

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY SIDE

1998/CLE/gen/FP/58

IN THE MATTER of the Estate of Amado Bartholomew Antoni late of Bahama Reef Condominium Apartment No. 402, Freeport, Grand Bahama, and of the Will of the said Amado Bartholomew Antoni dated 15th December 1992;

AND IN THE MATTER of a Grant of Letters of Administration with the said Will Annexed issued on 5th day of January, A.D., 1994 in Probate Action No. 464 of 1993.

AND IN THE MATTER of the Real Estate Devolution Act 1914

AND IN THE MATTER of The Companies Act, 1992.

BETWEEN

LENA WEBER ANTONI

(Suing in her capacity as Personal Representative and as Sole Beneficiary under the entitled Will)

First Plaintiff/Judgment Debtor

PEACHES LIMITED

Second Plaintiff

AND

M. KIRK ANTONI

and

MELANIE M. MALONE

and

A. BLAIR ANTONI

Defendants/Judgment Creditors

BEFORE:

The Honourable Madam Justice Estelle Gray Evans (Acting)

APPEARANCES: Mr Maurice O. Glinton for the first plaintiff/judgment debtor
Mr Harvey O. Tynes, Q.C. for the defendants/judgment creditors

HEARING DATES: 2007: 22 November, 26 November and 12 December

DECISION

Evans, J. (Ag)

1. Two applications in this action were heard before me on the dates listed above.
2. One was a referral from the Deputy Registrar pursuant to a Summons filed 13 November 2007 on behalf of the first plaintiff returnable before the Deputy Registrar “(or failing her, a Judge of the Court)” for the following:

“...that the Order for Examination of Judgment Debtor and the Garnishee Order” (both dated 2 November 2007) “...made *ex parte* by the Deputy Registrar on the Judgment Creditor’s application, may be discharged or varied as the case may be ...and/or alternatively, for an order staying all proceedings in furtherance of the Examination Order and all executions under the Garnishee Order pending final determination of the application, or further order. AND that provision may be made for the costs of and occasioned by this application”
3. The summons was originally set for hearing before the Deputy Registrar on 15 November 2007.
4. At that hearing, counsel for the plaintiff raised the issue of the Deputy Registrar’s jurisdiction to have heard the *ex parte* applications for the Examination Order and the Garnishee Order (“the said Orders”) and although noting that she did “not accept the jurisdiction point”, the Deputy Registrar, in exercise of the powers conferred on her by virtue of Order 32 rule 12 referred the matter to a judge in chambers.
5. The other application was by way of summons also filed 13 November 2007 returnable before a judge to have the Certificate of Taxation filed herein on 29 August 2007 and bearing the date 13 August 2007 set aside under the court’s inherent jurisdiction on the ground of irregularity in that the said certificate was issued prematurely.
6. Both summonses were supported by the Affidavit of the first plaintiff/judgment debtor “(the plaintiff)”, Lena Weber Antoni, also filed 13 November, 2007.
7. I will deal with the last-mentioned summons first.

Certificate of Taxation

8. As pointed out by Mr Tynes for the defendants, this is a case that has been fully litigated all the way to the Privy Council which ordered that the plaintiff should pay the costs of the defendants in the Privy Council as well as the court below.

9. The costs at the Privy Council were agreed at £41,450 and the costs at the Supreme Court were taxed on 13 August 2007 and allowed at \$134,375.00.

10. No application for review of those taxed costs was filed by or on behalf of the plaintiff and the defendants on 29 August 2007 filed a certificate of taxation in the sum of \$134,375.00, the said certificate bearing the date 13 August 2007, giving rise to the defendants/judgment creditors' application, *ex parte*, for the said Orders, which the plaintiff now seeks to have "discharged or varied."

11. It is not disputed that the Certificate of Taxation bears the date the taxation was conducted, that is 13 August 2007; or that it was filed in the Supreme Court on 29 August 2007 or that it was served on the plaintiff or her attorneys on 30 August 2007.

12. What is disputed, however, is the effect of the said Certificate bearing the date on which the taxation was conducted.

13. It is the plaintiff's submission that the effect of the Certificate of Taxation bearing the date on which the taxation was conducted by the Deputy Registrar is to deny the plaintiff **"the right to apply for a review of certain items and amounts allowed at taxation as prescribed by Rules of the Supreme Court Order 59 rule 31 and consequently the right to a further review thereof on appeal as prescribed by the said Rules."**

14. On the other hand, it is the submission of counsel for the defendants that, although the Certificate bears the date on which the taxation was conducted, it was not signed and filed until 29 August 2007 and therefore, he submits, it cannot be said that the Certificate was issued prematurely or that the Judgment Debtor was denied the right to apply for a review as prescribed by Order 59 rule 31(2).

15. Order 59 rule 31 of the Rules of the Supreme Court provides:-

"31. (1) Any party to any taxation proceeding who is dissatisfied with the allowance or disallowance in whole or in part of any item by the Registrar, or with the amount allowed by him in respect of any item, may apply to him to review his decision in respect of that item.

(2) An application under this rule for review of the Registrar's decision may be made at any time within 14 days after that decision or such shorter period as may be fixed by the Registrar;

Provided that no application under this rule for review of a decision in respect of any item may be made after the signing of the Registrar's certificate dealing finally with that item."

16. The taxation having occurred on 13 August 2007, an application for a review under rule 31(2) above ought to have been made within 14 days of that date, i.e. on or before 27 August 2007.

17. No such application was made.

18. The said Certificate was served on the plaintiff's counsel on 30 August 2007, some 17 days after the taxation occurred and three (3) days after the date limited for applications for review by the Deputy Registrar.

19. By virtue of the proviso to rule 31(2), upon the signing of the said certificate the plaintiff was precluded from applying for a review, unless the certificate was set aside. Per Chapman, J. in *Brown v Yonde* [1967] 3 All ER 1070, (1967) 1 WLR 1544, at 1545 **"The proviso to Rules of the Supreme Court Order 62 rule 33(2) (Order 59 r. 31(2)) is mandatory and a certificate of taxation is an absolute bar to a review of taxation unless set aside."**

20. In the case of *Thorne v Thorne* [1979] 3 All ER 164 it was held that the court had power to set aside a certificate of taxation in proper circumstances e.g. (i) where the certificate was obtained by fraud; or (ii) was granted in circumstances which were contrary to natural justice; or (iii) where there was a mistake as to any vital details; or (iv) where there was an error and a delay of a short period in which case (none of which is alleged here) the court, under Order 3 rule 5 and also under its inherent jurisdiction, could extend the time for objections to taxed costs.

21. In *Thorne* the Certificate was set aside because there was a satisfactory explanation of the default of the husband and the delay had been very short.

22. Counsel for the defendants submitted that as the plaintiff's only ground of objection was that the Certificate had been issued prematurely, in that it is dated the day of the taxation, it did not fall within *Thorne*, and his application to set it aside should, therefore, be dismissed.

23. In any event, he submitted, it was the common practice in the Supreme Court to date the Certificate the date on which the taxation was concluded, in the same way in which judgments and orders of the court are dated, that is the delivery date - hence the Certificate bearing the date 13 August 2007, notwithstanding that it was signed on a later date, which date he indicates was 29 August 2007 the date the Certificate was filed.

24. The rule regarding the dates of judgments or orders of the court is Order 42 rule 3 which provides that **"a judgment or order of the court...takes effect from the date of its date..."** unless the court orders otherwise and using Mr Tynes' analogy, in my view, would mean that the Certificate would then take effect from the day of its date.

25. The proviso to rule 31(2) is that no application for review of a decision in respect of any item may be made **"after the signing of the taxing officer's certificate dealing with that item."** (underline added).

26. I am, therefore, of the view that since the operative date for the certificate is the date of signing, a more likely analogy would be found in section 108 of the Evidence Act which provides that **"the court shall presume, until the contrary is shown, that every document bearing a date was executed on the date which it bears..."**

27. So until the contrary is shown, the Certificate bearing the date 13 August 2007 is presumed to have been signed on 13 August 2007.

28. In this regard, Mr Tynes submitted that the Certificate was in fact signed on a date subsequent to 13 August 2007 and in his affidavit filed 21 November, 2007, Michael Kirk Antoni, one of the judgment creditors/defendants, deposed inter alia:

“6. I am told by Mr Harvey O. Tynes and I verily believe that following the taxation hearing on the 13th August 2007 before Deputy Registrar, Stephana Saunders, he prepared a Certificate of Taxation in respect of the total sum of \$134,375.00 allowed by the Deputy Registrar, and in accordance with the common practice in the Supreme Court, the Certificate was dated the 13th August 2007.

7. I am told by Mr Tynes and I verily believe that the Certificate was subsequently delivered to Mrs. Brenda Johnson, secretary to the Deputy Registrar on the 28 August 2007 for the purpose of obtaining the signature of the Deputy Registrar but the Certificate was not signed by the Deputy Registrar until the afternoon of the 29th August whereupon it was filed in the Registry of the Supreme Court.”

29. Counsel for the defendant submits, and I accept that this evidence has not been challenged or controverted and therefore the presumption as regards the date of signing has, I find, been successfully rebutted.

30. I also accept Mr Tynes’ submission that the purpose of rule 31(2) aforesaid is to give the party (plaintiff or defendant) dissatisfied with the taxed amount 14 days within which to seek a review.

31. In this case, that did not happen and so a certificate was filed.

32. So, this is not a case where counsel attempted to file his objections within the time limited therefor only to be met with a certificate already filed; nor is it a case where the certificate was served on the plaintiff prior to the expiration of the 14 days; nor is it a case where the plaintiff is seeking leave to file his objections out of time.

33. This is, however, a case where the Certificate was filed and served after the time limited for applying for a review and no reasons were given by the plaintiff for her failure to make application for a review under rule 31 within the specified time.

34. I therefore find that the time for the plaintiff to seek the review having expired three (3) days before the Certificate was served on and therefore came to the attention of the plaintiff through her counsel, she was not deprived of her statutory right under Order 59 rule 31 notwithstanding the Certificate of Taxation bears the date of 13 August 2007 being the date on which the taxation was concluded.

35. The summons filed herein on 13 November 2007 to set aside the Certificate of Taxation is therefore dismissed with costs to the judgment creditors/defendants, to be taxed if not agreed.

36. **Now to the issue of the referral.**

Lack of jurisdiction

37. The plaintiff's application to set aside the said Orders is made under the inherent jurisdiction of the court as well as pursuant to Order 32 rule 6 of the Rules of the Supreme Court which provides that **"the court may set aside an order made *ex parte*."**

38. Counsel for the plaintiff challenges the Deputy Registrar's authority to make the said Orders on the general ground, he says, that the said Orders are **"bad for want of jurisdiction in the Deputy Registrar and (assuming the Deputy Registrar possessed the requisite jurisdiction), on the grounds of material non-disclosure on the part of the judgment creditors (the defendants) at the time of the application for the said Orders and that the procurement of the said Orders was procedurally improper constituting an abuse of process."**

39. The authority for the issuance of the Examination Order and the Garnishee Order are to be found in Orders 48 and 49 of the Rules of the Supreme Court.

40. Order 48 rule 1 provides, inter alia, that:

"(1) Where a person has obtained a judgment or order for the payment by some other person...of money... the Court may, on an application made *ex parte* by the person entitled to enforce the judgment or order, order the judgment debtor to attend before the Registrar and be orally examined."

41. And Order 49 rule 1 provides, inter alia, that:

"(1) "Where a person (... "the judgment creditor") has obtained a judgment or order for the payment by some other person (... "the judgment debtor") of money, not being a judgment or order for the payment of money into court, and any other person within the jurisdiction (... "the garnishee") is indebted to the judgment debtor, the Court may...order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee."

42. The current practice as regards the issuance of the said Orders, which I do not think is disputed, is this:

1. The judgment creditor (or his attorney) files an affidavit deposing to the factors set out in Order 48 or 49 (as the case may be) and leaves the affidavit along with a draft of the proposed Order at the Office of the Registrar.
2. The Registrar reviews the file and, after being satisfied that there is a money judgment on the file and that the affidavit and draft order are in the proper form, signs and issues the order.
3. The judgment debtor then obtains a date from the Registrar before whom the examination is to be conducted.

43. In New Providence, the Registrar (including Deputy) who issues the Examination Order is not necessarily the one before whom the examination is conducted. However, in Grand Bahama there is only the Deputy Registrar who performs both functions.

44. Mr Glinton for the plaintiff challenges the authority of the Deputy Registrar to exercise the function of “the court” in Orders 48 and 49 in making the said Orders, “notwithstanding that such may have been the practice since before coming into force of the current Rules” as, he submits, by issuing the said Orders, the Deputy Registrar purported to exercise a jurisdiction that is prima facie vested in “the court”, which, in his submission, does not include the Registrar or the Deputy Registrar.

45. “The Court” is defined in the Supreme Court Act, 1996, Chapter 53 Statute Laws of The Bahamas Revised Edition 2000 (“the Act) as “the Supreme Court established under Article 93 of the Constitution” and in the Rules of the Supreme Court 1978, unless the context otherwise requires as “the Supreme Court or any one or more judges thereof whether sitting in court or in chambers or the Registrar, but the foregoing provision shall not be taken as affecting any provision of these Rules and, in particular, Order 32, rule 11, by virtue of which the authority and jurisdiction of the Registrar are defined and regulated.” *Order 1 rule 4(2)* (underline added)

46. Order 32 rule 11 of the Rules of the Supreme Court provides:

“ (1) The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these rules may be transacted by a judge in chambers except... in respect of the following matters and proceedings, that is to say-

...

Any other matter or proceeding which by these Rules is required to be heard only by a judge...”

47. Mr Glinton submitted, and I agree, that a distinction ought to be made between the functions and duties performed or authorized to be performed by the Registrar that are of an administrative or clerical nature and those which are adjudicative, requiring the exercise of judicial powers constitutionally vested in superior courts by the judges but permitted in Masters of court selectively.

48. It is not disputed that the current practice of the Registrar issuing Examination and Garnishee Orders is grounded in Order 32 rule 11 which is based on and is similar to the English equivalent which ***“defines and delimits the jurisdiction of Queen’s Bench Masters and Family Division Registrars...by reference to the power to transact all such business and exercise all such authority and jurisdiction which ‘under the Act or these rules’ may be transacted by a judge in chambers, and in relation to such power, authority and jurisdiction it equates the Masters and Family Division Registrar with the Judge in chambers save in certain specified matters and proceedings which are expressly excepted and reserved to the Judge in Chambers.”*** (English Supreme Court Practice 1979 32/11-13/3).

49. I note here that under the English Rules, ordinary *ex parte* applications made in chambers without a summons before a Master include:

- (1) examination of judgment debtor
- (2) garnishee order nisi

50. Notwithstanding the practice, Mr Ginton submitted that whether the exercise by the Deputy Registrar of what is prima facie, within the jurisdiction of the “court” to do is lawful, depends on whether the Registrar, or a Deputy Registrar, as Master, is a component part of the Supreme Court by virtue of section 68 of Act.

51. He submitted further that the interpretation which section 68 of the Act and the section which it repealed (section 8 of the Supreme Court Act, 1896 “the 1896 Act”) tend to support as a general proposition is that the Registrars, although officers of the court, are not, as such, or as Master, competent parts of “the court” in the sense that a judge is; but that they constitute “the court” for the purpose of the exercise of the specific powers conferred upon them – not for all purposes, as a judge has.

52. The repealed section 8 of the 1896 Act, titled “Functions of Registrar and Deputy Registrar,” provides:

“8. The Registrar of the Supreme Court shall be Clerk of the Crown and the Registrar and Deputy Registrar shall be taxing masters for all matters in the Supreme Court subject to review by a justice and shall also have and exercise all such powers of a master of the High Court of Justice in England as may be prescribed by rules made under this Act, and shall perform all duties imposed upon them by this Act and such other duties as may from time to time be prescribed.” (underline added).

53. The functions of the Registrar and Deputy Registrar in the 1896 Act have been re-enacted across four (4) sections of the Act, namely: sections 65(2), 67(2), (68), and 69 set out hereunder:

“65(2). The Registrar shall have such jurisdiction, powers and duties as are by this Act or rules of court conferred or imposed upon the Registrar;

“67(2). The Deputy Registrar...shall have all such powers and perform all such duties as may be prescribed by this Act or by rules of court and carry out all such functions and transact all such business as the Registrar, with the approval of the Chief Justice shall require;

“68. The Registrar and Deputy Registrar shall be Masters of the court and as such shall have all such authority and jurisdiction to transact civil business of the court as may be conferred upon a Master by rules of court”; and

“69. For the purpose of taxation of costs, the Registrar, the Deputy registrars and the Assistant Registrars shall be taxing masters.”

54. In support of his submission that the Deputy Registrar, not being a component part of “the court” had no jurisdiction to exercise the function of “the court” in issuing the said Orders, Mr Glinton invited the court to compare the position obtaining in other jurisdictions.

55. For example, in England, where section 68 of the English Supreme Court Act 1981 makes provision for rules of court to be made as to the cases in which the jurisdiction of the High Court may be exercised otherwise than by judges of that court and includes a reference at paragraph (c) thereof to “masters, registrars, district registrars or other officers of the court.”

56. And in the States of Victoria and Western Australia where the relevant statutes provide that the Supreme Court shall consist not only of the judges but also of the masters; and also in South Australia where the Supreme Court Act was amended to constitute “the court” as “a Chief Justice, the puisne judges and the masters” which would appear to make the masters part of the court in South Australia.

57. I note here, however, the comments of Wilson, J., at page 69 of *The Commonwealth v The Hospital Contribution Fund of Australia [1981-1982] C.L.R. 49* (one of the cases cited by counsel for the plaintiff) that “in each of those states” (i.e. Victoria and Western Australia), “the constitution of the Supreme Court has been changed in an attempt to meet the problems which flowed from (the) decision” in the case of *Kotsis v. Kotsis (1970) 122 C.L.R. 69* which *The Commonwealth* case says was wrongly decided.

58. In the *Kotsis* case, it was held by a majority opinion of the High Court of Australia, with one dissent, that “the true effect of the laws of New South Wales under which the Supreme Court was constituted and registrars were appointed was that the registrar was not a member of the court.” (pp. 75). However, as indicated above, that position has now been overruled by the said court, albeit differently constituted.

59. In Mr Glinton’s submission, the purported exercise by the Deputy Registrar of “the court’s jurisdiction” arises not from anything which the Rules Committee did, but from what it has not done after being empowered by sections 68 and 76 of the Act to do and so, in his view, even if this court were to find that the Registrar and Deputy Registrars are “the court” (although not component parts of the court as defined by the Act) for the purpose of the exercise of the powers conferred upon them as masters, there is still the question, he says, of whether rules prescribed by section 76 of the said Act to be made for the purpose of giving effect to it have been made conferring Registrar and Deputy Registrars with the exercise of the requisite jurisdiction and powers for purposes of Orders 48 and 49 or are met in the existing rules.

60. Mr Ginton submitted further that given the definition of “the court” in *O.I r. 4(2)* above and given the wording of the said Orders the context does not require that “court” be construed as meaning or including Deputy Registrar or even Registrar, for that matter and that as creatures of statute, a Master’s jurisdiction is only that which the statute confers and, he submits, only if the rules so provide the Master may exercise a “Court jurisdiction”, subject to any limits set by the rules.

61. It is accepted that both the 1896 (section 8) and the 1996 (section 68) Acts created Masters out of the offices of Registrar and Deputy Registrars; that each Act, submitted Mr Ginton, is enabling insofar as it authorized and delegated conferment of the court jurisdiction to the Rules making authority established by them.

62. Mr Ginton, submitted further that the existing rules fail to meet this requirement not only by reason of the omission of Deputy Registrar from the definition of Registrar in *O.I r.4*, but that “the deficiency in the rules is made rather obvious by reference to others of its provisions, for example Order 65 rule 1 which prescribes for Registrars exercising the court’s authority (jurisdiction assumed) to make orders on applications to obtain evidence for use in foreign courts and tribunals.”

63. Therefore, submitted Mr Ginton, the defect in the purported exercise by the Deputy Registrar of the court jurisdiction arises not from anything which the Rules Committee did, but rather from what it has been remiss in doing, that is, in failing to make the appropriate rules to confer the exercise of the “court jurisdiction” upon Registrars and Deputy Registrars as Masters. In his view, therefore, rules must be made to cure that defect.

64. Additionally, Mr Ginton submitted that apart from the need of specific rules vesting them with such, the Registrar and Deputy Registrar ought not to be exercising the powers of “the court” in Orders 48 and 49 because, citing the case of *M’Alister v. Walters (1890) W N 204 and Practice Note (1890) W N 224*, as a general rule the court disapproves the practice of Registrars as Masters taking examinations before themselves and, since, in the absence of independent examining court officers, Registrars also serve as examiners on a return of the Order granted by them, any application to set aside such orders must still be referred to a judge.

65. Mr Tynes’ broad submission to Mr Ginton’s submissions was that, in his view, none of the authorities cited by Mr Ginton considered provisions which are identical or similar to the provisions of our Supreme Court Act or the rules which are made or deemed to be made thereunder and therefore “has no relevance whatsoever” to the interpretation of The Bahamas Supreme Court Act or Rules.

66. He submitted further that the language employed by the Parliament of The Bahamas is so plain that there is no need to look to decided cases anywhere for assistance.

67. Mr Tynes pointed out that the 1996 Act is an Act to consolidate with amendments the Supreme Court Act and other written laws relating to the Supreme Court in The Bahamas and the administration of justice therein; to repeal certain obsolete or unnecessary written laws so relating; and for connected purposes and he referred the court to several sections thereof.

68. Mr Tynes submitted further that the words “by rules of court” in section 15 of the Act are unqualified and, in his view, clearly suggest that apart from the Act there may be rules of court in existence at 1st January 1997, the commencement date of the Act, or rules to be made in the future and that section 15 of the Act clearly indicates that if no specific provision has been made then one should look to the former practice and the jurisdiction is to be exercised as near as may be in accord with former practice.

69. Section 15 of the Act entitled “Rules as to exercise of jurisdiction” provides:

15. The jurisdiction vested in the court shall so far as regards procedure and practice be exercised

- (a) in the manner provided by this Act or by rules of court.
- (b) where no such provision has been made, in accordance with former practice as near as may be; or
- (c) where there is no former practice, in such manner as seems to the court just and practicable in the circumstances.

70. According to the submission advanced by Mr Tynes, sections 68 and 69 of the 1996 Act confer, by the Act itself and by rules of court, certain specific powers and duties on the Registrar and Deputy Registrar and, in addition, so far as the Deputy Registrar is concerned, by the requirements of the Registrar, but that the Registrar and Deputy Registrar are also made Masters of the court with the authority and jurisdiction to transact civil business of the court as may be conferred upon a Master by rules of court, so that, in his view, the Act contemplates that rules of court may already be in existence.

71. In Mr Tynes’ submission, section 76(1) relates to rules of court which may already be in existence and section 76(3) allows for rules to be made in the future.

72. Section 76(4), he submitted, speaks to the position with respect to existing rules as the section recognizes that there may have been rules in existence, made before the date of the commencement of the Act, and construed as having been made under the powers to make rules in pursuance of section 76(4) which in effect says that the 1978 rules must be construed as having been made on or after 1 January 1997.

73. So, says Mr Tynes, when one looks at the 1978 (existing) rules, Order 32 rule 11 thereof confers on Registrars and Deputy Registrars the same authority/jurisdiction that a judge has in chambers, except in certain specified instances. Therefore, he submitted, if a judge could sign/issue an Order for Examination of Judgment Debtor then so could a Registrar or Deputy Registrar and likewise a Garnishee Order.

74. In Mr Ginton’s submission, subsection (3) of section 76 provides for rules of court made, not deemed made, in pursuance of that section and, in his view, subsection (4) does not have the effect of either re-incorporating or incorporating the 1978 rules by reference, without referring to them, or of deeming those rules made in pursuance of the 1996 Act, as contended by Mr Tynes. So, submitted Mr Ginton, the basic proposition with which the court is left is that no rules have been made pursuant to section 76 of the Act to give effect to the provisions of that Act.

75. It is not disputed that except for an amendment dealing with case management, no rules have been enacted since the 1996 Act pursuant to section 76,

76. However, I agree with Mr Tynes' submission that the references in Sections 15, 68 and 76 to "rules of court" contemplate rules which may already be in existence as well, as in the case of section 76(3) rules to be made in the future and in this regard, I note the difference in the wording of, say, Section 26 of the Act which provides that "rules of court shall be made" with that of section 68.

77. I therefore find that the references in Sections 15, 68 and 76 to "rules of court" contemplate rules which may already be in existence and that the question posed by Mr Ginton as to whether rules prescribed by section 76 of the Supreme Court Act to be made to give effect to it have been made conferring Registrars and Deputy Registrar with the power to exercise the requisite jurisdiction and powers for purposes of Order 48 and 49 or are met in the existing rules must be answered in the affirmative.

78. The Registrar having, by virtue of Order 32 rule 11 of the Rules of Court been given power to "transact all such business and exercise all such authority and jurisdiction as under the Act or these rules may be transacted by a judge in chambers" (i.e. the powers of a master) except in respect of certain specified matters, none of which include the issuance of the said Orders, had, in my view, the jurisdiction to issue the said Orders.

79. As pointed out by counsel for the defendants, if a judge could do it, so could a registrar, unless, of course, the rules specifically say the registrar could not, which in the case of Orders 48 and 49, they do not.

80. Indeed, in my view, Order 48 is a good example of the two (2) functions which the registrar performs: the judicial, in issuing the said Order, and the administrative, in conducting the examination.

81. Mr Ginton's submitted that the allegation of want of jurisdiction in the Deputy Registrar is analogous to that of the inferior court in the case of *The Mayor and Aldermen of The City of London v. Richard Henry Cox* 1967 2 L.R. 239. That case dealt with two (2) different courts – one inferior and the other superior.

82. Although I understand Mr Ginton to be equating the exercise of the registrar's function to that of the inferior court and the judge's to that of the superior court, I do not accept it. Instead, I adopt the view expressed by Mason, J. at page 64 in *The Commonwealth* case that "*the vesting of judicial power in a High Court consisting of a Chief Justice and justices should not necessarily exclude the exercise of some jurisdiction and powers by a master or registrar of the Court, whether as delegate or otherwise, provided that the exercise is subject to review or appeal*" as well as that of Murphy, J. at page 65 that "*the Constitution, in vesting, or providing for the investing of jurisdiction in courts should not be taken as allowing the exercise of the jurisdiction only by those who in the strictest sense constitute the court such as justices of the High Court and other federal courts; it should be taken as permitting the exercise by officers who are under the supervision of those who constitute the court.*"

83. Neither counsel was aware of any decided cases in the jurisdiction which examine the jurisdiction power and duties of a Registrar or Deputy Registrar. However, I found *The Commonwealth* case helpful.

84. In that case, the Hospital Contribution Fund of Australia (“the Fund”) instituted a suit in the Common Law Division of the Supreme Court of New South Wales against Mr Hunt, the then Commonwealth Minister of State for Health. In 1981, the Fund caused to issue out of the Supreme Court a subpoena directed to the then Minister for Health requiring him to produce the documents specified therein. On the return of the subpoena before the Master who had issued the same, The Commonwealth claimed privilege in respect of certain of the documents which were referred to therein.

85. More relevantly for present purposes it also challenged the jurisdiction of the Master to make an order in respect of the production of the documents. The proceedings were adjourned to allow the question of jurisdiction to be determined and thereafter the proceedings in *The Commonwealth* case were instituted.

86. In *The Commonwealth* case it was held that a Master of the Supreme Court of New South Wales is not a component part of the Court but does constitute “the court” for the purpose of the exercise of the powers conferred upon him.

87. Similarly in The Bahamas, the Registrar and Deputy Registrar, although not a component part of the Court, constitute “the Court” for the purpose of the exercise of the powers conferred upon them by Sections 65 through 69 of the Act and Order 32 rule 11 of the rules.

88. In my view, Order 32 rule 11, having been made in pursuance of section 8 of the 1896 Act which was repealed and replaced by sections 65 through 69 of the 1996 Act, conferred on the Registrar (and Deputy Registrar), the power to exercise the authority and jurisdiction of a judge in chambers, except in certain specific instances, one of which being any matter or proceeding which is required to be heard only by a judge.

89. So, if it were intended that the jurisdiction of “the Court” in Orders 48 and 49 be exercised by a judge and not exercisable by the Registrar, the framers of the rules would have said so. I note here that Order 48 rule 3 specifically empowers the Registrar to conduct the examination:

“48(3) The Registrar shall take down, or cause to be taken down, in writing the statement made by the judgment debtor or other person at the examination read it to him and ask him to sign it, and if he refuses the Registrar shall sign the statement”.

and Order 32 rule 11(1)(d) recognizes that there may be specific instances in the Rules where a power is to be exercised only by a judge.

90. In my view, therefore, the Registrar and Deputy Registrar of the Supreme Court in The Bahamas, although not component parts of “the Court”, on the authority of *The Commonwealth* case nevertheless constitute “the Court” for the purpose of the exercise of the powers conferred upon them by Order 32 rule 11 which include the issuance of the said Orders under Orders 48 and 49 respectively.

91. The plaintiff’s prayer that the said Orders be set aside on the ground that the Deputy Registrar lacked jurisdiction to make the same is therefore refused.

Material Non-disclosure

92. It is not disputed that “a person who makes an *ex parte* application to the court is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not do so, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.” Warrington, LJ in *The King v. General Commissioners for the Purposes of Income Tax Acts for the District of Kensington Ex parte Princess Edmond de Polignac* LR (1917) 486 at 509.

93. Therefore, when applying for an *ex parte* order it is the duty of the applicant to make a full and frank disclosure to the court of all the relevant facts of which he knows and failure to do so may itself be a ground for setting aside the order.

94. Mr Glinton submitted that the information provided in the plaintiff's affidavit in support filed 13 November 2007 ought to have been given by the defendants at the time of their *ex parte* applications for the said Orders not only because it was relevant but because they had a duty to be full and frank in making the applications.

95. In her said affidavit the plaintiff averred, inter alia:

1. “There is produced exhibited hereto marked “LWA 4” a copy of Minutes of an Extraordinary General Meeting of the members of Peaches Limited at which I was represented as a member by my proxy Mr Glinton, who is also my attorney. From the resolutions recorded in the said Minutes, it is clear that I have continued to maintain the position regarding my claim to ownership of properties Peaches Limited has held in its name since the death of Dr. Amado; it is also clear that this was a fact known to Kirk at the time of the application for the Examination and Garnishee Orders, such that, as was explained to me by my attorney, it being material to the subject-matter of the said application there was, I am advised by my said attorney, a duty to make full and frank disclosure.
2. Whilst I was aware of and do not dispute an agreement my attorney made as to costs awarded the defendants in the Privy Council appeal in the sum of £41,450 Sterling, this amount stands to be reduced by sums of money representing the proceeds of sale of land previously sold by them which Kirk and the other defendants paid to themselves. Meantime Kirk and the others by their control of the Company holding the title to my lands continue to deprive me of them and any values they represent.
3. Whether or not the taxed amount of \$134,375.00 will be greatly reduced (if at all) on a review of the items and amounts awarded under the said Certificate should my application succeed, cannot be speculated on; yet the possibility of a reduction in the amount by whatever sum should be a relevant consideration in the Deputy Registrar's exercise of her discretion to grant both the Examination Order and the Garnishee Order, *ex parte*.

4. As for the attachment of the account operated at Royal Bank of Canada, whilst the defendants might not have known, it is operated to receive the widow's pension paid to me under the National Insurance scheme.”

96. As noted by Mr Tynes, there was no complaint made by or on behalf of the plaintiff/judgment debtor that the affidavits of Michael Kirk Antoni in support of the application for Examination Orders and Garnishee Order do not satisfy the requirements of Orders 48 and 49 respectively or were in any way defective.

97. He submitted that the defendants/judgment creditors have met all of the requirements of Orders 48 and 49; that the issue raised in the affidavit of the plaintiff/judgment debtor had not been raised in the action which had been litigated went all the way to the Privy Council, nor had she commenced any proceedings against the defendants/judgment creditors for any claim seeking a set off or reduction of the amount claimed by the defendants/judgment creditors, nor was there any judgment against the defendants/judgment creditors for the amount claimed against which the debt owed by the plaintiff/judgment debtor may be set off.

98. I accept Mr Tynes' submission and find that there was no material non-disclosure on the part of the defendants/judgment creditors in the application before the Deputy Registrar for the said Orders.

99. The plaintiff/judgment debtor's prayer that the said Orders be set aside on the ground of material non-disclosure is refused.

Conclusion

100. In the result both of the plaintiff/judgment debtor's summonses filed herein on 13 November 2007 are dismissed with costs to the defendants/judgment creditors to be taxed if not agreed.

Estelle G. Gray Evans,
Justice (Acting)
15 February 2008

