COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2014/CLE/gen/773 consolidated with

BETWEEN

OLD FORT BAY PROPERTY OWNERS ASSOCIATION LIMITED
Plaintiff

AND

OLD FORT BAY COMPANY LIMITED
Defendant

BETWEEN

2014/CLE/gen/0889

MATTHEW CHANCE HUDSON
ZSUZSANNA MARTA FOTI
Plaintiffs

AND

OLD FORT BAY COMPANY LIMITED
NEW PROVIDENCE DEVELOPMENT COMPANY LIMITED
Defendants

AND BETWEEN

2017/CLE/gen/00014

OLD FORT BAY COMPANY LIMITED
Plaintiff

AND

OLD FORT BAY PROPERTY OWNERS ASSOCIATION LIMITED
Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: **In Action 2014/CLE/gen/773**
Mrs. Krystal Rolle QC and Mrs. Vanessa Carlino for the Plaintiff
Mrs. Gail Lockhart-Charles QC and Mrs. Lisa Esfakis for the Defendant

In Action 2014/CLE/gen/0889
Mrs. Krystal Rolle QC for the Plaintiffs
Mrs. Gail Lockhart-Charles QC and Mrs. Lisa Esfakis for the Defendants

In Action 2017/CLE/gen/00014
Mrs. Gail Lockhart-Charles QC and Mrs. Lisa Esfakis for the Plaintiff
Mrs. Krystal Rolle QC and Mrs. Vanessa Carlino for the Defendant

Hearing Dates: 26 January 2022

Practice and Procedure – Leave to appeal and stay pending appeal – Judgment delivered – One discrete issue remains undetermined - Whether the Court had jurisdiction to request further evidence before determining issue – Stay of case management order – Case management powers of court – Order 31A of the Rules of the Supreme Court, 1978, as amended – Order 31A r. 18(s) and r.25

Inordinate delay in delivery of Judgment – Whether the inordinate delay in delivering the Judgment affected the Court's understanding of the issues and evidence – Limited circulation of draft Judgment – Amendments made in final Judgment - Whether Judge has power to amend of its Court's own motion before sealing – *Re Barrell* jurisdiction – Power of Court to review and correct its own judgment

Whether the Defendant required leave of some of the orders to appeal – Section 10 and 11 (f) of Court of Appeal Act – Whether the orders were interlocutory or final orders

The Defendants are the Developer of an upscale gated community known as Old Fort Bay. By Summons filed 18 January 2022, the Developer sought leave of this Court to appeal certain orders made in paragraph 300 (2) – (4) of a final Judgment delivered by this Court on 4 January 2022 where the Court decided that some areas were "common areas" and some were not. The Court also ordered that the Developer transfer the areas which are "common areas" to the Old Fort Bay Property Owners Association ("the POA"). On the issue of the Marina Expansion, the Court opined that it needed further evidence to come to a proper determination and, pursuant to its case management powers, made certain orders which the Developer argued that the Court was wrong to do after the trial and delivery of the Judgment. The Developer also raised a preliminary issue that the inordinate delay in the delivery of the Judgment adversely affected the Court's understanding of the issues and the evidence. The Developer also seeks a stay pending appeal.

The POA and two named Plaintiffs ("the Plaintiffs") opposed the application and, raised the preliminary issue that all of the orders complained of save for the case management directions relative to the Marina Expansion are final orders for which leave of this Court is not required. The Plaintiffs further asserted that with respect to the Marina Expansion, it was within the Court's case management powers to request further evidence which it deemed necessary to determine the issue.

HELD: Refusing the application for leave to appeal and stay pending appeal with costs to the Plaintiffs to be taxed if not agreed.

1. The Final Judgment consisting of 107 pages and over 300 paragraphs was rendered exactly 17 months and 1 week after its conclusion. As noted in paragraph 17 of the Judgment, the Court apologized for the inordinate delay in the delivery of the Judgment and expressed that it was principally due to the complexity of the matter which lasted for about 13 days (inclusive of a site visit) and generated boxes of documents and transcripts. The Court also stated that, notwithstanding the protracted delay, it had the benefit of all the transcripts and its own notes which included the assessment of the demeanour of the witnesses as they gave their evidence. The Court also stated that it clearly recalled the evidence, the demeanour of the witnesses and what transpired during the trial. The Court of Appeal cases of **Polymers International Limited v Philip Hepburn** SCCIv App No. 8 of 2021 (Judgment delivered on 18 November 2021) and **Scotiabank (Bahamas) Limited v Macushla Pinder** SCCiv App No. 73 of 2021 (Judgment delivered on 15 December 2021 relied upon. The case of **Bond v Dunster Properties Ltd & Or.** [2011] EWCA considered.

2. A judge need not mention every single argument advanced by Counsel in the ruling but that does not necessarily mean that the judge did not consider it. There is no duty on a judge, in giving his reasons, to deal with every single argument presented by counsel in support of his case. It is sufficient if what the judge says, show the parties, and if need be, the Court of Appeal, the basis upon which he/she acted: **Maria Iglesias et al v Juan Jose Sanchez Busnadiego (In his Capacity as Judicial Administrator of the Spanish Estate of Jesus Iglesias Rouco)** [2017/ CLE/gen/00937]; **Piglowska v Piglowska** [1999] 3 All ER 632 and **Eagil Trust Co. Ltd. v Pigott-Brown and another** [1985] 3 All ER 119 applied.

3. A judge retained the power to reconsider a judgment which he/she has delivered before the order consequent upon it has been sealed, but the judge should only exercise this power if there are strong reasons for doing so: **Re Barrell Enterprises and others** [1972] 3 All ER 631, CA; **Re: Petition of Henry Armbrister 2007/CLE/qui/01438 & 2008/CLE/qui/845** and **Hong Kong Zhong Development Company Limited v Squadron Holdings SPV016HK, Ltd.** 2016/CLE/gen/01295. In the present case, the Court emailed the Judgment and advised the parties not to widely circulate the Judgment as it was a "draft" subject to amendments and typographical corrections. Inaccuracies,

typographical and minor factual errors were corrected of the Court's own motion before the issuance of the final Judgment before the order was signed and sealed.

4. Leave to appeal is not required for final orders : see Section 11 (f) Supreme Court Act.

5. The test for determining whether an order is final or interlocutory is whether the decision finally disposes of the matter in dispute - **Salaman v Warner** [1891] 1 QB 734 applied; **Findeisen and another v The Wahoo Resort foundation and another** [2014] 3 BHS J No 62 applied.

6. Case management decisions are discretionary and as such, appellate courts will not interfere with those decisions unless the Court has misdirected itself on law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong – **Maria Iglesias et al v Juan Jose Sanchez Busnadiego (In his Capacity as Judicial Administrator of the Spanish Estate of Jesus Iglesias Rouco)**; **Wembley National Stadium Limited v Wembley (London) Limited [2000] Lexis Citation 2361** and **Broughton v Kop Football (Cayman) Ltd [2012] EWCA Civ 1743** applied**.**

7. Since the Court has an unfettered discretion to make case management orders and the Defendant cannot point to any error in the order, it has no reasonable prospects of success on appeal. The Defendant has not satisfied the evidentiary basis for a stay pending appeal. The Court however will maintain the status quo in relation to the area near the security gate until the determination of the appeal.

8. Where the Court has not yet decided an issue but requests further evidence to facilitate the determination of that issue, that request for evidence is not "fresh evidence" and as such, the principles of *Marshall v Ladd* do not apply – **Ladd v Marshall** [1954] 1 WLR 1489 distinguished. The Bahamian case of **Carla Anita Cecilia Braynen Turnquest v Water and Sewerage Corporation** [2018/CLE/gen/2021 and **Water and Sewerage Corporation v Carla Anita Cecilia Braynen Turnquest** SCCiv App 90 of 2020 applied.

RULING

Charles J:

Introduction

[1] In a Judgment handed down on 4 January 2022, this Court made the following Orders at paragraph 300:

1. A Declaration that Pineapple Grove, Pineapple House and the Old Fort Bay Club are the properties of the Developer and do not fall within the definition of “common areas”.

2. A Declaration that the Identified Beach Reserve is “common area” within the OFB Subdivision and ought not to be sold. The POA is entitled to damages for the sale of a portion of the Identified Beach Reserve. Such damages are to be calculated by Counsel.

3. With respect to the Marina Expansion:

    (i) All contiguous property owners must be consulted and be given an opportunity to express their opinion (s) in writing;

    (ii) A comprehensive Environmental Assessment Report to be prepared by a Qualified Expert to be agreed by all Counsel;

    (iii) Another site visit to be arranged by all Counsel upon consultation with the Court and to include, if possible, a visit to the marinas at Lyford Cay Club and Albany.

4. A Declaration that the Developer transfers forthwith to the POA the properties determined by the Court to be “common areas” including the lands by the security gate. [Emphasis added]

[2] By Summons filed on 18 January 2022, Old Fort Bay Company Limited and New Providence Development Company Limited (“the Developer”) sought leave of this Court to appeal to the Court of Appeal paragraph 300 (2) – (4) of the above Order relative to the Beach Reserve, the Marina Expansion and the Declaration that the Developer transfer the areas determined as “common areas” inclusive of the area by the security gate. The Summons also sought an order that enforcement of the orders appealed against be stayed pending the determination of the appeal. The

application was supported by two affidavits of Kavonn Thurston, one filed on 18 January 2022 and a Supplemental Affidavit filed on 26 January 2022.

[3] Old Fort Bay Property Owners' Association Limited and the two-named Plaintiffs, Matthew Chance Hudson and Zsuzsanna Marta Foti (collectively referred to as "the Plaintiffs") resisted the applications. In respect of the Marina Expansion, they assert that the order made was within the Court's wide and unfettered discretion to make such a Case Management Order and that it was reasonable for the Court to have concluded that it lacked the evidence that it needed to dispose of the issue. In respect of the Orders made at paragraph 300 (2) and (4), the Plaintiffs assert that these are final orders, from which leave of this Court is not required to appeal.

Grounds of appeal

[4] There are eleven (11) Grounds of Appeal in the Draft Notice and Grounds of Appeal. Grounds 1 to 8 do not concern this Court as they are final orders and any appeal from the final order of a Judge lies with the Court of Appeal.

[5] Grounds 9 and 10 regarding the Marina Expansion are the only grounds which require my consideration. They are dealt with below in the POA's preliminary issue: whether leave is required for some of the orders. Ground 11 is an overarching ground.

Developer's preliminary issue – inordinate delay of Judgment

[6] The Developer's first and primary assault on the Judgment is that the inordinate delay of 18 months to deliver the Judgment compromised the Court's understanding of the issues. Mrs. Lockhart-Charles QC appearing for the Developer, submitted that the delay is exacerbated by a further eight (8) years between the commencement of the action, (which has prevented the Developer from developing his own land in accordance with the Planning Approval granted in 2013 and its express right under Clause 1(2) of the Second Schedule of the Conveyance) and the commencement of the trial. This serious delay, says Mrs. Lockhart-Charles, will be further compounded by the Court's order relative to the

Marina Expansion. She further submitted that, because of the delay, the Court's understanding (or memory) of the issues was adversely affected. According to Mrs. Lockhart-Charles, this was evident by the failure of the Judge (either entirely or adequately) to deal with many of the arguments and factual matters raised by the Developer. Another manifestation of the Court's misunderstanding, says Mrs. Lockhart-Charles, was what she called several unexplained and material changes from the draft Judgment to the final Judgment which were unfavourable to the Developer. In addition to revealing the Court's lack of understanding of the issues, she contended that it calls into question whether those amendments truly reflect the Court's reasons or whether they have been influenced by submissions made following the delivery of the draft Judgment, of which she stated that she was not aware.

[7] The trial of this consolidated action ended on 28 July 2020. The Judgment was delivered exactly 17 months and 1 week later. The Court acknowledged that the delay was inordinate and gave reasons why it took so long to deliver the Judgment. At paragraph 17 of the Judgment delivered on 4 January 2022, the Court stated:

> **"The Court apologizes for the inordinate delay in the delivery of this Judgment but it was principally due to the complexity of the matter which lasted for about 13 days (inclusive of a site visit) and generated boxes of documents and transcripts. That said, in preparing this Judgment, the Court had the benefit of all the transcripts and its own notes which included the assessment of the demeanour of the witnesses as they gave their evidence. Concisely, the Court clearly recalls the evidence, the demeanour of the witnesses and what transpired during the trial.** [Emphasis added]

[8] The Court, very cognizant of the legal maxim "*justice delayed is justice denied*" and that judgments ought to be delivered in a timely manner, strives to achieve that goal but this is not always possible especially with a busy calendar and administrative challenges. But no reason is a good reason for any delay.

[9] That said, this action (consolidated), which was set initially for 3 days, lasted for 13 days with evidence taking 10 full days due to extensive and, occasionally, repetitive questions on cross-examination. Submissions took two days and a site

visit took place one evening in the midst of the Covid -19 pandemic on 3 July 2020. Due to social distancing and other protocols, the Court declined the offer to go on the boat provided especially without the assistance of the expert witnesses (who were not present). The Court was therefore unable to appreciate the nature and size of the Marina Expansion. The site visit was therefore incomplete. Upon writing the Judgment, the Court realized that another site visit with the expert witnesses would be of assistance.

[10] In my judgment, the fact that the trial has concluded and a Judgment rendered does not preclude the Court from requiring further evidence on a discrete issue which is still extant and undetermined. In England, as a matter of principle, a judge retained control of a case to the extent of being able to reconsider the matter *of his own motion* **or** to hear further argument on a point which he has decided **even after judgment has been handed down (but before it has been drawn up).** The court has the power to permit pleadings to be amended even if that involved a new argument being put forward, or further evidence being adduced at that stage: **Charlesworth Relay Roads Ltd (In Liquidation)** [1994] 4 All ER 397, per Neuberger J.

[11] Additionally, Mrs. Lockhart-Charles made much of the pre-trial delay of eight (8) years since the commencement of the two actions in 2014 during which time the Developer has been prevented from developing his own land in accordance with the Planning Approval granted in 2013. This is not entirely accurate. One of the cases, 2017/CLE/gen/00014 - *Old Fort Bay Company Limited v Old Fort Bay Property Owners Association Limited* – was instituted in 2017 by the Developer. On 13 June 2017, Mrs. Lockhart-Charles applied for the consolidation of the three matters. On that day, the Court consolidated the three actions and gave case management directions including fixing the trial of the consolidated action for 5 days from 10 to 14 September 2018. Due to the parties' non-compliance of the case management order, they came back to Court seeking a vacation of the September 2018 trial date. In hindsight, the Court should have been more proactive and refused the vacation of the trial date. Subsequently, there were at

least two further case management hearings. At the Third Case Management hearing on 23 October 2018, both parties consented to a 3-day trial from 20 to 23 May 2019 (instead of the previously set 5-day trial). Instead, the trial dragged on for 12 full days. In any event, pre-trial delay is not a relevant consideration in assessing the time that it took the Court to render a Judgment. Furthermore, the Court's docket reflects that the parties and not the Court were responsible for the delay.

[12] I do not agree with Mrs. Lockhart-Charles that the Court's understanding of the issues was compromised by the delay in the delivery of the Judgment. In fact, it seems odd to me that the Developer was satisfied with the issues which were decided in its favour but found that the judge fell into obliviousness when it came to those issues which were not in its favour. As reiterated, the Court had the benefit of all transcripts and its own contemporaneous notes taken each day during the hearing. The remainder of the relevant evidence was by way of documentary evidence (witness statements, expert evidence, plans, conveyances etc.) and written submissions (which supplemented the oral submissions).

[13] On the issue of delay, Mrs. Lockhart-Charles referred to the case of **Bond v Dunster Properties Ltd & Ors** [2011] EWCA Civ. 455. That case concerned a delay of 22 months. The Court of Appeal described a delay of 22 months between the end of the hearing and the delivery of judgment as "*lamentable and unacceptable*" **but held that it did not render the judge's conclusions unsafe so as to make it just to order a retrial**. The court noted that there is no statutory rule that a judgment must be delivered within a specified time but a judgment has to be delivered "within a reasonable time" and what is reasonable may vary according to the complexity of the legal issues, the volume and nature of the evidence and other matters. Where delay occurs the litigants should receive an apology and, if possible, an explanation [Emphasis added].

[14] Within recent times, our Court of Appeal have admonished judges for delay in rendering timely judgments. In **Polymers International Limited v Philip Hepburn**

SCCIv App No. 8 of 2021 (Judgment delivered on 18 November 2021) and **Scotiabank (Bahamas) Limited v Macushla Pinder** SCCiv App No. 73 of 2021 (Judgment delivered on 15 December 2021), our Court of Appeal has been very critical of inordinate delay of judgments by judicial officers. In the latter case, Sir Michael Barnett Kt. P stated at (para 17) that the judge did not apologize for the delay nor proffer any explanation for the delay. Then, at paras 22-23 of the Judgment, Sir Michael said:

> **"22. Judges cannot continue to ignore these admonitions as to what constitutes a reasonable time for the delivery of judgments. Judges are the guardians of the fundamental rights and freedom guaranteed by the constitution. Judges cannot by inordinate and *inexcusable* delays in delivering their judgments themselves breach a litigant's right to a fair hearing within a reasonable time.**
>
> **23. Whilst we appreciate the heavy workload that judges carry, it is imperative that they manage their workload in a manner that does not cause inordinate delays *Two* years to deliver judgment *after a two day trial* is simply unacceptable."** [Emphasis added]

[15] In **Polymers**, the delay in rendering the judgment was almost 5 years after the completion of the trial. The appellant complained that such a lengthy delay makes the Ruling in its entirety unsafe. The appellant further submitted that "it is clear on a read of the Ruling alongside the evidence led at the trial that the facts and evidence of the various witnesses were no longer fresh in the Learned Judge's mind, occasioned by her failure to consider and give sufficient weight to crucial facts".

[16] On appeal to the Court of Appeal, Sir Michael Barnett P, at para 46, referred to the case of **Yearwood v Commissioner of Police** [2004] ICR 1660 and **Kaamin v Abbey National PLC** [2004] ICR 841. In a nutshell, these cases set down the benchmark for the delivery of judgment which is 3 months for interlocutory matters and 6 months for judgments. At para 47, Sir Michael quoted from a judgment of Sir Geoffrey Vos in **Bank St. Petersburgh PJSC v Arkhangelsky** (op cit) where he stated:

> **"45. …A delay of the magnitude in the present case, whatever explanation may be, is plainly inexcusable. It should not have happened and should not have been allowed to happen, particularly in a case where there is an allegation of dishonesty, and the reputation of future employment prospects of the individuals concerned were at stake. Nevertheless, it is quite clear from the authorities that *delay alone will be insufficient to afford a ground setting aside a judgment aside. However, the delay will be an important factor to be taken into account when an appellate court is considering the trial judge's findings and treatment of the evidence and the appellate court must exercise special care in reviewing the evidence, the judge's treatment of that evidence, his findings of fact and his reasoning."*** [Emphasis added]

[17] Finally, the learned President, Sir Michael, in cautioning judges to deliver judgments in a timely manner, stated at paras 51 and 52:

> **"51. In my judgment, the criticism of the judge's findings and/or failure to find are unfair. The criticism in my judgment is an example of *trawling through a judgment"* a phrase Lord Scott mentioned in *Cobham v Frett* [2001] 1 W.L.R. 1775.**
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> **52. Notwithstanding the delay, it is clear that the judge reviewed in detail the evidence which was contained in written witness statements, oral testimony which was taken verbatim by the stenographer and summarized by counsel in their submissions. We have also had the benefit of reviewing the material."**

[18] In the present case, the evidence alone took 10 full days and two days were spent on oral submissions even though written submissions were provided. That alone speaks to the complexity of the matter. In addition, **all** pre-trial delays rest with the parties; not with the Court. Where the Court fell short was its failure to time-manage Counsel during their cross-examination and so, what was fixed for 3 days ended up occupying 12 days in the court's calendar. That, in itself, added to the burden to the Court's already packed calendar.

[19] In any event, the 17 months' delay in rendering the Judgment did not compromise my understanding of the facts and issues. In my judgment, the Developer's preliminary objection with respect to inordinate delay is hopeless and is doomed to fail.

[20] Another criticism levied at the Court is what Lord Scott in **Cobham v Frett** [supra] referred to as *"trawling through a judgment".* A judge need not mention every single argument advanced by Counsel in the ruling but that does not necessarily mean that the judge did not consider it. There is no duty on a judge, in giving his reasons, to deal with every single argument presented by counsel in support of his case. It is sufficient if what the judge says, show the parties, and if need be, the Court of Appeal, the basis upon which he/she acted.

[21] In **Maria Iglesias Rouco et al v Juan Jose Sanchez Busnadiego (In his Capacity as Judicial Administrator of the Spanish Estate of Jesus Iglesias Rouco) and Others** [2017/CLE/gen/00937] - Ruling delivered on 7 December 2021, the Plaintiff sought leave of this Court to appeal a written Ruling refusing to stay the proceedings. Counsel for the Plaintiff asserted that the Court failed to consider a myriad of facts that were not specifically mentioned in the written Ruling. Mrs. Lockhart-Charles, who appeared on behalf of one of the Defendants, submitted that trial judges are not required to include every single fact and consideration in written decisions. The Court relied on several authorities and agreed. This is what the Court stated at paras 47- 48 of the Ruling:

> **[47] "The Notice of Motion of Appeal otherwise alleges several misstatements of facts in the Stay of Proceedings Ruling and is littered with assertions of matters that the Plaintiffs say the Court failed to consider in making its determination that the Plaintiffs had not demonstrated circumstances adequately exceptional to justify refusing the stay. As all Defence Counsel pointed out, the mere fact that a matter is not mentioned in a Written Ruling does not mean that it was not taken into account. The House of Lords in Piglowska v Piglowska [1999] 3 All ER 632 emphasised that first instance judges are not required to include every single fact and consideration in their written reasons. At pages 643 and 644, Lord Hoffmann stated:**
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> > **"In *G v G* [1985] 2 All ER 225 at 228, [1985] 1 WLR 647 at 651–652 this House, in the speech of Lord Fraser of Tullybelton, approved the following statement of principle by Asquith LJ in *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343 at 345, which concerned an order for maintenance for a divorced wife:**
> >
> > **'It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is**

> **of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.'**

This passage has been cited and approved many times but some of its implications need to be explained. First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc v Medeva plc* (1996) 38 BMLR 149 at 165:

> **'The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'**

The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the district judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in s 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself. The reason why I have taken some time to deal with the Court of Appeal's assertion that the judge did not realise that she was entitled to exercise her own discretion is that I think it illustrates the dangers of this approach. The same is true of the claim that the district judge 'wholly failed' to carry out the statutory exercise of ascertaining the husband's needs." [Emphasis added]

[48] This very point was restated in Eagil Trust Co. Ltd. v Pigott-Brown and another [1985] 3 All ER 119, where the English Court of Appeal

expressed that a judge does not have to traverse each and every point made by Counsel:

> **"…Apart from such exceptions [to the duty to give reasons], in the case of discretionary exercise, as in other decisions on facts or law, the judge should set out his reasons, but the particularity with which he is required to set them out must depend on the circumstances of the case before him and the nature of the decision he is giving. When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis on which he has acted, and if it be that the judge has not dealt with some particular argument but it can be seen that there are grounds on which he would have been entitled to reject it, this court should assume that he acted on those grounds unless the appellant can point to convincing reasons leading to a contrary conclusion (see Sachs LJ in Knight v Clifton [1971] 2 All ER 378 at 392–393, [1971] Ch 700 at 721)."**[Emphasis added]

[22] Another grievance of the Developer pertains to what is said to be *"a number of unexplained, material changes between the draft Judgment and the final Judgment, including new/contrary findings which are clearly unfavourable to the Developer. The fact that numerous material changes have been made to the draft is a clear indication that the delay has affected the Court's grasp and recollection of the issues. It also begs the question of whether these changes truly reflect the Court's reasons, or whether these amendments have been influenced by submissions made following the hand down of the draft and if so by what submissions (as the Developer has not seen any)".*

[23] A brief chronology of events may shed some light on this issue. It is the normal practice of this Court to deliver its rulings/judgments by Zoom at 2.30 p.m on any given day. On Friday, 31 December 2021 at 2.30 p.m., the Court experienced

technical difficulties and resorted to emailing the "draft" Judgment to all parties with a caveat that it was only a "draft" and therefore, it should not be widely circulated. The final Judgment was delivered in a matter of days on Tuesday, 4 January 2022 which was the first working day after the New Year Holiday; Monday 3 January 2022 being a public holiday. The signed and sealed Judgment was only made available to Counsel only on Thursday, 27 January 2022 because of administrative challenges in printing this lengthy judgment. However, all Counsel were kept abreast of the reasons for the delay.

[24] Mrs. Lockhart-Charles took particular issue with paragraph 264 of the final Judgment. She contended that the finding that the Canals, Waterways and Boat Basin are common areas was inserted in the Final Judgment although it appeared nowhere in the draft Judgment. Paragraph 264 of the draft Judgment reads as follows:

> **"[264] Mrs. Rolle QC argued that there is no legal basis for the finding that the Developer owns the 3.724 acre portion of the Canals & Waterways of the OFB Subdivision is implausible in light of the POA's own acknowledgement of this fact as far back as 2008. Dr. Munnings' 30 June 2008 letter asserts that the *Marina* as "owned and represented by NPDCo". In any event, *if the Developer does not own the Marina*, the rhetorical question is then: who owns it? Surely, it cannot be the POA as they have not produced any Conveyance to show ownership."**

[25] Clearly, the focus was on "the Marina" and not "the Canals and Waterways". On finalizing the Judgment, the Court observed the omission with respect to the "Canals, Waterways and Boat Basin and altered paragraph 264 of the draft Judgment. Paragraph 264 of the final Judgment reads:

> **"[264] Mrs. Rolle QC argued that there is no legal basis for the finding that the Developer owns the 3.724 acre portion of the Canals and Waterways of the OFB Subdivision. In my judgment, the Canals and Waterways as well as the Boat Basin are common areas. Its use is common to all users in this residential community. However, with respect to the Marina, the POA itself has acknowledged that it is owned by the Developer. This acknowledgement dates back to 2008. Dr. Munnings' 30 June 2008 letter asserts that the Marina as "owned and represented by NPDCo". A rhetorical question is: if the Developer**

does not own the Marina which it developed as far back as circa 2003, then who owns it? Is the Developer holding it on trust for the POA as it alleged? If so, then at some point in time, the Developer did own it."

[26] True, the draft Judgment did not state that the Canals, Waterways and Boat Basin are common areas but neither did the letters from Dr. Munnings nor the POA. The last few sentences are crystal clear that the focus was on the Marina. It would be contrary to my *raison d'etre* to ever conclude that the Developer owns the "Canals, Waterways and Boat Basin" since their use is common to all residents of Old Fort Bay as are the roadways.

[27] Any complaint of what the real position was which was exacerbated by the following paragraph of the Judgment which states that, "in any event, the POA's claim of the Canals, Waterways and Boat Basin as a "common area" is barred by the doctrine of laches" was simply an error or mistake on my part which the Court of its own motion without the aid of any Counsel corrected in the final Judgment.

[28] In any event, the law is clear. Under **Re Barrell Enterprises and others** [1972] 3 All ER 631, CA (legal practitioners in England described the jurisdiction to alter a judgment before it is perfected as 'the Barrell jurisdiction') which is the law in The Bahamas: see Sir Michael Barnett CJ in **Re: Petition of Henry Armbrister 2007/CLE/qui/01438 & 2008/CLE/qui/845** and this Court's Ruling in **Hong Kong Zhong Development Company Limited v Squadron Holdings SPV016HK, Ltd.** 2016/CLE/gen/01295, a judge has the power to reconsider a judgment which he has delivered before the order consequent upon it has been sealed, but the judge should only exercise this power if there are strong reasons for doing so.

[29] Since the introduction of the Civil Procedure Rules in England in 1998, judges even have a much broader jurisdiction to change their minds **of their own volition** than was the position under **Re Barrell** (where they have to show "exceptional circumstances") particularly before a Judgment is finalized and perfected as in the present case. **In re L,** for example, in deciding whether to change their minds judges must act in accordance with the "overriding objective…to deal with the case

justly"; such discretion may have to be exercised "judicially and not capriciously", but as Lady Hale stated "every case is going to depend upon its particular circumstances."

[30] In any event, all parties were fully aware that it was a "draft" Judgment which was subject to alterations. For that reason, the Court restricted its wide circulation. Further, the time which elapsed during the draft Judgment and the final Judgment was a matter of 3 days; all of which were the New Year holidays in this jurisdiction. The final Judgment was delivered on Tuesday, 4 January 2022 (the first working day). Further, the Developer could not say that it was prejudiced by the changes made because the Court takes judicial notice that 3 days after receiving the final Judgment, the Developer issued a Statement to two of the leading newspapers circulating in this jurisdiction lauding the Judgment. The headline in one of the newspaper, the Tribune Business News of 7 January 2022 reads "*Bitter impasse:* ***Both sides claim win in Old Fort battle***".

[31] Next, of concern to the Court is that, in her written as well as oral submissions, Mrs. Lockhart-Charles (recently elevated to one of Her Majesty's Queen's Counsel) hurled spurious and unsubstantiated allegations at the Court and Mrs. Rolle QC who is a highly respected Queen's Counsel in this jurisdiction. Mrs. Lockhart-Charles stated:

> **"It also begs the question of whether these changes truly reflect the Court's reasons, or whether these amendments have been influenced by submissions made following the hand down of the draft and if so by what submissions (as the Developer has not seen any)."**

[32] This was subsequent to an email dated 17 January 2022 which she wrote to Mrs. Rolle. I quote selectively: "provide me with …and *also "**a copy of all communications between Hudson, Foti, the POA and its representatives and the Court** in relation to this matter including any communications between the date of the draft judgment and the date of the corrected judgment***."

[33] In a nutshell and to put it mildly, Mrs. Lockhart-Charles alleges that Mrs. Rolle QC and others "*conspired*" with the Court to make changes to the Judgment which are favourable to the POA. This is a serious indictment on the Court and a highly respected Queen's Counsel. Mrs. Lockhart-Charles does not have a shred of evidence to substantiate her baseless and speculative allegations. This kind of behaviour is disturbing. In addition, it is also not healthy for the administration of justice in this country. The court is the last bastion of hope for preserving and protecting the constitution, the ultimate guardian of democracy, justice and people's fundamental rights. Correspondingly, judges should be above reproach in the eyes of a reasonable observer for their conducts and behaviours are the key to maintaining public faith in the judiciary.

[34] Perhaps, a reminder is needed. In **In the Matter of a Contempt of Court committed by Kenneth McKinney Higgs and James M. Thompson** [1988] BHS J. No. 11, **Gonsalves-Sabola J** (as he then was) stated at para 11 that:

> **"11. Persons who lose cases can always appeal to a higher court. Bringing an appeal is the remedy for any grievance felt at the hands of the tribunal of first instance. Scurrilous abuse of the judge in reprisal is not a remedy. The former is lawful, the latter criminal…."**
> [Emphasis added]

[35] See also paragraph 20 of **In the Matter of the Contempt of Court of Mrs. Donna Dorsett-Major on 3 June 2020.**

[36] I do hope that Mrs. Lockhart-Charles will retract these speculative and fanciful allegations which have no place in a court of law. I say no more.

POA's preliminary issue – Whether leave is required for each of the orders

[37] As already mentioned Mrs. Lockhart-Charles QC seeks leave of this Court to appeal paragraph 300(2) - (4) of the Judgment which concerns (i) the Beach Reserve, (ii) the Marina Expansion and (iii) a Declaration that the area by the security gate is a "common area" and the order for the Developer to transfer all common areas to the POA.

[38] Mrs. Rolle QC appearing with Mrs. Carlino (Counsel for the POA) raised the preliminary point that the Orders, save for the Marina Expansion, are final orders, from which leave is not required to appeal. I agree.

[39] Section 11 of the Court of Appeal Act, Part III deals with the appellate civil jurisdiction. Section 10 references appeals from the Supreme Court in civil proceedings and section 11 places six restrictions on civil appeals. Section 11 (f) provides:

> **No appeal shall lie –**
>
> > **(f) <u>without the leave of the Supreme Court or of the court from any interlocutory order or interlocutory judgment made or given by a Justice of the Supreme Court</u> except –**
> >
> > > **(i) where the liberty of the subject or the custody of infants is in question;**
> > >
> > > **(ii) where an injunction or the appointment of a receiver is granted or refused;**
> > >
> > > **(iii) in the case of a decree nisi in a matrimonial cause or a judgment or order in an Admiralty action determining liability;**
> > >
> > > **(iv) in the case of an order in a special case stated under the Ch. 181 Arbitration Act;**
> > >
> > > **(v) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Ch. 308 Companies Act in respect of misfeasance or otherwise; or**
> > >
> > > **(vi) in such other cases to be prescribed as are in the opinion of the authority having power to make rules of court, of the nature of final decision."**

[40] The test for determining whether an order is final or interlocutory was set out by Lord Esher MR in **Salaman v Warner** [1891] 1 QB 734 as follows:

> **"The question must depend on what would be the result of the decisionof the Divisional Court assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands,finally dispose of the matter in dispute, I think that for the purposes ofthese rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in theother, will allow the action to go on, then I think it is not final, but interlocutory."**

[41] Our Court of Appeal in **Peace Holdings Limited v First Caribbean International Bank (Bahamas) Ltd** [2014] 2 BHS.J. No. 73 has adopted Lord Esher's application test expounded in **Salaman v Warner and Others** [1891] 1 QB 734. At paragraph 24, the Court of Appeal determined that:

> **"…[I]f the decision whichever way it is given will, if it stands, finally dispose of the matter in dispute, it is final. If, on the other hand the decision if given one way will dispose of the matter in dispute, but if given in the other, will allow the action to go on, then it is interlocutory."**

[42] This Court was confronted with the same question in **Findeisen and another v The Wahoo Resort foundation and another** [2014] 3 BHS J No 62 as to whether an order was final or interlocutory for the purpose of determining whether leave to appeal was required under 11 (f) of the Supreme Court Act. There, the Court applied the **Salaman** test and found that the judgment finally disposed of all of the matters. The decision was affirmed by the Court of Appeal.

[43] Succinctly put, where the court's decision finally disposes of the matter in dispute, the decision is a "final decision". On the other hand, where the decision will allow the action to go on, then the order is not a final order but an interlocutory one.

[44] In the present case, the orders made in paragraph 300 (2) and (4) of the Judgment are final orders in respect of which the Court's leave is not required. I will therefore dismiss the Developer's application for leave to appeal those orders.

[45] With respect to the Orders made at paragraph 300(3) (i) – (iii) of the Judgment, both parties agree that the Orders are interlocutory Case Management order, which requires leave for appeal pursuant to 11 (f) of the Court of Appeal Act.

The law

Leave to appeal

[46] In **Gregory Cottis (as Executor of the Estate of Raymond Adams) v Robert Adams (a beneficiary of the Estate of Raymond Adams)** SCCiv App & CAIS No. 23 of 2021, Evans JA, in delivering the Judgment of the Court, set out the law on leave to appeal at paras 11-12:

> **"11. In *Smith v Cosworth Casting Processes Limited* (1997) 4 All ER 840, Lord Woolf, opined as follows:**
>
> > **(1)<u>The court will only *refuse* leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal</u>. 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".**
>
> **12. In *Keod Smith v Coalition to Protect Clifton Bay* (SCCivApp No. 20 of 2017, Isaacs JA adopting the guidance from Lord Woolf noted at paragraph 23 of the Judgment:**
>
> > **"<u>The test on a leave application is whether the proposed appeal has realistic prospects of success</u> 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."[Emphasis added]

Stay pending appeal

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

[48] Therefore, in order to obtain a stay pending appeal, the intended Appellant must obtain a stay from the court below.

[49] In **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 fully at paras 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."**

See also **Cottis** at paragraphs 22 to 24.

[50] The Court considers the present application on the basis of these well-established principles.

Discussion

Order requiring further evidence with respect to Marina Expansion

[51] With respect to the Marina Expansion, the Court requested further evidence in order to determine this discrete issue. At paragraph 300 (3) of the Judgment, the Court ordered:

(i) All contiguous property owners must be consulted and be given an opportunity to express their opinion (s) in writing;

(ii) A comprehensive Environmental Assessment Report to be prepared by a Qualified Expert to be agreed by all Counsel; and

(iii) Another site visit to be arranged by all Counsel upon consultation with the Court and to include, if possible, a visit to the marinas at Lyford Cay Club and Albany.

[52] The Developer submitted that the Judge erred in law (i) in failing to identify that the sole remaining issue before her regarding the Marina Expansion was whether it would inevitably give rise to nuisance to one or more of the Plaintiffs, and/or (ii) in

failing to determine the same on the evidence before her, in accordance with the Court's duty to resolve fully argues disputes, and/or (iii) in failing to conclude that, on the evidence before her, the only available conclusion was that there would be no inevitable nuisance and/or the Plaintiffs failed to prove their case to the contrary.

[53] Mrs. Lockhart-Charles submitted that the Court's discretion to make such a case management order after the trial was concluded was "plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree". She referred to Lewison LJ in **Broughton v Kop Football (Cayman) Ltd** [2012] EWCA Civ. 17. 43, para 51 as approved by the UK Supreme Court in **HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd and another** [2014] UKSC 64.

[54] Mrs. Lockhart-Charles argued that the Courts have consistently emphasised the importance of finality in judicial decision making, subject to the right of appeal. Consequently, the Court would need to have very good reasons for inviting further evidence after the close of the proceedings which could have been produced at an earlier stage. In this regard, she quoted Lewison LJ in **Fage UK Ltd & Anor v Chobani UK Ltd & Anor** [2014] EWCA Civ 5 at p 114 and **AR v ML** [2019] EWFC 56.

[55] Neither of these cases bears any similarity to the present case. Paragraph 114 of **Fage** is essentially a caution to appellate courts not to interfere with trial judge's findings of fact unless compelled to do so and **AR V ML** concerned an appeal by a husband against a final order allowing the wife to adduce further evidence relating to her housing needs after the financial remedies judgment had been delivered (though it had not been perfected). This is not a case of allowing litigants to treat the trial as a dress rehearsal and to seek a further performance on the basis of any new evidence.

[56] Mrs. Lockhart-Charles also argued that it is well settled that the Court must reach a decision only on the basis of the case as pleaded and canvassed before it. She

referred to the UK Court of Appeal case of **Satyam Enterprises Ltd v Burton & Anor** [2021] EWCA Civ. 287.

[57] Our Court of Appeal has made the same pronouncement in many cases. In **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018, our Court of Appeal held that the starting point must always be the pleadings. At para. 39 of the judgment, Sir Michael Barnett JA (as he then was) stated:

> **"The starting point must always be the pleadings. In Loveridge and Loveridge v Healey [2004] EWCA Civ. 173, Lord Phillips MR said at paragraph 23:**
>
> > **"In *Mcphilemy vs Times Newspapers Ltd. [1999] 3 ALL ER 775* Lord Woolf MR observed at 792-793:**
> >
> > > **'Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.'** "[Emphasis added]

[58] At paragraph 40 of the Judgment, Sir Michael went on to state:

> **"It is on the basis of pleadings that the party's decide what evidence they will need to place before the court and what preparations are necessary for trial."**

[59] Thus, pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise. They are still vital to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear **the general nature** of the case of the pleader and the court is obligated to look at the witness statements to see what are the issues between the parties.

[60] With respect to the Marina Expansion, the Plaintiffs primary contention was premised on the construction of the Proviso. The Plaintiffs contended that, on a

proper interpretation of the Proviso, the Developer had no right to extend the Marina ("the Primary Marina Claim") which is pleaded in paragraph 77 (i) and (ii) of the POA's Amended Statement of Claim filed on 31 October 2017 and in paragraphs 56 and 57 (i) to (iii) of the Hudson/Foti's Statement of Claim filed on 1 May 2015.

[61] In addition to the Primary Marina Claim, the Plaintiffs pleaded alternative and/or additional marina claims ("the Alternative & Additional Marina Claims"). The POA's Alternative & Additional Marina Claims are pleaded at paragraph 78(a) and (b) of its Amended Statement of Claim and the Hudson/Foti Alternative & Additional Marina Claims are pleaded at paragraphs 58 to 71 of their Statement of Claim.

[62] As Mrs. Rolle correctly submitted, the Plaintiffs presented evidence in support of both of their claims. The POA's evidence in support of its Alternative & Additional Marina Claims included the Impact Assessment Report of their expert, Mr. John Guttman which did not concern the POA"s Primary Marina Claim. However, the Plaintiffs' Alternative & Additional Marina Claims and the evidence which was proffered in support thereof raised, among other things, for the Court's determination the "*impact*" of the Marina Expansion. In this regard, the Court has to decide the Plaintiffs' Alternative & Additional Marina Claims and make findings and a determination on such alleged "*impact*". Therefore, the Court did not exceed its generous ambit with respect to the pleadings.

[63] The Plaintiffs' pleaded case did not involve a challenge of the government approval. The Court is not called upon to set aside or vitiate government's approval. Unquestionably, I have to make a determination on the Plaintiffs' Alternative & Additional Marina Claims as to whether the Marina Expansion ought to be approved by the Court. Preferring Mr. Guttman's evidence to that of Mr. Turrell, I came to the conclusion that in order to properly determine this discrete issue relative to the Marina Expansion and the Plaintiffs' Alternative & Additional Marina Claims, I required additional evidence.

[64] The Developer's second primary assault of the Judgment with that there was a draft Judgment which was replaced by a final Judgment and certain changes were made, for instance, at paragraph 283, without an explanation. When the first judgment was circulated on 31 December 2021, the Court advised the parties that it was a "draft" which will be subject to inaccuracies, typographical errors or minor factual errors. The Court admonished Counsel not to widely circulate the draft Judgment.

[65] I have previously mentioned quite a bit that it was a "draft" Judgment and not a "final" one so Counsel ought to have even assisted the Judge to clarify what appeared ambiguous in the Judgment but neither party did that.

[66] In England, the purpose of sending a draft judgment to the parties is to enable them to draw the judge's attention to typographical, spelling or minor factual errors and also to give the parties an early opportunity. *Counsel has a duty to point out to the judge any omission in his judgment so that the matter can be dealt with there and then.* It was not appropriate to rely on the alleged omission to seek leave to appeal: **Re S (Omission from judgment: Duty of counsel (2007) Times 2 July.** See also: **The Caribbean Civil Court Practice: David diMambro and Louise diMambro** at page 340 –Note 30.4: Review of Decision by Judge.

[67] This practice seems 'far-off" to some attorneys in this jurisdiction but as the New Civil Procedure Rules are about to be promulgated (having been circulated widely to all stakeholders yesterday), many cultural changes will follow. That said, this is a long established and standard practice in my court and Mrs. Lockhart-Charles is very much aware of this practice. Notwithstanding, no Counsel assisted this Court with the editing of any judgment, be it the "draft" or "final". As I stated, such practice is infrequent in this jurisdiction. Mrs. Lockhart-Charles criticized such an approach and is of the opinion that a judge cannot change/correct his/her "draft" Judgment before the final Judgment is rendered is misguided.

[68] In the final Judgment, the Court made some changes to incorporate that the initial "view may change when the Court does a fuller site visit as opposed to the one which was done during the Covid-19 pandemic". That initial view may change when the experts (who ought to have accompanied the Court) would point out certain things to the Court regarding the nature and size of the Marina Expansion. It would also assist the Court with Mr. Hudson and Ms. Foti's grievances on their ability to navigate the Boat Basin freely.

[69] In addition, it was Mr. Henderson, not the Plaintiffs, who repeatedly referred to the marinas at Lyford Cay and Albany. The Court did not have the benefit of visiting those marinas. A visit to those marinas would give the court a better understanding of marinas in upscale gated communities. I agree that it would have been tidier if all of this has taken place before the Judgment was rendered. That said, the Marina Expansion issue is a discrete which has no bearing on the other issues which have already been determined.

[70] Mrs. Lockhart-Charles further submitted that the Court was wrong in law to consider that impact on views was potentially capable of constituting a nuisance. According to her, there is no right to a view, whether in the law of nuisance or otherwise. I do not disagree with the principle that loss of a view is not capable of constituting or contributing to a common law nuisance: Lord Hoffmann in **Hunter v Canary Wharf Ltd** [1997] AC 655 at 709.

[71] Mrs. Lockhart-Charles' next criticism of the Court requiring further evidence is that the Court was wrong in law to consider the impact on property values which she says is not capable of constituting a nuisance. At paragraph 279 of the Judgment, I stated:

> **"The POA, Mr. Hudson (who does not live in Old Fort Bay) and Ms. Foti (who did not come to court to give testimony) vehemently objected to the Marina Expansion because, principally, they are of the opinion that it will be a "commercial" Marina and compromise their security and vista. In the case of Mr. Hudson, he testified that, having reviewed the Plan and given the nature, size and intended purpose of the expansion, it would have the effect of substantially limit or at least**

> **affect his ability to safely navigate within the Boat Basin. He also stated that it would create security risks for the entire community but especially for himself and Ms. Foti since their properties are adjacent to the Boat Basin. He further stated that it would also obstruct the amenity view of both of them, thereby decreasing the value of their properties and it would also lead to fouling of the riparian environment of the entire Boat Basin and adjacent canal.** [Emphasis added]

[72] The Court was not only considering the view of Mr. Hudson/Ms. Foti and the POA but other factors, for example, security, navigation of the Boat Basin (common area) by Mr. Hudson and Ms. Foti, the decrease (if any) of the values of their respective properties caused by the obstruction of their views and the fouling of the environment which may be caused by the Marina Expansion.

[73] Additionally, Mrs. Lockhart-Charles submitted that the Court was wrong to order an Environmental Impact Statement because that claim had been deleted from the POA's Amended Statement of Claim. Further, she said, the opinions of the contiguous property-owners, who are not parties to this action, is irrelevant. Public consultation (sought by the opinions of residents), and the planning merits (sought by the Environmental Impact Assessment) are matters for the planning approval process, which was already completed. She further argued that the decision to defer a final decision on the Marina Expansion will result in unfairness to the Developer, as it now adds to the delay already suffered and will only allow the Plaintiffs to improve their case.

[74] In my judgment, Mrs. Rolle correctly submitted that, notwithstanding that the POA did not ask for an Impact Assessment Report in in its Statement of Claim, it is within the Court's power to ask for evidence that it must consider to finally determine the issue. The POA pleaded that the Marina was a "*common area*" and that the Developer ought not be permitted to expand it on the basis that the Marina Expansion would compromise the security, exclusivity and vista of the POA and particularly interferes with the rights granted to Mr. Hudson and Ms. Foti.

[75] The question to be asked relative to the Marina Expansion is whether the nature and size of the proposed expansion would negatively impact the Canals, Waterways and Boat Basin and the contiguous property owners including Mr. Hudson/Ms. Foti. Mr. Henderson for the Developer sought to convince the Court that the expansion would not negatively impact the waterways by listing proposed user restrictions, but he was an ordinary witness with no authority to assert same. The Court noted that Mr. Henderson also had an axe to grind and rejected aspects of his evidence. Mr. Turrell, an expert in ocean engineering, marine designs and marine biology, gave evidence favourable to the Developer. However, for reasons given in the Judgment, I treated his evidence as an expert whose evidence lacked independence. Mr. John Guttman gave an Impact Assessment Report, not an Environment Assessment Report, for the POA. He was subject to cross-examination and his expertise was preferred over Mr. Turrell. He stated that the expansion could have negative effects: see paragraphs 289-290 of the Judgment.

[76] Although Mr. Turrell's evidence was that the expansion would not negatively affect the waterways, I approached his evidence with extreme caution. The Developer stated that there is an Impact Assessment Report in the Agreed Bundle of Documents but no mention was made of it during the trial. Shoving it among a mass of documents does not assist the Court particularly on this technical issue. It is on this basis that the Court ordered a report on the environmental effects of the Marina Expansion by *an expert agreed by both parties*, to avoid the issue of independence (or lack thereof).

[77] In my view, the opinions of contiguous property owners are a relevant consideration to the determination of the issue but it is not the sole determining factor. The question is whether the Marina Expansion would be a nuisance. The POA asserted that it would be a nuisance and the Developer asserted that it would not. At the end of the day, upon further submissions, I may well conclude that the contiguous property owners' view on the Marina Expansion ought not to be given any weight at all.

[78] Furthermore, the Court is not precluded from obtaining an *objective* Environmental Assessment Report merely because it is relevant to the planning approval phase. Mrs. Lockhart-Charles' suggestion that the Court has usurped the functions of the Subdivision Planning Approval Committee is untenable because the Court has not set aside Planning Approval and cannot do so. It is a matter that the Court will consider in determining this discrete issue of the Marina Expansion. It is for the Court, not Counsel, to determine the issues. It follows that the Court should decide what it considers and what weight, if any, to give to those considerations.

Case management powers – an unfettered discretion

[79] It cannot be disputed that judges have wide and unfettered discretion when managing cases. These powers exist inherently and also under Order 31A Rule 18(2)(s) which provides that the Court has the power to "*take any other step, give any other direction or make any other order for the purpose of managing the case and ensuring the just resolution of the case."*

[80] In **Paulista Ltd v Alfredo Neves Penteado Moraes; Moraes v Paulista Ltd** [2013] 1 BHS J. No. 21, Conteh JA had this to say at para 29:

> **"Discretion is an integral part of the case management function and powers of the trial judge. This enables the judge to decide, whether in a given case, there should be a preliminary trial of issues. Order 31A, Part I, (see S.I 44 of 2004), supplements the Rules on the powers of the Supreme Court in case managing of actions."**

[81] At para 27, Conteh JA also stated:

> **"Order 33, rr. 1, 3 and 4 of the Rules of the Supreme Court, undoubtedly confers such discretion on a trial judge in civil cases. It is discretion, which if properly exercised, an appellate court should uphold and not lightly interfere with".**

[82] In **Maria Iglesias Rouco**, this Court comprehensively confirmed the unfettered nature of case management powers and the approach of appellate courts not to interfere with the discretion of a lower court unless the Court has misdirected itself on law, has failed to take relevant factors into account, has taken into account

irrelevant factors or has come to a decision that is plainly wrong. At paras 59-63 of the Ruling, this Court stated:

> **"[59] The approach of appellate courts to the review of judicial discretions and case management decisions is well-established.**
>
> **[60] An appellate court will not interfere with the discretion of a lower court unless it is satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a different way or unless clearly satisfied that there has been a miscarriage of justice. In Ratnam v Cumarasamy [1964] 3 All ER 933, Lord Guest giving the advice of the Privy Council stated at page 934:**
>
> > **"The principles on which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion: *Charles Osenton & Co v Johnston* ([1941] 2 All ER 245 at p 257; [1942] AC 130 at p 148), per Lord Wright. The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice: *Evans v Bartlam*."**
>
> **[61] As Mr. Deal correctly submitted, appellate courts will rarely allow appeals against case management decisions and will uphold robust and fair case management decisions. By its nature, case management is "quintessentially" a matter for the first instance judge seised of the proceedings. In Wembley National Stadium Limited v Wembley (London) Limited [2000] Lexis Citation 2361, Parker LJ said at paragraph 54:**
>
> > **"The issue whether to grant expedition, and if so how much and on what terms, was a matter essentially for the discretion of the judge. As is well-known, this court will not lightly interfere with the exercise of judicial discretion. That applies, in my judgment, with particular force to case management decisions. The whole purpose of case management would be frustrated if an appeal route against case management decisions were thought to be readily available to the dissatisfied party. The reality is quite the contrary, in my judgment. Case management rarely involve issues of principle, and the onus on a dissatisfied party to demonstrate that a case management decision is plainly wrong cannot be easily discharged. By its nature, case management is quintessentially a matter for the court in which the proceedings are being conducted, and the scope for intervention by an appellate court in relation to case management decisions taken by that court is necessarily limited, in my view. Only in the most compelling**

> **circumstances, as I see it, would intervention of that kind be warranted."**
>
> **[62] However, an appellate court may interfere with a case management decision if satisfied that the judge has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong. In Broughton v Kop Football (Cayman) Ltd [2012] EWCA Civ 1743, Lewison LJ said at paragraph 51:**
>
> > **"Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."**
>
> **[63] The breadth of the court's case management powers is self-evident in Order 31A itself but nowhere more than in O.31A, r. 18 (s). The wide terms of this open-ended section expressly states that the Court may "take any other step, give any other direction or make any other order for the purpose of managing the case and ensuring the just resolution of the case."** [Emphasis added]

[83] The direction to obtain the opinions of residents of Old Fort Bay and an Environmental Assessment Report is a case management decision. In my judgment, the Developer has failed to show how the Court erred in law by requesting further evidence that it considers is required in order to determine the Marina Expansion issue.

[84] Mrs. Lockhart-Charles intimated that the order constitutes a request for fresh evidence, which the Court is not empowered to admit in the circumstances. However, Mrs. Rolle correctly submitted that the order is not a request or invitation for further evidence. The Court has not yet decided the Marina Expansion issue. The Court simply asked for more evidence to properly determine the issue

pursuant to case management powers. Accordingly, it is not fresh evidence as in **Ladd v Marshall** [1954] 1 WLR 1489.

[85] For all of these reasons, it was reasonable for the Court to make the order seeking further evidence. In my judgment, there is no reasonable prospect that the Developer would be successful in asserting that it was not within the Court's wide and unfettered case management power to request further evidence to determine an issue which has not yet been determined.

Analysis and determination of Stay pending appeal

[86] With respect to a stay pending appeal, the Developer seeks an Order that "*enforcement of the orders appealed against be stayed pending the determination of the appeal*."

[87] The Summons is supported by two affidavits of Kavonne Thurston; one filed on 18 January 2022 and a Supplemental Affidavit filed on 26 January 2022.

[88] In a nutshell, the Developer seeks a stay in respect of the Court's determination as to the "*common areas"* and the Court's Order that such "*common areas"* be transferred to the POA.

[89] At paragraph 7 of both Thurston affidavits, she deposed that she verily believes that if a stay is not granted, then it is likely that the Developer will be compelled to convey to the POA the land which is currently in the Developer's possession that the Court has determined to be "common areas" before the hearing of the Developer's appeal thereby rendering the appeal nugatory.

[90] As Mrs. Rolle correctly asserted, the Thurston affidavits contain no facts whatsoever to demonstrate that but, for the Court's intervention, the POA with knowledge of the existence of the appeal, will nevertheless compel the Developer to transfer lands which it knows remains the subject of litigation. According to Mrs. Rolle, therein lies the evidentiary vacuum.

[91] As was expressed in **Maria Iglesias Rouco**, the Court would not grant a stay if there is no evidentiary basis for it.

[92] In the circumstances, the Developer's application for a Stay is refused.

[93] That said, Mrs. Lockhart-Charles had corresponded with Mrs. Rolle on her decision to appeal the Judgment and whether she would agree to a stay. In an email dated 17 January 2022, Mrs. Rolle wrote:

> **"We hereby acknowledge specifically your confirmation of the Developer's intention to appeal the issue regarding "the Area near the Security Gate" and your intention to seek a Stay, if necessary, relative to this issue. We confirm on behalf of the POA, their agreement that the status quo relative to the "Area near the Security Gate" shall be maintained pending the final determination of such appeal. For the avoidance of doubt, the status quo for this purpose includes the fact inter alia that the Developer has been utilizing the property for parking AND the fact that the POA has similarly been utilizing the property for the parking of its vehicles…."**

[94] In this regard, the status quo as it pertains to the area near the Security Gate shall be maintained pending the final determination of the appeal.

[95] Since the evidentiary basis for a stay has not been met, I will refuse any Stay with respect to the Beach Reserve.

Conclusion

[96] Leave is not required to appeal the final orders given in the Judgment save for the Marina Expansion issue which is interlocutory.

[97] In my judgment, it is within the Court's case management powers to request further evidence having determined that the evidence adduced with respect to the adverse effects of the Marina Expansion has not sufficiently assisted in determining the issue: See also: **Carla Anita Cecilia Braynen Turnquest v Water and Sewerage Corporation** [2018/CLE/gen/2021 and **Water and Sewerage Corporation v Carla Anita Cecilia Braynen Turnquest** SCCiv App 90 of 2020. In that matter, Stewart J, in the course of the trial of a trespass claim, after hearing the witnesses,

made a determination **of her own volition** that she needed additional evidence from the experts to enable her to determine the southern boundary of the property in question. She made an order to that effect. The Defendant took objection and sought leave to appeal which the learned judge refused. The Defendant then appealed to the Court of Appeal. The Court of Appeal urged the Defendant to withdraw the application firstly because it was intended to appeal the judge's determination as to what evidence she needed to make a determination on the matter and secondly, because whatever decision the judge ultimately made would be open to appeal. The Defendant withdrew the application for leave and was ordered to pay costs.

[98] For all of the reasons given, I will refuse leave to appeal as the Developer's Notice of Appeal on the Marina Expansion has no prospect of success since the Court has exercised its unfettered Case Management powers and discretion to request further evidence.

[99] The Stay pending appeal is also refused. However, the status quo will be maintained relative to the area by the Security Gate.

Costs

[100] The Plaintiffs are the successful party in this application. As such, they are entitled to their costs to be taxed if not agreed.

Dated this 8th day of February 2022

Indra H. Charles
Justice