COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2010/CLE/gen/01137

BETWEEN

(1) RICHARD ANTHONY HAYWARD
(2) SUSAN JANE HEATH
(3) GILES EDWARD HAYWARD
(4) RUPERT CHARLES HAYWARD
(5) FRANCESCA ROSE CHELSOM
(6) EMMA LOUISE CAMERON
(7) ALEXANDER JAMES WROUGHTON HEATH
(8) NICHOLAS CHARLES EDWARDS HEATH

Plaintiffs

AND

(1) STRIKER TRUSTEES LIMITED
(2) PROMETHEUS SERVICES LIMITED
(3) RICHARD W DEVRIES
(4) KEITH GRIFFITHS
(5) SIR JACK ARNOLD HAYWARD (died 13 January 2015)
(6) LADY JEAN MARY HAYWARD (died 12 May 2015)
(7) FREDERICK ARTHUR LEBLANC CAMERON (a minor) by PRESTON RABL his Guardian ad Litem
(8) IAN BARRY
(9) PATRICIA RUTH BLOOM
(10) AMY BLOOM CLOUGH
(11) TREVOR BETHEL
(12) JONATHAN MICHAEL HAYWARD

Defendants

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Lawrence Cohen QC with him Mr. Ferron Bethell and Ms. Camille Cleare of Harry B. Sands for the Plaintiffs
Mr. John Wilson and Mrs. Erin Hill of McKinney Bancroft & Hughes for the 1st Defendant
Ms. Keri Sherman of Alexiou Knowles for the 7th Defendant
Mr. Matthew Paton for the 9th and 10th Defendants
Ms. Meryl Glinton of Maurice O. Glinton & Co. for the 11th Defendant
Mr. Christopher Jenkins and Mr. Ra'Monne Gardiner of Lennox Paton for the Judicial Trustee

Hearing Date: (Heard on paper)
Written submissions by the Plaintiff submitted on 26 July 2019
Written submissions by the Defendant, Trevor Bethel submitted on 2 October 2019
Reply skeleton arguments on behalf of the Plaintiffs submitted on 9 October 2019

Practice and Procedure – Counsel also a witness of fact – Counsel of Record co-complainant to Bar Council about the Judge – Counsel ordered to withdraw his services "as Advocate" to defendant – Clarification of Ruling before Order sealed – Whether Order made of the Court's own motion – Whether Counsel had an opportunity to be heard before order was made – Whether judge functus officio – Whether Judge has jurisdiction to give further opportunity before Order perfected – *Re Barrell* jurisdiction – Reopening a decision before appeal –Power of Court to review and correct its own judgment

Subsequent to the delivery of a Written Judgment on 11 July 2019 whereby I ordered that Mr. Glinton QC withdraws his services to the Defendant as appears in paragraph 92 of the Judgment, it became apparent that I should make that paragraph clearer by adding (i) the words "Advocate" to the last sentence of that paragraph (as already found in paragraph 83 of the Judgment) and (ii) an additional sentence to the effect that "Given this finding, the Court shall give Mr. Glinton QC an opportunity to be heard (on the issue of whether he ought to withdraw as Advocate" (the terminology used in Rule VIII of The Bahamas Bar (Code of Professional Conduct) Regulations.

The Defendant objects to such additions submitting that the Court is *functus officio* even though the Order implementing the Judgment had not been perfected. The Plaintiffs say that the Order has not been perfected and therefore, the Court retains a residual jurisdiction to amend, reverse or vary its Order until it is perfected. They say that that there must be exceptional circumstances warranting its exercise in accordance with the *Re Barrel* jurisdiction.

HELD: dismissing the Defendant's submissions with Costs to be summarily assessed by the Court at the next hearing.

1. As a matter of principle, a judge retains a residual jurisdiction to control a case to the extent of being able to reconsider the matter of his own motion or to hear further argument on a point which has been decided even after judgment had been handed down (but before it has been perfected). There must be exceptional circumstances warranting its exercise. See **Re Barrell Enterprises and others** [1972] 3 All ER 631(CA), **Compagnie Noga D'Importation et D'exportation SA v Abacha (No 2)** [2001] 3 All ER 513, **The**

Queen v Gilbert Henry [2018] CCJ 21 (AJ) **and RTL v ALD and others** [2015] 1 BHS J. No. 82.

2. The Plaintiffs' Counsel did not make a request or application to re-open the Judgment such that the procedure set out *per curiam* in **Taylor and Another v Lawrence and Another** [2002] All ER 353, 354 was not necessary.

3. All Counsel have a responsibility, whether or not invited to do so by the judge, to raise with the judge and draw to his/her attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgement, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process: See **In re A (Children) (Judgment; Adequacy of Reasoning) (Practice Note), [20011] EWCA Civ, 1205**. Good lawyers normally assist the judge rather than resorting to the appellate process.

4. The Court, of its own motion, realized that there was an obvious inadvertence in not adding "as Counsel" or "as Advocate" to paragraph 92 to maintain consistency with previous paragraphs of the Judgment. Further, the Court realized that it should have given a further opportunity to Mr. Glinton QC to be heard on the issue of his withdrawal as Advocate for the Defendant. This was a genuine mistake by the Court.

7. There was no indication that Mr. Glinton QC acted on anything to his detriment see **The Queen v Gilbert Henry** [2018] CCJ 21 (AJ).

8. The Court cannot be *functus officio* as even now it has to finalise its Order.

RULING

Charles J

Introductory

[1] On 11 July 2019, this Court dismissed the Recusal Application sought by the intended 11th Defendant, Trevor Bethel ("the Defendant") with costs to be taxed if not agreed to the Plaintiffs and to the other Defendants who made submissions. In addition, the Court ordered that Mr. Glinton QC, a joint complainant with the Defendant before the Ethics Committee of The Bahamas Bar Council, cannot effectively be a litigant and a lawyer at the same time. This was a finding arrived at in paragraph 83 of the Recusal Judgment delivered on 11 July 2019 ("the Judgment"). After setting out Commentary 1(c) and Commentary 3 to The Bahamas Bar (Code of Professional Conduct) Regulations at Rule VIII - The Attorney as an Advocate - in paragraphs 80 and 82 of the Judgment , the Court stated:

> **"Based on the fore-going, I find as a fact that the evidence of Trevor Bethel consisted of repeating what Mr. Glinton QC had told him so that the evidence being placed before the court was that of Counsel. Mr. Glinton QC could not therefore continue to act as Counsel for this reason as well as the fact that he had joined with Trevor Bethel as co-complainant in a complaint to the Ethics Committee of the Bar Council in respect of the conduct in this case. Counsel is required to preserve his independence and cannot continue to act where he is either a witness or in the position of a litigant."**

[2] Later on in the Judgment, under the sub-heading, Analysis and Findings, the Court, in paragraph 92, stated as follows:

> **"In addition, I will also order that since Mr. Glinton QC is a joint complainant with Trevor Bethel before the Ethics Committee of The Bahamas Bar Council, he cannot effectively be a litigant and a lawyer at the same time. Therefore, it is only fit and proper that he withdraws his services to Trevor Bethel."**

[3] Subsequent to the delivery of the Judgment whereby I ordered that Mr. Glinton QC withdraws his services to the Defendant, as appears in paragraph 92, it became apparent that I should have made that paragraph clearer by adding:

> **(i) "The words "as Advocate"[1] to the last sentence of paragraph 92; and**
>
> **(ii) An additional sentence to the effect that "Given this finding, the Court shall give Mr. Glinton QC an opportunity to be heard (on the issue of whether he ought to withdraw as Advocate."**

[4] It is important to point out that, to date, the Order implementing the Judgment has not been perfected.

The relevant legal principles

[5] It has long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected. As a matter of principle, a judge retains control of a case to the extent of being able to reconsider the matter of his own motion or to hear further argument on a point which has been decided even after

[1] "Advocate" is the terminology used in Rule VIII of the Bahamas Bar (Code of Professional Conduct) Regulations: The Attorney as an Advocate.

judgment had been handed down (but before it has been perfected). The Court has the power to permit pleadings to be amended, even if that involved a new argument being put forward, or further evidence being adduced at that stage: per Neuberger J in **Charlesworth v Relay Roads Ltd (in liquidation)** [1999] 4 All ER 397.

[6] However, once the court has made and perfected the order, only in exceptional circumstances that a judge should be invited to reverse a reasoned decision, since an appeal is the more appropriate course in such a situation: **Compagnie Noga D'Importation et D'exportation SA v Abacha (No. 2)** [2001] 3 All ER 513, following the approach adopted in **Re Barrell Enterprises and others** [1972] 3 All ER 631, CA (legal practitioners in England described the jurisdiction to alter a judgment before it is perfected as 'the Barrell jurisdiction'). In **Re Barrell**, Russell LJ stated at p. 636:

> "**When oral judgments have been given, either in a court of first instance or on appeal, the successful party ought save in most exceptional circumstances to be able to assume that the judgment is a valid and effective one. The cases to which we were referred in which judgment in civil courts have been varied after delivery (apart from the correction of slips) were all cases in which some most unusual element was present".**

[7] Thus, it is beyond question that the court's power to review and change its mind on a conclusion at any time before the order is drawn up is well established: **Stewart v Engel** [2000] 3 All ER 518. Sir Christopher Slade stated at p. 525:

> **"Since there must be some finality in litigation and litigants cannot be allowed unlimited bites at the cherry, it is not surprising that, according to the authorities, there are stringent limits to the exercise of the discretion conferred on the court by the Barrell jurisdiction."**

[8] In addition, in **Compagnie Noga D'Importation**, Rix LJ stated at paras. 42 - 43:

> **"[42] Of course, the reference to exceptional circumstances is not a statutory definition and the ultimate interests involved, whether before or after the introduction of the CPR, are the interests of justice. On the one hand the court is concerned with finality, and the very proper consideration that too wide a discretion would open the**

> **floodgates to attempts to ask the court to reconsider its decision in a large number and variety of cases, rather than to take the course of appealing to a higher court. On the other hand, there is a proper concern that courts should not be held by their own decisions in a straitjacket pending the formality of drawing up the order. As Jenkins LJ said in *Re Harrison's Share [1955] 1 All ER 185 at p. 188*, *[1955] Ch 260 at 276*: 'Few judgments are reserved and it would be unfortunate if once the words of a judgment were pronounced there were no locus poenitentiae.'**
>
> **[43]Provided that the formula of 'exceptional circumstances' is not turned into a straitjacket of its own, and the interests of justice and its constituents as laid down in the overriding principle are held closely to mind, I do not think that the proper balance will be lost. Clearly, it cannot be in every case that a litigant should be entitled to ask the judge to think again. Therefore, on one ground or another, the case must raise considerations, in the interests of justice, which are out of the ordinary, extraordinary, or exceptional. An exceptional case does not have to be uniquely special. 'Strong reasons' is perhaps an acceptable alternative to 'exceptional circumstances'. It will necessarily be in an exceptional case that strong reasons are shown for reconsideration."** [Emphasis added]

[9] More recently and closer to home, in **The Queen v Gilbert Henry** [2018] CCJ 21 (AJ), a criminal appeal emanating from Belize to the Caribbean Court of Justice, Mr. Henry was convicted of causing dangerous harm and sentenced to five years imprisonment. His appeal was heard almost five years after on 14 March 2017. Eight days later, on 22 March 2017, an order was delivered orally by the Court of Appeal dismissing the appeal and affirming the conviction and sentence. The Court added that its reasons would follow. A written judgment was ultimately delivered on 16 June 2017, in which the Court of Appeal allowed the appeal and quashed the conviction. The written judgment did not mention the earlier oral decision which had dismissed the appeal. In the period between the oral decision and the written judgment no steps were taken to draw up and formally record what was orally stated.

[10] The Director of Public Prosecutions ("the Director") sought special leave from the CCJ to appeal the written judgment. The proposed appeal argued that, having delivered the oral decision, the court became *functus officio* and therefore had no jurisdiction to deliver the subsequent contrary written decision.

[11] In delivering the judgment of the Court, Mr. Justice Anderson, in paragraph 17 had this to say:

> **"...[T]he Court begins from the widely accepted principle that there must be finality to litigation. Judicial decisions must confer certainty and stability. People who are affected need to know where they stand. They must be able to order their affairs in the sure knowledge that the word of the court is the final word on their legal rights and responsibilities. <u>However, a second principle is equally uncontroversial. The principle of finality cannot be applied in an unyielding manner if that application results in injustice.…It is thus settled law that a court has an inherent power to even reopen a criminal appeal to ensure that justice is done. Thus, both principles are required to ensure public confidence in the administration of justice.</u>"**[Emphasis added]

[12] In paragraph 20 of the judgment, the learned Judge continued:

> **"In *Edmund v The State* TT 2007 CA 39, the Trinidad & Tobago Court of Appeal was of the view that the delivery of its oral judgment at the end of the hearing of the appeal was immediately binding. Having made the order, the court considered itself *functus officio.* This was also the view of Russell LJ in *Re Barrell Enterprises and others* [1972] 3 All ER 631 but with an important qualification. The learned Lord Justice was of the view that when oral judgments have been given, either in a court of first instance or an appeal, "the successful party ought, *save in the most exceptional circumstances* to be able to assume that the judgment is a valid and effective one: ibid p. 636. (emphasis added).**

[13] Having analyzed **Re Barrell Enterprises** and subsequent kindred cases, his Lordship distilled the following applicable principles, at para. 23:

> **(a) "An oral decision or order made by a judge is normally binding from the moment it is delivered. It has legal force and parties are entitled to rely upon it….**
>
> **(b) <u>The court retains a residual jurisdiction to vary its earlier decision until the order of the court is recorded or otherwise perfected. That jurisdiction is exercisable on narrowly defined principles. There must be exceptional circumstances warranting its exercise. A relevant factor in deciding whether the jurisdiction should be exercised is whether any party has acted upon it to his or her detriment, especially in a case where it is expected that he or she may do so before the order is formally drawn up. The court should normally invite</u>**

<u>submissions (which may be written submissions) from the parties affected by the earlier decision and should in its subsequent decision, refer to the earlier decision and explain its reasons for varying or overturning it;</u> and

(c) <u>The court is *functus officio* once the order has been recorded or otherwise perfected.</u> Thereafter remedy for errors in the judicial process lies in the appellate process."

Discussion

[14] Learned Counsel Ms. Glinton who appeared for the Defendant made comprehensive submissions. She submitted that the Court is *functus officio* in relation to the Judgment and on the matters sought to be ventilated. She argued that whilst the Court erred in ordering, in paragraph 92 of the Judgment, that Mr. Glinton QC withdraw his services ("the Withdrawal Order"), the Court cannot now re-open or amend paragraph 92, as proposed, as there are no legal grounds upon which to do so.

[15] Learned Counsel submitted that the procedure to be followed on application to re-visit or re-open a judgment or decision, was addressed by Lord Woolf in **Taylor and Another v Lawrence and Another** [2002] All ER 353 at page 354:

> **"Accordingly, a party seeking to reopen a decision of the court whether refusing permission to appeal or dismissing a substantive appeal, must apply in writing for permission to do so. The application will then be considered on paper and only allowed to proceed if after the paper application is considered the court so directs. Unless the court so directs, there will be no right to an oral hearing of the application. The court should exercise strong control over any such application, so as to protect those who are entitled reasonably to believe that the litigation is already at an end."**

[16] A review of this case reflects that the above passage was a holding (*per curiam*) of the Court and not Lord Woolf. In any event, **Taylor** supports the learning that even after an order was perfected in the Court of Appeal, that Court had a residual jurisdiction to reopen an appeal which it had already determined to avoid real injustice in exceptional circumstances.

[17] Learned Counsel Ms. Glinton next and correctly submitted that **a court may review, correct or alter its judgment** **<u>at any time until its order has been perfected</u>.** She referred to the case law surrounding the re-opening of arguments or decisions following pronouncement but when the Order has not been sealed as in **In Re Barrel Enterprises** and **Compagnie Noga**, upon which Plaintiffs' Counsel has relied in support of their proposition that the Judgment ought to be re-opened.

[18] She submitted that **Compagnie Noga** upheld both the general jurisdiction to re-open arguments and/or a Decision (referred to as the *Barrell* jurisdiction), and **"the need for exceptional circumstances as a requirement for proper exercise of the jurisdiction to reconsider a decision":** page 525 although it was noted that **"strong reasons"** was perhaps an acceptable alternative in wording.

[19] Learned Counsel then submitted that the Judgment cannot be re-opened for the purposes sought for similar reasons as those given by Rix LJ in **Compagnie Nog**a**.** In refusing to re-open, Rix LJ acknowledged the judgment of Sir Christopher Slade in **Stewart v Engel** [2000] 3 All ER 518 at page 524 that:

> **"<u>Neuberger J in Re Blenheim Leisure(Restaurants) Ltd (No 3) (1999) Times, 9 November gave some helpful examples of cases where the jurisdiction might justifiably be invoked before the order in question was drawn up: '… a plain mistake on the part of the court; a failure of the parties to draw to the court's attention to a fact or point of law that was plainly relevant; or discovery of new facts subsequent to the judgment being given</u>. Another good reason was if the applicant could argue that he was taken by surprise by a particular application from which the Court ruled adversely to him and that he did not have a fair opportunity to consider. <u>It is to be observed that in all these instances, if the court had no power to reconsider its order before it was drawn up, the only remedy open to the party prejudiced would be by way of appeal from the order.</u> Though on such hypothetical facts an appeal would have a good chance of success, <u>common sense suggests that in such cases the judge who made the order should himself have the power to vary it before the appeal procedure has to be set in motion, with the likelihood of exposing all parties to far greater expense and delay than an application to the court of first instance.</u>"** [Emphasis added]

[20] Ms. Glinton surmised that it is likely that the Plaintiffs' Counsel's request flowed from complaint made by both Counsel for the Defendant in this Court and in the Court of Appeal, that there was no formal application by Summons, or at all, for an Order that Mr. Maurice O. Glinton QC withdraw his services as Counsel and that Mr. Glinton QC himself was not permitted to be heard on the issue; so that when the Plaintiffs' Counsel led submissions on the point during the hearing of the Recusal Application, Counsel for the Defendant, Ms. Glinton, would have been taken quite by surprise and would not have had a fair opportunity to put authorities before the Court to refute those submissions, and certainly would not have assumed that such an Order would factor into the Judgment. This is wholly inaccurate and will be addressed momentarily in submissions advanced by Mr. Cohen QC.

[21] Learned Counsel Ms. Glinton, relying very heavily on **Compagnie Noga**, submitted that indeed, this was one of the complaints in that case, as was acknowledged by Rix LJ:

> **"It was not a case based on contract partly oral and partly written, but a case based on a written contract which referred to the figure of $US100m by means of the descriptive phrase 'settlement amount' or 'settlement sum'. In the circumstances, my judgment simply fails to articulate reasons, or sufficiently transparent reasons for its conclusion. In any event, Noga was not given a fair opportunity to deal with the manner in which its case has been dealt with."**

[22] Ms. Glinton submitted that Rix LJ went on to determine **"the points which Mr. Gee seeks to raise are those which were covered by competing submissions at trial, albeit without the aid of the authorities which Mr. Gee now brings into play, and without the refinement of analysis which he now seeks to employ."**

[23] Says Ms. Glinton, in the present case, it cannot be argued that the Plaintiffs had no opportunity to be heard on the issue now raised because they did so at various stages of the hearing on 2 July 2019. She quoted extensively from the Transcript of Proceedings on that day.

[24] Learned Counsel Ms. Glinton submitted that the Plaintiffs made considerable submissions on this point and it is wrong to suggest that the Withdrawal Order was made on the Court's own motion and not on the instigation (albeit not on a proper application by Summons) of the Plaintiffs, but also insofar as it must be acknowledged that the Court was referred to what were considered relevant provisions of the Bahamas Bar (Code of Professional Conduct) Regulations, on which the Court no doubt relied in making its decision. So that, much like in the **Compagnie Noga** case, the point was sufficiently raised, and further, the relevant authority (or in this case Regulations) on the point were presented and considered by the Court.

[25] Learned Counsel further submitted that there can be only be three points to be raised in opposition to the Withdrawal Order being made, all of which, it is submitted, were already put to the Court, although "without the aid of the authorities" and "without the refinement of analysis", as was also the case in **Compagnie Noga**. They are:

(1) That there had been no threat toward Her Ladyship, actual or intended;

(2) That the issues raised in the Complaint were not before Justice Charles for determination, and the issues raised in the complaint cannot be conflated with the issues raised in this action;

(3) That Mr. Glinton QC has no interest in the subject matter of the claim which is before her Ladyship and that his joining with the Defendant in a complaint to the Bar Council could not make him a witness in this action or in any way impartial as to the issues raised in this action or the reliefs sought, none of which are sought as against the Defendant in any event;

(4) That it is not unheard of for Counsel to make applications for recusal of a Judge based on their reasonable belief that the Judge is not unbiased as towards them personally, so that even if Mr. Glinton QC were also himself making the

application for recusal that could not in and of itself require him to withdraw.

[26] In addition, Ms. Glinton submitted that whilst there was prima facie an unquestionable unfairness as to the procedure which gave rise to the Withdrawal Order, and which was adverse to both the Defendant and Mr. Glinton QC, it cannot be said that the Withdrawal Order was made without the input of Counsel for the Plaintiffs or that it was made of the Judge's own motion, or that the opposing arguments were not known to the Court either through the oral rebuttals of Ms. Glinton on behalf of the Defendant or through what is, the common law if not commonsensical. As noted by Plaintiffs' Counsel, the principles to be applied are "**nothing revolutionary, it's nothing surprising, it's what we're all brought up with at the Bar."**

[27] Ms. Glinton submitted that one must ask the question which Rix LJ was compelled to ask of himself and proffer an answer in **Compagnie Noga** namely:

> **"In the present case Noga asks the court to reconsider its judgment because of the submission that it has got the answer wrong. In every case where an appeal is allowed, the court below has, by definition, got it wrong. The solution is to appeal. <u>What is special, what is exceptional about this case? What are the strong reasons?</u> It is not a case of *ex tempore* oral judgment. The judgment here, whatever its defects, has been reserved and is the product of substantial reflection. It is not a case where a new binding precedent has immediately reversed the previous law so as to make a judgment simply unsustainable, as in *Re Harrison's Share*. It is not a case where a judge has of his own motion immediately come to the conclusion that he is wrong, as in *Millensted's* case […] It is not a case where, even before judgment, a court has realized that it has not had its attention drawn to the critical section in a statute […] and has itself required a new hearing. It is not a case of new evidence, or of amendment. It is not a case of new thoughts. […]**
>
> **If this case is like none of those, what is it then? It is a case where it is said that the judge has got it wrong, on points which have been argued."**

[28] Learned Counsel submitted that there are no extraordinary factors or even strong reasons for this matter to be re-opened as the Order is wrong. But it was a wrong

decision at which the Court arrived based upon argument and authority by Plaintiffs' Counsel (but, it is submitted for the avoidance of doubt, without proper procedure and with such authorities wrongly applied), and contrary to the clear, (but, unsupported), objections of Counsel for the Defendant, and in the absence of Mr. Maurice Glinton QC, who was not afforded an opportunity to respond (which would have been apparent to the Court), but whose response would logically be no different from that which was argued.

[29] Additionally, learned Counsel Ms. Glinton submitted that a further reason why the issue cannot be re-opened to allow for Mr. Glinton QC to make representations is that the Court, in the course of its Judgment, made several findings relevant to the Withdrawal Order, and which cannot be severed from her ultimate decision and Order at paragraph 92 of the Judgment.

[30] For example, the Court held:

1. At paragraph 22 of the Judgment:

> **"It is clear that Mr. Glinton QC has issued a threat to me that if I do not recuse myself for further proceedings in this action, he will lodge a formal complaint against me on his client's behalf with the Ethics Committee of the Bahamas Bar Association which indeed, he subsequently did, not only on Trevor Bethel's behalf but also his. As Learned Queen's Counsel Mr. Cohen properly pointed out, it is the plainest possible impropriety to make any threat to a judge of an adverse consequence if the judge did not do what the litigant asked. Moreover, it is equally improper for that threat to be carried out, more so when, as in this case, the sole purpose in doing so is to attempt to influence the judicial decision still to be made by me."**

2. At paragraph 67:

> **"…The overwhelming probability is that the source is Mr. Glinton QC who could not be a witness and continue as Counsel."**

3. At paragraph 68:

> **"Mr. Cohen QC argues that whatever the source, Mr. Glinton QC cannot be continuing as counsel for a further reason- in joining with Trevor Bethel as co-complainant to the Bar Council- he is personally asserting the facts on which the complaint is based as well as his own personal opinions. According to leaned Queen's Counsel Mr. Cohen, it is inconceivable that Mr. Glinton QC can therefore have the independence essential to act as counsel.**

4. At paragraph 71:

> **"I also agree with Mr. Cohen QC that these are not trivial defects to be amended given the seriousness of the allegations made against a judge and the fact that evidence ought to be available from Mr. Glinton QC. I agree that striking out of paragraphs of the affidavit leaves nothing of substance."**

5. At paragraph 75:

> "**It was very plain that Trevor Bethel objects to my hearing of this case based on what Mr. Glinton QC told him. As he said during his cross-examination: see page 61 of the transcript of proceedings of 2 July 2019:** ***"I am relying on his opinion…."***

6. At paragraph 78:

> **"From his cross-examination, one thing stands out: he relies entirely on what Mr. Glinton QC told him about the judge."**

7. At paragraph 79:

> **"Now, given that Trevor Bethel and Mr. Glinton QC are joint complainants before the Bar Council, there can be <u>no excuse</u> for Mr. Glinton QC to abstain from giving evidence as he plainly cannot continue as counsel whilst joining with a party as a litigant in relation to the same subject matter."**

8. At paragraph 80:

> **"Learned Queen's Counsel Mr. Cohen refers to The Bahamas Bar (Code of Professional Conduct) Regulations at Rule VIII- The Attorney as an Advocate. Commentary 1(c) is especially significant. It states 'The attorney must not, for example, - (c) endeavor or allow anyone else to endeavor, directly or indirectly,**

to influence the decision or action of a tribunal or any of its officials in any case or matter, whether by bribery, personal approach or any means other than open persuasion as an advocate."

9. At paragraph 81:

"The letter of 10 May 2019 threatens the judge."

10. At paragraph 82:

"**Commentary 3 is equally important. It states that: 3. The attorney should not express his personal opinions or beliefs, or assert as fact anything that is properly subject to legal proof, cross-examination or challenge. <u>He must not make himself in effect an unsworn witness or put his own credibility in issue. If the attorney is a necessary witness he should testify and the conduct of the case should be entrusted to another attorney. The attorney who was a witness in the proceedings should not appear as advocate in any appeal from the decision in those proceedings.</u> There are no restrictions upon the advocate's right to cross-examine a fellow attorney and the attorney who does appear as a witness should not expect to receive special treatment by reason of his professional status." [Emphasis Added]**

11. At paragraph 83:

"Based on the foregoing, I find as a fact that the evidence of Trevor Bethel consisted of repeating what Mr. Glinton QC had told him so that the evidence being placed before the court was that of Counsel. Mr. Glinton QC could not therefore continue to act as Counsel for this reason as well as the fact that he had joined with Trevor Bethel as co-complainant in a complaint to the Ethics Committee of the Bar Council in respect of the conduct of this case. Counsel is required to preserve his independence and cannot continue to act where he is either witness or in the position of litigant."

[31] Learned Counsel Ms. Glinton finally submitted that, in light of all of these findings, it cannot be said that any opportunity afforded to Mr. Glinton QC at this point would be fair or impartial.

[32] Ms. Glinton further submitted that while it is regrettable that the Withdrawal Order was made under such aberrant, unfair and prejudicial conditions, it cannot now be

said that any amendment to paragraph 92 of the Judgment to include language affording Mr. Glinton QC an opportunity to be heard would be permissible under the *Barrell* jurisdiction or would in any way, in the interest of justice, be fair or impartial. The Judgment must be taken in its entirety and the circumstances are not in any way extraordinary but merely unfortunate.

[33] Learned Queen's Counsel Mr. Cohen made brief submissions. Firstly, he took issue with paragraph 1 of the written submissions by learned Counsel Ms. Glinton wherein she stated that "*these written submissions are lodged on behalf of Julius Trevor Bethel at the invitation of Justice Charles to do so at the request of the Plaintiffs' Counsel Mr. Cohen QC.*"

[34] This could be addressed succinctly. Mr. Cohen QC made no request or application but merely pointed out that the words "as Counsel" should be carried through in paragraph 92 to maintain consistency with paragraph 83 and the quotation in paragraphs 80 and 82 of the Judgment.

[35] As for the addition of the opportunity to be heard, Mr. Cohen QC drew to the Court's attention that in the Court of Appeal Mr. Glinton QC has said that this was without an opportunity to be heard. Mr. Cohen submitted that, upon the filing of submissions by Ms. Glinton, he now realized that "*Mr. Glinton QC might be hiding from the opportunity to be heard which apparently, he craved*". Learned Queen's Counsel drew the Court's attention to the Transcript of 29 July 2019 at page 21, lines 26-31 wherein Ms. Glinton expressly stated in respect to the submissions to be filed on 12 August 2019 in relation to Mr. Glinton QC that:

> **"My lady, I believe that we can simultaneously address the legality of his being heard as well as the desire for him to be heard."**

[36] Mr. Cohen QC argued that nowhere in the submissions of 12 August 2019 nor the present submissions does it state whether Mr. Glinton QC wishes to be heard, still less what he wishes to say beyond paragraph 22 of the Withdrawal Order made

under such aberrant, unfair and prejudicial conditions and it cannot now be made to accommodate hearing Mr. Glinton QC.

[37] With respect to the judgment of Rix LJ in **Compagnie Noga**, Mr. Cohen submitted that Ms. Glinton completely misunderstood the decision. After a 7 month trial when judgment was reserved for about 8 months, Rix LJ delivered his judgment running to hundreds of paragraphs considering and dealing with the submissions made. The submission made to him was that he had misunderstood some of the submissions made on behalf of Compagnie Noga and the cases cited to him. Rix LJ has considered the submissions and rejected them. Save in exceptional circumstances, review was a subject for appeal unless there were exceptional circumstances.

[38] With respect to the opportunity to be heard, Learned Queen's Counsel pointed out that it is incorrect to state that she was taken by surprise and did not have a fair opportunity to put in submissions to refute submissions and also, to put authorities before the Court. He argued that the Plaintiffs' skeleton arguments for the hearing on 2 July 2019 of the Recusal Application dealt not only with the disgraceful conduct of Mr. Glinton QC but pointed out that at least three times with reasons (paras 5.1 and 6) that it was inconceivable that he could continue as counsel and be a witness, have the requisite independence to act as counsel and act as counsel when he had joined with the Defendant as a litigant in relation to the same subject matter.

[39] Those skeleton arguments, he submitted, were served on Maurice O. Glinton & Co who are on record and made the Recusal Application on behalf of the Defendant. A personal application to the same effect in even broader terms was made to the Court by Mr. Glinton QC by letter dated 10 May 2019.

[40] Mr. Cohen QC stated that Mr. Glinton QC was actually present in Court during most of the hearing on 2 July 2019 and actually attempted at one stage to intervene in cross-examination. This is accurate. The hearing was conducted by Ms. Glinton

on behalf of the firm in which Mr. Glinton QC was either a principal or a partner. Further written submissions were made after the hearing and nothing was said as to the position of Mr. Glinton QC.

[41] According to learned Queen's Counsel Mr. Cohen, Mr. Glinton QC and Maurice O. Glinton & Co. abstained from any complaint about the inevitable consequence of the finding which had already been explained in the Plaintiffs' skeleton arguments – i.e. he could not continue as Counsel. Indeed, says Mr. Cohen, these attorneys who were completely lacking in the independence required of counsel such that they merely sat back and said nothing beyond that the Court had no power to order the withdrawal of Mr. Glinton QC.

[42] Mr. Cohen further submitted that the Court's power to control attorneys as its officers was explained briefly to the Court in the Plaintiffs' skeleton arguments for 29 July 2019 dealing with the ground of appeal: para 5.52 onwards where the cases of **Myers v Elman** [1940] AC 282 HL and **Geveran Trading Co. Ltd v Skjevesland** [2003] 1 WLR 912 AC were referred to. Mr. Cohen next submitted that in a case of abuse such as the present, the Court had an obvious duty to do so and what has happened even after 29 July 2019 demonstrates what occurs when attorneys without the necessary degree of independence try to act as Counsel.

[43] Learned Queen's Counsel submitted that the Plaintiffs do not make it a real issue on the point of the Court giving Mr. Glinton QC an extra opportunity to be heard for if he wishes to say something to be considered by the Court, there seems to be every reason to hear it now.

Analysis and Conclusion

[44] It is imperative that I address the issue raised in paragraph 1 of the written submissions dated 2 October 2019 by learned Counsel for the Defendant, Ms. Glinton. She submitted:

> **"These written submissions are lodged on behalf of Julius Trevor Bethel at the invitation of Madam Justice Indra Charles ("Justice Charles") to do so at the request of the Plaintiffs' Counsel, Mr. Lawrence Cohen QC, that her Judgment delivered on 11 July 2019 ("the Decision") following the hearing of an application by Mr. Bethel for her recusal ("the Recusal Application") be re-opened for purposes of adding certain words to paragraph 92 of the Decision. Specially, Plaintiffs' Counsel has requested that:**
>
> **i. The words "as Counsel" be added to the last sentence of paragraph 92 of the Decision; and**
>
> **ii. That additional language be added to paragraph 92 of the Decision to the effect that Her Ladyship would invite Mr. Maurice O. Glinton QC to be heard on the question of whether he ought to be ordered to withdraw."**

[45] If I understood Counsel correctly, she is of the opinion that the proper procedure has not been followed because, at paragraph 2 of her submissions, she cited the case of **Taylor v Lawrence** [supra] where the Court (per curiam) not Lord Woolf stipulated the procedure to be followed on the making of such an application.

[46] To be succinct, Mr. Cohen QC did not make any such request or application. He merely pointed out:

i. In respect of the addition of the words "as Counsel" in paragraph 92, that these words had not been carried through into that paragraph though they were found earlier in the Judgment (e.g. in paragraph 83 and in the quotation in 80 and 82 of The Bahamas Bar (Code of Professional Conduct) Regulations where the role is described of the Attorney as Advocate. In other words, to add clarity to the Judgment.

ii. As for the addition of an opportunity to Mr. Glinton QC to be heard, Mr. Cohen drew to the Court's attention that in the Court of Appeal Mr. Glinton QC had said that this was without an opportunity to be heard.

[47] Even if but not accepting that Mr. Cohen QC was the one who requested that the Court should make the two additions to the Judgment, besides the fact that the Order has not been perfected (which I will address momentarily), my

understanding is that there is an implied responsibility of both Counsel, whether or not invited to do so by the judge, to raise with the judge and draw to his/her attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process. This responsibility is even greater where the judge does not have a judicial clerk to assist with editing of judgments. In the UK, for example, there is a Practice Direction that addresses the guidance above: Munby LJ in **In re A (Children) (Judgment; Adequacy of Reasoning) (Practice Note),** [2011] EWCA Civ, 1205. Good lawyers normally assist judges rather than resorting to the appellate process.

[48] That said, the Court, of its own motion, realizing that there was an obvious inadvertence in not adding "as Counsel" or "as Advocate" to paragraph 92 to maintain consistency with previous paragraphs of the Judgment and, not giving an opportunity for Mr. Glinton QC to be heard, did not approve the draft Order. To date, the Order has not been perfected.

[49] The draft Order as originally circulated - see Schedule 2 of the Skeleton Argument on behalf of Plaintiffs (for hearing on 26 September 2019) - provides merely that Mr. Glinton QC should withdraw his services. Having come back to the Order for the second time in late July, the Plaintiffs realised that the draft inadvertently went further than was intended by the Court. It should plainly have been an order for Mr. Glinton QC to withdraw his serves as Advocate/Counsel and not generally. So far as the Order is concerned, the substance of the point was accepted by Ms. Glinton in her email to Ms. Cleare dated 25 July at 20:40 hours and copied to the Court and all Counsel. Ms. Glinton wrote:

> **"As for the Order, we would agree to the addition of "as Counsel" rather than "as Advocate".**

[50] In my considered opinion, there is really no difference between the word "Counsel" or "Advocate". Indeed, in legal parlance, they are used interchangeably. However,

the word used in Rule VIII of The Bahamas Bar (Code of Professional Conduct) Regulations (set out in paragraph 80 of the Judgment) is actually "*Advocate*".

[51] Although the terms are interchangeably used, I will adopt the statutory language and insert the word "Advocate" in paragraph 92. To maintain consistency in the judgment, I will also use "Advocate" and not "Counsel" in paragraph 83. This will be done by means of a footnote. Any suggestion that the Court is *functus officio* is clutching at straws since this is an occasion where even the slip rule should apply.

[52] With respect to the addition of a sentence to paragraph 92 to give Mr. Glinton QC a further opportunity to be heard, this was a case of a genuine mistake on the part of the Court. To my mind, whether or not it was prompted by the Plaintiffs' Counsel is immaterial.

[53] In my opinion, the Court cannot be *functus officio* as even now it has to finalise its Order.

[54] All of the authorities indicate that the Court is fully entitled to amend, alter or even withdraw its judgment even to the point of changing the result at any time before the Order is sealed or perfected: See **Re Barrell** and Rix LJ in **Compagnie Noga** [supra]. However, the Court should only do so for a strong reason and the jurisdiction is certainly not to be exercised lightly.

[55] I should point out that the law in The Bahamas is based on rules which pre-date the introduction of the Civil Procedure Rules [UK] so arguments based on the perceived lowering of the test because of the need to achieve the overriding objective may have limited application as for example in **Re L v B (Children) (Care Proceedings: power to revise judgment)** [2013] 2 All ER 294 where the UK Supreme Court held that they were not bound by **Re Barrell** and the test of "exceptional circumstances".

[56] That said, the *Barrell jurisdiction* is still good law in The Bahamas. This point was fortified in **Hong Kong Zhong Development Company Limited v Squadron**

Holdings SPV016HK, Ltd. (2016/CLE/gen/01295) (unreported) [delivered on 4 May 2017) where, at paragraph 13 of the judgment, this Court stated:

> **"In RTL v ALD and others [2015] 1 BHS J No. 82, Winder J affirmed that the Re Barrell jurisdiction is the law of the Bahamas. He stated at para 37:**
>
> > **"The Bahamas however, has not as yet introduced any CPR changes and therefore I find the Barrell jurisdiction remains the state of our law. This position has been confirmed by Barnett CJ in the case of *Re: Petition of Henry Armbrister 2007/CLE/qui/01438 & 2008/CLE/qui/845*. I accept therefore that it is only in the most exceptional circumstances that I ought to revisit a decision made by me…"**

[57] Having analyzed the authorities cited to me including the case of **Gilbert Henry**, I am of the firm view that the court retains a residual jurisdiction to vary its earlier judgment until the order of the court is perfected. That jurisdiction is not unfettered. There must be exceptional circumstances warranting its exercise.

[58] In **Gilbert Henry**, the CCJ identified a relevant factor in deciding whether the jurisdiction should be exercised is whether any party has acted upon it to his or her detriment especially before the Order was formally drawn up.

[59] As His Lordship in Gilbert Henry said at para. 23:

> "…**The court should normally invite submissions (which may be written submissions) from the parties affected by the earlier decision and should in its subsequent decision, refer to the earlier decision and explain its reasons for varying or overturning it; and**
>
> **The court is *functus officio* once the order has been recorded or otherwise perfected. Thereafter remedy for errors in the judicial process lies in the appellate process."**

[60] In the same way, learned Counsel Ms. Glinton was invited to make submissions which she did so comprehensively. There was no indication that Mr. Glinton QC acted on anything to his detriment. Indeed, he is given a further opportunity to appear before this Court to advance any argument he may wish to make. Just to

reiterate, the fact that such further opportunity was not given to Mr. Glinton QC was a genuine mistake and an oversight on my part.

[61] In conclusion, I will make the following amendments to the Judgment delivered on 11 July 2019 by indicating by way of footnotes:

(i) In paragraph 83, the words "as Counsel" will be replaced by the words "as Advocate" in line 4; and

(ii) An additional sentence be added to paragraph 92 which will now read:

> **"Therefore, it is only fit and proper that he withdraws his services as Advocate to Trevor Bethel. Given this finding, the Court will give Mr. Glinton QC an opportunity to be heard."**

[62] The Defendant, being the unsuccessful party in these proceedings, will pay costs to the Plaintiffs to be summarily assessed by the Court on 19 November 2019 at 10:00 a.m.

Dated this 5th day of November, A.D. 2019

Indra H. Charles
Justice