COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2019/CLE/gen/00452

BETWEEN

WINCREST CAPITAL LTD.

Plaintiff

AND

REBECCA FERNIE

Defendant

Before:	**The Hon. Madam Justice G. Diane Stewart**
Appearances:	**Mr. John Delaney Q.C. and Mrs. Lena Bonaby for the Plaintiff** **Mr. Garth Phillippe for the Defendant**
Hearing Dates:	**22nd November 2019, 27th November 2019, 27th January 2019, 5th March 2020**
Ruling Date:	**10th May, 2021**

RULING

Civil – Summary Judgment – Preliminary requirements to hear an application for Summary Judgment – Conditional Appearance – Revocation of Injunction restraining Defendant from breach of confidence – Court can only revoke order in exceptional circumstances – Audi alteram partem – Right to be heard

1. At the end of three inter partes hearings, by way of an oral decision, I acceded to the Plaintiff's application for an Anti-suit Injunction against the Defendant in addition to an injunction to prevent the Defendant from any further breaches of the duty of confidence on the 27th January, 2020 **(the "Breach of Duty of Confidence Injunction")**. I promised to put my reasons in writing. I additionally heard the parties on the Plaintiff's application for summary judgment and reserved my decision with respect thereto.

2. Resulting from the aforementioned decisions, the Defendant seeks an Order for the reconsideration and revocation of the Breach of Duty of Confidence Injunction pursuant to **Order 31A Rule 18 (7) of the Rules of the Supreme Court ("RSC")** and/or the inherent jurisdiction of the Court. The Defendant additionally seeks an order to make submissions in response to the merits of the Plaintiff's summary judgment application in the event that the court does not accede to the Defendant's preliminary objection that the Court lacks jurisdiction **(the "Defendant's Revocation Summons")**.

3. Accordingly, this is a three part ruling which will address:

1. The Court's decision on the Plaintiff's summary judgment application addressing, specifically whether the Court lack's the jurisdiction to determine the same;

2. The Court's jurisdiction to reconsider and revoke its Order prior to perfection; and

3. The written decision granting the Anti-Suit Injunction.

BACKGROUND HISTORY

4. The Plaintiff's action against the Defendant is for injunctive relief to restrain the Defendant for the alleged continuing breach of her duty of confidence and wrongful misuse of confidential information and for damages for breach of confidentiality, breach of contract and the tort of detinue and/or conversion of the Plaintiff's property and/or negligence or otherwise.

5. Its claim is as a result of the Defendant's alleged breach of a non-disclosure agreement subsequent to the termination of her contractual engagement with the Plaintiff with whom she was a Chief Operations Officer and Director. More particularly, the Plaintiff alleged that the Defendant wrongly retained possession of the Plaintiff's property, commenced foreign court proceedings against it, members of the Plaintiff's Board of Directors and certain third parties and made unauthorized disclosures of confidential information by filing the same in the foreign proceedings.

6. In turn, the Defendant entered a conditional appearance and applied to have the Plaintiff's Writ of Summons filed 5th April 2019 and the corresponding Statement of Claim filed 29th April 2019 set aside, struck out, dismissed or stayed; the application of which was heard on the 22nd November, 2019 and dismissed.

7. Thereafter, on the 27th November 2019 and 27th January, 2020, the Court heard the parties on the Plaintiff's Summons for an Anti-Suit injunction and other injunctive relief and summary judgment on parts of its Statement of Claim.

DEFENDANT'S REVOCATION SUMMONS

8. The grounds relied on by the Defendant are set out as follows.

   8.1 There were no findings of fact as to whether the information allegedly disclosed qualified for and retained the essential characteristic of confidence, whether the filing of an exhibit in the New York proceedings constituted a breach thereof, and if so whether the effect of the Plaintiff refusing to enter into the confidentiality order in the New York proceedings (as formally offered by the Defendant) constituted a waiver or loss of confidence on the part of the Plaintiff. Accordingly, the Court erred in granting the breach of confidence injunction and said injunction should be revoked.

   8.2 Counsel for the Defendant was not afforded the opportunity to make oral arguments on 27th January, 2020 in response to the Plaintiff's oral arguments with respect to the confidential character of the information, the alleged breach of confidential information and alleged breach of confidential information points made on the 27th November, 2019. It must be stated here that the application was the Plaintiff's and the Plaintiff had the right of reply to the submissions of the Defendant.

8.3 The Court reserved the ruling of the summary judgment application to further consider the issue raised in the Defendant's submissions as to lack of jurisdiction, without hearing the Defendant's counsel's oral submissions on the merits of the summary judgment application itself. The summary judgment application was made in respect of the allegations of confidence and breach of confidence. It follows that the consideration on the merits of the summary judgment application ought to have been adjourned pending a decision on jurisdiction. If the Court lacked jurisdiction then it could not judge adjudicate on a summary application, the factual matters necessary to ground the breach of confidence injunction.

9. The Defendant relied on the Second Affidavit of Crispin Hall filed 10th February, 2020 in support of the Defendant's Revocation Summons **("Second Affidavit")**. By the Second Affidavit, the Defendant exhibited the transcripts from the 22nd November, 2019, 27th November, 2019 and 27th January, 2020 which she intended to rely on.

10. She additionally exhibited a letter dated 7th February, 2020 whereby the Plaintiff's Counsel sought to make further submissions to persuade the Court after it had reserved in order "to research" and after having heard the Plaintiff's reply to Defendant's submissions objecting to the application of the Plaintiff on the ground that the Court lacked jurisdiction.

11. The Defendant also exhibited a letter dated 7th February 2020 from her Counsel with the comments and reservations with respect to the Plaintiff's draft Order of the 27th January, 2020 hearing, despite there being no written ruling handed down.

12. The Defendant averred that a variation or revocation of the breach of confidentiality injunction and an opportunity to make oral submissions would enable the Court to deal with the action justly.

SUMMARY JUDGMENT

13. The Defendant contended that the Court reserved its ruling on the summary judgment application to further consider the issue raised in the Defendant's supplemental submissions dated 26th January, 2020 as to lack of jurisdiction, due to only a conditional appearance being entered, without hearing the Defendant's Counsel on the merits of the summary judgment application itself.

14. Moreover, she submitted that as the summary judgment application was made in respect of allegations of confidence, and breach of confidence, the consideration on the merits of the summary judgment application ought to have been adjourned pending a decision on jurisdiction.

15. The Plaintiff on the other hand submitted that its Counsel presented oral submissions on the 22nd and 27th November 2019 and that the Defendant's Counsel presented its case in opposition on the 27th November 2019 and the 27th January 2020 with the Plaintiff having a final reply.

16. The Plaintiff conversely contended that the Court had jurisdiction, pursuant to Part 24 of the Civil Procedure Rules, to hear and determine a summary judgment application before the Defendant's challenge to jurisdiction is determined and relies on **Moloobhoy v Kanani [2013] EWHC Civ 600** where Longmore LJ states,

> **"[16] Rix J's judgment was given against the background of the old RSC Order 14, which only allowed an application for summary judgment to be made after a Defendant had given notice of intention to defend, which he would not do in his Acknowledgement of Service challenging the jurisdiction but would do, if he wished, in the second Acknowledgement of Service be filed once the jurisdiction challenge had failed.**
>
> **[17] The new CPR have made a departure from this latter requirement, while substantially preserving the prior practice in relation to challenges to the jurisdiction. Part 24.4(1) provides, as I have already said, that a Claimant can launch an application for summary judgment once an Acknowledgement of Service has been filed or before that if the court gives permission. It is therefore open to a court to give permission to a Claimant to apply for summary judgment at any time. *In Speed Investments v Formula One Holdings*, in the High Court, Lewison J qualified the approach of Rix J and contemplated that it might be possible, where a challenge to the jurisdiction is made, to permit an application for summary judgment. He said in para. 18:**
>
> > **"Although, therefore, I accept that the court does have the power to permit an application for summary judgment to be made before an outstanding challenge to the jurisdiction has been determined. It seems to me that it will be a very rare case in which the court exercises that power. In general terms, as Rix J says, the price that a Claimant must pay for being able to bring foreign Defendants before the curt is that they have a real opportunity to decide whether or not to submit to its jurisdiction."**

17. In turn, the Defendant submits that the Moloobhoy case concerned the English CPR rules as they stood in 2012 and not Order 12 and 14 of the RSC which is still the applicable regime in The Bahamas.

DECISION

18. I reserved my decision with respect to the summary judgment application. I shall now give my decision and my reasons for the same.

19. The governing provisions for an application for summary judgment are set out in **Order 14, r. 1 of the RSC** which states:

> **"ORDER 14**
> **SUMMARY JUDGMENT**
> **(R.S.C. 1978)**
>
> **1. (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant."**

20. The Supreme Court Practice 1976, Vol. 1, at 14/1/2 sets out the preliminary requirements for an application for summary judgment.

"Preliminary Requirements – The following are the conditions precedent for the plaintiff employing the summary process of O. 14 :

(a) the defendant must have entered an appearance ;
(b) the statement of claim must have been served on the defendant ; and
(c) the affidavit in support of the application must comply with the requirements of Rule 2, *infra*.

(a) Appearance by Defendant – This is a preliminary necessity to applying for summary judgment under O. 14. The words of Rule 1 preclude an application under O. 14 before the defendant has appeared, i.e., has either entered an unconditional appearance or his conditional appearance has become unconditional. If there is no appearance, judgment in default of appearance may be entered under 0. 13. If the appearance is conditional, the plaintiff cannot apply under O. 14 so long as the appearance remains conditional (Ricard v. Scusook, per Channel, J., at Chambers, December 15, 1901)."

21. By the Plaintiff's Summons filed 28th June 2019, it sought summary judgment on the following:

"Summary Judgment
2. Pursuant to O. 14, r. 1 RSC, summary judgment against the Defendant respecting the Plaintiff's claims made at paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and/or 15 and/or sub-paragraphs thereof of the Plaintiff's Statement of Claim filed herein on 29 April 2019 ("Statement of Claim") and corresponding relief as pleaded in the prayer of the Statement of Claim."

22. The aforementioned paragraphs referred to in the Plaintiff's Statement of Claim filed 29th April 2019 are set out as follows:

"5. As part of and supplementing the employment arrangements, the Plaintiff and the Defendant agreed in writing a confidentiality and non-disclosure agreement ("NDA") effective June 2015 by which the Defendant:
5.1 Acknowledged that during her employment with the Plaintiff that she will be given access to sensitive and confidential information consisting of client names amongst other confidential material (collectively "confidential information") of the Plaintiff and its clients;
5.2 Agreed that, amongst other things, she will:

a) not share confidential information with persons who are not authorized by the Plaintiff to have it;
b) not publish confidential information;
c) not communicate the confidential information to anyone without authority;
d) not use or disclose the confidential information for purposes other than those authorized;
e) not remove the confidential information from the Plaintiff's premises without permission to do so;

f) accept full responsibility to ensure the confidentiality and the safe keeping of any confidential information she received; and

g) take every reasonable step to prevent unauthorized parties from examining and/or copying the confidential information.

5.3 Confirmed her understanding that the duties of confidentiality expressed in the NDA applied both during and after her employment and that any breach will result in termination of employment and/or legal action.

6. Pursuant to her engagement, the Defendant owed the Plaintiff duties (amongst others) as follows:

6.1 Of fidelity to serve honestly and faithfully;

6.2 Of trust and confidence;

6.3 By her employment expressly pursuant to the NDA-

a) not disclose confidential information without authorization to do so; and

b) to maintain the confidentiality of the confidential information both during and after the engagement.

7. Further it was an implied term of the engagement that the Defendant would not misuse the Plaintiff's confidential information.

8. The Plaintiff entrusted the Defendant with extensive access to confidential information and with certain technology devices ("Plaintiff's property"), namely, a Microsoft Surface Pro 4 tablet computer, Microsoft Surface Pro 4 Keyboard, an Apple iPhone, and Bloomberg keyboard.

9. On or about 28 April 2017 the Defendant's engagement with the Plaintiff was terminated.

10. Subsequent to the termination of the engagement by the Plaintiff, the Defendant wrongly –

10.1 Retained possession of the Plaintiff's property;

10.2 In or about June 2018 commenced certain foreign court proceedings against the Plaintiff, members of the Plaintiff's Board of Directors, and certain third parties, specifically, proceedings before the Supreme Court of the State of New York ("foreign court"), County of New York, Index No. 653282/2018 ("foreign proceedings") respecting the engagement and/or other aspects of the Defendant's relationship with the Plaintiff.

10.3 Made unauthorized disclosures of confidential information by filing confidential information in the foreign proceedings.

11. On 28 February 2019 the foreign proceedings were ordered dismissed by the foreign court on the ground of forum non conveniens, the foreign court holding that New York is an inconvenient forum. That notwithstanding, the foreign proceedings have put the Plaintiff to inordinate costs and substantial prejudice of litigating in an inconvenient foreign jurisdiction.

12. Egregiously, the Defendant wrongly misused the Plaintiff's property to access confidential information consisting of the Plaintiff's emails with its clients and wrongly published the same within the foreign proceedings.

13. The Plaintiff has requested the Defendant to take reasonable steps towards mitigating and/or avoiding loss or damage to the Plaintiff and/or its

clients as a consequence of the Defendant's unauthorized disclosures of confidential information, namely to –

- **Withdraw and/or redact the confidential information filed in those foreign court proceedings;**
- **Return all originals and copies of the confidential information; and**
- **Disclose to the Plaintiff theidentity of all persons to whom the Defendant has disseminated the confidential information.**

14. By reason of the Defendant's unauthorized disclosure of confidential information in the foreign proceedings, the Defendant has breached the duty of confidentiality owed to the Plaintiff, and in so doing the Defendant has put the Plaintiff at risk of sustaining substantial reputational loss and damage in addition to risk of liability to the Plaintiffs clients which may result in pecuniary loss and damage."

23. I note that the above paragraphs referred to all relate to the allegations that the Defendant breached the confidentiality agreement. In any event, I must first consider the Defendant's preliminary objection which is that the Court cannot hear the Plaintiff's summary jurisdiction on its merits based on the fact that she only entered a conditional appearance.

24. The preliminary requirements for summary judgment applications are that an appearance must have been entered, the statement of claim must have been served on the Defendant and the Affidavit in support must be in conformity with the requirements of Order 14, Rule 2 of the RSC. However, if the appearance is conditional, the Plaintiff cannot apply under Order 14 of the RSC for an order for summary judgment so long as the appearance remains conditional.

25. A conditional appearance limits the jurisdiction of the Court. Order 12, Rule 6 of the RSC sets out the premises for obtaining a conditional appearance.

> **"6. (1) A defendant to an action may with the leave of the Court enter a conditional appearance in the action.**
> **(2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under rule 7 and the Court makes an order thereunder."**

26. In **Cahir O'Neill v. Eddie Rowan trading as PLM Promotions [2014] NIMaster 9,** Master Bell of the High Court of Justice of Northern Ireland stated that the purpose of a conditional appearance is to allow the defendant to dispute either the court's jurisdiction or the validity of the issue or the service of the writ. In Cahir O'Neill, the Court was tasked with considering whether, inter alia, a conditional appearance became an unconditional appearance in reliance on Order 12, Rule 7 (1) and (2) of the Irish Rules of the Supreme Court which mirrors Order 12, Rule 6 of the Bahamian RSC. Master Bell at para.13 stated:

> **"[13] The purpose of a conditional appearance is to allow the defendant to dispute either the court's jurisdiction or the validity of the issue or the service of the writ. Having entered the conditional appearance on 23 January 2013, the defendant's solicitors did not, as they should have done, immediately make an application asking for a declaration that the writ had not been validly served. Instead, faced with correspondence dated 28 January 2013 from the plaintiff's solicitor noting their conditional appearance and looking forward to receiving their defence, the defendant's solicitors did in fact serve a defence and a notice for particulars on 24 April 2013. Subsequently, the plaintiff's solicitor served a reply to defence and a notice for particulars. It was only on the 24 June 2013 that the defendant issued a summons seeking an order under Order 12 Rule 8 declaring that the Writ was not duly served and setting it aside."**

27. In **Egan v. Murphy [2019] IECA 7**, Whelan J, delivering the Irish appellate court's judgment held,

> **"31.....The use of a conditional appearance is confined to specific objections by a defendant to jurisdiction or the regularity of the proceedings. Service of a conditional appearance does not shift the burden of proof regarding such a contention. Its primary purpose is to signal to the plaintiff and to the court a defendant's intentions as to the defence of the case....."**

28. By Order made 23rd April, 2019, the Defendant was granted leave to enter a conditional appearance in this matter. Thereafter, the Defendant filed both a Memorandum of Conditional Appearance and a Notice of Conditional Appearance on 23rd April, 2019. Subsequently, by Summons filed the 7th May 2019, the Defendant filed a Summons To set aside or strike-out and dismiss or stay the action pursuant to O. 12, Rule 7 of the RSC, invoking the limited jurisdiction of the Court to consider the mentioned applications. Aside from its defence in relation to the anti-suit injunction and breach of confidence injunction and the preliminary arguments made herein, the Defendant has not taken any fresh step which could be considered a waiver to the Court's limited jurisdiction. The Defendant's appearance remains conditional.

29. The Bahamas is still governed by the Rules of the Supreme Court. Therefore, any case law that considers and interprets the new Civil Procedure Rule regime of the United Kingdom, is not applicable in this jurisdiction as those rules are different from the existing rules.

30. I have considered all of the evidence and submissions of the parties that were made in writing and orally. I accept the Defendant's preliminary objection that the Court is prevented from hearing the Plaintiff's summary judgment application as the Defendant has only filed a conditional appearance in this action.

31. The application for summary judgment is dismissed with costs to the Defendant to be taxed if not agreed.

JURISDICTION TO RECONSIDER AND REVOKE A COURT ORDER

32. The Defendant submitted that the Order granting the beach of confidence injunction is problematic. As such, the Court has the power to reconsider its Order and to change its

mind so as to correct the error in the Order by revoking the breach of confidence injunction as the Order has not yet been perfected.

33. She relied on **In Re L and B (Children) (Care Proceedings: power to revise judgment) [2013] 2 ALL ER 294**, particularly para. 19 in which Lady Hale SCJ stated:

> **""(19) Thus there is jurisdiction to change one's mind up until the order is drawn up and perfected. Under the Civil Procedure Rules (r.40.2(2) (b)), an order is now perfected by being sealed by the court. There is no jurisdiction to change one's mind thereafter unless the court has an expressed power to vary its own previous order. The proper route of challenge is by appeal. On any view, therefore, in the particular circumstances of this case, the judge will have [the] power to change her mind. The question is whether she should have exercised it."**

34. The Defendant contended that the Court must revisit the Order judicially, in order for the matter to be dealt with justly.

35. In further reliance on **In Re L and B (Children)**, the Defendant cites paras. 37 - 38 of the judgment which states as follows:

> **"[37] Both the CPR and the FPR make it clear that the court's wide case-management powers include the power to vary or revoke their previous case-management orders: see CPR 3.1(7) and r 4.1(6) of the Family Procedure Rules 2010, SI 2010/2955. This may be done either on application or of the court's own motion: CPR 3.3(1), FPR 4.3(1). It was the absence of any power in the judge to vary his own (or anyone else's) orders which led to the decisions in Re St Nazaire Co (1879) 12 Ch D 88 and Re Suffield and Watts, Ex p Brown (1888) 20 QBD 693, [1886-90] ALL ER Rep 276. Where there is a power to vary or revoke, there is no magic in the sealing of the order being varied or revoked. The question becomes whether or not it is proper to vary the order.**
>
> **[38] Clearly, that power does not enable a free-for-all in which previous orders may be revisited at will. It must be exercised 'judicially and capriciously'. It must be exercised in accordance with the overriding objective. In family proceedings, the overriding objective is 'enabling the court to deal with cases justly, having regard to any welfare issues involved'; FPR 1.1(1). It would, for the reasons indicated earlier, be inconsistent with that objective if the court could not revisit factual findings in the light of later developments. The facts of Re M (children: determination of responsibility for injuries are a good examples. At the fact-finding hearing, the judge had found that Mr C, and not the mother, inflicted the child's injuries. But after that, the mother told a social worker, whether accurately or otherwise, that she had inflicted some of them. The Court of Appeal ruled that, at the next hearing, the judge should subject the mother's apparent confessions to rigorous scrutiny but that, if he concluded that it was true, he should alter his findings."**

36. The Defendant submitted that there were no findings as to the proper law governing the claim that the Defendant was liable for breach of confidence which ought to have been the starting point for the inquiry as to whether or not to grant the Plaintiff's injunction.

37. Additionally, she submitted that the Court did not consider her submission that, according to orthodox principles of choice of law, the place where the harmful event allegedly occurred was New York and accordingly New York law applied to that aspect of the Plaintiff's claim, including the claim for an injunction.

38. She contended that there was no proper finding of fact that the Defendant had filed evidence that New York law does not recognize breach of confidence as an equitable claim and, accordingly, injunctive relief could not be available in respect of any breach and the Plaintiff did not file any contrary evidence.

39. The Defendant contended that the Court erred in failing to rule that the proper law of the breach of confidence claim was New York law, alternatively, it failed to make any ruling as to the proper law. Further, regardless of which law applied to the claim, the Court did not hear opposing submissions on or make any findings of fact as to whether the information allegedly disclosed retained the essential characteristic of confidence.

40. Further she contended that there was no finding that the filing of an exhibit in the New York proceedings constituted a breach and if so whether the effect of the Plaintiff refusing to enter into the confidentiality order in the New York proceedings constituted a waiver or loss of confidence on the part of the Plaintiff.

41. With respect to the Defendant's submission that her Counsel was not given an opportunity to make oral arguments, she relied on the Second Affidavit of Crispin Hall filed 10th February, 2020. She contended that Counsel for the Plaintiff made oral arguments on the confidential character of the information and alleged breach of confidential information points at the 27th November, 2019 hearing, but there was no opportunity given to her Counsel to make opposing oral arguments on the factual issues or the governing law on the 27th January, 2020.

42. The Defendant relied on **Order 31A, Rule 18 (2) (o) of the RSC** which states:

> **"(2)Except where these Rules provide otherwise, the Court may –**
> **(o) instead of holding an oral hearing, deal with the matter on written representations submitted by the parties."**

43. She contended that it was a general rule for hearings to be heard orally and that the Court had the power to dispense with an oral hearing and determine a matter based on written representations. She further contended that since there was no dispensation and the Plaintiff's counsel was given an opportunity to make oral submissions, justice demanded that her Counsel be afforded a like opportunity.

44. The Defendant cited **Al-Rawi v Security Service and others [2010] EWCA Civ 482** where Lord Neuberger stated at para. 14:

> **"Under the common law a trial is conducted on the basis that each party and his lawyer see and hears all the evidence and all the argument seen and heard by the Court. This principle is an aspect of the cardinal requirement that the trial process must be fair, and must be seen to be fair, and must be seen to be fair; it is inherent in one of the two fundamental rules of natural justice, the right to be heard (or audi alteram partem, the other rule being the rule against bias or nemo iudex in causa sua."**

45. The Plaintiff on the other hand submitted that the provisions of **O. 31A, r. 18 (7) RSC** are modeled on the English Civil Procedure Rules, r. 3.1 (7). They relied on the dictum in **Collier v. Williams [2006] 1 WLR 1945** which provides that a party seeking a discharge of an order made at an inter partes hearing must either show (a) a material change in circumstances or that (b) the judge was misled in some way, but also that the above circumstances were the only circumstances where the power to revoke or vary an order already made should be exercised.

46. The Plaintiff relied on a number of authorities to support its submission that only in certain circumstances should a court revisit its earlier orders, starting with Patten J's judgment in **Lloyds Investment (Scandinavia) Ltd v Christen Ager-Hanssen [2003] EWHC 1740 (Ch) at** [7] where he stated:

> **"'.....it seems to be that, for the High Court to revisit one of its earlier orders, the applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual positon before him."**

47. In **Bagani Stiftung v JMV Fixed Income Arbitrage Performance Partners, Ltd et al (Anguilla) [2008] ECSCJ No. 119** George-Creque J stated at para. 9:

> **"...it must always be kept in mind that where a matter has come on for a hearing on full notice and an order has been made, it is not open to a party on a later application to set aside the order to seek to re-argue or invite a review of the same material with a view to the court being persuaded to come to a different conclusion thereon. That would be tantamount to the court acting as an appellate court in review of its own order."**

48. In **L and B (Children) (care proceedings: power to revise judgment) [2013] UKSC 8** it was held that a judge has jurisdiction to vary his decision any time before the order was drawn up and perfected and was not bound to look for exceptional circumstances to exercise such jurisdiction, it was made clear that, when deciding whether or not to change a decision, the judge must consider the overriding objective of the court to deal with the case justly.

49. Finally in **Heron Bros Ltd v Central Bedfordshire Council (No 2) [2015] EWHC 1009** where about three hours after Edwards-Stuart J handed down his ruling on a strike-out application, the defendant applied for him to revisit that ruling on the basis that there was a further point to raise which was relevant to the exercise of his of discretion. Edwards-Stuart J at paras. 20 – 21 of his decision stated:

> **"(20) It seems to me that the court should approach this application in three stages. First, the court should decide whether the application should be entertained at all. Second, if it is appropriate to consider the application, the court should consider whether the point raised by the application is reasonably argued. If it is not, the application should be dismissed. If it is, then the third stage is for the Court to give directions for a short oral hearing to enable the point to be argued fully (unless the parties have agreed that it can be dealt with on paper).**

(21) For the reasons that I have already given, I do not consider that this is a case in which the circumstances are such to justify the court entertaining an application to revisit the judgment. No fresh material has come to light that was not known before the judgment was handed down."

50. The Plaintiff therefore submitted that the Defendant's Revocation Summons should not be entertained and/or be dismissed for the following reasons:

    50.1 The Defendant's revocation application and the evidence filed in the Second Affidavit of Crispin Hall does not satisfy the requirements as laid out in Lloyds Investment (Scandinavia) Ltd v Christen Anger-Hanssen (as applied in Collier v Williams) and Heron Bros Ltd v Central Bedfordshire Council (No 2). Specifically, the Defendant has not alleged that there has been a material change in circumstances or that the Court was misled in some way or that there was any fresh material which came to light.

    50.2 Applying the rationale in L and B (Children), it would not be just to do so by reason that (a) there has been no material change in circumstances or (b) the Court was not misled in some way or (c) that fresh material has not come to light.

    50.3 The Court permitted the Defendant to oppose the Plaintiff's Amended Summons which the Defendant did by written submissions dated 28th October 2019 which expressly addressed the Plaintiff's breach of confidence and summary judgment applications. The Defendant also provided supplemental written submissions dated 26th January 2020 which specifically addressed the Plaintiff's summary judgment application.

    50.4 The Defendant made oral submissions opposing all matters which commenced on 27th November 2019 and were completed on 27th January 2020. The Plaintiff submits that the lapse in time between the commencement and the completion afforded the Defendant ample time to improve its principal submissions to further address the Amended Summons.

    50.5 Both the Defendant's principal and supplemental written submissions were relied on during the Defendant's oral submissions.

    50.6 The Defendant wrongfully seeks to re-argue or wrongfully invites a review of the same material with a view to the Court being persuaded to come to a different conclusion which would be tantamount to the Court acting as an appellate Court in the review of its order.

51. The Plaintiff concludes that the Court should defer the effect of its decision on the Plaintiff's breach of confidence application pending and subject to the handing down of its decision on the Plaintiff's summary judgment application.

DECISION

52. It is common ground that the Court is vested with the power to vary or revoke its order prior to perfection. This power was given to the Court under its case management

powers pursuant to Order 31A of the RSC, specifically Order 31A, r. 18 (7) which provides that:

> **"(7) A power of the Court under these Rules to make an order includes a power to vary or revoke that order."**

53. This point was recently canvassed by my learned sister Charles J in **Surf "N" Turf Ltd v. Deltec Bank & Trust Limited et al 30 October 2020 SC 2017/CLE/gen/00937 (unreported),** who was also invited to accept the finding of Lady Hale SCJ in **L and B (Children)** as the applicable law with respect to a Court's jurisdiction to reconsider an order made that was not perfected.

54. Beginning at para. 11 of her judgment, Charles J opined:

> **"[11] It is incontrovertible that the Court has the discretion to vary or reconsider its decision prior to the perfection of an Order. However, that discretion is not unfettered. It is well established in this jurisdiction that the exercise of this discretion is limited to exceptional circumstances. In Re Barrell Enterprises and others [1972] 3 All ER 631, CA, Russell LJ stated at p 636:**
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> > **"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". [Emphasis added]**
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> **[12] Further, Russell LJ also stated the following (at p 636):**
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> > **"The cases to which we were referred in which judgments 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."**
>
> **[13] In her written submissions, Learned Counsel Mrs. Lockhart-Charles relies on the English Supreme Court case of Re L v B (Children) [2013] UKSC 8, and in particular the following excerpt from the judgment of Baroness Hale which she invites the Court to adopt:**
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> > **"[27] ... This court is not bound by the Barrell case or by any of the previous cases to hold that there is any such limitation upon the acknowledged jurisdiction of the judge to revisit his own decision at any time up until his resulting order is perfected. I would agree with Clarke LJ in Stewart v Engel [2000] 1 WLR 2268, 2282 that his overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up. On the other hand, in In re Blenheim Leisure (Restaurants) Ltd, Neuberger J gave some examples of cases where it might be just to revisit the earlier decision. But these are only examples. A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances."**
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> **[14] Re L v B (Children) was a case decided in England & Wales where the Civil Procedure Rules ("the CPR") governs civil procedure and practice. The Bahamas does not yet have the CPR and operates under the Rules of the Supreme Court.**
>
> **[15] It is noted that similar arguments that a judge in The Bahamas could reconsider a prior unperfected ruling without exceptional circumstances being present were raised by the Respondents in the Bahamian case of RTL v ALD and others [2015] 1 BHS J No. 82. However, in that case, Winder J affirmed that the Re Barrell jurisdiction remains the law of The Bahamas. He stated at para 37:**
>
> > **"The authority advanced by the Respondents does suggest that the rule is not so rigid as to require the exceptional circumstance. Having considered**

> **these authorities it appears to me that they are all largely based upon environments, which have undergone CPR reforms. 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..."**
>
> **[16] Re Barrell was also applied by this Court in Hong Kong Zhong Qing Development Company Limited v (1) Squadron Holdings SPV0164HK, Ltd et al 2016/CLE/gen/01295.**
>
> **[17] Accordingly, once the Court has made its decision, it is only in exceptional circumstances that a judge can be invited to reverse that decision, since an appeal is the more appropriate course for the aggrieved party: Compagnie Noga D'Importation et D'exportation SA v Abacha (No. 2) [2001] 3 All ER 513, following the approach adopted in Re Barrell.**
>
> **[18] All of these cases emphasized the principle of the finality and binding effect of an orally delivered decision. In Edmund v The State TT 2007 CA 39, a criminal appeal, 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. The Court considered itself *functus officio.* This reflected the view of Russell LJ in Re Barrell, namely that when oral judgments have been given, either in a court of first instance or on 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.*"**
>
> **[19] While Re Barrell affirmed the principle of finality of oral judgments, it does however leave the door open to the reopening of such judgments in exceptional circumstances."**

55. I too agree that I am bound by Re Barrell which dictates that only in exceptional circumstances should a judge be invited to reconsider a decision. The threshold must be high in order to ensure that there is finality in litigation and to prevent litigants from repetitive bites at the proverbial cherry.

56. The order made in this case had not been perfected at the time the Defendant's Revocation Summons was filed and heard. The Defendant contends that there was no finding of fact with respect to the alleged breaches and that her Counsel was not given an opportunity to be heard by way of oral arguments in response to oral arguments made by the Plaintiff's Counsel.

57. The right to be heard also known by its latin term "audi alteram partem" is a revered principle of natural justice which exists to ensure that a decision is not made for or against a litigant without such person being given the opportunity to explain or respond to any charge or adverse claim. Its importance is so great, that it is enshrined in an individual's constitutional right to a fair hearing.

58. This Court is cognizant of the importance of a parties' constitutional right to be heard and it is always its intention to ensure fairness and justice for all parties. Accordingly, I shall consider the Defendant's grounds in support of the Defendant's Revocation Summons in order to determine whether there are such exceptional circumstances that would require the order to be revoked.

Ground One - The Defendant claims that the Court erred in granting the breach of confidence injunction and therefore the injunction should be revoked as there was no finding of fact as to:

1. **whether the information allegedly disclosed, qualified for and retained the essential characteristic of confidence,**

2. **Whether the filing of an exhibit in the New York proceedings constituted a breach thereof and if so whether the effect of the Plaintiff refusing to enter into the confidentiality order in the New York proceedings constituted a waiver or loss of confidence on the part of the Plaintiff.**

Ground Two - The Defendant's Counsel was not given the opportunity to make opposing oral arguments on the factual issues or governing law in response to the Plaintiff's oral arguments with respect to the confidential character of the information and alleged breach of confidential information at the 27th January 2020 hearing.

59. This first ground is linked to the Defendant's argument that the Court did not have the jurisdiction to make the aforementioned decision as there was only a conditional appearance entered on her behalf. I have already indicated in this ruling that I was barred from considering the Plaintiff's summary judgment application because of the existence of the conditional appearance which had not by action or otherwise become unconditional.

60. The portions of the Plaintiff's statement of claim set out above, on which the Plaintiff sought summary judgment, concern the Defendant's alleged breach of confidence; a fact that is disputed by the Defendant.

61. The Defendant filed evidence and written submissions in response to both the Plaintiff's summary judgment application and the injunction application all of which were reviewed and considered by this Court. The Defendant nevertheless takes issue with not being allowed to present oral arguments to the Court pursuant to its second ground in support of the Defendant's Revocation Summons which I now address.

62. As I earlier acknowledged the right to be heard is a fundamental tenet of natural justice. Accordingly, a court must never be seen to stifle such a right and it has never been an intention of this Court to do so in these or any proceedings. The record reflects my position with respect to the same throughout the hearings of the various applications. However, the issue here is whether submissions must only be made orally or can be made in writing or both.

63. More importantly, with respect to all of the applications, the parties filed numerous Affidavits and submitted written submissions in opposition to and in support of the various applications. Deadlines are set by the Court for the filing of evidence and

submissions ahead of hearings in order to give each party the opportunity to consider the issues raised and respond to them.

64. The filings and submissions gives the Court an opportunity to review and consider an application, ahead of it being heard. As Charles J in **Higgs Construction Company v. Patrick Devon Roberts et al [2020] 1 BHS J. No. 9** opined, which I completely endorse, that in keeping with the objectives of Order 31A of the RSC, counsel must be better prepared to argue cases by presenting written submissions in advance of the hearing. This practice aids in the delivery of justice in a more efficient and timely manner and more particularly allows the counsel to consider every issue which the court has to determine and place their full submissions on these issues in writing for the court to consider before making its ruling. After the presentation of written submissions, Counsel are asked to highlight verbally those parts of their submissions, which they wished to emphasize to the Court.

65. Commendably, both parties in the instant case did just that and it is based on the written evidence and submissions that I was able to make the orders made on the 27th January, 2020. The constitutional right to be heard is not limited to oral arguments. It is the right to have all evidence before the court in support of or in opposition a matter, considered and adjudicated upon based on the applicable law in the circumstances.

66. The transcript of the 27th January, 2020 clearly shows that despite producing written submissions and evidence, Counsel for the Defendant was heard orally on the summary judgment application. In relation to the breach of duty of confidence injunction application, the Defendant's written evidence and submissions were also considered.

67. Additionally, as it was the Plaintiff's application that the Defendant would have responded to , any final reply would have been granted to the Plaintiff. This point was also explained to the Defendant's Counsel at the 27th November, 2019 hearing as seen in the transcript at pg. 63, lines 2 – 8,

> **"THE COURT: And, then the way it works, of course, you know, Mr. Philippe, just to make sure that when a person applies they start with their submissions, the other side responds and the applicant gets the final say. I don't want anybody saying that I'm giving additional time because that's the way the rules work. Okay?**
> **MR. PHILIPPE: Yes, my lady."**

68. Upon a review of the transcript, it is evident that the Defendant's Counsel was in fact given an opportunity to be heard on both the anti-suit injunction application and the breach of confidence application. Specific questions were put to him with respect to the latter and he gave the answers of his choice in response. Accordingly, the Defendant was in fact given the opportunity to be heard orally and as previously stated both those oral arguments and the written evidence and submissions were considered to make the determination made.

69. In any event, before my reasons could be put in writing the Defendant's summons was filed, the relief of which was to my mind premature as she nor her Counsel were aware

of the reasons behind my decision. To elaborate, I clearly stated that I would reserve on the summary judgment application because there was something that I needed to research.

Ground One

70. While I am barred from considering the summary judgment application, I am not prohibited from considering an application for an interim injunction pending the final determination of an action, which is what the Plaintiff sought and what was ordered with respect to the Breach of Duty of Confidence Injunction. This remedy is an all too common one, the requirements for granting such relief were derived from the locus classicus **American Cyanamid v Ethicon Ltd. [1975] 2 WLR 316** where it has been established that the granting of an interlocutory injunction is both temporary and discretionary and must be decided when, hypothetically, the existence or the violation of the right, or both is uncertain and will remain uncertain until final judgment is given. Once the requirements are met the Court has a discretion to grant the interlocutory injunction.

71. If an order for an interlocutory injunction is made, the Plaintiff is bound to give an undertaking to pay damages to the Defendant for any loss suffered if it is subsequently determined that the Plaintiff was not entitled to restrain the Defendant from doing what she was threatening to do. Lord Diplock stated:

> **"My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial.....The court must weigh one need against another and determine where "the balance of convenience" lies.**

72. The Plaintiff's need for protection must be weighed against the corresponding need of the Defendant to be protected against injury resulting from being prevented from exercising his own legal rights for which he could not be adequately compensated under the Plaintiff's undertaking in damages if the uncertainty was resolved in the Defendant's favor at the trial. This is known as the balance of convenience test. In order to satisfy this

test, whether there is a serious issue to be tried must be considered i.e. the matter must not appear to be frivolous or vexatious.

73. In reliance on the principles enunciated above, the breach of duty of confidence injunction was ordered. Based on the evidence before me, I recognized that there was a serious issue to be tried as the Plaintiff alleges that the Defendant has disseminated information of a confidential nature pursuant to a non-disclosure agreement. This allegation stems from the Defendant's disclosure of certain information in a claim based in New York for unlawful and wrongful termination against the shareholders of the Plaintiff, along with the retention of other alleged company products.

74. I made no finding of fact as to whether or not the actions of the Defendant constituted a breach, more specifically whether the information disseminated and the items withheld were of a confidential nature. The court should not attempt to resolve critical disputed questions of fact or difficult points of law, particularly where the point of law turns on fine questions of fact which are in dispute or were presently obscure, without testing of the evidence at trial.

75. I also wish to make it clear that there could be no finding made as to the nature of the alleged information as the Defendant has yet to file a Defence in the matter. While numerous affidavits have been filed in opposition to the Plaintiff's applications, the Defence is the pleading at the heart of a Defendant's case on which all evidence in defence of a claim must flow.

76. Accordingly, if at the end of trial, it is determined that the information was not of a confidential nature then the Defendant would be adequately compensated in damages for all loss flowing from the granting of the injunction.

77. As there was no finding of fact as to the nature of the information and my decision to grant an interlocutory injunction was made based on the American Cyanamid principles, I find that this is not an exceptional circumstance to exercise my discretion to vary my order and the Breach of Duty of Confidence Injunction remains.

THE ANTI SUIT-INJUNCTION

78. The Plaintiff sought injunctive relief pending final determination of the action, pursuant to the Supreme Court Act, s. 21 and Order 29, Rule 1 of the RSC and/or the inherent jurisdiction of the Court. The interim relief sought would be, *inter alia*, to restrain the Defendant from pursuing any other appeal of the order made in proceedings in the Supreme Court of the State of New York in action No. 653282/2018 in the County of New York, against the Plaintiff or initiating any other foreign proceedings against the Plaintiff, any director or officer of the Plaintiff and/or the Plaintiff's principal namely, Ms. Barbara Ann Bernard.

79. In support of the application, the Plaintiff relied on the Affidavit of Rodman F Delevaux filed 28th June 2019. It was averred that the Plaintiff was a Bahamian company which operated entirely in The Bahamas and that the members of its Board of Directors resided in The Bahamas. Additionally, that the Defendant was a Bahamian national and resided in The Bahamas and that her engagement with the Plaintiff was governed by Bahamian law.

80. The Plaintiff further averred that in the foreign proceedings, third party defendants had consented to submit to the jurisdiction of the Bahamian courts. More importantly, the foreign proceedings were dismissed by the foreign court expressly on the ground that New York was not the convenient forum.

81. The Plaintiff stated that the foreign court had concluded that the dismissal was proper because personal jurisdiction was lacking over the Plaintiff and the Bahamian resident directors in New York. Further,its foreign counsel had advised its Bahamian attorneys that, the Defendant had filed the very bare minimum for the initiation of an appeal and that the Defendant had a period of six months to take more substantive steps to further her appeal.

82. The Plaintiff also averred that on the Defendant's pleaded facts, the Defendant has no reasonable prospect of successfully defending its claims and verily believed that the foreign proceedings were part of a misconceived strategy of the Defendant to avoid civil justice before the Bahamian courts with respect to causes of action between the parties justiciable within the jurisdiction. It was additionally stated that the wrongful strategy of the Defendant had caused it to expend exorbitant resources in litigating abroad while she took advantage of certain litigation fee arrangements which were prohibited in The Bahamas.

83. The Plaintiff believed that the Defendant calculated that she would enhance her chances of extracting a large payment from it in compromise of her claims not based upon merit but simply for relief from continuing costs of the foreign proceedings.

84. By the Second Affidavit of Rodman F. Delevaux filed 23rd September, 2019, the Plaintiff averred that the Defendant had filed a brief being a more substantive step in the appeal of the foreign court's order which had dismissed the foreign proceedings. In response, it replied to the Defendant's Brief and the Defendant in turn filed a Reply Brief.

85. The Defendant opposed the application for an anti-suit injunction by the Third Affidavit of Akeira D. Martin filed the 28th October, 2019. The Defendant averred, *inter alia*, that her claims arose under the laws of the State of New York for breaches of fiduciary duty, prima facie tort, conspiracy to commit breach of fiduciary duty and prima facie tort, fraudulent inducement, promissory estoppel, and sought declaratory judgment arising from the Plaintiff's wrongful and unlawful expropriation of her fifty percent (50%) ownership interest and exclusion from all of its income and profits. She added that all of the named causes of action were available to her in New York which is why she had made a bona fide pursuit of her claim therein.

86. By the Affidavit of Latoya K Greene filed 22nd January 2020, the decision of the Supreme Court of the State of New York dated the 28th February, 2019 was exhibited. The Supreme Court made the following findings:

> **"Wincrest, a Bahamian corporation, merely contracted with Press Management, a New York company, to receive consulting services to help operate Wincrest's Bahamian business operations. Similarly, Wincrest contracted with HedgePort, a non-New York domicillary, for HedgePort to provide consulting service to Wincrest in the Bahamas. Such transactions are insufficient for jurisdiction to lie pursuant to CPLR 302(a)(1) because the services were ultimately rendered in the Bahamas.**
> **Plaintiff points to the same conduct-the consulting services provided by Press Management and HedgePort-in asserting that the Wincrest Defendants and HedgePort committed tortious acts within New York such that jurisdiction may lie.**
> **Personal jurisdiction exists over a non-domicillary defendant who, in person or through an agent, "commits a tortious act within the state." CPLR 302(a)(2).**
> **Here, Plaintiff has not alleged a tortious act by any of the Wincrest Defendants that occurred in New York. Plaintiff has merely asserted, in conclusory fashion, a vague, tortious conspiracy involving a single New York company that provided consulting services to Bahamian defendants in the Bahamas. Whatever injury Plaintiff alleges necessarily must have been incurred in the Bahamas where Plaintiff lives and works. The nexus of the alleged tortious acts is the Bahamas where the Wincrest Defendants allegedly breached their fiduciary duties in pushing Plaintiff out of the Bahamian company.**
> **Thus, even if the Court concluded that New York is a convenient forum to litigate this dispute, which it is not, the Court would lack jurisdiction over the Wincrest Defendants and HedgePort regarding the claims asserted by Plaintiff.**
> **Accordingly, it is hereby**
> **ORDERED that the motions of Defendants to dismiss the action on the ground that New York is an inconvenient forum are granted on condition that Defendants Press Management and HedgePort consent to jurisdiction in the Bahamas...."**

87. Thereafter, the Plaintiff filed the Second Affidavit of Latoya K Greene on the 26th June, 2020 and exhibited the Court of Appeals Motion Decision decided on the 23rd June, 2020 which denied the Defendant's motion for leave to appeal the aforementioned decision of the New York Supreme Court.

SUBMISSIONS

88. **Section 21 of the Supreme Court Act** states that:

> **"(1) The Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so."**

89. **Order 29, Rule 1 (1) of the RSC** states:

> **"An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be."**

90. The Plaintiff relied on Lord Goff's judgment in **Societe Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871** where he identified the factors a Court should take into consideration when determining whether to grant an anti-suit injunction. At pg. 892 Lord Goff stated,

> **"(1) The jurisdiction is to be exercised when the ends of justice require it.**
> **(2) Where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed.**
> **(3) An injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy.**
> **(4) Since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution."**

91. The Plaintiff also cited **RTL v AL [2015] 1 BHS J. No.** 82 where Winder J considered the Societe Nationale case and outlined a list of the Court's considerations in determining whether to grant an anti-suit injunction. At para 65 he states;

> **"(a) Whether the Respondent is amenable to the court's jurisdiction;**
> **(b) Whether there exists an exclusive jurisdiction clause [in any binding contract], agreement or any other document governing the relationship between the parties;**
> **(c) Whether the Bahamas is the natural forum for the dispute;**
> **(d) Whether the foreign proceedings are/would be vexatious and oppressive;**
> **(e) Whether the ends of justice require the imposition of the restraint."**

92. The Plaintiff contended that anti-suit injunctions operate in personam, binding the party (amenable to the jurisdiction of the court) against whom the injunction was made as opposed to binding any foreign court. Therefore, an anti-suit injunction may only be issued against a person whom valid service of the Court's process can be affected as was affirmed by Winder J in **RTL v ALD** where he stated:

> **"Jurisdiction for the purposes of the annti0suit injunctions means simply that the party sought to be restrained must be a person amenable to be served with Court's process.**

93. The Plaintiff contended that where there was an exclusive jurisdiction clause in any agreement, contract or other document governing the relationship of the parties to a dispute, the Court would normally be minded to grant an anti-suit injunction to restrain proceedings in breach of the exclusive jurisdiction clause except where there are strong reasons to support the matter being litigated in another jurisdiction.

94. In **Donohue v Armco Inc. [2001] UKHL** Lord Bingham stated at para. 64:

> **"If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim failing within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of**

proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognize that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case."

95. The Plaintiff additionally submitted that where the exclusive jurisdiction of the Court was imposed by statute, the Court will take this consideration when determining whether to exercise its discretion. In that vein the Plaintiff contended that the Defendant was a former employee of it and as such, the terms of her engagement were governed by Bahamian law, specifically **Section 3(1) of the Employment Act** which states:

> **"Subject to this Act, the provisions of this Act shall apply in relation to any employee employed in any form of employment in The Bahamas including any such employment by or under the Crown in right of the Government of The Bahamas or by a local government authority or by any body corporate established by law for public purposes."**

96. In determining the natural forum, the Plaintiff relied on Longley J's decision in **Nygard Holdings Ltd. v. May [2005] 5 BHS J No 303** where he held that the Court has to consider which forum has the most 'real and substantial connection with the action and the parties and noted that the three factors that would speak to a real and substantial connection would be the availability of witnesses, the law governing the contract and the place where the parties resided or carried on business. The majority of the witnesses in thos action are either resident or willing to submit to the jurisdiction of the Bahamian Court. **"The nexus of the alleged tortious acts is the Bahamas" As confirmed by the New York Court.**

97. Before granting an anti-suit injunction, the Plaintiff submits that one must consider whether there was pursuit of a legal action in a foreign court. The Plaintiff relied on **Societe Nationale Industrielle Aeropoatiale** where Lord Goff said that it would be determined on a case by case basis:

> **"As with the basic principle of justice underlying the whole of this jurisdiction, it has been emphasized that the notions of vexation and oppression should not be restricted by definition.**
> **As Bowen LJ said in McHenry v Lewis (1882) 22 Ch D 397 at 407 – 408:**
> **"I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the Court can and will interfere whenever there is**

vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean."

98. The Plaintiff cited **Stichting Shell Pensioenfonds v Krys & Another [2014] UKPC 41** where Lords Sumption and Toulson determined that there were three categories of cases which could potentially work an injustice in the context of antisuit injunctions. At para. 18 they stated:

> **"18 The "ends of justice" is a deliberately imprecise expression. It encompasses a number of distinct legal policies whose application will vary with the subject matter and the circumstances. In *Carron Iron Co Proprietors v Maclaren* (1855) 5 HL Cas 416, Lord Cranworth LC (at pp 437-439) identified three categories of cases which, without necessarily being comprehensive or mutually exclusive, have served generations of judges as tools of analysis. The first comprised cases of simultaneous proceedings in England and abroad on the same subject matter. If a party to litigation in England, where complete justice could be done, began proceedings abroad on the same subject matter, the court might restrain him on the ground that his conduct was a "vexatious harassing of the opposite party". The second category comprised cases in which foreign proceedings were being brought in an inappropriate forum to resolve questions which could more naturally and conveniently be resolved in England. Proceedings of this kind were vexatious in a larger sense. The court restrained them "on principles of convenience, to prevent litigation, which it has considered to be either unnecessary, and therefore vexatious, or else ill-adapted to secure complete justice". Third, there are cases which do not turn on the vexatious character of the foreign litigant's conduct, nor on the relative convenience of litigation in two alternative jurisdictions, in which foreign proceedings are restrained because they are "contrary to equity and good conscience".**

99. The Plaintiff contended that the Court must consider the doctrine of comity when exercising its discretion to grant an anti-suit injunction. Comity required the Court to consider whether such indirect interference that would result from the granting of the anti-suit injunction would be justified in the circumstances of the case. It submitted that the key factor for consideration was whether the Court had a sufficient interest in or connection to the dispute and to answer the question, the Court would seek to determine whether The Bahamas is the natural forum of the dispute between the parties.

100. The Plaintiff also relied on **Airbus Industry v. Patel [1998] 2 ALL ER 257** where Lord Goff stated:

> **"As a general rule, before an anti-suit injunction can properly be granted by an English Court to restrain a person from pursuing proceedings in a foreign jurisdiction in cases of the kind and the consideration of the present case, comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign Court which an anti-suit injunction entails.**
> **In the alternative forum case, this will involve consideration of the question whether the English Court is the natural forum for the resolution of the dispute."**

101. The Defendant however maintained ed that there is a live dispute as to whether this Court has jurisdiction over the matter and that there were pending appeal proceedings in New York to determine whether the New York courts have jurisdiction over the claims. The Defendant submitted that Wincrest sought to short-circuit the due process of the New York applications which would consider whether the New York Court had jurisdiction.

102. The Defendant relied on **Masri v Consolidated Contractors International (UK) Ltd [2009] QB 503** where Lawrence Collins LJ explained the development of the principles governing anti-suit injunctions:

> **"a. The rationale for an anti-suit injunction is that the Court "has power over persons properly subject to its in personam jurisdiction to make ancillary orders in protection of its jurisdiction and its processes, including the integrity of its judgments. That power is of course a discretionary one, to be exercised in accordance with the requirements of international comity."**
> **b. Where an anti-suit injunction is brought to restrain foreign proceedings, the applicant must show that the foreign proceedings are "vexatious or oppressive" [41] approving earlier case-law, i.e. that suing in the foreign court amounts to "unconscionable conduct" in respect of which the applicant is entitled to an equitable remedy."**

103. The Defendant submitted that Wincrest did not come close to establishing the aforementioned factors. It had not established that the court had jurisdiction over the parties and the action. It also had not established that the New York proceedings were vexatious, oppressive or unconscionable. She added that she was not seeking to relitigate matters in New York which were already adjudicated in The Bahamas.

104. Further she contended that this Court did not even have the opportunity to consider whether it had jurisdiction over the substantial matters in dispute and that there was strong doubt as to whether the Court had jurisdiction over the action. She went on to say that the granting of the anti-suit injunction would, without a fair analysis or evaluation, pre-judge the question of this Court's jurisdiction.

105. The Defendant maintained that the New York courts were the courts first seised and that although the motion to dismiss was granted at first instance, there was no reason in principle why she should be restrained from pursuing her appeal, which was proceeding in that forum and was brought in good faith and in real belief as to its prospects of success.

106. Further, that the principle of judicial comity strongly indicated that this Court should allow the New York courts, the opportunity to finally rule on their own jurisdiction in the appeal proceedings. She added that to do otherwise, would risk a jurisdictional clash if the New York Court subsequently found that it had jurisdiction. The commencement of parallel proceedings she maintained at a time when the New York action was still alive and

subject to an active appeal was vexatious and oppressive; conduct which the Court ought not sanction.

107. The Defendant submitted that the anti-suit injunction was not based on any choice of forum agreement between the parties in favour of this jurisdiction. She added that the Plaintiff had not attempted to explain how it met the above test and relied solely on the New York first instance finding of forum non-conveniens which is apt to be overturned on appeal. While the Plaintiff asserted that her engagement was governed by Bahamian law, its underlying claims in the dispute were almost entirely based on an alleged breach of confidence which she claimed was governed by New York law.

108. The Defendant relied on **Star Reefers Pool Inc v JFC Group Co Ltd [2012] 1 Lloyds Rep 376** where it was held that an anti-suit injunction should not have been granted to restrain the pursuit of Russian proceedings where the foreign claimant who had been the first to issue proceedings, had not agreed or submitted to the English jurisdiction, and had a legitimate juridical advantage in seeking to litigate in Russia which was the forum of its disputed obligation. The Russian proceedings were not regarded as vexatious or oppressive.

109. The Defendant contended that there were close parallels with **Star Reefers** and the present case as she was the first to bring proceedings in New York, she did not agree or submit to this jurisdiction and the claims that she brought in New York for breach of fiduciary duty, prima facie tort and conspiracy are governed by New York law.

110. At the hearing on the 22nd November, 2019, which was the date of the Defendant's strike out application, the Plaintiff informed the Court that leave to appeal the Supreme Court of New York's decision dismissing the Defendant's claim therein was dismissed. At the hearing on the 27th November, 2019, the Plaintiff reminded the Court of the dismissal in support of its contention that an anti-suit injunction should be ordered. The Defendant however, contended that the New York appellate court's dismissal signified that the order for an anti-suit injunction should not be made.

DECISION

111. At the hearing of the anti-suit injunction application, the New York court had adjudicated the Defendant's action before it and held that New York was not the proper forum. It is based on that turn of events that I acceded to the Plaintiff's application. Nonetheless, I will still consider the applicable law with the respect to the granting of anti-suit injunctions in the jurisdiction which has been helpfully set out by Winder J in **RTL v. ALD and others - [2015] 1 BHS J. No. 82** which I adopt.

112. In **RTL v ALD**, Winder J considered numerous House of Lords and Privy Council decisions which too considered and addressed the various factors that arose in anti-suit injunction applications. As he rightfully opined, the cases of **Societe Nationale Industrielle Aerospatiale v Lee Kui Jak and Stichting Shell Pensioenfonds v Krys & Anor [2014] UKPC 41** are the leading Privy Council authorities.. Winder J, in agreeing

with the submissions of the Respondent considered that there were guiding principles to be followed:

> **"64 I approve the Respondents' statement in their written arguments as to the guiding principles to be followed. It was stated, *"There are four guiding principles at the outset: (i) the interlocutory injunction is a discretionary remedy of the courts exercised through its equitable jurisdiction (ii) where the court decides to grant an injunction restraining foreign proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed (i.e. in personam) (iii) an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy and (iv) since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution.* ...The case law now couches these principles, when considering, application for an anti-suit injunction, in terms of what is *vexatious or oppressive* or *unconscionable...*"**
>
> **65 The issues which fall for consideration in determining whether an anti-suit injunction should issue may be identified as follows:**
>
> (1) **whether the Respondents are amenable to the court's jurisdiction;**
> (2) **whether the relevant Trusts contains an exclusive jurisdiction clause;**
> (3) **whether the Bahamas is the natural forum for the dispute;**
> (4) **whether the proceedings are vexatious and oppressive; and,**
> (5) **whether the ends of justice require the imposition of the restraint."**

113. Consequently, the issues for consideration are:

a. **Whether the Defendant is amenable to the court's jurisdiction;**

The Defendant is in fact amenable to the court's jurisdiction as she is resident in The Bahamas and is amenable to service of the Court's process.

b. **Whether there was an exclusive jurisdiction clause between the parties;**

There was no exclusive jurisdiction clause between the parties. The Plaintiff , sought to rely on the Employment Act which states that any party employed in The Bahamas is subject thereto.

c. **Whether the Bahamas is the natural forum for the dispute;**

While the parties' disputed that the Bahamas was the natural forum, the New York court's decision resolved that dispute when it found that The Bahamas was considered the appropriate forum.

d. **Whether the proceedings are vexatious and oppressive**; and

The Defendant's action in the New York courts was the first action arising from the relationship between the parties. An aggrieved litigant has the option to initiate proceedings as he/she thinks fit. It must however be litigated in a court that has jurisdiction to determine the issues.

The initial application in New York tested the forum as the Defendant held an honest and reasonable belief that her matter was better suited to be heard by the New York jurisdiction. Her application was dismissed at first instance and by the appellate court. To continue to litigate there would be vexatious and oppressive.

Whether the ends of justice require the imposition of the restraint

A party is no doubt entitled to pursue every legal remedy available, including appealing a decision to a higher court if it is not satisfied with the lower court's decision. The Defendant pursued an appeal and was unsuccessful.

114. As I noted during the hearing, the **Star Reefers** case is distinguishable from this case . In **Star Reefers**, the Claimant, had chartered 3 vessels under two charterparties to K, a Cypriot nominee company through which the defendant, JFC, a Russian company acted. Although the charterparties contained English law and London arbitration clauses, JFC did not sign the charterparties and was not a party thereto. SRP claimed that JFC instead provided guarantees.. K subsequently fell behind with its payments and arbitration was commenced against both K and JFC, calling on each of them to appoint their arbitrators.

115. JFC disputed that it was a party to the charterparties or the arbitration agreements. JFC appointed its arbitrator without prejudice and later commenced proceedings in Russia in which it sought declaratory relief to the effect that the guarantees were ineffective. JFC contended that under Russian private international law the international transactions of a Russian party were governed by Russian law, and that under Russian law JFC's offers of guarantee had not been accepted by SRP. SRP commenced proceedings in the UK Court seeking payment under JFC's guarantees for unpaid hire and damages for repudiation of the charterparties and obtained without notice to JFC an anti-suit injunction which ordered JFC not to pursue nor to take any further steps in its Russian proceedings and continued as the judge found that JFC's Russian proceedings were vexatious and oppressive.

116. JFC appealed, submitting, *inter alia*, that in finding that the Russian proceedings were vexatious, the judge was wrong to consider that their purpose was to frustrate the determination of the dispute in England, or to regard any apparent weakness in the

argument from Russian law as evidence of vexatious intent and that the judge had omitted any consideration of comity.

117. The Court of Appeal held that the judge had appeared to entirely overlook the circumstance that JFC had a juridical advantage in the Russian court, unavailable to it in England, namely the application of Russian rather than English law to the substance of the parties' dispute. The New York court however, in this instance acknowledged and ruled that the Bahamian court was the appropriate forum and not New York and dismissed the New York action. There was no question of any juridical advantage being available to the Defendant.

118. As initially stated, the ruling handed down by the New York appellate Court squashed any doubt that the proper forum for any actions by the parties is that of the Bahamian Courts. I therefore acceded to the Plaintiff's application for an anti-suit injunction.

CONCLUSION

119.1 The Plaintiff's summary judgment application is dismissed as I am prevented from hearing it on its merits due to the fact that the Defendant only obtained leave to enter a conditional appearance and the appearance has not become unconditional. The Defendant is awarded her costs of that application to be taxed if not agreed.

119.2 The Breach of Duty of Confidence Injunction shall remain in place pending the determination of the action. The Plaintiff shall give an undertaking to compensate the Defendant in damages if it is determined that the injunction was wrongly granted.

119.3 The anti-suit injunction shall remain pending the determination of the action. The Plaintiff shall give the appropriate undertaking in damages to the Defendant.

119.4 A directions hearing shall be set on a date mutually convenient for all parties and for the filing of any pleadings and documents

119. Costs are awarded to the Plaintiff for both injunction applications to be taxed if not agreed.

Dated this 10th day of May, 2021

The Hon. Madam Justice G. Diane Stewart