COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

PROBATE DIVISION

2018/PRO/cpr/00035

IN THE MATTER OF THE JUDICIAL TRUSTEE ACT

IN THE MATTER OF THE ESTATE OF RAYMOND ADAMS

(DECEASED)

BETWEEN:

ROBERT ADAMS

(a beneficiary of the Estate of Raymond Adams)

Plaintiff

And

GREGORY COTTIS

(as Executor of the Estate of Raymond Adams)

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Christopher Jenkins of Lennox Paton for the Plaintiff
Mr. Damian Gomez QC for the Defendant

Hearing Date: 21 January 2021

Leave to appeal – Stay of proceedings – Principles on which application should be considered – Order 31A rule 25 – Interplay with right to a fair hearing under Article 20(8) of the Constitution

On 29 December 2020, the Court dismissed the Defendant's application for relief from sanctions on the basis that the Defendant has been unable to satisfy the three mandatory requirements at RSC O. 31A r. 25(2). These included a finding that the Defendant had a long history of non-compliance with directions, deadlines, court orders, as well as non-cooperation with the Judicial Trustee.

The Defendant applied for leave to appeal on two grounds:

(i) the learned judge erred in law by in effect punishing the Defendant for his non-compliance with the Unless Order dated 7 September 2020 when the evidence showed that the Defendant was incapicitated by blindness from 3 December 2019 and that it was this that prevented him from complying with the Orders dated 17 December 2019 and 7 September 2020 such that the said non-compliance was neither intentional nor contumacious; and

(ii) that the judge erred in law and adopted an interpretation of Order 31A rule 25(3) of the Rules of the Supreme Court as circumscribing the curative powers of the Court to enable a party in the circumstances of the Defendant to be heard on the merits of his Defence when his blindness negated his ability to comply with the said orders recited in ground 1 so as to deprive him of his right to a fair hearing as guaranteed by Article 20(8) of the Constitution of The Bahamas. Alternatively, the judge ought to have held that Order 31A rule 25 (3) infringed the Defendant's right to a fair hearing under article 20(8) of the Constitution and further that the Court had and continues to have unfettered discretion to relieve a person in the circumstances of the Defendant from sanctions and ought further to extend the time for him to file and serve his List of Documents.

The Defendant also applied for a stay pending appeal.

Held: Refusing leave to appeal and a stay pending appeal with costs fixed at $7,500

1. The principles that a Court should apply in determining an application for leave to appeal are as follows:

    a. It is part of the function of the Court in considering applications for leave to appeal to weed out hopeless appeals;

    b. The Court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal;

    c. The Court may grant the application even if not so satisfied for other reasons. Those reasons include where the issue is one which it would be in the public interest for the Court of Appeal to examine, or where the case raises an issue where the law requires clarification;

    d. If there is any doubt should leave be granted, the safe course is to refuse leave, as it is always open to the Court of Appeal to grant leave.

    Practice Note (Court of Appeal: Procedure) [1991] 1 All ER 186, **Smith v Cosworth Casting Processes Ltd.** [1997] 4 All ER 840, **Bethel v Barnett and others** [2011] 1 BHS J. No. 64, applied.

2. The proposed grounds of appeal had no realistic prospect of success. In particular:

    a. The Defendant did not challenge the finding of the Court that he had not generally complied with all other relevant rules, practice directions, orders and directions under Order 31A rule 25(2). Accordingly, even if the Court of Appeal was satisfied that the Court had erred in failing to find that the failure to comply with

the Unless Order was not intentional, or that there was otherwise no good explanation for the failure, this would not affect the outcome under Order 31A Rule 25.

b. The Defendant had the opportunity for a full trial on the merits of his Defence. It was his own conduct in breaching orders of the Court, directions, and deadlines, many of which predated his alleged medical issues, which resulted in the refusal of the Court to allow the Defendant's application for Relief from Sanction.

c. The Unless Order provisions of Order 31A, rules 22-25 provided a balance between the competing rights of litigants. Comments of Chadwick LJ at **Arrow Nominees Inc v Blackledge** [2000] 2 BCLC 167, para 54, and of Arden LJ in **Stolzenberg v CIBC Mellon Trust Co Ltd** [2004] EWCA Civ 827 at para 161 approved.

d. The word **'and'** rather than the word **'or'** contained in Order 31A rule 25(2), indicted that the Court had to be satisfied of all three factors set out therein. This wording was clear and required no clarification.

RULING

Charles J:

Introduction

[2] On 29 December 2020, I dismissed the Defendant's (Mr. Cottis) application for relief from sanctions on a litany of grounds; most notably that Mr. Cottis was unable to satisfy the three mandatory requirements at RSC O. 31A r. 25(2). Specifically, Mr. Cottis has had a long and blemished history of non-compliance with court orders as well as non-cooperation with the Judicial Trustee ("the Ruling".

[3] Aggrieved by the Ruling, Mr. Cottis filed a Summons and affidavit in support on 12 January 2021, seeking leave to appeal the Ruling on two discrete grounds namely:

1. The learned judge erred in law by in effect punishing Mr. Cottis for his non-compliance with the Unless Order dated 7 September 2020 when the evidence showed that Mr. Cottis was incapicitated by blindness from 3 December 2019 and the blindness prevented him from complying with the

Orders dated 17 December 2019 and 7 September 2020 such that the said non-compliance was neither intentional nor contumacious; and

2. The learned judge erred in law and adopted an interpretation of Order 31A rule 25(3) of the Rules of the Supreme Court ("RSC") as circumscribing the curative powers of the Court to enable a party in the circumstances of Mr. Cottis to be heard on the merits of his Defence when his blindness negated his ability to comply with the said orders recited in ground 1 so as to deprive him of his right to a fair hearing as guaranteed by Article 20(8) of the Constitution of The Bahamas ("the Constitution"). Alternatively, the judge ought to have held that Order 31A rule 25 (3) infringed Mr. Cottis' right to a fair hearing as guaranteed by the Constitution and further that the Court had and continues to have unfettered discretion to relieve a person in the circumstances of Mr. Cottis from sanctions and ought further to extend the time for him to file and serve his List of Documents.

[4] Mr. Cottis also seeks a stay of execution of the Ruling pending the determination of the appeal.

[5] Mr. Adams opposes the application and relies on the Second Affidavit of Sebastian Masnyk filed on 20 January 2021, filed in response to the Affidavit of Mr. Cottis. Mr. Cottis, in response, relies on the Affidavit of Anthony Mckinney, QC filed on 25 January 2021but undertakes to file his own affidavit directly controverting Mr. Masnyk's allegations.

[6] Mr. Cottis says that leave should be granted for two reasons namely:

(1) the grounds stated in the draft Notice of Appeal Motion each have a realistic prospect of success or

(2) further or alternatively that the court can grant leave even if it is not so satisfied that the appeal has any prospect of success but there is an issue which may be

one which the court considers should be in the public interest be examined or that the case raises an issue where the law requires clarifying.

Background

[7] Some background facts are helpful and are set out more extensively in the Ruling. The most recent failures and the failure which prompted Mr. Adams to seek an Unless Order, stems from the directions ordered on 17 December 2019 ("the December Directions Order"). That order required both parties to file their List of Documents by 20 March 2020.

[8] Mr. Adams met the deadline. Mr. Cottis did not and remained in breach of the December Directions Order. To date, Mr. Cottis has never given any indication of if or when he would comply with the December Directions Order, notwithstanding the requests of Mr. Adams, and notwithstanding that he has had over a full year to produce the List of Documents.

[9] Whilst it was the failure to provide disclosure that caused Mr. Adams to seek an Unless Order, it was only the latest failure in a long history of such conduct that left Mr. Adams with no other option. At each juncture, the Court provided generous time frames for compliance as accommodation for Mr. Cottis' reported medical difficulties, notwithstanding the time that elapsed between the hearings which could have been used to produce the List of Documents.

[10] On 17 June 2020, Mr. Adams applied for an Unless Order, which Order was granted on 7 September 2020. This Unless Order (filed 13 October 2020) required Mr. Cottis to produce his List of Documents by 13 November 2020, failing which his Defence would be struck out automatically. Notwithstanding that the Unless Order came after a significant period of non-compliance, the Court, at Mr. Cottis' request, still granted an enlarged period of time for compliance.

[11] Mr. Cottis failed to comply with the Unless Order (not even to provide a single document to show any good faith) and his Defence was struck out automatically on 13 November 2020. Mr. Cottis was eventually heard on an application for

relief from sanctions on 9 December 2020. That application was the proper opportunity to present and explain why he should be granted relief and should not be sanctioned for his conduct. Mr. Cottis provided very limited explanation and provided no answer to the assertions of Mr. Adams of persistent non-compliance with Court Orders, many of which predated the medical condition that Mr. Cottis complained of. Mr. Cottis did not raise any argument that Order 31A rule 25 was itself unconstitutional. It is only now, on seeking leave to appeal, that this ground is raised for the first time, alongside an assertion that the Court was wrong to find that his medical issues did not themselves justify the granting of Relief from Sanctions.

[12] The Defendant now also seeks to adduce additional evidence in his affidavit filed on 12 January 2021, to which the Plaintiff has provided a response in the Second Affidavit of Sebastian Masnyk, filed on 20 January 2021 (though which was provided to the Defendant's counsel on the evening of 19 January 2021 in final form).

The law

Leave to appeal - Test to be applied

[13] The general principles governing whether leave to appeal should be granted are well settled and are accepted by both parties.

[14] As Mr. Jenkins correctly submits, the Court must consider whether the grounds put forward, or any of them have any realistic prospect of success. In this respect, part of the Court's function is to weed out unmeritorious claims and to deter parties from commencing frivolous appeals. As stated by the English Court of Appeal in **Practice Note (Court of Appeal: procedure)** [1999] 1 All ER 186, it is a part of the Court's function to weed out hopeless appeals. In this regard the Court of Appeal provided the following guidance:

> **"7. The experience of the Court of Appeal is that many appeals and applications for leave to appeal are made which are quite hopeless. They demonstrate basic misconceptions as to the purpose of the civil appeal system and the different roles played by appellate courts and**

courts of first instance. Courts of first instance have a crucial role in determining applications for leave to appeal."

[15] The appeal systems and the requirement to obtain leave are imposed to avoid the expenditure of money and time on appeals which have no hope of success. The guiding principle in determining whether leave to appeal should be granted is set out in the Practice Note provided in the leading case of **Smith v. Cosworth Casting Processes Ltd.** (1997) 4 All ER 840 where Lord Woolf stated:

> **"The Court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why, however, this court has decided to adopt the former phrase is because the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient".**

[16] If there is any doubt that leave ought to be granted, the safe course is to refuse leave to appeal, as set out at paragraph 8 of the 1999 Practice Note (Court of Appeal: procedure) where it was stated:

> **"[I]f the court of first instance is in doubt whether an appeal would have a real prospect of success or involves a point of general principle, the safe course is to refuse leave to appeal. It is always open to the Court of Appeal to grant leave."**

[17] Therefore, if the Court considers that there is doubt as to the prospects of success of the Appeal, then leave to appeal should be refused.

[18] The principles set out in **Cosworth** were accepted and relied upon by Jon Isaacs J (as he then was) in **Bethell v. Barnett and others** [2011] 1 BHS J. No. 64. In **Bethell,** His Lordship stated, at paragraph 9:

> **"In Smith v Cosworth Casting Processes Ltd. [1997] 4 All ER 840 Lord Woolf, MR provides guidelines for applications for** leave to appeal. **I mention the first two of them:**
>
> **"36 The guidance is as follows:**

> **1. The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word "realistic" makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.**
>
> **2. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying." "**

[19] The principles derived from **Cosworth** principles were followed in many other cases. For instance in **In the Matter of the Petition of Scott E. Findeisen and Brandon S. Findeisen (as Trustees of the Stephen A. Orlando Revocable Trust) (2016/CLE/qui/01564), unreported, 15 June, 2020** this Court restated, commencing at paragraph 9 of the Ruling, the well-known guidance of Lord Wolff in **Smith v Cosworth Casting Processes Limited** (1997) 4 All ER 840. Specifically that:

(i) Leave to appeal will only be refused if the applicant has no realistic prospect of succeeding; and

(ii) Leave to appeal may even be granted where there is no realistic prospect of success but where there is an issue of a public interest or the law requires clarification.

[20] At paragraph 11 of **Findeisen**, this Court stated:

> **"Our courts have consistently followed the guidance given by Lord Wolff. In *Keod Smith v Coalition To Protect Clifton Bay* (SCCivApp No. 20 of 2017), Isaacs JA succinctly summarized the test to be applied by a court when determining whether to grant leave. At paragraph 23 of the Judgment, he stated:**
>
> > **"The test on a leave application is whether the proposed appeal has realistic prospects of success or whether it raises**

> **an issue that should in the public interest be examined by the court or whether the law requires clarifying: per Lord Woolf in *Smith v Cosworth Casting Process Ltd* [1997] 4 All ER 840."**
>
> **[12] Additionally, in *AWH Fund Limited (In Compulsory Liquidation) v ZCM Asset Holding Company (Bermuda) Limited* [2014] 2 BHSJ No. 53, the Court of Appeal held:**
>
> > **"The Court will refuse an application for an extension of time if satisfied that the applicant has no realistic prospect of succeeding on the appeal. Further, the court can grant the application even if it [sic] not so satisfied where the issue raised may be one which the court considers should in the public interest be examined by the court or where, the court takes the view that the case raises an issue of law which requires clarifying."**

[21] To be succinct, Mr. Cottis relies on both limbs of **Cosworth** namely: (1) Mr. Cottis has a realistic prospect of success on appeal and (2) this case raises an area of law that requires clarifying in the public interest.

The law on stay pending appeal

[22] Order 31A Rule 18(2)(d) provides that the Court may stay the whole or part of any proceedings generally or until a specified date or event.

[23] Further, rule 12(1)(a) of the Court of Appeal Rules, 2005 provides:

> **"(1) Except so far as the court below or the court may otherwise direct:**
>
> > **(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below."**

[24] **In the Matter of Contempt of Donna Dorsett-Major on 3 June 2020** [2020/CLE/gen/0000], Ruling delivered on 8 December 2020, this Court dealt with the applicable principles on stay pending appeal. For present purposes, I merely reiterate them wholly at paragraphs 23 to 28.

> **"[23] The starting point is that a judge has a wide discretion with regards to the grant of a stay. This is confirmed by the learned authors of *Odgers On Civil Court Actions* at page 460:**

> **"Although the court will not without good reason delay a successful plaintiff in obtaining the fruits of his judgment, it has power to stay execution if justice requires that the defendant should have this protection[…] [The] court has wide powers under the Rules of the Supreme Court."**

[24] As to how that discretion ought be exercised in these circumstances, the court's considerations have only broadened with the developing case law, beginning, most notably, with the decision of Brett, LJ in the case of *Wilson v Church No. 2* [1879] 12 Ch.D. 454 at 459 wherein he stated:

> **"This is an application to the discretion of the Court, but I think that Mr. Benjamin has laid down the proper rule of conduct for the exercise of discretion, that where the right of appeal exists, and the question is whether the fund shall be paid out of Court, the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory."[Emphasis added]**

[25] This was further developed in *Linotype-Hell Finance Ltd. v Baker* [1993] 1 WLR 321 wherein Staughton L.J. opined at page 323:

> **"It seems to me that, if the defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution."[Emphasis added]**

[26] So, where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application if the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success. This requires evidence and not bare assertions.

[27] Some additional principles that the Court should be guided by in considering an application for a stay pending an appeal is outlined in the case of *Hammond Suddards Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065 at para 22 *(per Clarke JL and Wall J):*

> ***"*By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what**

> **are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"**
>
> **[28] Guidance was also given by the English Court of Appeal in *Leicester Circuits Ltd v Coates Brothers plc* [2002] EWCA Civ 474. At para 13, Potter LJ said:**
>
> > **"The proper approach is to make the order which best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal."**

[25] It is on the basis of these well-established principles that the Court will consider the present application.

Examining the grounds of appeal

Ground 1: Noncompliance with Unless Order was neither intentional nor contumacious because of evidence of Mr. Cottis' blindness

[26] Learned Queen's Counsel Mr. Gomez submits that this ground has a realistic prospect of success because the Court erred in law because Mr. Cottis' non-compliance with the orders of 17 December 2019 and 7 September 2020 was neither intentional nor contumacious. In that regard, Mr. Gomez QC relies on the cases of **Bahamas Telecommunications Company Ltd v Island Bell Limited** (SCCivApp No. 188 of 2014); **Cropper v Smith** (1883) 26 ChD 700 at page 709 and **Attorney General v Rudolph King and others** (2000) unreported.

[27] Mr. Gomez QC further submits that Order 31A rule 25 needs clarification. He submits that there is a dearth of judicial authorities in respect of whether this rule should be applied disjunctively or conjunctively. He submits that the Court

adopted a conjunctive approach and it is now open to the Court of Appeal to come to the conclusion that the conditions ought to be read disjunctively. He further submits that the Court's approach was draconian and the Court erred in not appreciating Mr. Cottis' blindness and that the delay in complying with the Unless Order was neither intentional nor contumacious.

[28] On the other hand, Mr. Jenkins argues that the ground is misconceived. He submits that the application for relief from sanctions was heard entirely under the controlling legislation, namely Order 31A, rule 25. That rule removes the discretion of the Court to grant relief where unless three conditions are met:

(i) the failure to comply was not intentional; and

(ii) there is a good explanation for the failure; and

(iii) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

[29] In the Ruling, the Court found against Mr. Cottis on all three of these considerations but Mr. Cottis, in his appeal, appears only concerned with (i) and (ii). He does not appear to challenge the finding of the Court under (iii) at all. The challenge to the Judge's findings under (i) and (ii), even if successful, would not affect the outcome. Accordingly, this ground is hopeless. I agree.

[30] In addition, the Court was provided with no evidence that the failure to comply was not intentional nor that the explanation for the failure to comply was good. Mr. Cottis now, at the leave to appeal stage, seeks to adduce new evidence which was not before this Court. Mr. Jenkins submits that the late presentation of this new evidence ought to be rejected as:

(i) No reason has been proffered as to why the evidence is only being provided now;

(ii) The evidence now provided is inconsistent with the evidence previously provided.

(iii) The evidence now being provided is demonstrably misleading and/or false in several key respects, as set out in the Second Affidavit of Sebastian Masnyk.

[31] The inconsistencies and omissions in Mr. Cottis' latest evidence include the following:

(i) In his affidavit at para 2, Mr. Cottis states that he has been blinded since 3 December 2019. In his Chronology entry for 3 December 2019 he similarly states that he suffered retinal detachment in both eyes. However, these assertions are inconsistent with the letter to the Court from Dr. Sweeting dated 18 March 2020, exhibited to the (unfiled) first affidavit of Anthony McKinney dated 4 September 2020, which indicates that between December 2019 and March 2020, Mr. Cottis had issues with only his right eye, with his left eye having "20/20+2" vision;

(ii) In para 3 of his affidavit, Mr. Cottis stated that he has been "*unable to make arrangements for* [his] *practice in* [his] *absence from the Bahamas*". In para 4 he states in the final paragraph that he has spent "*much of the year 2020 in Florida where most of the surgeries on both* [his] *eyes were conducted*". In respect of this assertion:

(1) Mr. Cottis nowhere states the dates that he was actually out of the jurisdiction;

(2) Mr. Cottis has at least two employees/associates assisting him at his office, including his wife Olivia Cottis, who has worked extensively on the Estate, and attended a meeting with the Judicial Trustee's team alone in June 2019 to discuss the Mr. Cottis' obligations with the Order of 24 May 2019.

(iii) In para 4 of his affidavit, Mr. Cottis states that he has been inhibited from fully instructing his attorneys because all of the documents related to the Estate in his possession are in his office. In respect of this assertion, Mr. Cottis does not state that he has been unable to access his office, and this excuse could only apply between 20 March 2020 and May 2020, as prior to 20 March 2020, and after May 2020 attorneys have been able to access their offices.

(iv) In para 4 of his affidavit Mr. Cottis also states that he is a sole practitioner and the only law in his office, and has no-one in his employ or otherwise familiar with the Estate documents, who could identity and locate them and deliver them to his attorneys. In respect of this assertion:

(1) Mr. Cottis does not state why he was unable to do so himself for any of the period in question (see (c) above);

(2) Again, Mr. Cottis fails to mention that his wife Olivia Cottis is familiar with the Estate, having attended meetings on her own in relation to the matter, and having been involved in the estate for many years. It is not credible that neither Mrs. Cottis nor Ms. Bethel at his office knows the whereabouts of the files relating to this Estate.

(v) Crucially, in para 5 of his affidavit, Mr. Cottis claims that the delay in complying with the orders for filing and service of his List of Documents is entirely due to his blindness, and therefore not his fault. However, it is clear from the Second Affidavit of Sebastian Masnyk that Mr. Cottis was in fact working at various points on various matters, and undertaking other activities inconsistent with his claimed inability to produce his List of Documents. In particular, the Plaintiff has been able to provide evidence that:

(1) Mr. Cottis attended numerous meetings in the Bahamas in March 2020, including with Mr. Jenkins and Mr. Masnyk at Lennox Paton on 9 March 2020;

(2) Mr. Cottis worked on at least two conveyancing transactions between July and November 2020 with attorneys Simon Lowe from King & Co and Alastair Chisnall from Graham Thompson & Co representing the sellers in those transactions and Mr. Cottis representing the purchasers;

(3) An unaided Mr. Cottis attended a meeting attended by LXP Real Estate Department Head David Johnstone in December 2020 at Deltec Bank;

(4) Mr. Cottis has been witnessed driving his vehicle at various points during 2020 by multiple persons;

(5) Mr. Cottis was sending detailed correspondence with the Judicial Trustee's attorneys Delaney & Partners in June and July 2020 in relation to a matter related to the Estate relating to a company called Bellwood, which he remained a director of after his resignation in May 2019.

[32] The above affidavit evidence from both parties was not tested for their veracity and so, this Court will refrain from making any factual findings. That said, this is certainly new evidence which was available to Mr. Cottis before the hearing of the Unless Order. For reasons best known to him, Mr. Cottis chose not to rely on them. Mr. Cottis now seeks a "*second bite at the cherry."* Permitting Mr. Cottis to argue new ground or to make a new case is not permissible. Litigants cannot be allowed unlimited bites at the cherry or else there will be no finality in litigation. In addition, if such new grounds were to be entertained, this could well open the floodgates to numerous applications of this nature which the Court cannot countenance.

[33] For all of the above reasons, this proposed ground of appeal has no realistic prospect of success and leave to appeal is refused.

Ground B: Order 31A Rule 25(3) contravenes the constitutional right of the Defendant to a fair hearing under Article 20(8) of the Constitution.

[34] Mr. Gomez QC submits that the Court erred in law and adopted an interpretation of RSC Order 31A rule 25(3) as circumscribing the curative powers of the Court to enable a party in the circumstances of Mr. Cottis to be heard on the merits of his Defence when his blindness negated his ability to comply with the said orders recited in ground 1 so as to deprive him of the right to a fair hearing as guaranteed by Article 20(8) of the Constitution. Alternatively, the Court ought to have held that RSC Order 31A rule 25(3) infringed Mr. Cottis' right to a fair hearing at trial as guaranteed by Article 20(8) of the Constitution and to further have held that the Court continues to have unfettered discretion to relieve a person in the circumstances of Mr. Cottis from sanctions and ought further to have extended the time for Mr. Cottis to file and serve his List of Documents.

[35] Rule 25(3)(2) reads:

> **"The Court may grant relief only if it is satisfied that –**
>
> **(a) The failure to comply was not intentional;**
>
> **(b) There is a good explanation for the failure; and**
>
> **(c) the party in default has generally complied with all relevant rules, practice directions, orders and directions."**

[36] Article 20(8) of the Constitution provides:

> **"Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."**

[37] To succeed on this ground, Mr. Cottis would have to show that Mr. Cottis was not granted the opportunity for a full trial on the merits of his Defence. This is plainly not the case.

[38] The original Direction Order was made on 17 December 2019, giving generous time for compliance at Mr. Cottis' request. Mr. Cottis did not comply, apply for an extension of time, or request an extension from Mr. Adams. The Unless Order was made on 7 September 2020, and was filed on 13 October 2020; and again gave generous time for compliance. Mr. Cottis did not comply and his Defence was struck out.

[39] This non-compliance was the latest of 11 breaches of the rules, Court Orders and directions made by the Court, set out in detail in the Ruling of this Court. It was that history non-compliance, combined with Mr. Cottis' failure to provide a persuasive explanation for his non-compliance, or to show that it was not intentional, which has resulted in refusal of the Court to allow Mr. Cottis' application for Relief from Sanctions.

[40] In **Arrow Nominees Inc. v Blackledge** [2000] 2 BCLC 167, Chadwick LJ stated as follows at para 54:

> **"the function of a court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."**

[41] Article 20(8) of the Constitution grants similar rights to Articles 6 of the European Convention on Human rights. In **Stolzenberg v CIBC Mellon Trust Co Ltd** [2004] EWCA Civ 827, the English Court of Appeal considered the interplay between Unless Orders and Article 6 of the European Convention on Human Rights. At paragraph 161, Arden LJ had this to say:

> **"Article 6 of the Convention requires attention to be addressed to a matter which has always been implicit in cases of this kind, namely that the effect of the court's refusal to grant relief is that the losing party will be deprived of a trial of his defence on the merits. Clearly, as the judge recognised, that is an important factor. But three points must be borne in mind. First, it is open to a party to consent to judgment being given against him without a trial on the merits … Second, this is not an appeal against the judgments entered against the appellants. The appellants cannot say those orders were wrongly made. Third, the state can impose restrictions on the right of access to court provided that the restrictions serve a legitimate aim, are proportionate and do not destroy the very essence of the right. Here, the legitimate aim in imposing a sanction is to secure compliance with court orders, which in the instant case were made to ensure the effectiveness of freezing orders. The imposition of a sanction is proportionate if it is reasonably necessary for achieving that aim. The essence of the right of access to court is not destroyed because the litigant has the opportunity to seek relief against the sanctions. The refusal of that relief is Convention-compliant if the same tests are satisfied. The legitimate aim remains the same. Proportionality will be met if the overriding objective is met. The essence of the right will not be destroyed even if refused, since the appellants always had the chance to comply with the court orders and to help progress the case to trial".** [Emphasis added]

[42] **Arrow** and **Stolzenberg** were relied on by the English Court of Appeal in **JSC BTA Bank v Ablyazov (No 8)** [2013] 1 WLR 1331 at paras 135 to 140.

[43] In my judgment, it is Mr. Adams who is being robbed of his **right to a fair trial within a reasonable time** of his case, by reason of the failure of Mr. Cottis to even provide discovery and begin the process of case management. Mr. Cottis has breached a plethora of orders of this Court; in all 13 breaches.

[44] The Unless Order provisions contained in Order 31A, rules 22 – 25 provide a balance between the competing rights of litigants. It is a very powerful weapon in the court's armoury in order to discourage or punish delays.

[45] Had Mr. Cottis shown a good reason why an Unless Order ought not be granted, it would not have been, under Rule 22. He failed to do so.

[46] Further, had he provided a good explanation for his failure for an entire year to provide a List of Documents, and shown that this non-compliance was not

intentional, and demonstrated that he had in fact previously generally complied with rules, directions deadlines and orders, the Court would have granted any relief from sanctions. However, he has failed to do so. Ultimately, Mr. Cottis is the architect of his own misfortune.

[47] In my judgment, this ground of appeal is just as hopeless as the first ground of appeal and ought to be refused.

Clarification of the law: Order 31A rule 25

[48] Mr. Gomez further submits that Order 31A rule 25 needs clarification. He submits that there is a dearth of judicial authorities in respect of whether this rule should be applied disjunctively or conjunctively. He submits that the Court adopted a conjunctive approach and it is now open to the Court of Appeal to come to the conclusion that the conditions ought to be read disjunctively. This argument is meritless. The section is crystal clear. It needs no clarification. "[A]nd" cannot be read as "or".

Conclusion

[49] In the premises, I will dismiss the summons filed on 12 January 2021 seeking leave to appeal and stay pending appeal. Mr. Adams is entitled to costs fixed at $7,500.

Dated this 5th day of February, A.D., 2021

Indra H. Charles
Justice