*for the appropriate purposes*". Secondly, it was argued that having regard to the restaurant's performance and the recommendations of the independent study commissioned to consider the commercial viability of airport leases, it was not commercially feasible for NAD to grant the "extension" of the Parma Lease under the renewal option. Thirdly, it is submitted that the second Plaintiff did not comply with the terms of the Parma Lease for exercising the renewal option, and has not shown that NAD acted unreasonably in withholding the said renewal. All of these reasons are said to militate against the Plaintiffs having an arguable claim.

33. Next, it is contended that in any event, as damages would be an adequate remedy if the Plaintiffs' claim were successful, the injunction should be refused. In this regard, they cited several authorities, among them: **Locabail International Finance Ltd. v Agroexport and others (The Sea Hawk)** [1986] 1 All ER 901, where the UK Court of Appeal held that the High Court had been wrong to grant a mandatory injunction where damages would have been an adequate remedy; and **Bahamas Electrical Utility Union and James Dean v Bahamas Power and Light Company** (Equity Action No. 864 of 2017), where the Court similarly refused an injunction on the grounds that damages were adequate. Conversely, they say that if the Defendants were successful, it is unlikely that the Plaintiffs would be able to pay the "irreparable" damages both "*pecuniary and economic*" that NAD would suffer should an interlocutory injunction be granted.

34. Further they say that the balance of convenience favours the Defendants, as the second Plaintiff is only one member of the Patmor Group of companies, which continues to operate in the

other leased spaces in the LPIA, and therefore the Plaintiffs as a whole do not stand to suffer irreparable prejudice.

The law

35. The jurisdiction of the Supreme Court to grant injunctions is codified at s. 21 of the Supreme Court Act. It provides for the court to grant an interlocutory or final injunction “*in all cases in which it appears just and convenient to do so.*” Order 29 of the Rules of the Supreme Court (R.S.C.) 1978 sets out the procedural provisions governing the grant of such relief (q.v. Part 17 of the CPR 2022).

36. Although **American Cyanamid** remains the *locus classicus* for the grant of interlocutory injunctions, that case itself and subsequent cases have highlighted that these are general principles which have to be applied with some flexibility depending on the facts of the case. In **Cambridge Nutrition Ltd. v BBC** [1990] 3 All ER 523 (cited by the Plaintiffs), Kerr LJ emphasized that:

“The American Cyanamid case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a straitjacket....”.

In **National Commercial Bank of Jamaica Ltd. v Olint Corp. Ltd.** [2009] UKPC 16, the Privy Council deprecated a “*box-ticking approach*”, which it said “*does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction*”.

37. As recorded, Mr. Glinton adverted to the well-worn principles of **American Cyanamid v Ethicon** principles for granting interlocutory relief, which are often explicated by way of a four-part test as follows: (i) whether there is a serious question to be tried; (ii) whether damages are an adequate remedy; (iii) where does the balance of convenience lie; and (iv) whether there are special factors to be considered. The principles derived from the speech of Lord Diplock in **American Cyanamid** were admirably summarized by Mr Justice Ritchie in **JRV and Anor v BRG (Re Injunction)** EWHC 2238 (KB) 8 September 2023 as follows:

“(1) The grant of an interlocutory is a remedy that is both temporary and discretionary.

(2) The evidence available to the court at the hearing of the application for an interlocutory injunction is usually incomplete. It is given in writing and has not been tested by oral cross-examination.

(3) It is not part of the Court’s function at the interlocutory stage to try to resolve conflicts of evidence on the written evidence as to facts nor to decide difficult questions of law which call for detailed argument and mature considerations. These are for the trial judge.

(4) When an application for an interlocutory injunction to restrain a Defendant from doing acts alleged to be in violation of the Claimant’s legal rights is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when *ex hypothesi* the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action.

(5) It is to mitigate the risk of injustice to the Claimant during the period before that trial that the Courts grant relief by way of interlocutory injunction.

(6) This power is subject to the Claimant undertaking to pay damages to the Defendant for any loss sustained by reason of the injunction if it should be held at the trial that the Claimant had not been entitled to restrain the Defendant from doing what she was threatening to do.

(7) The object of the interlocutory injunction is to protect the Claimant against injury by violation of his rights for which he could not be adequately compensated in damages at the trial. Before an injunction can be granted the Claimant's need for the protection must be weighed against the corresponding need of the Defendant to be protected against injury resulting from being prevented from exercising her own legal rights for which she may not be adequately compensated under the Claimant's undertaking in damages at the trial.

(8) The court must weigh one need against another and determine where "the balance of convenience lies".

(9) Generally, the Claimant is not required to prove that he will win on the balance of probabilities. However, the court must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. Unless the material available to the Court fails to disclose that the Claimant has any real prospect of succeeding in the claim for a permanent injunction at trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

Whether serious issue to be tried

38. This is not a very demanding test. As this court observed in *Satish Daryanani v Leon Griffin et. al.* [2020/CLE/gen/000594] (22 January 2022), at para. 61:

"Several later cases [after *American Cyanamid*] also make the point that that question of what constitutes a serious issue is not to be investigated to any great extent. For example, *Mothercare Ltd. v Robson Brooks* [1979] F.S.R. 466, at 474, Sir Robert Megarry V.C. said: "*All that has to be seen is whether the Plaintiff has prospects of success which, in substance and reality, exist.*" Similarly in *Alfred Dunhill Ltd. v. Sunoptics SA* [1979] F.S.R. 373, Megaw L.J. said: "*It is irrelevant whether the court thinks that the Plaintiff's chance of success in establishing liability are 90 per cent or 20 percent.*"

39. Whatever the Defendants may think of the strength of the Plaintiffs' claims, it does not negate the fact that the Plaintiffs have very easily satisfied the Court of an issue to be tried that is not frivolous or vexatious—in other words a serious issue—with regard to its rights concerning the renewal/extension of the Parma Lease.

Damages and balance of convenience

40. It is true that the Plaintiffs have not offered an undertaking in damages, which is the usual price of obtaining an injunction. However, the fact that the Plaintiffs have not provided a specific undertaking in damages does not preclude the grant of the relief sought (see, for example, **Allen v. Jambo Holdings Ltd.** [1980] 1 WLR 1252). On the other hand, neither have the Defendants provided a cross-undertaking in damages in the event the injunction is refused and the Plaintiff suffers damages in the interim. They submit, rather ambivalently, that if the second Plaintiffs are

successful at trial and “*if NAD is so obliged*”, then the Plaintiffs’ remedy would be one entirely curable by damages.

41. I do not agree that damages would be an adequate remedy in this case. The Plaintiffs have submitted evidence that not only will they suffer grave financial loss, but also the loss of reputation and goodwill that could affect all of their businesses. The Plaintiffs are long-term lessees (over 30 years) of the commercial spaces in the LPIA, and it is quite foreseeable that a forced relinquishment of any of the premises would have a negative impact on the reputation of the group of companies. The case law recognises that in cases involving loss of goodwill or reputation, the undertaking in damages normally required for the grant of an interlocutory injunction may not provide sufficient protection, as such losses may be irreparable or incapable of precise monetary assessment (see **Lauritzencool AB v Lady Navigation Inc.** [2004] EWHC 2607 (Comm)). These matters, considered together, do not satisfy me that damages would be an adequate remedy for the Plaintiff, or that the Plaintiff would be in a position to pay any damages sustained by the first Defendant. In light of these doubts, I move on to consider the balance of convenience.

Balance of convenience

42. As was made clear in *Cyanamid*, the balance of convenience is a protean phrase and the list of matters the court may take into consideration is not closed. Later cases have opined on whether that phrase accurately describes the exercise that the court is involved in. For example, the Plaintiff cites the case of **Cayne v Global Natural Resource plc** [1984] 1 All ER 225, where May LJ said (at 237):

“...the balance that one is seeking to make is more fundamental, more weighty, than mere ‘convenience’. I think it is quite clear...that, although the phrase may well be substantially less elegant, the ‘balance of risk of doing an injustice’ better describes the process involved.”

In **National Bank of Jamaica Ltd. v. Olint** (*supra*), the Privy Council simply described it as the court having to engage in determining which course “*seems likely to cause the least irremediable prejudice to one party or the other*”.

43. As explained above, and as set out in the Mortimer affidavit, the Plaintiffs stand to suffer not only economic losses, but the loss of business reputation and goodwill. Additionally, as said in the affidavit, if the Parma Lease is imperiled, it could have cascading deleterious effects on the operations of the entire Patmor Group, affecting over 100 employees. The Defendants blandly refer to “*irreparable damages both pecuniary and economic*” that they would suffer, but never provided any evidence of this. I am completely satisfied that the course most likely to cause the least irremediable prejudice to one party or the other is to favour the grant of injunction sought by the Plaintiffs pending trial or determination of the issues. In any event, it appears that the Defendants have conducted themselves appropriately by agreeing to hold the ring and not evict the Plaintiffs during the currency of the proceedings, and therefore the grant of this remedy may only have formal consequences.

Quia timet relief

44. Although I have resolved this claim on traditional **American Cyanamid** grounds, I am equally of the view that the Plaintiffs would have been entitled to *quia timet* relief, or which is now referred to in the jurisprudence as a precautionary injunction. In other words, at the time of the claim, the Defendants had indicated that they would not renew or extend the lease and there was the spectre that the Plaintiffs would be imminently evicted from that space, but the Defendants had not taken any steps to actuate the latter threat. In such cases, the claimant is not required to show an actual breach of any rights, but only that there is a strong probability that, unless restrained by an injunction, the Defendants would act in breach of the Plaintiffs' rights and if they so acted, the harm would be grave and irreparable (see **Vastint Leeds BV v Persons Unknown** [2018] EWHC 2456 (Ch), where Smith J. comprehensively set out the principles governing the grant of *quia timet* injunctions).

Request for discovery of Transfer Agreement

45. No detailed submissions were addressed to the discovery request, and there seems to have been some confusion over whether the Transfer Agreement ("TA") and the Head Lease were one and the same document. In the Milo Butler affidavit filed 28 November 2019, the Defendants exhibited a document described as the "**Transfer Agreement**" dated 1 April 2007, as well as two amendments to it, the first dated 20 March 2009, and the second undated except for the year (2018). By the affidavit of Sharmon Ingraham filed 16 March 2020, the Defendants exhibited an Indenture dated 1 April 2007, which they described as the "**Head Lease**" between the Authority as the Landlord and NAD, and an amendment to that document dated 28 December 2018.

46. It was suggested (see fn. 37 of the Plaintiffs' skeleton on the injunction and discovery application) that the Head Lease and the TA might be one and the same document, although this was contained in skeleton submissions lodged *prior* to the disclosure of the TA in the Milo Butler affidavit. What is less explicable, are the averments in the defence of the first Defendant, at para. 11, where it is stated:

"The First Defendant avers that even if the Head Lease is not the transfer agreement contemplated by Regulation 2 of the Airport Authority (Fee and Charges) Act 2009 (the "Fees Act"), which is neither admitted nor denied, the granting of the Head Lease was entirely within the scope of the powers of the First Defendant.

47. This pleading is curious, as it was filed subsequent to the Butler affidavit in which the separate identity of these documents had already been established. For example, at para. 20, specific reference was made to clause 10.3 of the Transfer Agreement, and it was represented at para. 22 that "...the Transfer Agreement gives effect to and supplements the lease agreement between the Authority and NAD".

48. Furthermore, in skeleton submissions filed 18 November 2019, the Defendants clearly appreciated that the TA served a separate legal purpose than the Head Lease, as evidenced by the following submission:

“In fulfilment of the powers vested in it, the Authority lawfully assigned to NAD its functions and powers by virtue of the Transfer Agreement dated 1 April 2007 (the “Transfer Agreement”). As already stated, the AA Act provided the Authority with the necessary power to transfer its function and certain powers to carry out the said functions to an independent contractor – NAD. The Transfer Agreement refers to section 6 of the AA Act in its Recitals; the foundation on which the Transfer Agreement is made.”

49. On the Court’s reading, the document disclosed in the Butler affidavit was the TA referred to in the *Airport Authority (Fee and Charges) Regulations 2009*, dated the 1 April 2007, along with amendments. It was therefore disclosed, and thus the Court only deals with the application for discovery for completeness and out of deference to the parties’ submissions.

50. The Plaintiffs adverted to *Ord. 75, r.4 (3)*, which empowers the Court on the hearing of an application for summary judgment to order a body corporate Defendant, any director, manager, secretary or other similar officer thereof “*or any person purporting to act in such capacity to produce any document*”. They also referred to the well-known principle, which applies particularly in the context of judicial review or public law proceedings, that the policy of the law is to conduct litigation with “*cards face up on the table*”, and therefore the AA and NAD should make timely discovery of the documents (see, **Naylor v Preston Area Authority** [1987] 1 WLR 958).

51. The Defendants took a procedural objection to this request, which they categorised as an attempt to obtain pre-Case Management Disclosure, contrary to the procedure set out in *Ord. 24, r. 1(1)* of the RSC. That rule provides for discovery only after the close of pleadings, subject to and in accordance with the provisions of that Order. I should say at once that I find no merit in the procedural objection to discovery based on the rule providing for automatic discovery after close of pleadings. The case law is clear that there are many different bases on which discovery might be sought and ordered (see **Mitchell et. al. v Melidor et.al.** (SCCivApp No. 267 of 2015), although there is an onus on the claimant to identify the particular rule under which discovery is being sought. For example, an order for specific discovery can be made pursuant to *O. 24, r. 7 “at any time, on the application of any party to a cause or matter”*.

52. The Defendants contend that in any event, the TA is irrelevant to the claims made by the Plaintiffs, for reasons that will become more apparent later. In my judgment, the ability to seek production of corporate documents under *Ord. 75* does not remove the requirement for the general test for granting discovery, which is that the documents must be “*necessary for disposing fairly of the cause or matter or for saving costs*”. It is not enough for the applicants to show that the documents are relevant; he must show that the documents are necessary for one or more of the purposes specified: **Wallace Smith v Deloitte Haskens & Sells** [1997] 1 WLR 257.

53. As indicated, in my view the TA and the relevant amendments to it were disclosed. Had it been necessary for me to decide this matter, I would not have ordered the documents disclosed on the basis of the Plaintiffs' application, as it has not been shown that they are necessary for the fair disposal of the matter or to save costs, or even relevant. This is not to say that the documents may not have been liable to being disclosed on other grounds (for example, the TA was referred to in the Defence and affidavits of the Defendants, and would have been discoverable as a document referred to in pleadings). But this is now all academic. In the result, I am constrained to dismiss the summons for discovery of the TA.

(ii) *The Affidavit evidence and strike-out applications*

54. As mentioned, there were several applications by the parties to strike out affidavits under the various grounds available under *Ord. 41, rr. 5 and 6*, namely as containing facts that the deponent is unable to speak to of his own knowledge, containing opinions or submissions, or being scandalous, irrelevant and oppressive. They were as follows:

- (i) Plaintiffs' summons filed 15 October 2019 to strike out and/or have certain paragraphs struck out of the Nia Rolle affidavit filed 10 October 2019 (paras. 7, 8, 9, 10, 11, 12, 13, 41 and 45) on the grounds that counsel was not competent to swear an affidavit on behalf of NAD, and that certain paragraphs contain legal submission or opinions, or information with no identified sources;
- (ii) Plaintiffs' summons to strike out the affidavit of Sharmon Y. Ingraham filed 19 November 2019 exhibiting the unsworn affidavit of Milo Butler and affidavit filed 16 March 2020 exhibiting the Head Lease and Amendment, on grounds that counsel was not competent to swear an affidavit on behalf of the Authority;
- (iii) Plaintiffs' summons filed 4 December 2019 to strike out the affidavit of Milo Butler III, or paragraphs of it (12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30) as deploying legal arguments and opinion evidence;
- (iv) Defendants' summons filed 7 September 2020 to strike out paragraphs of the Mortimer affidavit on the grounds of various breaches of *Ord. 41* (paras. 6, 7, 9, 13, 14, 17, 18, 19, 21-28, 29, 32), including on the grounds of containing legal submissions.

55. I am not of the opinion, for reasons that will be stated shortly, that it is necessary to embark on a pedantic and minute examination of the contents of the individual affidavits, nor conduct a protracted discussion of the legal principles and authorities, to dispose of these applications. Neither is it necessary to deal with the applications separately. Suffice it to say that several of the affidavits on both sides fall foul of various Rules and legal principles.

Parties' submissions and alleged deficiencies in affidavits

56. I take first the Nia Rolle affidavit, which the Plaintiffs object to principally on the grounds that it is said not to comply with the requirements of *Ord. 41, r. 5(1)* and (2), namely, that its contents are not admissible evidence and that it is an abuse of process, having been sworn by counsel from the same Firm serving as counsel-and-attorneys at law for the Defendants. In this regard, it is useful for the Court to remind itself of the core relevant contents of *Ord. 41* as follows:

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

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

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

57. The main complaint is that the Rolle affidavit is sworn by counsel and attorney of the Firm based on instructions and second-hand information, and not by an officer of the Company. For example, the contents of the affidavit throughout is said to be based on: “...documents in the possession of [NAD]”, “...instructions received from representatives of [NAD]”; “...documents maintained in the files in my said firm for this matter...”; and “...from information which has come to my knowledge as an Attorney within the firm of attorneys acting on behalf of [NAD]. Further, there are averments repeated in paras. 27, 34, 36, 37, 41, 43, and 48 of the affidavit, along the lines of “I am instructed” or “I am further instructed”, which are said to violate the prohibition against “in-house witnessing” of evidence, a practice which has been deprecated in many cases.

58. The arguments in respect of the Rolle affidavit as to counsel swearing the affidavit may also be extended in principle to the Ingraham affidavits. But it is to be noted that the affidavit exhibiting the unsworn affidavit of Milo Butler was superseded by the sworn and filed Milo Butler affidavit (so that challenge is rendered academic), and the purpose of the second affidavit was mainly to exhibit documents.

59. As to the Butler and Mortimer affidavits, the main flaws were said to be that they deployed legal submissions and contained opinions. Take the following examples from the impugned paragraphs by both parties:

Butler affidavit

“18. The AA Act and its amendments (as explained above at paragraphs 13-16) being an Act of Parliament provide the Authority with the legislative authority to assign its functions and power to exercise such functions to NAD. As such, the Authority did lawfully assign to NAD the Functions and powers to exercise the Functions when it executed the Transfer Agreement with NAD.

[...]

23. I verily believe that NAD does not lack the capacity to legitimately take any action against the Second Plaintiff insofar as it relates to the Parma Lease. By virtue of the Transfer Agreement, NAD has the capacity and authorization to carry out the Functions of the Authority which have direct relation to lease spaces. Moreover, the Transfer Agreement gives effect to and supplements the lease agreement between the Authority and NAD. I am advised and verily believe it to be true that the First Plaintiff and the Second Plaintiff, as under-lessees, as the term is used in the Conveyancing and Law of Property Act, Chapter 138, Revised Statute Law of the Commonwealth of The Bahamas (the “CLPA”), are not entitled to enquire behind the apparent authority of NAD as landlord under the Head Lease. NAD is also responsible for ensuring that the airport is profitable and operates a first class competitive facility.”

Mortimer Affidavit

“22. I say, and verily believe that, absent just cause relating to the Plaintiffs’ failure to comply with terms of the Lease and/or the Deed, renewal or extension of the Lease is not discretionary, given the consideration and admissions of the Plaintiff’s compliance with their obligations thereunder.

[...]

24. Because NAD’s attorneys denied a request from the Plaintiffs’ attorneys in a letter to them of 30th May 2019 (exhibited hereto marked “PM2”) for a copy of a certain Transfer Agreement between the Authority and NAD dated 1st April 2007 and any amendments thereof from time to time before or after the Regulations made pursuant to section 25 of the Act, and of any instrument pursuant to which the Authority lawfully assigned to NAD any and all of the Authority’s functions and powers then until the terms of the Agreement are analysed as to its imports and legal effects, I verily and reasonably believe because of the legal advice I have obtained, that NAD is not now nor may have been at the relevant time lawful assignee of the functions and powers with which the Authority is statutorily vested.”

60. Counsel for the Plaintiffs cited a number of cases criticizing the “self-witnessing” practice, in particular **Casimir v Shillingford and Pinard** [1966-1967] 10 WIR 269, **Murray v Jacobs** [1966-1967] 10 WIR 490, and **Belgravia v CIBC Trust Company (Bahamas) Limited** (2005/CLE/gen/No.0785, unrept.). It is not necessary to consider all of the authorities.

61. In **Murray v Jacobs**, Lewis CJ explained the earlier decision of the West Indian Court of Appeal in **Casimir** denouncing the practice of attorneys swearing affidavits for use in proceedings in which the attorney also appear as counsel, noting:

“The Court has intimated that this unfortunate practice which has grown up, of members of the Bar swearing affidavits as to facts in causes before the court, and then appearing as counsel in the same cause, is one that should be stopped. The reason is, that where the acceptability or otherwise of an affidavit is a matter which the court has to determine, it is not proper, and is embarrassing to the court, that it should be placed in a position of having to decide whether an affidavit sworn by counsel who appears before the court is or is not acceptable. Counsel by swearing an affidavit as to facts material to a cause makes himself a witness in the cause and ought not at the same time to appear as counsel.”

62. In **Belgravia**, Adderley J. said on the point:

“In the absence of authority, it seems to me that unless there is a demonstrated firewall between attorneys in a firm it must be a bad practice for any attorney in the firm to swear affidavits containing material facts on behalf of a client who, as in this case, where the client has officers available to swear such affidavits. Such practice flies in the face of the Practice Directions No. 1 issued by Gonsalves-Sabola CJ dated 20 March 1995 and various authorities dealing with the undesirability of such a practice on the principle that an attorney should not be both counsel and witness in the same case because of the embarrassment it might cause the court. It seems to be that depending on the circumstances, the sanction should be that the offending affidavit not be admitted, that there be a requirement that it be re-sworn by the proper person, and that the costs thrown away occasioned by the re-swearing be borne by the attorney. I have not taken that action in this case but counsel should take note.”

63. In response to the criticisms made to the contents of their affidavits, the Defendants pray in aid *Ord. 45(2)*, which permits the use of “*statements of information and belief*” in affidavits used in interlocutory proceedings, provided the source or grounds are stated. They also cite the local case of **McMillen Trust (Trustee of) Rawat** [1991] BHS J. No. 42, where Hall J. (as he then was) endorsing the judgment of Peter Gibson J. in **Savings Investment Ltd. v Gasco Investments (Netherlands) BV and others** [1984] 1 All ER 296, summarized the principles as follows, highlighting the wide discretion of the Court to deal with material in affidavits which offended the Rules:

- “(a) An affidavit must comply with ordinary laws of evidence; accordingly, it may exceptionally contain hearsay evidence only when the “sources and grounds” are disclosed.
- (b) An affidavit must not contain matter which is scandalous and/or irrelevant and/or oppressive. “Irrelevant” material includes opinions, conclusions and submissions.
- (c) Where an affidavit which is filed contains any matter which it ought not to contain, the court need only ignore the offending matter unless the breach is egregious.
- (d) Where an objection is taken by a party to material contained in an affidavit filed by another Party, the court may instead of proceeding as at (c), order the offending material to be struck out, but should only do so in “plain and obvious” cases. If, the matter objected to is inconsequential the court would still proceed as at (c).”

64. With respect to counsel swearing affidavits, or the so-called self-witnessing rule, counsel for the Defendants cited a number of authorities and contended that these show that the real mischief the rule is directed to is the commingling of duties as advocate and witness.

65. For example, Practice Direction 1 of 1995 states that while little objection can be taken to affidavits sworn by attorneys deposing to purely formal matters, “*an attorney who is acting as an advocate in a case therefore should desist from appearing as a witness in the said case.*” Reference was also made to *Halsbury’s Laws of England 4th Ed.*, Vol. 3 at [para. 527], where the learned editors state:

“There is no rule of law which prohibits a barrister from acting or continuing to act as counsel in a case in which he is or becomes a witness; but such a practice is in general undesirable and ought to be avoided if at all possible.”

66. Counsel also cited the Federal Canadian Court of Appeal case of **In CBS Canada Holdings Co. v Canada** [2017] F.C.J. No. 347, where the Court made a distinction between “counsel” from a Firm who swore an affidavit and the “advocate” who appeared in court (as being akin to solicitors and barristers) to reject a challenge to the affidavit sworn by counsel; and **The Queen v Mitchell, ex parte Widlyne Melidor** [2015] 2 BHS J. No. 87, where Bain J. refused to strike out affidavits filed by counsel who worked in the Firm of the applicant’s attorneys on the ground that the affidavits were only used for exhibiting correspondence between the parties’ lawyers.

67. Counsel for the Defendants summarized the relevant principles based on the authorities as follows:

“(i) at common law, there is no prohibition from an attorney who is the actual advocate in an action from also being a witness; (ii) the trepidation which arises from an attorney serving both roles arises from a conflict which may arise from a particular attorney having to actively advocate in an action; and (iii) at the most once an attorney in an action becomes a witness, there may be an election as to whether that particular attorney should fulfil the function of an advocate or the function of a witness.”

Court’s discussion and conclusions

68. Having set out the applicable rules and principles regarding the adducing and content of affidavit evidence, I now consider what should be the Court’s response to the alleged transgressions of the rules alleged by both sides, but mainly by the Plaintiffs. I advert first to the principle, stated above by Hall J. in **McMillen Trustee (trustee of) Rawat**, that the court has a very wide discretion in deciding how to treat evidence which may fall foul of the Rules. As stated, “...where an affidavit...contains any matter which it ought not to contain, the court only need ignore the offending matter unless the breach is egregious.”

69. I accept that several of the breaches are not trivial, but I am not of the view that they are so egregious such as to compel the Court to exercise its discretion to strike out any of the paragraphs or the affidavits. Further, as these were the main affidavits filed on behalf of the parties in the matter, in support of and in opposition to the claim for summary judgment and specific performance, I have come to the conclusion that it would be a disproportionate sanction to excise substantive parts of any of the affidavits. Were I to accede to the applications, it would leave the Court with very little by way of evidence on which to determine the claim for summary judgment, or the other applications for that matter. This would not be in keeping with the overriding objective of dealing with cases justly and at proportionate costs.

70. As to the practice of counsel swearing affidavits, I reiterate here what this Court said in **Re Finethic** (2020/COM/com/00038, unrept.). That case concerned a winding up petition in which the affidavit in support of the appointment of liquidators had been sworn by counsel from the Firm representing the petitioner. After a review of the authorities and principles, this Court stated as follows:

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

[121] The facility of having in-house counsel swear material affidavits might be regarded as a simple matter of convenience. To my mind, however, it is a lazy indulgence that should not be encouraged or tolerated having regard to the relative ease with which affidavits can be procured from the proper principals wherever situated in the world by the use of information technology [...].

[122] While Mr. Hanna might be right to point out that there is no rule of evidence or at common law precluding the adducing of evidence by counsel in the firm representing the party, or by the advocate himself, subject to the rule of election, there is very little in the law or practice to condone it. All of the cases and authorities speak with one voice in deprecating the practice and indicate that it is to be avoided at all costs. In my view, it amounts to something more than an undesirable or bad practice; it necessarily diminishes the probative value of the evidence before the court and always has the potential to embarrass and prejudice the proceedings.”

71. Notwithstanding this, in the exercise of my discretion, I would not rule any of the affidavits inadmissible or require them to be re-sworn. It should be made plain that my conclusion in this regard is not intended in any way, shape or form to detract from the judicial statements that the practice of self-witnessing is to be studiously avoided, except for those categories of formalistic affidavits which might properly be sworn by counsel from the Firm representing one or other of the parties. But I have come to this conclusion for several reasons.

72. Firstly, the dicta in the cases regarding counsel swearing affidavits is directed mainly to the mischief of comingling duties as witness and advocates, although as indicated in the above passage this is not the only vice. Thus, although the affiants were from the same firm as counsel appearing in the matter, they did not appear as advocates in the matter. Secondly, although the Plaintiffs are right to point out the impropriety of counsel swearing material on behalf of a company, as opposed to such affidavits being sworn by the company’s officers, in my view it

would not be a proportionate response in the context of these applications, where summary relief is being sought, to refuse to allow the affidavits to be admitted and require them to be re-sworn.

(iii) Conflict of Interest in Representation

73. As indicated, the Plaintiffs, by Notice filed 4 December 2019, sought an order that the firm of Higgs & Johnson be removed from the record as counsel and attorneys acting contemporaneously for both the first and second Defendants on the grounds that: (i) it creates a conflict of interest between the first and second Defendants in respect of their legal and contractual relations vis-à-vis the LPIA; and (ii) that the dual representation of the Defendants does not admit of objective presentation of the issues, and is therefore subversive of the fair and impartial administration of justice.

Plaintiffs' submissions

74. Mr. Glinton argues that a conflict of interest and duty arises from the Firm's simultaneous representation of NAD and the Authority together, *"given that the causes of action and relief, respecting them, are distinctly different and incompatible"*. As put in the written submissions:

"1.13 The duty of the attorneys of the Firm to advise NAD and the Authority and their right to be (sic) receive advice regarding legal representation by the Firm, which inherently presents conflicts, are strict and not open to mitigation in the circumstances, particularly if acting as advocates. From material put before the Court in Nia Rolle's affidavit sworn on NAD's behalf, and counsel formally indicating to the Court that the Firm represents the Authority in opposing the Plaintiff's applications, it was apparent by the causes of action and the relief sought that the respective clients required that the attorneys take two different and mutually inconsistent, courses of action, and an inherent conflict.

[...]

1.16 By having mutually compatible defences, it virtually guarantees that NAD's and the Authority's will either both succeed or fail together in the circumstances that the Court is here presented with by them being simultaneously represented by the same counsel and attorneys, yet having distinct legal rights and interests which are conspicuously and inherently incompatible so as to warrant independent representation."

75. As far as can be ascertained, the conflict of interest is said to arise from the statutory and commercial relationship between NAD and the Authority, which the Plaintiff says amounts to a legal contradiction. According to the Plaintiffs, this arises because the property (LPIA) to which the commercial spaces in question are situated and the appurtenant landlord rights, privileges and functions all constitute a "public undertaking", which by s. 29(1) of the Act vests in the Authority (the second Defendant). Therefore, NAD's claims of landlord status and rights vis-à-vis the spaces comprising LPIA creates a conflict between the Defendants.

76. Section 29 of the Act provides:

“29(1). All immovable and movable property and undertakings owned by the Government and used by it for the operation of the airport, immediately before the date of the coming into operation of this Act (excluding air traffic control installations and equipment) shall by virtue of this Act be transferred to and vested in the Authority for the same purpose as they were held by the Government immediately before the date of the coming into of this Act.

(2) The transfer and vesting referred to in subsection (1) shall extend to the whole of such movable and immovable property and undertakings and shall include assets, powers, rights, and privileges and all things necessary or ancillary which are held or enjoyed in connection therewith or appertaining to the immovable and movable property and undertakings as well as all obligations affecting or relating to the movable and immovable property or undertakings.”

77. The evidence which the Plaintiff says illustrates this conflict appears from paras. 15, 16 and 17 of the Nia Rolle affidavit filed 10 October 2019 (which, as discussed, was one of the affidavits whose admissibility was challenged):

- “15. NAD was established as a private entity for the express purpose of developing, managing and operating the LPIA.
- 16. The functions of operating what was previously the Nassau International Airport were [...] prior to the establishment of NAD, vested in the Second Defendant, the Airport Authority [...] which was established pursuant to section 3 of the Airport Authority Act 2000.
- 17. Pursuant to a head lease made between the AA and NAD dated April 1, 2007, the AA leased LPIA to NAD so that NAD could carry out its said functions. One of the functions vested in NAD was the leasing of space within the LPIA including the spaces which are the subject of the instant action” (underlining supplied by Plaintiff).

78. The Plaintiff contends further that the purported leasing of LPIA to NAD to carry out functions vested in the AA (without statutory authority for that purpose) is *ultra vires* several provisions of the Act, including sections 6(2), 7(1), 7(2)(c), and para. 1(1) of the Second Schedule. In this regard, it is necessary to mention several of these provisions.

79. Firstly, s. 6 (1) grants to the Authority, *inter alia*, the following functions: “(a) *to manage, maintain and operate the airport*”; and “(b) *to operate or cause the airport to be operated as a commercially viable entity*”. Section (6)(2) provides that, notwithstanding s. 8, the Authority may, “*with approval of the Minister, engage an independent contractor to perform any or all of the functions granted to the Authority....*”. Section 7(1) grants powers requisite or incidental to the Authority for the performance of its functions, and s. 7(2) list those functions which include: “(c) *power to grant leases, or other interest or concessions in respect of land or buildings within the airport and its environs on such terms and conditions subject to payment of rent or other considerations as the Authority may think fit.*”

80. Mr. Ginton also referred to *The Code of Professional Conduct of The Bar Association* (Rule V of *The Bar Practice Regulations*) which provides guidance on the conflict of interest rule as follows:

“While it is not desirable that an attorney represent more than one client in any matter, the Bar recognizes that the choice should be that of the parties after due disclosure by the attorney to the client. Therefore, save after adequate disclosure in writing to and with the consent of the client or the prospective client concerned, the attorney must not advise or represent more than one interest in a matter nor shall he act or continue to act in a matter where there is or is likely to be a conflicting interest. A conflicting interest is one which would be likely to affect adversely the judgment of the attorney on behalf of or his loyalty to a client or prospective client or which the attorney might be prompted to prefer the interest of a client or prospective client.”

81. Mr. Ginton further cited **Clark Boyce v Mouat** [1994] 1 AC 428, where the Privy Council laid down the principle of “informed consent” in conflict situations—i.e., consent given with the knowledge that he (the attorney) may be “*disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice which conflicts with the interest of the other.*”

82. However, he underscored that the principle of informed consent may not avail in certain circumstances, where it may be professionally improper to act for more than one party even with informed consent, referring to **Mahoney v Purnell** [1996] 3 All ER 61, where May J said (p. 94):

“A solicitor who realises that a proposed transaction is potentially disadvantageous to one of his clients is, in my judgment, obliged to give more than the muted advice which Mr. Howe gave in this case, the more so when the client is potentially at a disadvantage. The possibility that giving such advice might be seen as a breach of his duty to Mr. Purnell (the other client) emphasised the perils that a solicitor acting for more than one party can encounter.”

83. In the circumstances, Mr. Ginton argues that NAD’s asserted ownership status and rights vis-à-vis the LPIA public undertaking and the terms of the Head Lease create a conflict of interests which requires independent representation of the Defendants.

Defendants’ submissions

84. The Defendants make several arguments in opposition to the complaint by the Plaintiff that there is a conflict of interest and the claim to have the Firm removed or counsel restrained. Firstly, they contend that the Plaintiffs lack *locus standi* to initiate the claim for restraint of counsel, as they are neither existing nor former clients of the Firm representing the Defendants, and there is therefore no fiduciary relationship between the Plaintiffs and the Firm to be breached. Secondly, it is said that on the proper application of the conflict of interest principles to the facts of the case, there is no violation and no reason to suppose that there is not informed consent, to the extent that there is any conflict.

85. As to the first point, the Defendants refer to and distinguish the case of **Deloitte v Touche A.G. v Johnson** [1999] 1 WLR, which was cited by the Plaintiffs. There, a Plaintiff who was neither a creditor nor a contributory sought to have the liquidators removed pursuant to a statutory provision which provided for the removal of the liquidators for, among other things, conflict of interest. The Privy Council determined that while the statute did not limit the category of persons who could make the application, the issue could not be determined separately from the legitimate interest with regard to the nature of the relief for which the application had been made. In other words, insofar as the application related to the duty associated with conflict of interest, the rule was limited to the party to whom the fiduciary duty was owed, not to an uninvolved third party. Arguing by analogy, the Defendants contend that so far as the current application is concerned, the Plaintiffs have no legitimate interest or standing to make the application.

86. Counsel contended, with reference to the local cases of **Smith v Dean** [2008] 3 BHS J No. 31 and **Leo International Holdings Ltd. et. al. v Sterling Assets Management** [2016] 2 BHS J. No. 136, that the “confidential information situation” did not apply to the facts of this case. In **Smith v Dean**, Adderley J. held (applying **Bolkiah (Prince Jefri) v KPMG** [1999] 2 AC 222) that in order to avoid prejudice to the administration of justice, the court’s inherent jurisdiction over its attorneys would be invoked to prohibit counsel who had acted for both parties in the original agreement for sale from acting for one party in the litigation arising from the transaction. In other words, again this case involved an existing client and a former client, and was distinguishable.

87. Then, in **Leo International Holdings Ltd.**, the Court refused an application by the Plaintiffs in an action to restrain a Firm from acting on behalf of the Defendant or any Defendant in the matter on the grounds that the firm had previously advised the Plaintiffs on certain legal issues relating to a property transaction. This was because the only duty which survived between the Plaintiff and the Firm was that of confidentiality, and the court was not satisfied that the Plaintiff had made out a case that the Firm was in possession of any confidential information.

88. In relation to the line of cases not involving confidential information, counsel contended that the Court should not too readily accede to an application to remove a party’s counsel (relying on para. 43 of **Geveran Trading Co. Ltd. v Skjevesland** [2003] 1 ALL ER 1) and must take into account the party’s choice to be represented by counsel in question (a point also made in Rule IV of the Bar Council Regulations).

89. Further, it was submitted that the Court should not intervene based on “generalized allegations of conflict of interest”, when the Plaintiffs have not in fact adduced any evidence to show that there is a conflict of interest. Reference was made to **Re A Firm of Solicitors** [1997] Ch. 1, where Lightman J. said:

“...there is the interest in the freedom of the solicitor to obtain instructions from any member of the public, and of all members of the public to instruct such solicitor, in all cases where there is no real need for constraint; there must be good and sufficient reasons to deprive the client of the solicitor or the solicitors of his choice.”

90. In this regard, it is contended that counsel for the Plaintiffs have not highlighted any specific facts that would lead the court to intervene based on exceptional circumstances or any conflict that would create specific prejudice, and that when pressed in argument to provide specifics, the response of the Plaintiffs' counsel was that the "*facts speak for themselves*". As put by the Defendants in their written arguments:

"15. Pursuant to the power given to the Airport Authority by virtue of s. 6 of the AA Act, the Airport Authority simply engaged an independent contractor to carry out the management of the airport. NAD is merely holding a tenement interest in the subject property pursuant to the Transfer Agreement. NAD does not purport to be the owner of the subject property; NAD is purely carrying out the functions it is allowed under the AA Act.

16. Therefore, the allegation that there is a conflict of interest between Higgs & Johnson acting for the First and Second Defendant is simply not true. Further, the Plaintiffs have not produced any evidence to show that a conflict of interest has arisen in the current circumstances; or that any '...exceptional circumstances exist in this case where there can be valid concerns as to public confidence in the administration of justice'. General allegations should simply not be entertained."

The Legal Principles

91. The principles governing conflict of interest in legal representation and restraint of counsel in such cases are primarily concerned with the need to protect confidential information acquired by virtue of the lawyer-client relationship: see the leading case of **Bolkiah (Prince Jefri) v KPMG (A Firm)** [1999] 2 AC 222 ("**Bolkiah**"). In that case, the House of Lords granted an injunction to prevent a firm of accountants which had provided litigation services to a former client and in consequences obtained confidential information, from undertaking work for another client with an adverse interest.

92. In **Bolkiah**, Lord Millett explained the difference between the nature of the duty owed by solicitors to existing clients and that to former clients as follows [at pg. 235C, 234H]:

"Where the court's intervention is sought by a former client...the court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter, the solicitor has no obligation to defend and advance the interest of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence. [...]

It is otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation."

93. In **Clark Boyce v Mouat**, Lord Jauncey, considering the contours of a conflict of interest situation, cited with approval Richardson J in **Farrington v Rowe McBride & Partners** [1985] 1 NZLR 83, 90 as follows:

“A solicitor’s loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interest are in opposition to those of another client. If there is a conflict in his responsibilities to one or both he must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting.... And there will be some circumstances in which it is impossible, notwithstanding such disclosure, for any solicitor to act fairly and adequately for both.”

94. However, it is clear that the Court’s jurisdiction to prevent an advocate from acting in a particular matter is wider than the need to protect confidential information, and may arise in wider conflict of interest circumstances. The law in this regard was set out by the UK Court of Appeal in **Geveran Trading Co. Ltd. v Skjevesland** (*supra*), where Arden LJ, writing for the Court said [paras. 41-42]:

“41. We, therefore, reject the submission...that the only circumstances in which the court can act to prevent an advocate from acting is where he has confidential information. The case law demonstrates that in exceptional circumstances an advocate can be prevented from acting even where he does not have such information.

42. Where a party objects to an advocate representing his opponent, that party has no right to prevent the advocate from acting based on the Code of Conduct as the content and enforcement of the Code are not a matter for the court. However, the court is concerned with the duty of the advocate to the court and the integrity of the proceedings before it. The court has an inherent power to prevent abuse of its procedure and accordingly has the power to restrain an advocate from representing a party if it is satisfied that there is a real risk of his continued participation leading to a situation where the order made at trial would have to be set aside on appeal. The judge has to consider the facts of the particular case with care (see the words of Lord Steyn in the *Man O’War Station* case cited at [32] above). However, it is not necessarily for a party objecting to an advocate to show that unfairness will actually result. ...In many cases it will be sufficient that there is a reasonable apprehension that this is the case because as Lord Hewart CJ memorably said in *R v Sussex JJ, ex p McCarthy* [1924] 1 KB 256...it is important that justice should not only be done but be seen to be done. Accordingly, if the judge considers that the basis of objection is such as to lead to any order of the trial being set aside on an appeal, as in *R v Smith* (Winston), he should accede to an order restraining an advocate from acting. But we stress that the judge must consider all of the circumstances carefully. ...

43. A judge should not too readily accede to an application by a party to remove the advocate for the other party. It is obvious that such an objection can be used for purely tactical reasons and will inevitably cause inconvenience and delay in the proceedings. The court must take into account that the other party has chosen to be represented by counsel in question.”

95. In **Geveran**, counsel identified four risk situations, which were endorsed by the Court, that could arise either before or during the hearing that would possibly justify the intervention of the Court: (i) a use of confidential information; (ii) professional embarrassment of counsel; (iii) infringement of the convention right to equality of arms; and (iv) concerns as to public confidence in the administration of justice.

96. Where an application is made for an injunction to restrain an advocate or firm from acting for a party, the court is in effect being asked to grant a *quia timet* injunction, although the test is slightly different from that in the normal *quia timet* injunctions (see above). But what it requires the court to do is to make an assessment of the likelihood of conflict, and balance the disadvantages which might arise as a result of the grant of refusal of the injunction. As in all cases concerning conflicts of interest, whether dealing with the use of confidential information or, as in this case, what is often called the double employment rule, this is eminently an evidential issue, and the cases are fact-sensitive.

97. In **Boulting v Association of Cinematograph, Television and Allied Technicians** [1963] 2 Q.B. 606 at 638, it was said by the Court of Appeal that the conflict rule (albeit in the context of an apprehended conflict between a company director to his company and union obligations):

“Must be applied realistically to a state of affairs which discloses a real conflict of duty and interest and not some theoretical or rhetorical conflict.”

Court’s discussion and conclusion

98. As mentioned, the conflict of interest relied on does not relate to the disclosure of any confidential information. It must therefore come within the Court’s inherent jurisdiction over its officers to protect the administration of justice, which was identified as the fourth category of risk in **Geveran**. It was also argued that counsel for the Defendants may be professionally embarrassed if they had to embark on cross-examination of the representatives of the Defendants, because of their alleged adverse interests.

99. Although the Plaintiffs have advanced very comprehensive written and oral submissions on the issue of conflict of interest, for the reasons given below (among others), I am not satisfied that there has been demonstrated to the Court a real or serious risk of a conflict of interest that would attract the intervention of the Court to protect fairness or the integrity of the judicial process.

100. Firstly, it is to be observed that the complaint and application for restraint of counsel is being made by the Plaintiffs, who are neither former nor current clients of the Firm representing the Defendants, and the Defendants were right to raise the issue of standing. In this regard, and as indicated by the Privy Council in **Deloitte & Touche AG v Johnson**, in interrogating the question of whether a sufficient conflict exists that would attract the intervention of the Court, regard must be had to nature of the claim or action.

101. The crux of the conflict of interest claim, as far as can be ascertained by the Court, is that there is an inherent conflict between NAD and the Authority by virtue of NAD's claim (said to be mistaken) to being the landlord of the leased spaces. This result is said to have come about owing to the *ultra vires* transfer of the Authority's functions in relation to the LPIA, which necessarily means the estate remains legally vested in the Authority. (I will come to consider the Transfer Agreement in a little more detail in the summary judgment section.) A few observations may be made with respect to the nature of the action, however.

102. Firstly, the Plaintiffs' (or more properly the first and second Plaintiffs') claim is based on the apprehended or actual breach of a lease (the Parma lease) and the 2017 Deed by NAD, in respect of which they seek summary judgment and specific performance. There is no commercial relationship between the Plaintiffs and the Authority (the second Defendant), nor has it been alleged that there is any contractual or statutory duty owed to the Plaintiffs by the Authority that has been breached. It is also possible, having regard to the landlord-tenant and commercial relationship between the Authority and NAD, that there could arise contentious issues between them that would require separate representation. But none arises in the instant case.

103. In any event, for reasons expounded on later in this Judgment, it is legally impermissible for the Plaintiffs to attempt to set up the argument that the Defendants are conflicted with respect to their status as landlord of the airport spaces owing to an unlawful or ineffectual transfer of statutory functions. This is because they have accepted the landlord-tenant relationship between them and NAD. It is not permissible for the Plaintiffs to set up a straw man conflict of interest scenario and then seek the disqualification of counsel on that basis. In fact, it is to be noted that the Defendants have reserved the right to make application to have the second Defendant struck from the action as an unnecessary party. No application was filed for that purpose, but there is obviously some merit in that position. If there is no properly constituted cause of action against the second Defendant, then the conflict of interest argument falls by the wayside.

104. Secondly, even in those cases where there is the risk of disclosure of confidential information, it has been held that the risk must be "*a real one, and not merely fanciful or theoretical*" (per Lord Millett in **Bolkiah**, pa. 237F). The cases in which the court would restrain counsel from acting as advocate where there is no issue of breach of confidentiality were said to be "*very exceptional*". Examples of situations given in **Geveran** involved improper relationships between counsel (or those giving the appearance of impropriety), such as the following: (i) where a pupil barrister met the accused and discussed his case and then sat behind the prosecutor (**R v Smith (Winston)** (1975) 61 Cr. App. R.128; or (ii) where the solicitor for the local authority in care proceedings cohabited with the solicitor for the family (**Re L (children) (care proceedings: cohabiting solicitors)** [2001] 1 W.L.R. 100).

105. The Court is entitled, especially in situations where there is no risk of disclosure of confidential information adverse to the complaining party, to carefully scrutinize the application. As discussed by the cases, the Court will intervene in *exceptional* cases even where there is no risk of a breach of confidentiality, where it is required in the interest of justice or to protect the

appearance of justice. However, as observed in **Boulting**, this should be based on a real conflict of interest and duties, not a theoretical one or one based on hypotheticals.

106. In the circumstances of this case, I see no basis for restraining the Firm of Higgs & Johnson from representing the Defendants, nor for restraining counsel in this regard. I would dismiss this summons.

(iv) The Summary Judgment Application

107. By summons filed 15 October 2019, the Plaintiffs also applied for summary judgment in the action against the Defendants in, or substantially in, the terms of the draft minute of the Judgment attached to the summons. These were substantially in the form of the relief sought in the Statement of Claim. The Summons was made pursuant to RSC Order 75, which provides in material part as follows:

- “1. (1) in any action begun by writ indorsed with a claim—
 (a) for a specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any real property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages; or
 (b) for rescission of such an agreement; or
 (c) for the forfeiture or return on any deposit made under such an agreement,
the Plaintiff may, on the ground that the Defendant has no defence to the action apply to the Court for judgment.
(2) An application may be made against a Defendant whether or not he has entered an appearance to the action.
2. (1) An application under rule 1 must be made by summons supported by an affidavit made by some person who can swear positively to the facts verifying the cause of action and stating that in his belief there is no defence to the action.
(2) The summons must set out or have attached thereto minutes of the judgment sought by the Plaintiff.
(3) The summons, a copy of the affidavit in support and of any exhibit referred to therein must be served on the Defendant not less than 4 clear days before the return day.
3. Unless on the hearing of an application under rule 1 either the Court dismisses the application or the Defendant satisfies the Court that there is an issue or question in dispute which ought to be tried, or that there ought for some other reason be a trial of the action, the Court may give judgment for the Plaintiff in the action. “

108. The Application was supported by the Affidavit of Patricia Mortimer, filed 15 October 2019, asserting that there was no defence to the Action.

109. The Plaintiff refers to the explanatory notes to *Ord. 14*, which are equally applicable to applications under *Ord. 75* [*Ord. 86* of the old UK RSC], where it is said (Note 14/3-4/1):

“The machinery of [O. 75] works on the basis that if the Plaintiff’s application is properly constituted, he is *prima facie* entitled to judgment unless the Defendant shows cause to the contrary or the application is dismissed.”

110. The Plaintiffs submit that the dispute underlying their cause of action raise questions primarily of law requiring the construction of the relevant statutory and/or contractual provisions, which are primarily questions of law and appropriate for declaratory relief. Further, that there are no factual disputes and refusing relief will cause injustice. The Plaintiffs cite the remarks of Sir Robert Goff L.J. in **European Asian Bank A.G. v Punjab & Sind Bank** (No.2) [1983] 1 WLR 642, (653-654) explaining the summary jurisdiction as follows:

“...at least since *Cow v Casey* [1949] 1 KB 474, this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under R.S.C., Ord. 14, even if the question of law is at first blush of some complexity and therefore takes “a little longer to understand”. It may offend against the whole purpose of Order 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal; see *Verrall v Great Yarmouth Borough Council* [1981] QB 202, 215, 218, per Lord Denning M.R. and Roskill L.J. The policy of Order 14 is to prevent delay in cases where there is no defence; and this policy is, if anything, reinforced in a case as the present concerned as it is with a claim by a negotiating bank under a letter of credit.”

111. Further, in **BNP Paribas Trust Corporation UK Ltd. v Uro Property Holdings, S.A.** [202] EWHC 3251 (Comm,) the court noted that issues of contractual construction can sometimes be decided on summary judgment if it is clear that no material evidence could be given at trial that would affect the outcome.

112. The Defendants resist the summary judgment application, which they argue is ill conceived as the first Defendant has a defence to the action and the matter ought to be tried. In this regard they point out that the first and third Plaintiffs have no cause of action against NAD and therefore cannot apply for summary judgment or for specific performance against NAD. (I pause here to observe that, the fact that there is said to be no cause of action disclosed by two of the Plaintiffs is not exactly a factor militating against summary judgment. If it is accepted that there is no defence to the claim asserted by the second Plaintiff, it means there is nothing else to be tried, and assists the claim for summary judgment.)

113. The Defendants lodged their submissions on the summary judgment application before the Plaintiffs had filed a statement of claim and the Defendants had likewise replied by defence, although these steps were later taken. But they referred to **Key v Maltarp** [1995] BHS J. No. 28, which clearly sets out that failure to file a defence does not constitute lack of a defence (and vice versa). There, Alfred J (Acting) said:

“The phrase ‘no defence to the action’ does not mean a failure to file ‘a defence’ and is therefore not synonymous with the phrase ‘default of defence’. In the simplest terms ‘no defence to the action’ means that the defence filed does not disclose any factual or legal grounds upon which the

claims of the Plaintiff can be resisted or defended. Thus, a defence entered which discloses nothing more than a blanket denial of the claims and allegations of a Plaintiff may be considered as being ‘no defence to the action’ in light of the claims and strong undisputed evidence in support of those claims.”

114. They contend, based on **Key** and the case of **Bigg and another v Boyd Gibbins Ltd.** [1971] 2 All ER 183, where the court held that in proceedings for specific performance under *RSC Ord. 86*, an order should only be made where the judge thinks that it is a plain case, and that this is not such a case. It is argued that the instant action not only involves “*the proper construction and interpretation of the so-called renewal option be it in the Parma Lease or within the Settlement Agreement relied upon by the Second Plaintiff, but also the proper application of the true factual grounds as they are in dispute.*”

Plaintiffs’ substantive arguments on merits

115. It seems to me that the principal arguments of the Plaintiff rest on two limbs, although they have not been presented in so linear a fashion: (i) the arguments directed to the *vires* of the delegation of the statutory authority; and (ii) that the Defendants breached the obligation for the automatic extension of the Parma Lease pursuant to the option for extension set out in the Deed.

116. As to the first limb, the Plaintiffs advanced two arguments, which are really the obverse and reverse of the same point: (i) the first is that NAD lacks lawful authority to lease the spaces inasmuch as they constitute public undertakings vested in the Authority under the Act (or as put in the skeleton submissions, because NAD lacks “...*legal capacity to assume performance of executory obligations over and respecting the public undertaking*”); and (ii) that the Authority cannot transfer or alienate its ownership rights in the LPIA public undertaking unless enabled by legislation, and there has been no legislation for that purpose.

117. These conclusions are based on the Plaintiffs’ interpretation of the legal and commercial position relating to the Authority and NAD. In this regard, counsel submits that the Authority has been made a party to the action because it is a body corporate established by the Act into which the undertakings once owned by Government were transferred, along with statutory functions and obligations vis-à-vis the undertaking (see the relevant sections of ss. 6, 7, 29(1) and (2) of the Act, set out above).

118. Further, reliance is placed on the statutory and common law principle that statutory authorities or bodies cannot assign undertakings, rights or obligations given for statutory purposes unless the statute expressly provides for such an assignment: see, **Re Woking Urban District Council (Basingstoke Canal) Act 1911** [1914] 1 Ch. 300. There, Swiften Eady L.J. said:

“Where a company is incorporated by statute for a public purpose, with compulsory powers of acquiring land and other statutory privileges, and with statutory obligations, it cannot, without the intervention of Parliament, transfer its undertaking or its powers or privileges, to other persons. Neither can it mortgage its undertaking, except in the manner and to the extent permitted by

Parliament. It has generally been with reference to railway companies that questions of this nature have arisen; but the rule is not limited to these companies; it also extends to water companies, canal companies and the like.”

119. It is pointed out that NAD was incorporated under the provisions of the Companies Act 1992, as a limited liability company with the following objects or purposes:

- “3. [T]o carry out as independent contractor any and all of the functions granted to the Airport Authority under section 6 of the Airport Authority Act;
- (a) to manage, maintain and operate the airport;
 - (b) to operate or cause the airport to be operated as a commercially viable entity;
 - (c) to provide aircraft ground handling services;
 - (d) to develop and implement a master airport development plan.”

120. Further it is noted that Art. 6 of its Articles of Association states that...

“...all the shares of the Company shall upon incorporation vest in the Airport Authority...in trust for Her [His] Majesty in right of Her Government of The Bahamas.”

121. Pursuant to the TA, the Authority “transferred” its functions for operating the airport to NAD, which (according to the affidavit of Nia Rolle filed 28 November 2019) “*was established as a private entity for the express purpose of developing, managing and operating the LPIA*”. The Plaintiffs impugn the “Transfer Agreement” on several grounds, mainly that: (i) the TA is *ultra vires* the Act, as the Authority could not alienate its rights and obligations in the LPIA without legislation for that purpose; (ii) it is doubtful that NAD is an independent contractor, as all of its shares vest in the Authority; and (iii) the Authority did not have legal capacity to establish NAD without enabling legislation.

122. Curiously, and despite the weight of argument directed towards NAD’s alleged lack of capacity to undertake the AA’s statutory functions relating to the management of the airport, the Plaintiffs assert that they are not claiming that the leases or Deed are void. To the contrary, they contend that their “*rights and interests derive legitimately under the Deed and lease they executed with NAD (but mistaken as to NAD’s legal competence and power to contract over and respecting the public undertaking legal ownership of which is vested in The AA)*”, and instead are seeking specific performance of the Agreement and interim protection in the meantime.

Renewal/extension of lease

123. On the issue of the renewal/extension, the Plaintiffs make several submissions. Firstly, they submit that the Defendants have confused or conflated the option to renew contained in the original leases with the obligation to “extend” in the Deed. The option under the original Parma Lease was as follows:

- “3.4 RENEWAL OPTION
If the tenant has:

- (a) performed all of the Tenant's covenants;
- (b) is not in default under any of the terms of this Lease; and
- (c) has maintained the Premises in good condition including meeting all provisions as set out in this Lease;

then the Tenant, on giving written notice to the Landlord not later than six (6) months prior to the last day of the Term of this Lease and with the Agreement of the Landlord, which agreement shall not be unreasonably withheld, shall have the right to renew this Lease for one additional five (5) year term at a reasonable minimum guaranteed rent to be mutually agreed, subject to the conditions set forth below, unless sooner terminated in accordance with the provisions of this Lease, upon the same terms and conditions as contained in this Lease, except that all rents shall be payable in accordance with Sections 4.1, 4.2, 4.3, 4.4 and 4.10 and there shall be no further right to renewal following the first renewal term. For greater certainty, all Rents including Additional Rent will continue to be paid by the Tenant during the renewal terms."

124. They contended that this is more than a semantic difference, as although "renewal" and "extension" might be synonymous in that both would have the effect of continuing the term of years, there is an important difference in that the Deed superseded the renewal options in the Lease. Thus, it is said that the obligation to give notice under the original leases no longer applied as a precondition to triggering the obligation, and neither does the requirements under the original renewal option relating to the performance of the tenant's covenants under the original lease. These breaches were said to have been forgiven or waived under the Deed, the purpose of which was to agree a compromise to allow recovery of NAD's debt on agreed terms.

125. Further, the Plaintiffs argue that Clause "v" of the Deed in effect provides for the payment of the outstanding receivables over the "period prescribed in the relevant lease" (a 5-year period), and the execution of the Deed was specifically intended to provide this extension for the Plaintiffs to liquidate the debt. Further, it is argued that renewal of the Lease is not discretionary but automatic, given the purpose for which the Deed was negotiated, and the Defendants having accepted that the Plaintiffs were in compliance with the terms of the Deed.

126. Finally, it is argued that it is clear from the correspondence and other material in the Mortimer affidavit and the reasons set out at paragraphs 36-43 of the Rolle affidavit, that NAD had ulterior motives for re-possessing the space and for refusing to extend the Parma Lease, based (among other things) on the independent study it commissioned. These included, *inter alia*, the following reasons: "*the relative lack of profitability of the premises in question*", and "*the restaurant's performance relative to other concessions offered at LPIA*", recommendation for "*a reconceptualization of the leased spaces*", all of which were said to lead NAD to "*unjustifiably and arbitrarily*" decide that "*it was not a commercially feasible decision to grant an extension*".

Defendants' Submissions

127. In response to the contention that there was an improper assignment of the functions of the Authority to NAD and by implication that there was no authority in NAD to grant the leases, the

first Defendant makes three main points. First, they were content to rely on the plain terms of the Act, which they say specifically empower the Authority to engage an independent contractor to perform any or all of the functions granted to the Authority. Secondly, they contend that by virtue of the TA, these functions were “*transferred*” to NAD, and that by virtue of the Head Lease agreement of the same date, the Authority leased the property the airport (LPIA) to NAD to enable it to carry out the said functions. Thirdly, it is submitted that NAD is a company incorporated under the Companies Act with separate legal personality from its shareholders, which enables it to independently carry out the objects and purposes in its Memorandum.

128. With respect to the Transfer Agreement, the Defendants advert to the various sections of the Act creating and/or empowering the Authority and setting out its functions, several of which have already been adverted to at paragraph 77 above. The Defendants contend that pursuant to these various statutory powers, the AA lawfully “*assigned to NAD its functions and powers by virtue of the Transfer Agreement dated 1st April 2007.*” Accordingly, NAD had the capacity to enter into the lease agreements with the Plaintiffs and the capacity to take legal actions against the second Plaintiff insofar as it relates to the Parma Lease. Further, the Defendants assert that the injunction and summary judgment applications are not proper applications to move the court for a declaration that the TA is *ultra vires*.

129. The Defendants also reject the claim that NAD is not an independent contractor. They submitted that “*an independent contract is a person or entity which provides a service and that it is not under the same control as an employee or agent*”. In this regard, it is said that NAD is neither the *alter ego* or agent of the Authority, and that notwithstanding that the Chairman and the General Manager of the Authority are the subscribers to NAD, “*the directing mind and will of the Authority is distinct from that of NAD as the Authority and NAD have entirely different and separate Boards of Directors.*” In other words, NAD has separate legal personality in accordance with the traditional principles of company law: see, **Gramophone & Typewriter Co. Ltd. v Stanley** [1908-10] All ER 833, where the UK Court of Appeal confirmed the well-established principle that the holding of all of the shares by Company “A” in Company “B” does not establish the relationship of principal and agent between the shareholder and the company.

130. It is further argued that Clause 10.3 of the Transfer Agreement specifically disavows any partnership, joint venture or joint enterprise and states that it is “*understood, acknowledge and agreed that the Operator is an independent contractor...*”. A similar provision is found in the Head Lease at Clause 14. However, the law is clear that whether or not a particular entity qualifies as an independent contractor is dependent not on labels, but the true nature of the contractual arrangement.

131. Further, the Defendants contend that the first and second Plaintiffs, as under-lessees, are not entitled to enquire behind the apparent authority of NAD as landlord under the Head Lease. In other words, they are estopped from denying that NAD had authority to enter into the leases with the Plaintiffs and that its powers in that regard had been properly delegated. In fact, the first Defendant points out the inconsistency in the Plaintiffs’ argument that the statutory functions did

not lawfully devolve on NAD, while in the same breath seeking specific performance of their agreements with NAD. This was expressed at para. 7 of its skeleton arguments as follows:

“7. By virtue of the First Mortimer Affidavit, the Plaintiffs seek to challenge the authority of NAD in granting the very same leases that the Second Plaintiff wishes to enforce. Notwithstanding its claims to reliefs that are reliant upon the leases being valid, the Plaintiffs question the basis on which NAD entered into the lease agreements. The Plaintiffs cannot on the one hand lawfully challenge the lease and on the other hand seek to rely upon the enforcement of the leases and/or documents which flow from the leases. Moreover, by virtue of the Conveyancing and Law of Property Act, Chapter 138, Statute Laws of the Bahamas (the “CLPA”)... the First Plaintiff and or the Second Plaintiff as under-lessees (as the term is defined in the CLPA at section 2) are not entitled to enquire behind the apparent authority of NAD as landlord under a head lease. The Plaintiffs are therefore estopped from claiming that the leases are invalid, yet seeking injunctive relief and/or specific performance of the lease and/or other agreements.”

Good faith

132. As to the contractual duty of good faith, the first Defendant deposed as follows in the affidavit of Nia Rolle:

“36. I am instructed and verily believe that NAD has complied with any obligation to give good faith consideration to a renewal of the lease. As can even be gleaned from the First Mortimer Affidavit: (i) NAD commissioned an independent study in relation to its lessees generally and this study indicated the relative lack of profitability of the premises in question; (ii) NAD met with representatives of the Plaintiffs and discussed these findings; (iii) NAD requested feedback from the Plaintiffs in relation to these findings; and (iv) NAD gave due consideration to all information.

37. Unfortunately, having regard to the restaurant’s performance relative to other concessions offered at LPIA, and the results of the said study in conjunction with the express terms of the Parma Lease, I am instructed that it was not a commercially feasible decision to grant an extension.”

133. In this regard, reference was made to Section 10.4 (a) of the Parma Lease, where the tenant covenanted as follows:

“The tenant shall operate and conduct its business upon the whole of the Premises in an up-to-date first class manner befitting the character of the Airport and the Building and shall act diligently and use all proper and reasonable efforts consistent with good business practice to achieve the highest degree of customer satisfaction for service and product choice, quality and price, and, subject to the foregoing to maximize the Gross Revenue of the Tenant and hence the Percentage Rent payable to the Landlord.”

134. Thus, the first Defendant contends that a “fundamental consideration” when determining tenant eligibility for a lease (or any extension of such a lease) is the potential revenue, and as the demonstrated history was one of limited revenue, an “automatic renewal” was not a commercially viable alternative for NAD.

135. In its written submissions, the Defendant expressed its position as follows:

“41. Section 3.7 (as contained in the Term Amendment) provided for a one time 5-year renewal option. While the Plaintiffs assert that the Second Plaintiff was entitled to the renewal, as is set out in the Rolle Affidavit, this position is untenable as the renewal option was subject to the conditions that: (i) the Second Plaintiff provide NAD with six months’ notice prior to the last day of the term of the Parma Lease (which was not provided); and (ii) that NAD must agree to the renewal option (albeit such an agreement could not be unreasonably withheld).

42. The Second Plaintiff not only failed to provide NAD with six months’ notice of its intention to renew as required by the terms of the Parma Lease, but also did not perform all of its covenants under the Parma Lease and was in default under the terms of the Lease. On this basis, in addition to the fact that there was a Deed of Settlement and Release made between NAD and the Plaintiffs dated 3 March 2017 (the “Release”) whereby there was an express admission that the Second Plaintiff fell into arrears under the Parma Lease, it is hardly unreasonable on the part of NAD to withhold its agreement to renew the Parma Lease.”

Court’s discussion and conclusions

Legal principles

136. Before looking at the substantive issue raised, I will briefly set out the legal principles relating to several of the issues raised and reliefs claimed, as follows: (i) summary judgment principles; (ii) general principles of commercial construction; (iii) specific performance; and (iv) declaratory relief.

Summary judgment principles

137. As the authorities indicate, summary judgment is only appropriate where there is no real prospect of a successful defence by the opposing party, or other reason for a trial and no material factual dispute. In particular, I bear in mind the observations of Popplewell J. in **Barclays Bank plc v Charles Landfrat** [2014] EWHC 504 (Ch), in which he summarized the principles stated by Lewison J (as he then was) in **Easyair Ltd. v Opal Telecom Limited** [2009] EWHC 339, in relation to summary judgment in the context of the UK CPR Part 24 [now part 15 of the CPR 2022] as follows:

“(7) [I]t is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had adequate opportunity to address it in argument it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant’s case is bad in law, the sooner that is determined the better. If it is possible to show by evidence that although material in the form of document or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at

trial, it would be wrong to give summary judgment, because there would be a real, as opposed to fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemical & Polymers Ltd. v TTE Training Ltd.* [2007] EWCA Civ 725.”

138. Further, in **The Football Association Premier League Ltd. v PPLive Sports International Ltd. (a company incorporated in Hong Kong SAR)** [2022] EWHC 38 (Comm), Fraser J. said [at 25]:

“On a summary judgment application the court must always be astute, and on its guard against, both a claimant maintaining that particular issues are very straightforward and simple, and also a Defendant attempting to dress up a simple issue (or issues) as being very complicated (factually or otherwise) and therefore requiring a trial. The overriding objective in Part 1.1 is not achieved by sending matters to a full trial if that is not justified when defences are properly considered. Equally, a Defendant with a defence (or defences) that ought to be heard at trial is entitled to have that occur.”

139. Shorn of the irrelevant arguments and collateral issues, the main issue for determination turns on the construction of the parties’ Agreement, and the question of whether the obligation to consider the extension in good faith was triggered and if so, whether it was properly exercised. In my view, despite the multiple affidavits that have been filed in these proceedings (mainly directed to the procedural applications), there are no factual disputes relevant to the question of construction that need to be determined by way of a trial. I therefore hold that this is a matter suitable for summary judgment.

General principles of construction

140. I was not addressed on the principles relating to the construction of commercial contracts such as the leases and the Deed, but there is not likely to be any dispute about these. The main principles are to be derived from a number of well-known United Kingdom cases, which do not require any elaboration, and I am content to simply adopt the first paragraph of the summary of Carr LJ taken from her judgment in **Network Rail Infrastructure Ltd. v ABC Electrification Ltd.** [2020] EWCA Civ 1645, as follows:

“[17] The well-known general principles of contractual construction are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2001] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd.* [2017] UKSC 24; [2017] AC 1173.

18. A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows: i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focusing on the meaning of the relevant words in their documentary factual and commercial context. That meaning has to be assessed in the light of (i)

the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the documents was executed; and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions; ...".

Specific performance

141. According to *Halsbury's Law of England* (Vol. 96 (2023), Lexis-Nexis):

"Specific performance is equitable relief, given by the court to enforce against a Defendant the duty of doing what the Defendant agreed by contract to do. ...The remedy is exceptional in character and the court has a discretion either to grant it or to leave the parties to their rights at law. The discretion, however, is not an arbitrary or capricious one; it is to be exercised on fixed principles in accordance with authority, although a court is not in modern times perhaps so constrained as once it was by previous decisions or black letter rules. The judge must exercise their discretion in a judicial manner."

142. As with all equitable remedies, the exercise of the court's discretion will involve consideration of all of the facts of the case and any equitable factors that might militate against the grant of the relief. As a starting point, the remedy is usually only granted where damages are inadequate to do justice between the parties (**Co-Operative Insurance Society Limited v. Argyll Stores (Holdings) Limited** [1997] J0521-2), which is often the case in contracts where the subject matter is unique, such as contracts for the sale of land. The factors that might militate against the grant of specific performance are numerous and it is unnecessary to parade them here. But the court will refuse relief if performance is impossible or inequitable (**E. Johnson & Co. (Barbados) Ltd. v NSR Ltd.** [1997] AC 400), or if the terms of the contract are not certain (**Co-Operative Insurance** case), or where the Defendant can rely on any of the recognized equitable defences (such as delay, mistake, unclean hands, or undue oppression or hardship to the other side, etc.).

143. Furthermore, it is to be noted that in circumstances where the court has jurisdiction to entertain an application for injunction or specific performance, if specific performance is unavailable or refused on discretionary grounds (where the claimant is otherwise entitled), the claimant will usually be entitled to damages at law for breach of contract: **E.J. Johnson & Co. (Barbados Ltd.) v NSR Ltd.** (*supra*).

Declaratory Relief

144. The court's jurisdiction to grant declaratory relief is very wide and derives both from statute (Supreme Court Act, ss. 15, 16, 19) and the Rules of Court. Of particular note is *R.S.C. Ord. 15, r. 17*, which provides that: "*No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment is sought thereby, and the Court may make a binding declaration of right whether or not any consequential relief is or could be claimed.*"

145. Secondly, the power to grant declaratory relief is discretionary. In **Financial Services Authority v Rourke** [2002] CP Reg 14, Neuberger J. said:

“...the power to make declarations appears to be unfettered. As between the parties in the action, it seems to me that the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court’s satisfaction. The court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court has to consider whether, in all the circumstances, it is appropriate to make such an order.” [...]

146. Then, in the authoritative text of Zamir & Woolf on Declaratory Judgments (4th Ed., 2011), this is what is said [§ 4-99]:

“If it can be shown that a declaration would not serve any practical purpose, this will weigh heavily in the scales against the grant of declaratory relief. If, on the other hand ...the grant of declaratory relief will be likely to achieve a useful objective, the court will be favorably disposed to granting relief. The question of whether or not any useful purpose would be served by granting declaratory relief is therefore of prime importance in determining how the discretion should be exercised...A declaration which would serve no useful purpose whatsoever can be readily treated as academic or theoretical and dismissed on that basis. However, while a declaration which resolves an issue of law cannot be described as being of no practical utility, the point may still be academic or theoretical because there is no existing factual claim which it will resolve.”

Court’s discussion and conclusions

Unlawful transfer of statutory authority

147. As noted, the Plaintiffs directed significant skeleton arguments to attacking what was said to be the unlawful and/or ineffectual transfer arrangement between the Authority and NAD, and the Defendants were forced to respond in kind. But for all the ingeniousness of the arguments, they are unmeritorious in the context of the claim.

148. The principle that the delegation of statutory undertakings requires clear legislative authority is not doubted. But to accept the Plaintiffs’ argument on the point would be to ignore the plain meaning of s. 6(2) and 8(1) of the Act. Section 8(1) provides for the Authority to delegate to its “*members or employees*” the powers to perform its functions and exercise such powers as the Authority may determine. Section 6(2) provides that notwithstanding 8(1), the Authority, with the approval of the Minister, may engage an independent contractor to perform any or all of the functions granted to the Authority.

149. I cannot foreclose my mind to the possibility that issues could be taken in public law with respect to whether or not NAD, as presently constituted, is an independent contractor, or that criticism can be made of the method by which the objectives of s. 6(2) were accomplished (i.e., “*transfer*” of functions and Transfer Agreement). But, I am not of the view that the Plaintiffs can take these points in demurral in the context of this claim. This is because, on the face of it, the Act

provides for the devolution of the Authority's powers, which has ostensibly been done, and moreover, a tenant who has accepted possession from a landlord and paid rent is estopped from denying that the landlord had the authority or title to grant the lease. This applies not only to the original landlord, but also to their assignees (see **Mackley v Nutting** [1949] 2 KB 55). The modern position was summarised in **Industrial Properties (Barton Hill) v Associated Electrical Industries Ltd.** [1977] EWCA Civ 1, where Lord Denning, MR, stated:

“...If a landlord lets a tenant into possession under a lease, then, so long as the tenant remains in possession undisturbed by any adverse claim—then the tenant cannot dispute the landlord's title. Suppose the tenant (not having been disturbed) goes out of possession and the landlord sues the tenant on the covenant for rent or for breach of covenant to repair or to yield up in repair. The tenant cannot say to the landlord: ‘You are not the true owner of the property.’ Likewise, if the landlord, on the tenant's holding over, sues him for possession or for use and occupation or mesne profits, the tenant cannot defend himself by saying: ‘The Property does not belong to you, but to another.’ But if the tenant is disturbed by being evicted by title paramount or the equivalent of it, then he can he dispute the landlord's title.”

150. Curiously, despite impugning the validity of the “transfer”, the Plaintiffs’ argument is not to deny the landlord-tenant relationship, but to argue instead that they are “*tenants under tenancies of estoppel*”, relying in part on the ruling of the House of Lords in **Bruton v London & Quadrant Housing Trust** [1999] 3 WLR 150. This argument is best considered in the way in which it is cast in the written submissions as follows:

“4.01 At all material times the Plaintiffs and NAD stood in a relationship of landlord and tenant respecting the said spaces in LPIA into which the Plaintiffs were let into possession and have remained undisturbed by any adverse claimants. Therefore, the Plaintiff's cause(s) of action are rights and interest vested in them qua tenants under tenancies of estoppel of which they may seek an order of specific performance as against NAD and any other landlord with a superior title.

4.02 It is submitted representations made in the Leases and the Deed by NAD and the Plaintiffs foreclose any dispute as to the existence of the relationship of the parties creating tenancies of estoppel, the law on which is excerpted in Hill & Redman's Law of Landlord and Tenant. In *Bruton v London & Quadrant Housing Trust* [1991] 3 WLR 150, the House of Lords found that estoppel was not necessary to create the relationship of landlord and tenant, notwithstanding that the grantor of the rights in question was itself a mere licensee of the land and so lacked an estate that would enable it to grant a proprietary interest.”

151. With the greatest of respect, I have considerable difficulty in following the arguments of the Plaintiffs in this regard. It appears that they are attempting to paint themselves into the second category of estoppel in relation to the law of landlord and tenant identified in *Hill & Redman* [LexisNexis UK (2025), at [47] as follows:

“[47] The application of estoppel to the law of landlord and tenant may be subsumed under two related heads. First, a tenant is prevented or estopped from denying the right of this landlord to grant the lease and, conversely, a landlord is prevented or estopped from denying the title of his tenant under the lease. Second, a person who has no legal estate in the land may nevertheless

purport to grant a lease of that land; in that event, there is created between him and his purported tenant a tenancy by estoppel which binds them and their respective successors in title just as if the landlord had a sufficient interest to grant the lease.”

152. In my judgment, the House of Lords’ decision in **Bruton v Quadrant Housing Trust** does not assist the Plaintiffs’ claim to tenancy by estoppel. On a proper understanding, it is against them. The rationale of that case, as explained in the leading speech of Lord Hoffman, is as follows [at 416]:

“...[I]t is the fact that the agreement between the parties constitutes a tenancy that gives rise to an estoppel and not the other way around. It therefore seems to me that the question of tenancy by estoppel does not arise in this case. The issue is simply whether the agreement is a tenancy. It is not whether either party is entitled to deny some obligation or incident of the tenancy on the ground that the trust had no title.”

153. I therefore agree, as argued by the Defendants, that there is nothing on the facts of this case that would constitute the Plaintiffs tenants by estoppel. They are tenants in accordance with the terms of the leases (to the extent superseded by the Deed) signed with NAD. The Act vests ownership of the Airport in the Authority, and the Authority made a valid disposition of certain parts of the property for a term of years (30), specifically on the terms that the airport facility could only be used for the functions and purpose for which the Authority had devised it. There is no question that NAD therefore holds a sufficient legal estate in the property to grant sub-leases, and that therefore the Plaintiffs are regular tenants vis-à-vis NAD. In any event, as has been noted, the Plaintiffs are estopped from arguing otherwise, having accepted the landlord-tenant relationship between themselves and NAD.

154. For all its creativity, the arguments directed to improper delegation fails, and in any event the Plaintiffs have no standing to make it, as their claim arises solely under the landlord-tenant relationship with NAD. Had the Defendants made their application to have the second Defendant struck out, the Court would have been constrained to accede to the application.

Contractual duty of good faith in considering obligation to extend

155. As indicated, this is not a case of an implied duty of good faith; the obligation was specified in the 2017 Deed. It has been set out earlier in this Ruling, but it is useful to reproduce it here:

“NAD hereby agrees to consider in good faith a Five (5) year extension of each of the Lease Agreements extensions (the “Lease Extensions”). As a condition precedent to this Lease Extension, the Patmore Group must meet, on a timely basis, all of its financial obligations to NAD under the Lease Agreements and pursuant to the Term Sheet, and this Deed and abide by all rules, regulations and policies of NAD.”

156. NAD argued, as set out above, principally that renewal based on section 3.7 of the Parma Lease was “untenable” based on the non-compliance by the Plaintiffs with the terms of the renewal option under the lease, in particular tendering the 6-month notice for renewal, performance of the

covenants under the lease and not being in default of any of the lease terms. Further, it was asserted that NAD had not forgiven or waived the breach of the conditions precedent which would “*trigger any right to a renewal of the Parma Lease*”, and in this regard it referred to Section 1.1 of the Release. That provides as follows:

“No waiver by NAD of any default under this Deed, or otherwise in relation to the Owing Accounts Receivable shall constitute or be construed to be a waiver of any future or subsequent default. NAD shall not be taken to have waived a default and shall not be deemed to have waived any of its rights pursuant to this Deed or otherwise in relation to the Owing Accounts Receivable or the Arrears Balance unless such waiver is expressly agreed to in writing by NAD.”

157. Notwithstanding this, NAD accepts, in the Rolle affidavit that “...*the provision of the Lease which relates to renewal must necessarily be substituted with clause xi of the Release which only commits NAD to consider a renewal in good faith*” (para. 35 (c)), and “...*NAD is of the view that the term which is most favourable to it is set out within the Release being that NAD shall consider in good faith a five-year renewal.*”

Option to renew under Cl. 3.7 and obligation to extend under the Deed

158. I do not accept the Plaintiffs’ argument that the Deed creates an automatic entitlement to extension for a further five-year period based on the consideration given for it and the Defendants’ admission that the Plaintiffs had complied with the preconditions for the exercise of the option. But the Plaintiffs are right to point out that the provisions of the Deed in which NAD agreed to consider in good faith an extension of the lease subject to the preconditions set out in the Deed are to be construed as a new arrangement that supersedes the original option to renew in the Lease. If the Deed does not expressly preserve the original option, and instead substitutes a different mechanism for considering renewal, the original option is considered to have been superseded or waived: **Sherwood v Tucker** [1924] 2 Ch. 440.

159. In my view the Deed did not preserve the original renewal clause. In this regard, it is notable that Clause “xvi” of the Deed preserves the original lease “*save as expressly provided herein*”, making it plain that the terms of the original leases were to apply except so far as they are inconsistent with the provisions made in the express terms of the Deed. In fact, it is to be observed that Clause “xi” of the Deed specified *different* preconditions to be met for the exercise of the extension.

160. I am also of the view that NAD’s reliance on the “no waiver” clause is mistaken. On a plain reading of that clause, the no waiver is said to apply to any “*future or subsequent*” default. In fact, this could only be the case, as otherwise there would be no need for a “Release”, as is borne out by the statement in the Nia Rolle Affidavit (35(b), (c)):

“b) [...] The reason that the Release was necessary, which was not disputed, is that the Second Plaintiff had not performed all of its covenants under the lease and was in default under the terms of the Lease. ...

c) [H]aving regard to; in particular, the Second Plaintiff's breach of the Parma Lease, the Release was a compromised position and, to the extent set out therein, modified the provisions of the Lease."

161. Therefore, applying the principles of commercial construction referred to above, I find that it was NAD's intention that the extension option in the Deed was intended to replace the option for renewal in the original lease, whilst retaining the other provisions of the Lease that were not incompatible with the Deed. It is common ground that the Plaintiffs complied with the conditions specified in the Deed (which were said to be the conditions precedent to "this Lease extension") and therefore without more this triggered the right to have the extension considered in good faith.

Nature of option to renew/obligation to consider extension

162. Before looking at the good faith obligation, something must be said about the nature of the right or option to renew, and the relationship between the Lease and the Deed, in particular having regard to the declaration sought that the right or option constitutes property rights that cannot be expropriated without compensation. At common law, options to renew a lease are generally recognized as enforceable interests that can, in appropriate circumstances, amount to proprietary rights when exercised (**Woodhall v Clifton** [1905] 2 Ch. 257). Depending on the precise terms of the option and its connection to the lease, such options might also amount to an interest running with the land and the reversion. In this case, however, the obligation to consider the extension is contained in a separate Deed, and in my view it is a contractual or equitable right and not a property interest that is an incident of the original lease (see **Woodhall v Clifton**).

Good faith considerations

163. Despite the copious submissions on procedural and other issues, the parties did not address me in any substantive way on the legal principles relating to good faith. This was an unfortunate oversight and required the court to have regard to the principles without the assistance of counsel, but it is necessary to consider these principles for the resolution of this claim. As the common law has developed on the point, a contractual duty to act in good faith imposes certain objective standards on the exercise of that duty. These were identified by HH Judge Klein in **Unwin v Bond** [2020] EWHC 1768, after an extensive review of the authorities on the point, as follows:

"[230.]...once it is established that a prospective act of a Defendant is subject to a duty of good faith, the Defendant is bound to observe the following minimum standards:

- i) they must act honestly;
- ii) they must be faithful to the parties' agreed common purpose as derived from their agreement;
- iii) they must not use their powers for an ulterior purpose;
- iv) when acting they must deal fairly and openly with the claimant;

v) they can consider and take into account their own interests but they must also have regard to the claimant's interest.

These minimum standards are not entirely distinct from one another. Rather they tend to overlap.

231. Fair and open dealing is a broad concept and what it means in practice will depend on context. It is likely, that in many cases, the claimant is entitled to have fair warning of what the Defendant proposes. In those cases, where the Defendant is contemplating taking a decision which will affect the claimant, fair and open dealing is likely to require that the claimant is given an opportunity to put their case before the Defendant makes the decision and the Defendant is likely to be required to consider the claimant's case with an open mind.

232. Thirdly, and it is very much linked to the second point, the fact that a Defendant could have achieved the same result in a procedurally compliant way does not amount to a defence where that approach does not meet the minimum standards I have set out."

164. However, the Defendants do set out in some detail in the Nia Rolle affidavit the "good faith considerations" to which they had regard in considering the extension. As noted, they argued that they complied with this duty by, among other things, commissioning an independent study to review the leases, which determined that it was not commercially feasible to renew the Parma Lease. A consideration was also said to be the "demonstrated history" in relation to the Parma Lease of generating limited revenue. Further, they say that an offer was made to the Plaintiffs to participate in a RFP process in relation to proposals for leases of the space.

165. On the issue of whether they complied with the minimum requirements to consider the extension in good faith, in my opinion the Defendants are hoisted by their petards. In fact, they have admitted that they formed the conclusion that the extension of the lease was not "*commercially feasible*" based on the study, and the breaches of the "*conditions precedent*" in the original lease. As to the former, this shows that the Defendants could not have approached the exercise of their duty to consider the extension obligation with an open mind, and the latter shows that in fact they were importing preconditions from the original lease, when on the clear language of the Deed (as the Court has found), they no longer applied to the exercise of the obligation to consider the extension in good faith.

166. Most strikingly, it is apparent that they did not take into consideration at all the interest of the Plaintiffs, or the purpose for which they had negotiated the Deed. In fact, the reasons given for refusing the extension make it clear that their focus was mainly (if not exclusively) on their own economic interests, and no regard was given to the position of the Plaintiffs. Further, the invitation to participate in the RFP and NAD's indication that it was "*entirely willing to give due, equal and unbiased consideration to any proposal advanced*" was entirely irrelevant to the consideration of the extension under the Deed. In fact, participation in the RFP could only have been on the basis that the extension had already been refused and that the Plaintiffs were relegated to competing with others for the award of the lease.

167. For all of these reasons, in my judgment the first Defendant breached its obligation to consider the extension of the Parma lease in good faith, when it indicated it would not renew/extend the lease, in particular because it did not deal fairly and openly with the Plaintiffs and did not have regard to the Plaintiffs' interest.

168. The defence advanced by NAD in this regard does not, in my judgment, have any real prospect of success. In my view, and as has been explained, the provisions of the Deed, and in particular Clause "xi" and "xvi", are unambiguous. Reliance on the matters pleaded in the defence (and the affidavits) are wholly misplaced. They refer to and rely on the terms of the option to renew in the original lease, when by their own admission, these were superseded. In fact, far from exonerating their conduct, the defence tends to establish that the Defendants failed to consider the obligation to extend the lease in good faith. The legal inappropriateness of the defence, when considered in the factual context of the claim, demonstrates that the test for summary judgment has been satisfied.

169. The Plaintiffs would therefore be entitled to an order for specific performance of the obligation to consider the extension obligation in good faith. There may, however, be some hurdles to the grant of this remedy. As noted, specific relief may be refused even if the claimant is entitled to such relief where the obligations are not defined with sufficient certainty to allow them to be enforced, or if there are other factors which make it impractical to grant the remedy. In **Co-operative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd.** (*supra*), the House of Lords overturned the decision of the Court of Appeal and restored the decision of the first-instance judge who refused to grant specific performance to require the Defendant to keep open a shopping centre for retail trade, *inter alia* on the basis that an order to carry on a business would require constant supervision by the court. There, Lord Hoffman adverted to some of the difficulties that might be encountered with the remedy of specific performance even where the claimant established his entitlement:

"It by no means follows, however, that even obligations to achieve a result will always be specifically enforced. There may be other objections, to some of which I now turn. One such objection, which applies to orders to achieve a result and a fortiori to carry on an activity, is imprecision in the terms of the order. If the terms of the court's order, reflecting the terms of the obligation, cannot be precisely drawn, the possibility of wasteful litigation over compliance is increased. So is the oppression caused by the Defendant having to do things under threat of proceedings for contempt. The less precise the order, the fewer the signpost to the forensic minefield which he has to traverse. The fact that the terms of a contractual obligation are sufficiently definite to escape being void for uncertainty, or to found a claim for damages, or to permit compliance to be made a condition of relief against forfeiture, does not necessarily mean that they will be sufficiently precise to be capable of being specifically performed."

170. Although the specified duty to consider in good faith has objective requirements that have to be complied with, and which may be breached (as I have found), there would be some difficulty in crafting an appropriate order to accomplish that result. The Plaintiffs have asked for damages in the alternative. In all the circumstances of this case, I would therefore exercise my discretion

not to grant specific performance, and leave the Plaintiffs to their alternative remedy of damages, to be assessed if they cannot be agreed.

Sealing Order

171. I also make one brief observation on another issue that arose in this case. As noted, the parties (apparently by consent Order) agreed to the sealing of the Court's file in this matter. This, however, was rolled back when the matter was considered by this Court, and while the Court agreed that certain confidential documents should be placed in sealed envelopes and not be available for inspection by anyone but the parties, except with the prior permission of the Court, it did not justify sealing the Court's file. The case law is clear that party consent is not sufficient to justify sealing court files or restricting public access to documents, as the parties cannot waive the public right to open justice (see **Cape Intermediate Holdings Ltd. v Dring** [2019] UKSC 38. This is especially so when the matters involve public or statutory undertakings. However, to preserve the confidentiality of the parties' business dealings, the Court did agree to reporting restrictions, and certain financial information has therefore been redacted in this Judgment.

CONCLUSION AND DISPOSITION

172. Having regard to the reliefs claimed by the Plaintiffs by way of summary judgment and the various Declarations and Orders sought, I find as follows:

- (i) I refuse to exercise my discretion to grant the Order for specific performance of the obligation to consider the extension of the Parma Lease in good faith, even though the second Plaintiff is otherwise entitled, for the reasons given.
- (ii) I find that the first Defendant breached the obligation to consider the extension of the Parma Lease in good faith, and I therefore grant the second Plaintiff's claim for damages in the alternative, such damages to be assessed if not agreed.
- (iii) Having regard to the finding at (ii), it would serve no practical purpose granting the declaration sought at (iii) of the Writ—that the Deed ripened into a right which could not be lawfully abrogated as long as the Plaintiffs were compliant with its terms.
- (iv) I refuse the declaration declaring the Transfer Agreement dated 1 April 2007 invalid, as that has not been established as a matter of fact or law. In any event, this is not a declaration that the Plaintiffs are entitled to seek on the facts of the claim before the Court.
- (v) I accept as a general principle of law that options or rights to renew a lease may be recognised as enforceable interests that can, in appropriate circumstances, amount to property interests, and in some cases operate as covenants running with the land and the reversion. However, in the instant case, I have found that the obligation to extend the leases is a contractual right governed by the terms of the Deed, and the parties have available to them the usual remedies for breach. I therefore refuse the declaration sought that the right or option to renew/extend the leases amounts to property which cannot be expropriated without lawful compensation.

- (vi) For the reasons given, I would dismiss the summons for discovery and delivery up of the Transfer Agreement. As noted, this relief has been rendered academic by the Defendants' disclosure of the documents.
- (vii) I grant the interlocutory injunction sought, although such a remedy may now only be a mere formality, as the Defendants seem to have agreed to hold the ring by taking no further steps to interfere with the Plaintiffs' possession during the pendency of the matter and it has been indicated that the parties have continued in negotiations.
- (viii) I refuse the Order for a permanent injunction to prevent interference with the Plaintiffs' possession and enjoyment of the leased premises, as I am not satisfied that a right to a permanent injunction has been established as a matter of fact or law. In any event, the claim for injunctive relief was argued on the facts of the Parma Lease.
- (ix) I also refuse the Order for exemplary/vindictory damages, as none was argued and none made out.

173. As to the procedural applications, for the foregoing reasons, I would refuse to grant a restraint against the Defendants representing both Defendants in the circumstances of this case, as the Plaintiffs have not established that there is any inherent conflict in the representation of the Defendants that requires the intervention of the Court for fairness or to maintain the ends of justice. Further, the Plaintiffs have no live claims as against the second Defendants, who are in effect unnecessary parties to this action. Further, and again for the reasons given, I have declined to exercise my discretion to strike out the affidavits either on the basis of "self-witnessing" or for their content, on the grounds that such a course would be disproportionate to the claims and not in keeping with the overriding objective of litigation.

174. As there is no clear victor in this matter, I will hear the parties as to costs.

Klein J.



28 September 2025