

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT**

**Common Law and Equity Division**

**2012/CLE/gen/FP/0250**

**BETWEEN**

**JOAN JERKOVICH  
Plaintiff**

**AND**

**DIAMONDS BY THE SEA LTD.  
(formerly Sydenham-Smith Investments Limited)  
First Defendant**

**AND**

**CALLENDERS & CO.  
(a firm)  
Second Defendant**

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT**

**Common Law and Equity Division**

**2014/CLE/gen/FP/00037**

**BETWEEN**

**JOAN JERKOVICH  
Plaintiff**

**AND**

- (1) W. CHRISTOPHER GOUTHRO**
- (2) GOUTHRO & CO. (a firm)  
Defendants**

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mrs. Pearline Ingraham along with Jacqueline Banona-Adderley for the Defendants and holding brief for Callenders & Co.  
Mr. Charles Mackay along with Mrs. Joyce Cooper-Bowe for the Plaintiff  
Mrs. Karen Brown for Gouthro & Co.

HEARING DATE: March 17, May 13, and June 12, A. D. 2020

### **RULING**

This is an application for Discovery. An Oral Ruling was delivered on July 9, 2020 and at the request for Counsel for the First Defendant the same was reduced to writing.

#### **Introduction:**

1. This is an application by Diamonds By the Sea Ltd. (formerly Sydenham-Smith Investments Limited), the First Defendant in Action No. 250 of 2012 (“**the First Action**”) by way of a Summons filed in the First Action on September 7, 2016 for an Order for Discovery. On February 28, 2019 the Court made a Case Management Order and at paragraph 2 thereof ordered the Plaintiff to file an Affidavit in response to the First Defendant’s Summons for Discovery. The discovery application was subsequently set down for hearing on March 17, 2020. On March 16, 2020, no Affidavit yet having been filed, the Plaintiff produced to the Second Defendant, via email, a number of documents. On March 17, 2020, at the hearing of the Discovery application, this was made known to the Court and the hearing was adjourned so that the documents produced could be considered by the First Defendant. The Plaintiff was also ordered to file an Affidavit Verifying the Plaintiff’s List of Documents within 7 days. The hearing was adjourned to May 4, 2020 for Ruling on the papers in the event the Plaintiff’s Affidavit did not meet the First Defendant’s application for discovery.

2. On May 5, 2020 I made enquires of the parties as to whether the Affidavit Verifying the List had been filed or whether I had to write a Ruling on the papers. On May 7, 2020 Mrs. Ingraham-Wood requested clarification on the Order made on March 17, 2020 and requested new filing dates for the Affidavits and Submissions ordered to be filed by the parties in respect of the extant Summons for Discovery. On May 13, 2020 I requested Mrs. Ingraham-Wood to forward the documents filed in support of the Discovery application which she did. She also advised me that Mr. Mackay had forwarded a draft Affidavit by the Plaintiff and she requested an opportunity to respond to it. In as much as the Order made on March 17, 2020 had not been perfected or complied with, on June 10, 2020 I wrote to the parties setting down a Zoom directions hearing for June 12, 2020 so that I could "reset" the proceedings.
3. At a Zoom directions hearing on 12<sup>th</sup> June 2020, Counsel for the Plaintiff indicated to the Court that he was still in the process of having the Affidavit sworn and apostilled in Arkansas, USA and anticipated having the same in hand within 2 weeks for filing. I took the view that once the Verifying Affidavit was filed Discovery would be completed and the matter would proceed to the next step which would be Mr. Mackay's extant Discovery Summons filed June 9, 2020. Mr. Mackay shared this view.
4. Mrs. Ingraham-Wood did not agree with the Court's position and asked for permission to address the Court on this point. The Court directed the parties to make submissions on whether the Plaintiff's Affidavit, **if filed**, would dispose of the First Defendant's Discovery Application and if so, what is the procedural way forward.
5. It is Mrs. Ingraham-Wood's position that to the extent that the Affidavit purports to deal with the merits of the case, the First Defendant objects to the same and asserts that the Plaintiff's case is as set out in her pleadings which she is bound by. That accordingly, the First Defendant reserves all of its rights, but that in light of the Further Discovery and the Verification Statement contained in the Plaintiff's Affidavit, it is the First Defendant's position that there is no need for the Court to

determine the First Defendant's Discovery Application except for the issue of costs. That substantial costs have been incurred in the form of preparing the Discovery Application, preparing submissions in support of the Discovery Application and numerous court appearances. Accordingly, the Court ought to make a decision as to who should pay the costs of the First Defendant's Discovery Application. I accept Mrs. Ingraham-Wood's submissions.

6. Mr. Mackay has addressed the Court on a number of the substantive issues in this action but as indicated, I agree with Mrs. Ingraham-Wood that the only issue outstanding in the Discovery Application is the issue of costs. Mr. Mackay has addressed the Court on the issue of costs in his submissions and his position is that costs should be in the cause.

### **Disposition of the issue of Costs**

7. Having heard the parties on the issue of cost, I am persuaded that the documents finally produced were produced approximately 3 years after the filing of the application for discovery and on the eve of the hearing of the application and that at that point the Plaintiff ought really to have had the requisite Affidavit Verifying the List of Documents in place, filed and served and that it was not before the Court at that time. And so, I am going to award the First Defendant its costs on the preparation of the Discovery Application and the costs for the attendances which includes the cost of the attendance on March 17, 2020, in any event. I am also going to order that the First Defendant may file its Notice of Taxation within the 3 months period, which actually begins upon the expiration of the emergency orders and protocols, but that the First Defendant shall not set the taxation down for hearing before the Registrar until the conclusion of this trial.

Dated this 9<sup>th</sup> day of October A. D. 2020

**Petra M. Hanna-Adderley**  
**Justice**