COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2022/CLE/gen/01633

BETWEEN

RICHARD JOHNSON

Claimant

AND

HON. MICHAEL PINTARD, MP
(Sued on his own behalf and in his representative capacity as Leader of the Free National Movement)

First Defendant

AND

DR. DUANE SANDS
(Sued on his own behalf and in his representative capacity as Chairman of the Free National Movement)

Second Defendant

Before:	**Her Ladyship The Honourable Madam Justice Deborah Fraser**
Appearances:	**Mr. Gregory Moss for Richard Johnson**
	Mr. Khalil Parker KC with Roberta Quant and Lesley Brown for the Defendants
Judgment Date:	**22 May 2023**

Application to set aside injunction – Rule 11.18 of the Supreme Court Civil Procedure Rules, 2022 – Rule 11.20 of the Supreme Court Civil Procedure Rules, 2022 – Material Non-Disclosure - Serious question to be tried - Balance of Convenience – Adequacy of Damages – Special Factors to be considered

JUDGMENT

1. This is an application brought by the First and Second Defendants to set aside an order made by this Court on 08 March 2023.

Background

2. The Claimant, Mr. Richard Johnson ("**Mr. Johnson**") is a member and Vice Chairman of the Free National Movement, a political party in The Commonwealth of The Bahamas ("**FNM**").

3. The Hon. Michael Pintard is the leader of the FNM ("**Mr. Pintard**") and Dr. Duane Sands is the Chairman of the FNM ("**Dr. Sands**" and collectively, "**Defendants**").

4. On 30 October 2022, Dr. Sands prepared and sent a memorandum to Mr. Johnson purportedly informing him that his duties as Vice Chairman have been reassigned and that he was not authorized to speak on behalf of the FNM, effective immediately ("**Purported General Suspension**"). No formal charge(s) was provided to Mr. Johnson prior to receiving the Purported General Suspension.

5. On the same day, the Secretary General of the FNM issued a notice that a specially called Council Meeting would be held on 31 October 2022 for the purpose of deliberating: (i) the Purported General Suspension of Mr. Johnson; and (ii) Mr. Johnson's attendance at future Council meetings until the Disciplinary Committee had concluded its investigation and report. The subject of discussion was Mr. Johnson's alleged pattern of threating and abusive behavior, foul language and disruptive conduct at FNM meetings.

6. A meeting of the Executive Committee of the FNM took place on 31 October 2022 where Mr. Johnson was initially excluded, but was eventually allowed to attend. At the meeting, Dr. Sands informed the Executive Committee of the Purported General Suspension.

7. Dr. Sands then called a meeting of the Central Council where a motion was tabled to suspend Mr. Johnson from all future meetings of the Central Council ("**Purported Central Council Suspension**") until after the Disciplinary Committee deliberated on the Purported General Suspension.

8. Subsequently, a Statement of Charges were sent to Mr. Johnson on 17 November 2022.

9. On 28 November 2022, Mr. Johnson filed a Specially Indorsed Writ of Summons ("**Writ**") claiming that the Defendants did not follow the mandatory disciplinary procedure as outlined under the FNM Constitution prior to either of the purported suspensions and usurped his authority as Vice Chairman unlawfully. He also claims that all members who participated in the votes in favor of the purported suspensions were bias towards him. He asked the Court for the following reliefs:

    (i) A declaration that the purported suspensions are ultra vires of the FNM Constitution;

(ii) An order that the Defendants disclose to Mr. Johnson names of all persons who participated in the respective votes in favor of the purported suspensions on the basis that such persons have displayed actual and/or apparent bias against Mr. Johnson.

(iii) An injunction prohibiting all persons who participated in the respective votes in favor of the suspensions, inclusive of the Defendants, from acting as members of any Tribunal concerning this matter due to actual and/or apparent bias.

(iv) General Damages and/or exemplary damages in the amount of $250,000 for unlawful interference with Mr. Johnson's membership rights and privileges as a Vice Chairman of the FNM.

(v) General Damages and/or exemplary damages in the amount of $250,000 for mental distress by reason of loss of and/or unlawful interference with the membership rights and privileges of Mr. Johnson as a Vice Chairman of the FNM.

(vi) Interest.

(vii) Costs.

(viii) Such further relief the Court deems just.

10. On 18 January 2023, the Defendants filed a Defence denying all allegations and put Mr. Johnson to strict proof. They aver that there was no suspension and that Mr. Johnson was merely informed that his duties as Vice Chairman were reassigned. They further assert that he has no powers and/or privileges save and except those designated to him by the Chairman of the FNM. Also, they assert that on 31 October 2022, the Central Council reasonably and lawfully resolved to exclude Mr. Johnson from Executive Committee and Central Council meetings pending the conclusion of the disciplinary proceedings instituted against him by the Executive Committee.

11. The Defendants further aver that Mr. Johnson was duly served with a Statement of Charges on 17 November 2022. They also assert that Mr. Johnson posed a threat to members of the FNM entitled to peacefully attend and participate in Central Council and Executive Committee meetings. The Defendants further aver that Mr. Johnson demonstrated and declared an intention to continue his pattern of disruptive, abusive and threatening behavior which necessitated the Central Council's decision to exclude him from further meetings pending the decision of the disciplinary tribunal.

12. Subsequently, on 08 March 2023, Mr. Johnson made an ex-parte application (with a Certificate of Urgency attached dated 08 March 2023 and filed 29 March 2023) for and was granted an injunction restraining the following: (i) any

interference with Mr. Johnson's duties as Vice Chairman of the FNM, attendance and participation in meetings of the Executive Committee and the Central Council pending determination of the Plaintiff's claim or further order of the court; and (ii) Bryan Brown, Jaunianne Dorsett and Clement Penn Sr. participating in any Tribunal convened or to be convened to hear and determine the Statement of Charges against Mr. Johnson or any appeal by reason of their actual/apparent bias against Mr. Johnson pending determination of the Plaintiff's claim or further order of the court ("**Injunction**").

13. On 17 March 2023, the Defendants filed an application to have the Injunction set aside. A certificate of urgency was filed subsequently on 20 March 2023.

14. On 30 March 2023, an order ("**30 May Order**") was made directing all parties to: (i) act cordially to one another during all meetings of the FNM; (ii) refrain from any personal attacks on social media; and (iii) refrain from discussing these proceedings outside of court. The Court then afforded the parties an opportunity to arrive at a consent position, however, the parties were unable to.

ISSUES

15. The issue that this Court must decide is whether the Injunction ought to be set aside?

Defendants' Evidence

16. The Defendants filed the Affidavit of Sherman Stevens ("**Mr. Stevens**") on 17 March 2023. The affidavit states that: (i) Mr. Stevens is a Meritorious Council Member of the FNM; (ii) on 16 March 2022, Mr. Stevens heard loud outbursts with expletives from Mr. Johnson during an Executive Committee Meeting; (iii) members of the FNM were fearful and reluctant to attend FNM meetings due to Mr. Johnson's abusive behavior and the potential consequence of such members in attendance becoming targets of Mr. Johnson's social media tirades; (iv) Mr. Johnson's loud and belligerent behavior has been ongoing for months and that the Defendants tried to manage his behavior on a consistent basis; and (v) Mr. Johnson's continued presence at any FNM meetings would disrupt and prevent pertinent business of the FNM.

17. On 22 March 2023, the Defendants filed the Affidavit of Donald L. Saunders ("**Mr. Saunders**") which provides that: (i) Mr. Saunders is the Deputy Chairman of the FNM; (ii) Mr. Johnson did not have any specific duties assigned to him as Vice Chairman of the FNM; (iii) the Vice Chairman has a right to be present at Executive Committee and Central Council meetings, but that such right is not absolute and is circumscribed by requirements such as the obligation to respect

the rights of other Executive Committee and Central Council members, the power of the Central Council to protect and preserve the integrity and safety of the members and constitutional operation of the FNM; (iv) Mr. Johnson's behavior over the past several months has given rise to serious complaints and was the subject of disciplinary proceedings; (v) neither of the Defendants purported to exclude Mr. Johnson from his membership in the Executive Committee and/or Central Council; (vi) the Central Council exercised its discretion to prevent Mr. Johnson from attending Executive Committee and Central Council meetings until disciplinary proceedings against him have concluded; (vii) Mr. Johnson, through voice notes and social media posts, has publicly declared his opposition to the leadership of the FNM. Accordingly, this precipitated the Central Council's decision to prevent Mr. Johnson's attendance at meetings as politically sensitive matters are routinely discussed at such meetings; (viii) Mr. Johnson was served with a Statement of Charges on 17 November 2022 and he provided a response on 30 November 2022. The next step was to appoint a Disciplinary Tribunal, but Mr. Johnson approached the Court before the Disciplinary Tribunal could be empaneled; (ix) the rules of natural justice have been adhered to by virtue of the process the FNM attempted to utilize and adhere to; (x) the suggestion that Mr. Brian Brown, Mrs. Juanianne Dorsett and Mr. Clement Penn Sr. are bias is baseless; (xi) the Injunction is oppressive and unduly interferes with the ability of the FNM to conduct its affairs in accordance with the Constitution; (xii) Mr. Johnson has not demonstrated any serious issue to be tried; and (xiii) a request to have paragraph 7 and the first portion of paragraph 8 of Mr. Johnson's Second Affidavit be struck out.

Claimant's Evidence

18. On 29 March 2023, the Third Affidavit of Richard Johnson was filed by Mr. Johnson. It states that: (i) Mr. Johnson does become "heated" when expressing his views as he is passionate about the FNM and the future of The Bahamas; (ii) he does not support the present leadership of the FNM; (iii) Mr. Johnson is a duly appointed Vice Chairman and as such is entitled to attend Executive Committee and Central Council meetings, deliberations and votes. Such right can only be deprived of after a fair hearing pursuant to Articles 53 to 61 of the FNM Constitution. No such hearing has taken place and neither Defendant is empowered to deprive Mr. Johnson of his democratic rights until such hearing; (iv) Mr. Johnson was excluded from participation of the Executive Committee and Central Council by the Defendants, contrary to the articles of the FNM Constitution; (v) Mr. Johnson has rights and duties as Vice Chairman which is outlined in paragraph 5 of his Statement of Claim filed herein on 28 November 2022; (vi) the Disciplinary Tribunal was only appointed after Mr. Johnson's counsel wrote to the Defendants protesting what was done and invited them to reinstate Mr. Johnson as Vice Chairman of the FNM.

Defendants' Submissions

19. The Defendants seek to have the Injunction set aside. They submit that it ought to be set aside as it is unreasonable and unsustainable. The Defendants advance that there was no full and frank disclosure. They rely on the well-known decision of **American Cyanamid v Ethicon [1975] A.C. 396 ("American Cyanamid"),** which provides the relevant principles the Court must consider when granting an interim injunction.

20. The principles may be summarized as follows:

    (i) Whether there is a serious issue to be tried?

    (ii) Where does the balance of convenience lie?

    (iii) Whether damages would be an adequate remedy?

    (iv) Whether there are any special factors which should be taken into account?

21. The Defendants then go to apply these principles. They submit that there is no serious issue to be tried that would allow the issuance and maintenance of the Injunction. They assert that Mr. Johnson ought to have engaged the disciplinary process as provided under the FNM Constitution rather than have the Court interfere with this established and enshrined procedure.

22. The Defendant further asserts that damages would be an adequate remedy as evidenced by Mr. Johnson's request for damages in his Writ of Summons. They further assert that, Mr. Johnson, having pleading damages, cannot argue that damages would not be an adequate remedy in the circumstances.

23. The Defendants also submit that the balance of convenience lies in its favor. They assert this on the basis that Mr. Johnson has gone against the entire operation of the Executive Committee and Central Council and that Mr. Johnson would not suffer any irreversible harm if the Injunction is discharged. They then provide excerpts from the case of **Madden et al v Irish Countrywomen's Association et al [2018] IEHC 551 at paragraphs 60 and 61** to advance the proposition that applying the principle of necessity may cause the court to authorize a course of action that does not strictly comply with the constitution of an organization. The relevant excerpt reads:

> **"The question of where these two conclusions point, in terms of the appropriate reliefs to be granted or not, is not an easy one. In my view, there is no relief that I can order which complies strictly with the terms of the ICA Constitution. The parties themselves, in**

> **their respective proposals, have grappled with how to move the current situation forward, and it is clear that is no easy matter given the existing constitutional provisions. I am conscious that the reliefs sought are equitable reliefs, and it seems to me that the Court should be guided, inter alia, not only by the usual equitable principles, but also by what it considers to be best for the organization, that is to say, the ICA, as a whole…..Having given the matter considerable thought, it seems to me that the principle of necessity must come into play, in the sense that the court must make an order authorizing a course of action even if it is not strictly in accordance with the Constitution by reason of the exceptional circumstances that have arisen and having regard to the fact that the ICA, an organization which has 8,000 members, is a registered charity and company limited by guarantee with a trust fund, and must somehow continue to function on a day-to-day basis and yet resolve the current impasse."**

24. The Defendants submit that the Court must consider what is best for the organization as a whole and advance that the discharge of the Injunction is in the best interests of the FNM. They also contend that there are no special factors that need be considered by the Court.

25. In relation to principles on the law of bias, the Defendants extensively quote passages from the case of **Re Bernard Evans et al Ex Parte The Bahamas Communications and Public Officers Union Pension Plan and Trust Fund 2017/COM/bnk/00007**. Essentially, the case provides what the test is for apparent bias. There, Charles Snr J opined:

> **"The test for apparent bias is well settled. The question to be asked is 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased': per Lord Hope in Porter v Magill [2001] UKHL 67 at para 103."**

26. The Defendants submit that there is no evidence of bias and that the allegation is untenable. They further submit that the allegation was merely a means of stalling the disciplinary process. They conclude by requesting the Injunction be set aside in order to allow the FNM to continue its affairs.

Claimant's Submissions

27. Mr. Johnson asserts that the Injunction should stand. He too relies on the above mentioned principles from ***American Cyanamid***. He advances that there is a serious issue to be tried as the Defendants seek to undermine and act ultra vires of the FNM Constitution to the detriment of Mr. Johnson. He asserts that his functions as Vice Chairman have been usurped, and that his exclusion from

meetings are unlawful. He further submits that the Court must decide whether such decisions are permitted under the articles of the Constitution.

28. Mr. Johnson also submits that the balance of convenience ought not be considered in the circumstances as Mr. Johnson would succeed on the first factor along with the adequacy of damages (as he has made an undertaking to provide damages, should the Court rule against his position).

29. Alternatively, Mr. Johnson submits that, should the Court be minded to consider the balance of convenience, it would still be in his favor. He provides the case of **Dr. Charlene Reid (d.b.a Easy Dental Care) v Teachers and Salaried Workers Cooperative Credit Union Limited [2021] 1 BHS J. No. 60** to buttress his position. This case involved a plaintiff requesting an interim injunction that would prevent the defendant from evicting her from commercial premises. At paragraph 46 of that decision, it reads:

> **"On that state of the material before the court, I would have no hesitation in holding that the balance is clearly in favor of the plaintiff. Whatever inconvenience may be experienced by the landlord in superintending the commercial relationship with the plaintiff must pale in comparison to the tremendous dislocation and interruption of business operations that would be occasioned by the forced relocation of the dental facilities, not to mention the possible impact on the employees of that facility. It seems to me that the defendant is relatively assured of obtaining its rental payments, but just wishes to be rid of what it considers a problem tenant."**

30. On that basis, Mr. Johnson asserts that the same principles should apply to the instant case. He asserts that the Defendants see him as a "problem" Vice Chairman and seek to blatantly disregard the enshrined procedure of the FNM Constitution. Accordingly, he asserts, the balance of convenience lay in his favor as no inconvenience would be suffered by the Defendants if Mr. Johnson were permitted to attend FNM meetings.

31. With respect to apparent bias, Mr. Johnson relies on the case of **R (on the application of PD) v West Midlands and North West Mental Health Review Tribunal [2004] EWCA Civ 311**.

32. There, the court opined:

> **"Silber J summarized the relevant principles to be deduced from recent authorities as follows:**
>
> (a) **In order to determine whether there was bias in a case where actual bias is not alleged "the question is whether the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that the Tribunal was**

biased' (per Lord Hope of Craighead in Porter v Magill [2002] 2 AC 357 at 494 [103]). It follows that this exercise entails consideration of all the relevant facts as "the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased'

(b) **"Public perception of a possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. ….."**

33. Mr. Johnson submits that Mr. Bryan Brown, Mrs. Jaunianne Dorsett and Mr. Clement Penn Sr. together with all members of the Executive Committee and/or Central Council of the FNM who voted or otherwise participated in the aforesaid meetings held on 31 October 2022, should be restrained from participating as members in the hearing of the disciplinary tribunal or any appeal due to their apparent bias as against him.

34. He then submits that there is prejudgment and provides the case of **Sim Yong Teng and another v Singapore Swimming Club [2016] SGCA 10** to support his position. Paragraphs 48 and 50 read:

"48. In Webb and Hay v The Queen (1994) 181 CLR 41, Deane J stated (at 74) that:

'The area covered by the doctrine of disqualification by reason of appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise gives rise to a reasonable apprehension of prejudice, partiality or prejudgment. The second is disqualification by conduct, including published statements. That category consists of cases in which conduct, either in the course of, or outside, the proceedings, give rise to such an apprehension of bias. The third category is disqualification by association. It will often overlap the first (eg., a case where a dependent spouse or child has a direct pecuniary interest in the proceedings) and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contract with a person or persons interest in or otherwise involved in, the proceedings. The fourth is disqualification by extraneous information. It will commonly overlap the third (e.g. a case where a judge is disqualified by reason of having heard some earlier case….and consists of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias)……'

Prejudgment as actual bias

50. The rule against prejudgment prohibits the reaching of a final conclusive decision being made aware of all relevant evidence and arguments which the parties wish to put before the arbiter…..'"

35. He concludes by requesting that the application not be acceded to and that the Injunction remain in effect.

DISCUSSION

(I) Whether the Injunction ought to be set aside?

36. The Court derives its power to set aside or vary an injunction from rules 11.18 and 11.20 of the Supreme Court Civil Procedure Rules, 2022 ("**CPR**"). Rule 11.18 (properly read) provides:

> **"11.18 Applications to set aside [or] vary an order……..made without notice.**
>
> **(1) A respondent to whom notice of an application was not given may apply to the Court for any order made on the application to be set aside or varied and for the application to be dealt with again.**
>
> **(2) A respondent must make such an application not more than fourteen days after the date on which the order was served on the respondent.**
>
> **(3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule, and the time within which it must be made."**

37. Rule 11.20 of the CPR (properly read) provides :

> **"11.20 Application to set aside [an order made in the] absence of [a] party.**
>
> **(1) A party who was not present when an order was made may apply to set aside or vary the order.**
>
> **(2) The application must be made not more than fourteen days after the date on which the order was served on the applicant.**
>
> **(3) The application to set aside the order must be supported by evidence on affidavit showing —**
>
> **(a) a good reason for failing to attend the hearing; and**
>
> **(b) that it is likely that had the applicant attended some other order might have been made."**

38. Though there was no strict adherence to rules 11.18 (as the Injunction does not comply with rule 11.18(3)) the Defendants did file their application to set aside the Injunction on 17 March 2023, which is within the fourteen day requirement to make such application.

39. The Defendants assert that there was no full and frank disclosure of facts. Material non-disclosure of facts relevant to a matter significantly impacts the Court's decision on whether to set aside or vary an order. This was explored in the case of **Smed v Allen et al BS 2017 SC 91.** There, Winder J (as he then was) had to determine whether an order restraining the defendants from interfering with the utilities or any part of the property that the plaintiff occupied should be set aside. At paragraphs 13 and 14 of the judgment, Winder J said:

> **"13 In Sandy Port Homeowners Association v. Bain [2015] 2 131–1S J. No. 102, the Bahamas Court of Appeal considered the jurisdiction to set aside injunctions on the ground of material non-disclosure. In that case Barnet CJ had granted an interim order on December 24 2012 and thereafter the defendant filed a summons dated 5 February 2013, supported by an Affidavit of the same date, to have the injunction set aside and the writ struck out. In the Affidavit the defendant alleged that at the time the plaintiff made the application for the interim injunction he and his attorneys failed to draw the Courts attention to certain material facts. According to Crane-Scott JA, the Court's jurisdiction to revoke an Order granted ex parte is two-fold, namely pursuant to Order 32 Rule 6 and secondly under the Court's inherent jurisdiction. They each provide the Court with the power to revoke an order granted ex parte if the Court is furnished with material which was not previously divulged when the original order was granted. Order 32 Rule 6 allows the Court to set aside an order granted ex parte after an inter partes hearing, where the Court finds that material facts were undisclosed when the application for the order was made.**
>
> **14 The purpose for the requirement to make full and frank disclosure during an ex parte hearing is to provide the Court with all the relevant material to make a fair determination on whether a discretion should be exercised. The first defendant contends that the plaintiff failed to disclose to Gomez J that:**
>
> **a) the plaintiff's lease agreement and option to purchase agreement had expired;**
>
> **b) the contract for the sale of the property had been terminated due to the plaintiff's failure to complete when served with the notice to complete; and,**
>
> **c) that the plaintiff was informed that the landlord did not intend to renew the lease.**

15 I agree that the matters cited are material and that the record does not reflect that counsel brought them to the attention of the learned judge. (emphasis added)"

40. In that case, Winder J ruled that the order was to be set aside due to the plaintiff's failure to disclose such material facts.

41. The Court also wishes to highlight the Court of Appeal decision of **Blue Planet Group v William Downie SCCivApp No. 80 of 2018** ("**Blue Planet**") for principles which govern the effect of an applicant's failure to provide full and frank disclosure on an ex parte application.

42. In ***Blue Planet***, the appellant company brought an action in the Supreme Court against the respondent for, *inter alia*, breach of contract. Prior to the trial, the appellant company made an ex-parte application for an injunction to prevent the dissipation of funds emanating from the sale of property owned by the respondent in fear that he was leaving the jurisdiction permanently prior to the trial of the action. The appellant company was initially granted an injunction, based on evidence and information the court had at the time of the ex-parte application. The respondent then made application to have the injunction discharged on the basis of material non-disclosure. This was acceded to and the appellant company appealed that decision.

43. The court in ***Blue Planet*** was tasked, *inter alia*, with deciding whether or not the judge at first instance correctly applied the law relevant to material non-disclosure when electing to discharge an existing injunction made ex-parte.

44. At paragraph 46 of ***Blue Planet***, the Court stated:

"46. Firstly, at paragraph 9 of his Ruling, the learned judge adverted to the Brink's -Mat principles noting, quite correctly, that there is considerable authority governing the legal effect of an applicant's failure to be full and frank on an ex parte application. He viewed the Brink's-Mat principles (summarized in the oft-cited dicta of Ralph Gibson LJ) as the appropriate starting point and extracted them in full. For convenience, we reproduce them below:

"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:

(i) The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac [1917] 1 KB 486 at 514 per Scrutton LJ;

(ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers:

see the Kensington Income Tax Comrs case [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing Dalglish v Jarvie (1850) 2 Mac & G 231 at 238, 42 ER 89 at 92, and Thermax Ltd v Schott Industrial Glass Ltd [1981] FSR 289 at 295 per BrowneWilkinson J.

(iii) The applicant must make proper inquiries before making the application: see Bank Mellat v Nikpour [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including: (a) the nature of the case which the applicant is making when he makes the application; (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in Columbia Picture Industries Inc v Robinson [1986] 3 All ER 338, [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see Bank Mellat v Nikpour [1985] FSR 87 at 92—93 per Slade LJ.

(v) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains … an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty … ' see Bank Mellat v Nikpour (at 91) per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Comrs case.

(vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(vii) Finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': see Bank Mellat v Nikpour [1985] FSR 87 at 90 per Lord Denning MR. The court has a discretion, notwithstanding proof of material nondisclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms: '… when the whole of the facts, including that of the original nondisclosure, are before it, [the court] may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.'; (See

Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party) [1988] 3 All ER 178 at 183 per Glidewell LJ.)(emphasis added)""

45. The court in ***Blue Planet*** agreed with the judge at first instance's application of the above principles and the decision to discharge the injunction as the appellant company did not disclose the fact that the respondent had shareholdings in the appellant company which, was valued more than the amount claimed in the appellant company's Writ of Summons. Had the judge at first instance known about this, he would not have granted the injunction preventing the disposal of the sale proceeds from the property, as the affidavit provided at the initial ex-parte application stated that the property was the only asset that the respondent had in the jurisdiction and there was a risk that proceeds from the sale of the property would be dissipated if an injunction was not granted.

46. At paragraph 55 of ***Blue Planet***, the court made the following pronouncements:

> **"The law is clear. A party seeking an ex parte injunction or other order, especially one as draconian as that which [Blue Planet] sought in the court below, is under a duty to make "a full and fair disclosure of all the material facts". If this is not done (as the law requires) in the body of the supporting affidavit, the applicant is certainly not entitled to lay the blame at the feet of the judge for not fully appreciating the significance of matters appearing in the pleadings or vaguely buried in one of the paragraphs of the draft order attached to the application. The duty of full and fair disclosure means precisely that. The judge's attention is to be drawn to the relevant facts, (both favourable and unfavourable) which are to be set out in the supporting affidavit. [Blue Planet] failed to do this (emphasis added)."**

47. Though the facts in ***Blue Planet*** are distinguishable from the instant case, the legal principles emanating from the case, along with the court's reasoning are applicable.

48. In relation to the instant case, paragraphs 3, 5 and 6 of the Affidavit of Sherman Stevens state:

> **"3. At almost every meeting of the FNM's Central Council which I attended, and Mr. Johnson was present, Mr. Johnson was abusive, loud, and disruptive of the meetings. While Mr. Johnson appeared to target his abuse toward the Leader and Chairman of the FNM, other party members and attendees Central Council Meetings were also subjected to his abuse on a consistent basis. Mr. Johnson has created an environment where party members are reluctant to attend and participate in Central Council Meetings for fear of becoming the subject of his abuse and threats in the meeting or via social media and his voice notes thereafter.**

> **5. Mr. Johnson's disruptive and aggressive behavior delayed and, in some instances, prevented Central Council from conducting its business. Mr. Johnson, as a matter of course, refused to follow the directives of the Chairman, who, despite giving Mr. Johnson great latitude to express himself, sought to maintain order....**
>
> **6. The Chairman, despite Mr. Johnson's repeated personal attacks and abusive language, has sought over several months to manage Mr. Johnson's campaign of disruption, however Mr. Johnson's behavior escalated to the point where, in my honest opinion, it could no longer be tolerated, if the rights of other Central Council Members, and the party itself, to decency and order were to be given proper regard. Mr. Johnson's objective appears to be the disruption of the ordinary operation of the party at all, or any cost (emphasis added)."**

49. Paragraph 9 of the Affidavit of Donald Saunders provides:

> **"9. I must observe that the Claimant, by voice note, social media post, and/or otherwise, has publicly declared his opposition to the leadership of the FNM. Central council's decision also therefore required the Claimant, an elected officer of the FNM, presently subject to disciplinary proceedings, who has openly declared opposition to the leadership of the FNM of which he forms a part, not to attend meetings of its highest constitutional bodies, where politically sensitive matters are routinely discussed, until those issues were addressed and resolved (emphasis added)."**

50. Though Mr. Johnson did exhibit the Statement of Charges (which contained all allegations made against him) to his affidavit filed herein on 08 March 2023 at the time of the ex-parte Injunction application, the extent and severity of Mr. Johnson's purported behavior was not brought to the Court's attention until this application (by virtue of the evidence provided in the Affidavit of Sherman Stevens and the Affidavit of Donald L. Saunders). Furthermore, this evidence has not been challenged or contested by Mr. Johnson. It appears his conduct precipitated the Executive Committee's and the Central Council's decisions.

51. In the Court's view, this was not an innocent non-disclosure. Being aware of the charges levied against him, the body of Mr. Johnson's affidavit ought to have apprised the Court of, or at the very least explained, his actions/purported behavior which gave rise to the Executive Committee's decision to exclude him from future meetings. The Court finds such information to be material facts which Mr. Johnson did not provide prior to the granting of the Injunction.

52. With respect to the principles emanating from ***American Cyanamid*** as stated above, the Court would also wish to highlight the following pronouncements from that very decision (in relation to whether there is a serious question to be tried):

> **"The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.**
>
> **It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial. (emphasis added)"**

53. In the instant case, from the affidavits provided to the Court, it is clear that there are several issues and conflicting facts. The Court will not attempt to go through the exercise of delving deep into any evidence at this stage. I am satisfied that there appears to be a serious issue to be tried.

54. With respect to the balance of convenience, the Court finds that the balance leans in favor of the Defendants. To allow the Injunction to continue may very well stifle further pertinent business and management of the FNM. No serious or irreversible harm would come to Mr. Johnson if the FNM was permitted to continue its functions for the time being. Damages is more than adequate should the final determination be made in Mr. Johnson's favor, particularly as he has pleaded damages in his Writ of Summons. Lastly, no special factors apply to the matter.

55. In relation to the apparent bias, this is a substantive issue which the Court, at this stage, will not address. Further evidence will be considered at the substantive trial.

CONCLUSION

56. In the circumstances and based on the authorities referred to above, the Court will not discharge the Injunction, but shall exercise its powers under the CPR and vary it.

57. The varied Injunction will read as follows:

    a) The Plaintiff shall remain a Vice Chairman of the FNM save and except he shall not be permitted to exercise any powers or duties that he may have under the FNM Constitution until final determination of the matter by the Court.

b) The Defendants, their agents, representatives, servants, fellow members, fellow agents, fellow officers, affiliates and/or otherwise are restrained from preventing Mr. Johnson from attending any meetings of the FNM he would ordinarily be permitted to attend as Vice Chairman of the FNM.

c) Mr. Johnson is restrained from any formal participation during any FNM meetings he attends as Vice Chairman.

d) The Defendants, their agents, representatives, servants, fellow members, fellow agents, fellow officers, affiliates and/or otherwise are restrained from empaneling any Disciplinary Tribunal in relation to Mr. Johnson's Statement of Charges until final determination of the matter by the Court.

e) The 30 March 2023 Order remains in effect.

f) Costs are reserved until final determination of the matter.

58. As the matter is sensitive, and of public interest, the Court is prepared to give early trial dates and further directions in preparation for trial once the parties agree on the terms for such directions.

Justice Deborah Fraser

Dated this 22nd day of May 2023