COMMONWEALTH OF THE BAHAMAS **2020/APP/sts/No.00015**

IN THE SUPREME COURT

Appellate Division

IN THE MATTER OF THE INSURANCE ACT, CHAPTER 347 OF THE REVISED LAWS OF THE BAHAMAS

BETWEEN

CARLA OUTTEN-MINNIS

Appellant

AND

THE INSURANCE COMMISSION OF THE BAHAMAS

Respondent

Before: Chief Justice Sir Brian M. Moree, Kt. QC

Appearances: Ms. Dwana Davis with Ms. Palincia Hunter for the Appellant
Mr. Frederick Smith QC with Mr. R. Dawson Malone and Ms. Kandice Maycock for the Respondent

R U L I N G

Moree, CJ:

Introduction

[1] This is my Ruling on the application made in this appeal by Ms. Carla Outten-Minnis ("***the Appellant***") by the summons filed on 13 October, 2021 (***"the Strike Out Summons"***) whereby she seeks to strike out parts of the Affidavit of Lorna Longley-Rolle filed on 30 March, 2021 ("***the Longley-Rolle Affidavit***") on behalf of the Insurance Commission of The Bahamas ("***the Commission***"). The

application is supported by the Affidavit of Krystian Butler filed on 18 October, 2021 ("***the Butler Affidavit***").

[2] The Strike Out Summons contains three main paragraphs. The paragraph numbered 1 ("***the Order 41 Point***") seeks to strike out:

(i) the words "*The Commission advised the Appellant that she had been given all of the information that the Commission was capable of disclosing…."* in paragraph 36 of the Longley –Rolle Affidavit; and

(ii) the words "*But she said that she did not deny that the customers listed who benefitted from the said payments were her clients*" in paragraph 42 of the Longley-Rolle Affidavit

under the inherent jurisdiction of the court for non-compliance with Order 41 rule 5(1) of the Rules of the Supreme Court ("***the RSC***"). There is also a general sub-paragraph seeking to strike out *"…references to information which the deponent is unable of her own knowledge to prove, except however, such information which the deponent expressly or by implication is specifically referring to as the content of documents which she has read in her relevant capacity.*" This is not particularized and it is unclear what specifically in the 27 pages of the Longley-Rolle Affidavit is intended to be challenged under this sub-paragraph. Therefore I can say nothing further on this sub-paragraph.

[3] The paragraph numbered 2 of the Strike Out Summons ("***the New Evidence Point***") is divided into seven sub-paragraphs lettered (a) through (g). It cites Order 41 rule 6 and Order 31A rule 18(2)(s) of the RSC and the inherent jurisdiction of the court as the basis to strike out from the Longley-Rolle Affidavit the last sentence of paragraph 9; paragraphs 10, 11, 12 and 26; the second sentence of paragraph 31 ("collectively ***the Disputed Paragraphs***"); pages 14-17, 23-109 and 136 of Exhibit LLR-1 ("***the Disputed Documents***") and all references to those documents. The grounds for the strike out under each sub-paragraph are set out in the summons.

[4] I must specifically refer to sub-paragraph (g) which reads:

> **"Further, and in any event, the Respondent failed or refused to seek permission of the Court to enter the foregoing facts** [set out in sub-paragraphs (a) through (f)] **as further evidence in these proceedings as it was required to do pursuant to the terms and effect of Order 55 Rule 7(2) of the RSC."**

[5] In dealing with paragraph 2 of the Strike Out Summons, counsel for the Appellant, Ms. Davis, stated that sub-paragraphs (a) through (f) are all subsumed into sub-paragraph (g). Therefore, on her submissions, the court should consider all the sub-paragraphs in paragraph 2 under sub-paragraph (g). On this approach, Ms. Davis stated that the sole issue under paragraph 2 is whether the Commission required permission from the court under Order 55 rule 7(2) of the RSC to put into evidence in the appeal the Disputed Paragraphs and the Disputed Documents.[1] If permission was required, the Commission had not obtained it and consequently Ms. Davis contended that all the Disputed Paragraphs and the Disputed Documents should be struck out. Alternatively, if such permission was not required then paragraph 2 of the Strike Out Summons would be dismissed.

[6] Ms. Davis submitted that the Disputed Documents contain evidence on questions of fact which was only known to one party – the Commission – and was not disclosed to the Appellant during the proceedings before the Commission. Therefore both parties had not considered that evidence. She emphasized that the Disputed Documents were not disclosed to the Appellant until they were exhibited to the Longley-Rolle Affidavit. Therefore Ms. Davis submitted that the Disputed Documents constitute new or further evidence which can only be received into evidence in this appeal with the permission of the court under Order 55 rule 7(2) of the RSC.

[1] See Transcript of 17 November, 2021 at page 16 lines 21-26 & page 18 lines 8-20.

[7] The paragraph numbered 3 of the Strike Out Summons seeks costs.

Background

[8] The Strike Out Summons was the first in time of four applications made in this case in the lead up to the main hearing of the Notice of Originating Motion filed on 29 July, 2020 to appeal "….*the determination of* [the Commission] *notified to the Appellant by letter dated 28th May, 2020 whereby it proposes to cancel the registration of the Appellant as an Insurance Salesperson effective the 31st day of July, A.D., 2020.*" In December, 2021 I delivered my Ruling on the other three applications ("***the Three Applications***") and at that time reserved my decision on the Strike Out Summons.

[9] Pursuant to my earlier Ruling on the Three Applications, the Appellant filed the Amended Notice of Originating Motion on 18 November, 2021 (*"****the Appeal****")* and this appeal is now proceeding on the basis of that amended originating document.

[10] In my earlier Ruling on the Three Applications, I set out the brief factual background to this case and for convenience I repeat it below. It provides in summary form the context of the Strike Out Summons.

[11] The Appellant is currently a registered insurance salesperson with the Commission under the provisions of the Insurance Act ("***the Act"***). The Commission is an independent regulatory agency with responsibility for regulating all insurance activity in and through The Bahamas.

[12] The Appellant signed an Agent Agreement with Colina Imperial Insurance Ltd. ("***Colina***") whereby she was appointed as an Agent of the company effective as of 1 August, 2007. Subsequently, on 4 November, 2016 Colina terminated the appointment for what is termed "lapping." Mrs. Lorna Longley-Rolle is the internal Legal Counsel of the Commission and she defines "lapping" in the Longley-Rolle Affidavit as *"…a fraudulent practice whereby an employee*

diverts a payment made by one customer to cover a missing payment from another customer." The Appellant denies that she was involved in "lapping".

[13] Based on the information received from Colina relating to the termination of the Agent Agreement with the Appellant, the Commission launched its own independent investigation into whether the Appellant's registration as a salesperson should be cancelled. Ultimately, after a period of dealings between the parties with regard to the investigation, the Commission informed the Appellant by letter dated 28 May, 2020 ("***the Cancellation Letter***") that it had concluded that:

> (i) she had breached section 126(2)(b)(ii) of the Act by carrying on insurance business otherwise than in accordance with sound insurance principles and practices; and
>
> (ii) she had demonstrated that she was not a fit and proper person for continued registration as an insurance intermediary pursuant to section 126(2)(b)(vi) of the Act.

The Cancellation Letter stated that for those reasons the Commission proposed to cancel her registration as an insurance salesperson effective 31 July, 2020. It also stated that at any time prior to 31 July, 2020, the Appellant had the right to submit a written request for the Commission to reconsider its decision stating the reasons why her registration as a salesperson should not be cancelled. Finally, the letter advised the Appellant of her right of appeal under section 228 of the Act.

[14] Counsel for the Appellant wrote to the Commission on 20 July, 2020 acknowledging receipt of the Cancellation Letter and responding to a number of the matters set out therein. He requested that Ms. Outten-Minnis be provided with the documentary evidence that was relied on by the Commission in coming to its conclusion expressed in the Cancellation Letter that she was "….*carrying on insurance business otherwise than in accordance with sound insurance principles and practices pursuant to s. 126(2)(b)(ii)* [of the Act] *and that* [she was] *not a fit and proper person for continued registration as an insurance*

intermediary pursuant to s. 126(2)(b)(vi) [of the Act.]" Counsel also requested that no steps be taken to cancel his client's registration until there is "…*a fair and proper hearing…"* to give her an opportunity to respond to the evidence. The letter concluded by stating that if a response from the Commission was not received within five business days, the Appellant would commence legal proceedings in the Supreme Court to appeal the "…*the decision to cancel our Client's Registration as outlined in* [the Cancellation letter]."

[15] The Commission responded to the letter on 27 July, 2020 asserting that its process was fair to the Appellant and maintaining that she had been provided with "….*all information that the Commission was capable of disclosing.*" The letter notes that a request for a reconsideration had not been made and states that the opportunity to do so remained open until 31 July, 2020.

[16] On 29 July, 2020 the Appellant's counsel once again wrote to the Commission stating in part that "……*there is no basis for us to ask for reconsideration as you have not provided us with any new information/evidence that would allow for us to provide a different response from that which was already advanced in previous communications.*" The letter concluded by stating that legal proceedings would be commenced and the relevant documents would be served on the Commission.

The Appeal

[17] On the same day, 29 July, 2020, the Appellant commenced this action by filing the Notice of Originating Motion and her supporting Affidavit. As a result of case management directions by the court, the hearing of that Notice was fixed for 18 October, 2021. However, the Strike Out Summons and the Three Applications intervened. The main hearing of the Appeal is now fixed for 17 and 18 January, 2022.

[18] This Appeal seeks to set aside the decision of the Commission, acting under section 126 of the Act, whereby it proposed to cancel the registration of the

Appellant as an insurance salesperson effective 31 July, 2020 ("***the Decision***"). The grounds of appeal are:

1. **The Commission erred in law and fact in failing to provide the Appellant with the specifics or evidence that was used to determine that the Appellant was in breach of section 126(2)(b)(ii) of the Act;**
2. **The procedure used by the Commission in this matter which involved factual and evidential disputes denied the Appellant the right to be heard;**
3. **The procedure used by the Commission in determining that the Appellant breached the Act resulting in the proposal to cancel the Appellant's insurance registration was unfair and in breach of the principles of natural justice;**
4. **The decision of the Commission is against the weight of the evidence adduced and disclosed during the investigation; and**
5. **The Commission erred in law and in fact in the proposed cancellation of the Appellant's registration as an insurance salesperson.**

[19] According to the written submissions of Ms. Davis, the gravamen of the Appellant's claim in the Appeal is that the Commission failed or refused to provide the specifics or evidence upon which it relied to determine that the Appellant was in breach of section 126(2)(b)(ii) of the Insurance Act.[2] At paragraph 11 of her written submissions dated 9 November, 2021 ("***the Appellant's November Submissions"***) counsel for the Appellant succinctly summarized the main issue in this way:

> **"This case is about holding the** [the Commission]**, as a decision-maker, accountable for its process and any decisions arising therefrom."**

[20] As I understand it, the Appellant is contending that the process followed by the Commission in making the Decision was unfair and the Commission erred in not providing her with the documents which it relied on in concluding that she acted in breach of section 126(2)(b)(ii) of the Act and that she was not a fit and proper person for continued registration as an insurance intermediary pursuant to section 126(2)(b)(vi) of the Act. The scope of the complaints by the Appellant is

[2] See paragraph 9 of the Submissions of the Appellant dated 9 November, 2021.

limited to the alleged procedural errors committed by the Commission in making the Decision. As stated in paragraph 44 of the Appellant's November Submissions "[t]*he simple issue before this court is whether it was right for the* [Commission] *to refuse to disclose any evidence upon which it relied."*

[21] In the Appellant's November Submissions the Appeal is described in these terms:

> **"34. The failure to produce the Undisclosed Evidence forms the gravamen of the Appellant's appeal."**

[22] It is clear from those submissions that the main target of the Appellant's objection under the Strike Out Summons is the "Undisclosed Evidence" which is defined as "*pages 14-17, 19-109, 136-140 of LLR-1*" to the Longley-Rolle Affidavit. That is substantially the same as the Disputed Documents plus pages 20-23 and 137-140 of *LLR-1*.

The Strike Out Summons

[23] Mr. Smith QC, counsel for the Commission, objected to the hearing of the Strike Out Summons on the grounds set out in the Notice of Objection filed on 15 October, 2021 ("***the Notice***"). I decided to proceed with the hearing on the basis that the objections in the Notice would be considered as part of the overall disposition of the Strike Out Summons.

[24] The Strike Out Summons was filed approximately six and a half months after the Longley-Rolle Affidavit was filed and shortly before the initial trial date for the Appeal. Prior to the filing of the Strike Out Summons on 13 October, 2021 (and the written Submissions of the Appellant of the same date) there had been no indication that the Appellant intended to challenge any parts of the Longley-Rolle Affidavit. In fact, the Appellant responded in detail to that Affidavit (including a number of the parts challenged by the Strike Out Summons) in her Supplemental Affidavit filed on 20 September, 2021 ("***the Supplemental Affidavit***").

[25] The first point made by senior counsel for the Commission was that the Appellant had waived any objection which she might have had with regard to the Longley-Rolle Affidavit by responding to it in the Supplemental Affidavit.

[26] As a general practice it is best that a party in an appeal who intends to object to an affidavit (or parts thereof) on the ground that it is fresh evidence should not file an affidavit in answer to it until the objection is ruled on by the court. If the affidavit is allowed then the objecting party can apply for time to answer the fresh evidence. However, in my view it stretches the point too far to submit that a party waives the right to object to the fresh evidence in all cases where he/she responded to it prior to taking the objection. The position must be considered in the circumstances of the particular case having regard to, amongst other factors, the nature, content and scope of the response.

[27] In my earlier Ruling on the Three Applications I held that the failure of the Appellant to file her appeal within the time period prescribed in Order 55 rule 4(2) was an irregularity under Order 2. By extension it might be contended that consistency requires non-compliance with Order 41 rule 5(1) to be treated in the same way. However, that would be to misapprehend the adjectival law on affidavits.

[28] In the case of ***Wilmington Trust Company v Rawat etal Equity Side No. 1407 of 1990*** Justice Hall (as he then was) was dealing with an application under Order 41 rules 5 and 6 of the RSC to strike out substantial parts of numerous affidavits. He considered the submissions of counsel for the plaintiff that (i) improper material in an affidavit is an irregularity like any other irregularity which may be waived under Order 2 rule 2 of the RSC; (ii) the word "content" in Order 2 rule 1 is wide enough to include affidavits; and (iii) by answering most of the evidence which was challenged under Order 41 rule 5 in their own affidavits, the defendant had taken a fresh step thereby waiving any irregularity in the affidavits filed on behalf of the plaintiff. In rejecting those submissions Hall J stated:

> **"29. In my judgment it is necessary, first of all, to remember that affidavits are a means whereby evidence is given. By the rules of court under consideration here, evidence by means of, affidavit may be placed before the court for its consideration. Nevertheless, it is to the general law of evidence that regard must be had in order to determine matters of admissibility:–**
>
> > **"It is important to observe that, unless there is a specific provision excepting the rule, the contents of affidavits must be confined to such matters as are admissible by the rules of evidence…". Phipson on Evidence, 13th edition paragraph 34 — 02**
>
> **30. I therefore, reject the submission of [counsel for the plaintiff] that Order 2, especially rule 2, is relevant here. That Order — deals with matters of procedure and the matter of affidavits is a species of the law of evidence and this is not an area in which those two branches of adjectival law overlap."**

[29] I respectfully agree with that analysis.

[30] Senior Counsel for the Commission referred to my case management order made on 16 June, 2021 and submitted that the Appellant should have sought leave to file the Strike Out Summons under the provision which gave the parties liberty to apply. According to my notes, the terms of my Order did not specifically address new applications (although it did limit the filing of additional affidavits) and in my view it would not be fair or reasonable to decline to hear the Strike Out Summons on the ground that it was filed in breach of the case management directions.

[31] Another objection in the Notice to the court hearing the Strike Out Summons is that it was filed too late and is itself an abuse of process having been filed only a few days prior to the trial date. A procedural chronology is set out in paragraph 12 of the Notice and Mr. Smith QC contended that this clearly demonstrates the delays in this case occasioned by the failure of the Appellant to comply with filing dates. He stressed that throughout the many dealings relating to the Appellant's Affidavit in response to the Longley-Rolle Affidavit, there had been no indication that any part of that Affidavit would be challenged. Moreover,

there was no such indication in the Supplemental Affidavit which responded to the Longley-Rolle Affidavit. Mr. Smith strongly complained that the late filing of the Strike Out Summons had "*ambushed the Commission"* and had seriously disrupted the orderly conduct of these proceedings and specifically the trial.

[32] Counsel for the Appellant conceded that the Strike Out Summons was filed late but, she contends, not too late. She referred to the Butler Affidavit where it shows that she was only retained as lead counsel in this case during the week of 4 October, 2021 following the election to Parliament and appointment to Cabinet of the Appellant's previous senior counsel who had conduct of the Appeal. Ms. Davis stated that in preparing for trial she formed the view that the Strike Out Summons should be filed to resolve the issues relating to the Disputed Paragraphs and the Disputed Documents to facilitate a more orderly hearing of the Appeal.

[33] Ms. Davis reminded the court that senior counsel for the Commission had taken a preliminary point on the day of the hearing of the Appeal without advance notice and this had significantly delayed the disposition of the Appeal.

[34] This case has taken a circuitous route to the hearing of the Appeal as a result of numerous applications made at a late stage of these proceedings. Those applications have taken a considerable amount of judicial time and delayed the disposition of the Appeal. This is unfortunate and it is now imperative to clear the path for the hearing of the Appeal without further delay. While the timing of the Strike Out Summons is a factor to be considered I am not convinced that it is, by itself, a reason for dismissing the application.

[35] Accordingly, I will deal with the Strike Out Summons on its merits. Essentially, it only raises two issues. The first is whether parts of paragraphs 36 and 42 of the Longley-Rolle Affidavit should be struck out at this stage. The second is whether the Disputed Paragraphs and the Disputed Documents should be struck out as constituting further evidence adduced on behalf of the Commission in the

Appeal without obtaining the permission of the court under Order 55 rule 7(2) of the RSC.

The Order 41 Point

[36] The Appellant seeks to strike out part of the second sentence in paragraph 36 of the Longley-Rolle Affidavit which reads:

> **"*The Commission advised the Appellant that she had been given all of the information that the Commission was capable of disclosing….*"**

[37] Order 41 rule 5 of the RSC provides that:

> **"5. (1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.**
> **(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof."**

[38] The Longley-Rolle Affidavit is not related to an interlocutory proceeding but to the main hearing of the Appeal. In these circumstances Order 41 rule 5(2) is not apposite. Therefore under Order 41 rule 5(1) Mrs. Longley-Rolle can only give evidence as to facts which she is able of her own knowledge to prove. In the normal way the court will ignore inadmissible evidence unless it is admitted by consent of the parties.

[39] Ms. Davis contended that Mrs. Longley-Rolle was not at the meeting referred to in paragraph 36 of her Affidavit. This appears to be correct as her name is not included in the Minutes of that meeting which are a part of Exhibit LLR-1 at pages 153-155 of the Longley-Rolle Affidavit. Consequently, Ms. Davis submitted that Mrs. Longley-Rolle had no personal knowledge of what was said at that meeting and on that basis the second sentence of paragraph 36 should be struck out on the ground that it is in breach of Order 41 rule 5(1).

[40] I note that in the letter dated 27 July, 2020 from the Commission to counsel for the Appellant at pages 150 – 152 of Exhibit LLR-1 it is stated in sub-paragraph

1 on page 150 that the Appellant "….*was also given all information that the Commission was capable of disclosing"* and then refers to the meeting on 12 January, 2018. That letter is not challenged by the Appellant. The letter does not specifically state that the Appellant was advised of this position at the 12 January, 2018 meeting but there is unchallenged evidence before the court that counsel for the Appellant was aware that this was the position of the Commission with regard to the request for additional information.

[41] Counsel for the Commission, Mr. Smith QC, opposed the strike out application with regard to paragraph 36 of the Longley-Rolle Affidavit. He referred to the above mentioned letter dated 27 July, 2020 and stated that the evidence in paragraph 36 which is challenged is repeated in that letter. Further, Mr. Smith submitted that any objection which the Appellant may have had to paragraph 36 was waived when she responded to that paragraph in the Supplemental Affidavit.

[42] I addressed the general issue of waiver above and stated my acceptance of the analysis on that issue by Hall J in ***the Wilmington Trust case***. In any event, paragraph 18 of the Supplemental Affidavit the Appellant merely states that she makes no admissions with regard to paragraph 36 of the Longley-Rolle Affidavit. I do not accept that this was a waiver of her right to object to the impugned evidence on the ground that Mrs. Longley-Rolle is unable of her own knowledge to prove the underlying fact.

[43] The impugned evidence here is the statement that "*The Commission advised the Appellant that she had been given all of the information that the Commission was capable of disclosing…."* As mentioned above, a similar statement appears in the correspondence between the Commission and the Appellant's counsel which is not challenged. I do not know what may turn on this point at the hearing of the Appeal but given that the parties were only a few days from the hearing of the Appeal when the Strike Out Summons was filed, it did not in my view justify a strike out application. The objection could have been taken at the hearing of the Appeal and if successful the court would have ignored the evidence. Indeed,

the authorities on Order 41 rule 5 indicate that the court will only strike out the impugned evidence (as opposed to ignoring it) in plain and obvious cases when the breach is egregious.

[44] As Mrs. Longley-Rolle was not at the meeting held on 12 January, 2018 she cannot give direct evidence of what factually occurred at that meeting. Accordingly, as the Longley-Rolle Affidavit is not for an interlocutory proceeding, the part of paragraph 36 which is challenged is contrary to Order 41 rule 5 (1). However, I do not regard the breach in this instance as egregious and bearing in mind that the hearing of the Appeal is about to commence I exercise my discretion to decline to strike out the impugned part of paragraph 36 of the Longley-Rolle Affidavit but I will not consider it when hearing the Appeal.

[45] The Appellant also seeks to strike out the last sentence of paragraph 42 of the Longley-Rolle Affidavit. It reads "*But she said that she did not deny that the customers listed who benefitted from the said payments were her clients.*"

[46] I can be brief on this issue.

[47] In the Supplemental Affidavit the Appellant states in paragraph 22 that "[t]*he particulars in paragraph 42* [of the Longley-Rolle Affidavit] *is* [should be are] *admitted and is reflected in the letter dated the 19th January, 2018.*"

[48] This is an unequivocal admission and I can see no practical utility in engaging in a technical procedure to strike out a factual statement which is wholly admitted by the Appellant. I will not strike out the last sentence of paragraph 42 of the Longley-Rolle Affidavit.

The New Evidence Point

[49] I am reminded that during her oral submissions Ms. Davis grouped all the sub-paragraphs of paragraph 2 together and contended that the sole issue for the court under those sub-paragraphs is whether the Commission requires permission from the court under Order 55 rule 7(2) of the RSC to adduce in the Appeal the

evidence in the Disputed Paragraphs and the Disputed Documents. On this basis, I do not need to consider each sub-paragraph on its own. In accepting Ms. Davis' approach to paragraph 2 of the Strike Out Summons, I will limit my consideration to the issues under Order 55 of the RSC. If there are any objections to the Disputed Evidence or the Disputed Documents on other grounds, I will deal with them as and when they arise in the course of the main hearing of the Appeal.

[50] This Appeal is from the Decision of the Commission in its role as a regulator and the decision maker in the proceedings involving the Appellant which are the subject of the Appeal.

[51] The Appeal is mainly process/procedure based. The principal grounds are in summary that (i) the Commission did not provide the Appellant with the documents and evidence which it relied on in making the Decision; and (ii) the process and procedure followed by the Commission in making the Decision denied the Appellant a fair hearing in breach of the principles of natural justice.

[52] In the Appellant's November Submissions counsel put it this way:

> "**6. …..this appeal is not about**
>
> **1. A desire for a further hearing…..The Appellant accepts the procedure as employed by the [Commission] but takes issue with its failure to observe the principles of natural justice regarding the treatment of the evidence before it, or**
>
> **2. A review of the Commission's proposal to cancel the Appellant's registration and the inferences drawn by it based on the evidence before it.**
>
> **7. This Appeal, however, is about the propriety of the [Commission's] decision despite its failure or refusal to give the Appellant an opportunity to review the evidence before the [Commission], and on which it relied to make its proposal to cancel the Appellant's registration….."**

[53] Ms. Davis contended that the Disputed Documents are new or further evidence for the purpose of the Appeal as they contain additional evidence on questions

of fact which was only known by one side – the Commission – throughout the proceedings in which the Decision was made and never disclosed to the Appellant. She submitted that this new evidence cannot be admitted in the Appeal without the permission of the court granted under Order 55 rule 7(2) of the RSC. As such permission was not sought by the Commission, counsel contended that the Disputed Documents should be struck out. Ms. Davis contended that it was not open for the Commission to decide on its own to adduce fresh evidence on questions of fact in the Appeal. That must be determined by the court on an application by the Commission.

[54] Order 55 rule 7(2) provides that:

> **"(2) The Court shall have power to receive further evidence on questions of fact, and the evidence may be given in such manner as the Court may direct either by oral examination in court, by affidavit, by deposition taken before an examiner or in some other manner."**

[55] Ms. Davis submitted that further evidence for the purpose of this rule and the Appeal includes evidence that is produced in this court but was not produced to the Appellant during the proceedings before the Commission or in the course of the investigation by the Commission.

[56] Counsel for the Commission, Mr. Smith QC, submitted that the Disputed Documents are not intended to support, justify or fortify the Decision. Rather, they are to put before the court factual matters pertaining to the process and procedure followed by the Commission and to provide the court with copies of the documents relied on by the Commission in making the Decision which were not given to the Appellant. He contended that the court must have this information in order to decide the issues raised in the Appeal. Mr. Smith submitted that the Disputed Documents fall within the ambit of Order 55 rule 7(4) of the RSC. That provision is as follows:

> **"It shall be the duty of the appellant to apply to the judge or other person presiding at the proceedings in which the decision appealed against was given for**

a signed copy of any note made by him of the proceedings and to furnish that copy for the use of the Court; and in default of production of such a note, or, if such note is incomplete, in addition to such note, the Court may hear and determine the appeal on any other evidence or statement of what occurred in those proceedings as appears to the Court to be sufficient. Except where the Court otherwise directs, an affidavit or note by a person present at the proceedings shall not be used in evidence under this paragraph unless it was previously submitted to the person presiding at the proceedings for his comments."

[57] In the case of **Stock v Central Midwives Board [1915] 3 K.B. 756** the Divisional Court was dealing with an appeal by Mrs. Stock against a decision of the Central Midwives Board removing her name from the roll of midwives. The Board had acted on a report containing inaccurate information pertaining to Mrs. Stock's character which had been admitted in breach of its rules. The report had not been provided to Mrs. Stock. In the appeal to the Divisional Court, new evidence was allowed to be adduced through affidavits setting out additional facts pertaining to Mrs. Stock's character to show that the decision of the Board was based on false statements. It is important to note that the new evidence consisted of facts which were not known to the members of the Board when they made the decision to remove the name of the appellant from the roll. This is clear from the judgment Lord Reading C.J. when he stated:

"It appears from the facts which we have now before us that the statements irregularly admitted were inaccurate…..

I only desire to add that, having had the advantage of having further evidence before us than was before the Board, and also of hearing the case argued and discussed in a way it was not discussed before the Board, we come to the conclusion on the material presented to us that the order of the Board removing her name from the roll cannot be supported, and that this appeal must succeed. "

So it is clear that in the ***Central Midwives Board case*** the further factual evidence (which was not known by the decision maker when making the decision) related to the merits of the decision and sought to show that it was wrong as the Board

acted on inaccurate statements. In the case before me the Disputed Documents are not directly related to the merits of the decision but to the process followed by the decision maker in coming to its decision and to the fairness or otherwise of the proceedings as a result of withholding documents from the Appellant.

[58] Counsel cited the case of ***Julian Higgins' Trade Mark Application [2000] R.P.C. 321.*** This is a trademark case where a Mr. Higgins applied to the Trade Marks Registry to register a trade mark in the form of a non-identical adaptation of the NASA logo with the words "*Nice and Safe Attitude*" printed underneath. The National Aeronautics and Space Administration ("NASA"), a well-known corporate entity of the Federal Government in the United States, objected to the application and filed a notice of opposition which is in effect a pleading. The hearing officer of the Trade Marks Registry dismissed the grounds in the notice of opposition by NASA and allowed the application by Mr. Higgins for registration of a trademark. NASA appealed the decision to the High Court and applied to admit additional evidence upon the hearing of its appeal to show that copyright subsisted in the NASA logo. The High Court granted leave to adduce the additional evidence through three affidavits after giving NASA leave to amend its notice of opposition. In giving his judgment Sir Richard Scott V.C. said:

> **"NASA have applied by motion for permission to adduce additional evidence on the hearing of the appeal to cover the inadequacies in their evidence before the hearing officer as to their entitlement to the copyright on which their argument was based. There are three affidavits they want to introduce……"**

[59] The additional evidence contained facts which were not known to the decision maker at the time when he decided to allow the registration of the trademark. Its purpose was to cover inadequacies in the evidence on the issue of copyright which was before the hearing officer as part of an appeal challenging the merits of the decision.

[60] ***Safeway Stores PLC v Hachette Filipacchi Press [1997] E.T.M.R. 552*** is another trademark case. The Registrar decided to revoke the registration of two marks under the Trade Marks Act. The registered proprietor of the marks appealed the decision to the High Court. The appellant applied under Order 55 rule 7(2) of the English Rules to adduce further evidence in the appeal to provide information on the sales and distributions of the foreign editions of a magazine in the United Kingdom. The court admitted the further evidence. In his Judgment Mr. Justice Lloyd stated:

> **"I am asked to allow that evidence to be adduced under Order 55, r. 7(2), which is the order dealing with appeals to the High Court from tribunals such as the Registry, which gives the court a discretion to receive further evidence on questions of fact. Whether that discretion will be exercised depends in many cases on the nature of the matter appealed against, and also no doubt depends in all cases on the circumstances in which the application is made……**
>
> **I think the circumstances in which the evidence was not given before the Registrar and is now sought to be given are relevant and so is the degree of substance of the evidence…."**

[61] The additional evidence was intended to meet a lacuna in the evidence which had been filed in the proceedings before the Registrar. This is clear from the following extracts from the Judgment:

> **"Mr Knight in this part of his decision, noted that there was no evidence of offers for sale in the U.K. edition, and referred to being told that there were various foreign editions which would promote and secure the sale of ELLE products in the United Kingdom, namely the editions of Portugal, Japan, Italy, Spain and France…..**
> **……**
> **In relation to that, Mr Birss says that his clients should have the opportunity of expanding on the evidence given by Mr Rose by way of the affidavit of Mc Patrick Lantz, and an affidavit has been sworn by him which gives some figures for sales and distributions of the French edition in the United Kingdom in the year 1993 and for sales of other foreign editions of the magazine in the United Kingdom in 1994, including the Portuguese, Japanese, Italian and Spanish editions, and he also gives some figures for the circulation of the U.K. edition between 1986 and 1994."**

[62] Again, the appeal was directed at the merits of the decision.

[63] In ***Central Midwives Board, Julian Higgins'*** and ***Safeway Stores PLC*** the decision maker in the proceedings giving rise to the appeal did not have the additional evidence when making the decision and the reason for adducing it in the appeal was to address substantive factual questions to support the attack on the merits of the decision.

[64] The circumstances of the case before me are materially different to these three cases. Here, the Appellant has, what is essentially, a process/procedure based appeal. She is contending that the procedure employed by the Commission was unfair and that the Commission wrongly withheld from her documents and evidence which it relied on in making the Decision. Therefore, the Court must know the process/procedure which the Commission followed in making the Decision. Only then can the court decide whether or not it was fair. Similarly, with regard to the complaint by the Appellant that the Commission wrongly withheld from her documents which it relied on in making the Decision, the court must know which documents in the possession of the Commission were withheld so it can decide whether in taking such action the Commission acted improperly or not.

[65] I do not regard the evidence in the Disputed Paragraphs and the Disputed Documents as relating directly to the merits of the Decision in the sense of seeking to fortify or justify the Decision by supplementing or expanding the evidence which was before the Commission when making the Decision or plugging a lacuna in the evidence in connection with the Decision. The Appellant submits that the Commission followed a flawed process. So the court must know what process was followed. Additionally, the Appellant contends that the Commission wrongly and unfairly withheld documents from her. So, again, the court must know which documents were withheld and be able to review them. That is what this is about. It is not about allowing the Commission to use to its advantage in the Appeal evidence and documents which it did not disclose to the Appellant to support its decision.

[66] This is not the usual case where a party in an appeal from a tribunal to the Supreme Court applies under Order 55 rule 7(2) to adduce further evidence on questions of fact in the appeal. In most instances, as seen in ***Central Midwives Board, Julian Higgins'*** and ***Safeway Stores PLC***, the further evidence sought to be adduced in the appeal was not before the decision maker and therefore not considered when making the decision which is the subject of the appeal. This case is different. Here the evidence and documents which are claimed by the Appellant to be further evidence on questions of fact as contemplated by Order 55 rule 7(2) were all known to the Commission and actually considered when it made the Decision. The objection by the Appellant in this case is that they were not disclosed to the Appellant during the proceedings before the Commission and therefore constitute new or further evidence on that basis.

Disposition

[67] In all the circumstances of this case and for the reasons stated above I am of the view that it was not necessary for the Commission to obtain permission under Order 55 rule 7(2) of the RSC to include in the Longley-Rolle Affidavit the evidence in the Disputed Paragraphs and the Disputed Documents. As stated earlier in this Ruling, if during the course of the main hearing of the Appeal there are other challenges to any part of that evidence outside of the scope of Order 55 of the RSC, I will deal with them when they arise.

[68] If I am wrong in my view on Order 55 rule 7(2) and permission was required, I am satisfied that in the circumstances of this case, as explained above, it would have been appropriate to give such permission upon an application by the Commission. I am of the view that ***Ladd v Marshall***, which related to an appeal from the High Court to the Court of Appeal in England under Order 59 rule 10(2) of the English Rules, would not have applied given that '*special grounds*' is not required under Order 55 rule 7(2).

[69] The Vice Chancellor considered this point in ***Julian Higgins'.*** He stated at page 236 of his judgment:

> **"The language of that rule** *[Order 55 rule 7(2)]* **is important. It contrasts with the much stricter language used in Ord. 59, r. 10(2)** *[which is equivalent to rule 24(2) of the Court of Appeal Rules]***, which provides that 'no such further evidence shall be admitted except on special grounds'. The well known case of Ladd v. Marshall [1954] 1 W.L.R. 1489 set out the manner in which courts are to approach the exercise of discretion to admit further evidence where Ord. 59, r. 10(2) applies. But since in cases like the present, appeals under the Trade Mark Acts, it is not Ord. 59, r. 10(2) but Ord. 55, r. 7(2) that applies, I do not for my part think that Ladd v. Marshall is of any assistance."**

[70] The same point was made by Mr. Justice Lloyd in ***Safeway Stores PLC*** at pages 559-560 of his judgment.

[71] Bearing in mind my conclusion on the Strike Out Summons I do not need to specifically consider the case of **Securities Commission of The Bahamas v. Accuvest Funds Securities Limited 2011/COM/com/25**. I would only say that as it relates to ***Ladd v Marshall*** it would seem to be inconsistent with the established authorities on Order 55 rule 7(2).

[72] Quite apart from Order 55 rule 7(2), I would allow the evidence in the Disputed Paragraphs and the Disputed Documents to be adduced in the Appeal under Order 55 rule 7(4) with regard to what occurred in the proceedings before the Commission which resulted in the Decision.

[73] I have considered the submissions of counsel on this point. Ms. Davis contended that under Order 55 rule 7(4) the court's power to consider any other evidence or statement of what occurred in the proceedings only arises if either the appellant has failed to provide a note made by any person who presided over the proceedings in which the decision appealed against was given or the note once received is deemed incomplete. On her submission, a note of the proceedings before the Commission is before the court. She supports this submission by reference to pages 2 and 3 of the letter from the Commission to counsel for the Appellant dated 27 July, 2020 and also numerous other letters and the Minutes of the meeting held on 12 January, 2018 at pages 110,126,119,133,153 and 143

of Exhibit LLR1 to the Longley-Rolle Affidavit. I understood Ms. Davis' submission on this point to be that collectively those documents are to be regarded as the note under Order 55 rule 7(4) of the RSC. Further she submitted that the note of the proceedings before the Commission, comprised of the abovementioned documents, is complete and therefore the power under Order 55 rule 7(4) to hear and determine the Appeal on any other evidence or statement of what occurred in the proceedings does not arise.

[74] It seems to me that the note which is contemplated in Order 55 rule 7(4) is not a collection of letters, minutes and other documents which together sets out parts of what occurred throughout the course of dealings between the parties. I do not accept that there is before the court at this time a note which complies with Order 55 rule 7(4). In any event, even if the contrary view is accepted, the note as defined by counsel for the Appellant is not, in my view, a complete record of what occurred in the proceedings which have given rise to the Appeal. Therefore, the power of the court under Order 55 rule 7(4) is engaged and I would allow the Commission to adduce the evidence in the Disputed Paragraphs and the Disputed Documents in the Appeal in connection with what occurred in the proceedings before the Commission. This is subject to any other objection which may be made in connection with that evidence which is upheld by the court.

[75] It remains open to the Appellant at the hearing of the Appeal to show that the withholding of the Disputed Documents was unfair and deprived her of a fair hearing in breach of the rules of natural justice. Indeed, as senior counsel for the Commission stated in his oral submissions *".....if [the Appellant] can persuade [the court] that something in here was so fundamentally necessary as ought to have been provided to [her], she's made her case out. She can direct -- if she can direct the Court that she was so -- that the Appellant was so unfairly treated by the failure to disclose something to her, before the cancellation decision was*

made, she's won."[3]

[76] On the issue of the cross examination of the Appellant with regard to the Disputed Documents, the court will be astute to ensure that it is conducted in a manner which reflects the position set out in paragraph 65 of this Ruling.

Conclusion

[77] I have concluded that I will not strike out any of the challenged material under the Strike Out Summons. Accordingly, that summons is dismissed. Counsel is invited to provide written submissions on the costs of this summons.

Dated 18 January, 2022

Sir Brian M. Moree Kt. QC
Chief Justice

[3] See page 31 of the Transcript of 15 November, 2021 at lines 12-19.