

IN THE SUPREME COURT

Common Law and Equity Division

**IN THE MATTER OF** the Quieting Titles Act, Chapter 393 of the Statute Laws of The Bahamas

AND

**IN THE MATTER OF ALL** THOSE pieces, parcels or lots of land consisting of 34.756 acres of the Flowers Estate Subdivision, being a portion of the 440-acre tract of land granted to Daniel Driggs by Crown Grant on 22<sup>nd</sup> July, 1818 and situate in the Settlement of Driggs Hill in the Southern District of the Island of Andros, one of the Islands in the Commonwealth of The Bahamas.

AND

**IN THE MATTER OF** the Petition of Palm Beach Andros Company Limited, Gerard Maurice Cussen, Rahna Cussen, Gerard Maurice Cussen and Rashna Cussen in their capacity as lawful attorneys for James Cussen, Sheena Cussen, Sarosh Nanavarti and Martin Sumner.

**Before:** Justice Ruth M. L. Bowe-Darville

**Hearing:** 4<sup>th</sup> October, 2021

**Appearances:** Glenda Roker for the Petitioners  
Damian Gomez, QC and Owen Wells for the Adverse Claimant,  
South Andros International Company Limited  
Van Gaitor and Karen Brown for the Adverse Claimant Grand  
Bahama Development Company

## **R U L I N G**

***Leave to appeal (Section 11 Court of Appeal Act) /Interlocutory Order/Due considerations (Real prospect of success at appeal etc.)***

1. By Summons filed herein on 30<sup>th</sup> June, 2021 the Petitioners applied pursuant to Section 11 (f) of the Court of Appeal Act, section 16 (3) of the Supreme Court Act, 1966 and under the inherent jurisdiction of the Court for leave to appeal the Order pronounced herein on 16<sup>th</sup> June, 2021 where it was ordered that the Petition as amended filed in the cause be struck out and dismissed in part and a declaration that the Adverse Claimants were the fee

simple owners of the remaining property that the costs of the proceedings be the adverse claimants to be taxed if not agreed.

2. At the opening of the hearing counsel or the Petitioners sought the Court's leave to amend the Summons by deleting that portion "...a declaration that the Adverse Claimants were the fee simple owners of the remaining property".
3. The Petitioners filed the affidavit of Shikita Deveaux in support of their application.
4. The said affidavit recited the relevant details giving rise to the application and resultant Order. Ms. Deveaux averred that:

2. *"On 27<sup>th</sup> May, 2021 during the cross-examination of Michael Flowers Sr. as witness for the Petitioner, Mr. Damian Gomez, QC, counsel for South Andros International Company Limited (SAIC) made a point in limine and a verbal application to strike out the Petition and Amended Petition on the basis that Mr. Flowers, Sr. was enjoined from the sale or transfer of properties pursuant to an Order dated 18<sup>th</sup> December, 2006 in Supreme Court Action 2006/CLE/gen/1303 – South Andros International Co. Ltd v Michael a. flowers and Flowers Development Co. Ltd."*

4. Written submissions were made by the Petitioners and the Adverse Claimant, Grand Bahama Development Company Limited. The Ruling was given on 16<sup>th</sup> June, 2021.
5. The Petitioners herein also exhibited a "draft" Notice of Appeal and, in submitting, indicated that the appeal had a good chance of success. The Adverse Claimants herein did not make written submissions but instead relied on the findings of the Court. Both Counsel intimated that they were both concerned about the Petitioners' ability to make out a case that would have a real prospect of success and persuade the Court to accede to their application for leave.

The Court noted that there is no perfected Order in this matter.

6. By its Notice the Petitioners seek the following reliefs;
  1. *An Order setting aside the Ruling of the Learned Justice;*

2. *An Order for the restoration of the Quieting Proceedings; and*
  3. *An Order that the Respondents pay to the Appellant the costs of the appeal and at the Supreme Court to be taxed if not agreed.*
7. The Petitioners proffered seven grounds of appeal. They were:
- 1. *The Learned Judge erred at law and in fact by lifting the veil of Three M' s Enterprises Limited and determining the company to be the alter ego of Michael Flowers;***
  - 2. *The Learned Judge failed to consider or give sufficient weight to the facts and evidence before the Court with respect to the beneficial ownership of the Three M's Enterprises Limited as opposed to the evidence with respect to the Directorship of Michael Flowers in Three M' s Enterprises Limited;***
  - 3. *The Learned Judge failed to take into consideration the fact that the properties the subject of the quieting title action were transferred by conveyances dated 15<sup>th</sup> August, 2003 from Flowers Estate Home Owners Association Limited to Three M's Enterprises Limited and were not vested in any named defendant in the Injunction Order dated 18<sup>th</sup> December, 2006 in 2006/CLE/gen/1303;***
  - 4. *The Learned Judge failed to take any viva voce evidence from the Adverse Claimants with respect to their claims;***
  - 5. *The Application pursuant to Order 18 Rule 19 was not properly before the Court in accordance with the provisions of the Rules of the Supreme Court;***
  - 6. *The adjudication of the Petition and the Adverse Claim is of public importance to all persons who are residents and descendants of South Andros and accordingly, ought to be fully ventilated; and***
  - 7. *The Ruling of the Learned Judge is perverse in law, unreasonable and is manifestly unsafe.***

8. The Petitioners referred the Court to section 11 of the Court of Appeal Act with particular reference to section 11(f) thereof:

**11. No appeal shall lie —**

- (a) *from any order allowing an extension of time for appealing from a judgment or order;***
- (b) *from an order of a Justice of the Supreme Court giving unconditional leave to defend an action;***

*(c) from any decision of the Supreme Court where it is provided by the Constitution that such decision is to be final;*

*(d) from any order absolute for the dissolution or nullity of marriage in favour of any party who, having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree, except upon some point which would not have been available to such party on such appeal;*

*(e) without the leave of the Supreme Court or of the court, from an order made with the consent of the parties or as to costs only where such costs are by law left to the discretion of the Supreme Court;*

*(f) 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 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 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 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 decisions.”*

9. This is an application for leave to appeal an interlocutory order. The Petitioner made reference in their submissions to the case of **Renald Ferguson v Charles Evans SCCiv App. No. 132 of 2020**. Barnett, PA considered the effect of an application for leave to appeal of an interlocutory order. He opined that an Order 18 Rule 19 application may or may not dispose of an action citing **Hunt v Allied Bakeries Ltd [1956] 1WLR 1326**. In appealing an interlocutory order leave is required as set out in the Privy Council’s decision in **Junkanoo**

***Estates v UBS [2017] UKPC 8.*** As such the application has been rightly brought.

10. In order to grant leave to appeal the Court must be satisfied that the applicants have some reasonable prospect of success on the appeal or that there are exceptional circumstances, namely, that there is an issue of public interest. Ultimately, the Court must consider the exercise of its discretion having considered all the circumstances of the case. The Petitioners contend that they have a reasonable prospect of success on the appeal and rely on the cases of ***The Quieting Petition of Scott Findeson et al [2020] 1BHS J No. 24 and Hayward v Striker [2019] 1BHS J. No.75.***

11. Further guidance can be had from the dicta of Lord Woolf MR as set out in ***Smith v Cosworth Casting Process Ltd. (1997) 4 All E.R. 840.***

***“(1) The Court will only refuse to give leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be very 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, the Court may take the view that the case raised an issue where the law requires clarifying”.***

12. Reference is made to the Practice Direction issued by the Court of Appeal in the UK in 1999 1 WLR 2.

Extracting therefrom: -

***“The general rule applied by the Court of Appeal, and thus the relevant bases for first instance Courts in deciding whether to grant***

***leave, is that leave will be given unless an appeal would have no realistic prospect of success. A fanciful prospect is insufficient. Leave may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal.***

.....

***However, if the issue to be raised on the appeal is a general importance that will be a factor in favour of granting leave.”***

***[Emphasis mine]***

13. There are a plethora of cases which have discussed and in which the issue of leave has been determined with reference to the dicta of Lord Wolff in ***Smith v Cosworth Casting Processes Limited*** and the Court of Appeal Practice Directions 1999, namely, ***Bethell v Barnett and others 2011 1BHS J. No.64; Fund Limited (in Compulsory Liquidation) v ZCM asset Holding Company (Bermuda) Limited [2014] 2 BHSJ No. 53; WIDLYBE Melidor et al v The Queen and Hon. Frederick A. Mitchell et al [2015] PUB/JRVVVv/00011; Keod Smith v Coalition to Protect Clifton Bay (SCCiv No. 20 of 2017; The Town Planning Committee v The Queen and the Coalition to Protect Clifton Bay et al (SCCiv App No. 63 of 2017; N.E.P.M. v J.L.M. and others [2018] 1 BHSJ No. 198Richard Anthony Hayward and another v Striker Trustees Limited and another [2019] 1 BHS J. No. 75***

14. The Court of Appeal of the United Kingdom gave directions for the presentation of applications for leave to appeal in its ***Practice Direction (Court of Appeal Leave to Appeal and Skeleton Arguments) 1999 WLR 2.***

***“The general test for leave***

***10. ...[T]he general rule applied by Court of Appeal, and this is the relevant basis for first instance courts deciding whether to grant leave, is that leave will be given unless an appeal would have no realistic prospect of success. A fanciful prospect is insufficient. Leave may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. Examples are where a case raises questions of great public interest or questions of general policy, or where authority binding on the Court of Appeal may call for consideration.***

***11. The approach will differ depending on the category and subject matter of the decision and the reason for seeking leave to appeal, as will be indicated below. However, if the issue to be raised on the appeal is of general importance that will be a***

*factor in favour of granting leave. On the other hand, if the issues are not generally important and the costs of an appeal will far exceed what is at stake, that will be a factor which weighs against the grant of leave."*

15. Of particular reference in the same Practice Directions is appeals from interlocutory orders:

**"Appeals from interlocutory orders**

***"17. An interlocutory order is an order which does not entirely determine the proceedings: see RSC Order 59 r 1A. Where the Application is for leave to appeal from an interlocutory order, additional considerations arise; (a) the point may not be of sufficient significance to justify the cost of an appeal; (b) the procedural consequences of an appeal (e.g., loss of the trial date) may outweigh the significance of the interlocutory issue; (c) it may be more convenient to determine the point at or after the trial. In all such cases leave to appeal should be refused.***

This Petition has only recently progressed to trial. What is of concern is the fact that different entities (*all involving Michael Flowers, Sr.*) conveyed to the Petitioners. On the adjournment the parties were directed to ascertain which of the remaining lots were still within the claim and within the parameters of the plans presented to the Court. The claims of the respective Adverse Claimants seem to overlap and others, on the face, seem to be outside the plans presented. The parties have yet to confirm to the Court the exact placement and extent of their respective claims

16. This is an interlocutory order for which leave to appeal is required. However, no consideration has been given to the relative significance of the appeal in relation to the possible cost of the appeal. Of greater importance is the non-completion of this action. The points of the appeal are matters which can be dealt with at trial and may be better suited for a wholesale appeal of the action. For the moment this is an unfortunate delay especially as the parties are all aware of the tenuous position of the Court with an impending retirement. For this latter reason alone, the Court should refuse the leave to appeal and progress

this matter to completion after which the Petitioners may consider a full appeal of any judgment given.

17. The Supreme Court Practice 1999 at Order 59/14 provides guidance for the drafting grounds of appeal. Notably

**“Draft grounds of appeal**

**The grounds on which leave to appeal is sought must be specified. Order 59 r. 14(2)(b). This can be done either by setting out the grounds of the proposed appeal in the Notice of Ex parte Application or by annexing to that Notice a draft Notice of Appeal. It is preferable to adopt the latter course, then, if leave to appeal is granted, the Notice of Appeal will be ready for service on the other party.”**

***[Also applied in R v Rt. Hon. Perry G. Christie et al PUB/jrv/12/2013; 15/2014; 16/2014 and 19/2014 and Sumner Point Properties Limited v David E. Cummings – 2012/CLE/gen/1399]***

In the instant application the Notice of Motion was merely attached as an exhibit to the Affidavit of Shikita L. Deveaux.

18. The Court is further constrained to direct the Petitioners to the notes to Order 59/3/9 of the same Supreme Court Practice 1999.

***“Every Notice of Appeal shall specify the grounds of appeal and the precise form of the order which the appellant proposes to ask***

....

***To that end the appellant (having specified the part of the judgment or order complained of) will also state what facts he alleges ought to have been found, or what error has been made in point of law (whether the point of law was raised in the court below or not).***

....

***Where the appeal involves, or includes, challenges to findings of fact, the notice of appeal must state the grounds on which it is contended that the Court of Appeal can properly interfere with those findings.***

....



***The notice of appeal should identify the evidence relied on and state the reasons why the findings should be reversed (e.g. Inconsistency in the findings, or failure by the judge to take account, or appreciate the significance of, evidence which he accepted).”***

19. The Court must consider the grounds of appeal listed in the Notice of Appeal as attached to the Affidavit of Shikita L. Deveaux to determine if the Petitioners have a realistic possibility of success on appeal. The court is ever mindful of the criteria set out by Lord Wolff, MR in ***Smith v Cosworth Casting Process Ltd.***

20. **Ground 1**

***The learned Judge erred in Law and in fact by lifting the veil of Three M’s Enterprises Limited and determining the company to be the alter ego of Michael Flowers.***

The Court makes reference to an application made earlier in these proceedings by Michael Flowers, namely by a Summons filed herein on 5<sup>th</sup> February, 2021 the Interested Parties, Michael Flowers, Sr. and Three M's Enterprises Limited, applied for the following:

***(1) AN ORDER that leave be granted for Michael Flowers Senior and Three M’s Enterprises Limited to enter the Quieting Action in 2015/CLE/qui/00146 under the inherent jurisdiction of the Court or alternatively under Section 7 (2) of the Quieting Titles Act, as interested parties by virtue of the covenants found in the Conveyances as outlined in the Petitioner’s Abstract of title filed 22<sup>nd</sup> June, 2015 and/or ALTERNATIVELY FOR AN ORDER that the covenants are rights that are deemed exempted under a Certificate of Title, if granted to the Petitioners under Section 15 of the Quieting titles Act.***

The Ruling of 14<sup>th</sup> May, 2021 settled that the corporate status of the applicants was dubious at most. That application was dismissed with costs. The Petitioners at no time challenged the corporate nature of the Three M’s Enterprises Limited nor did they deny or challenge the fact that they at all times did business with Michael Flowers in some property purchases and at other times with Three M’s Enterprises Limited or the

other vending companies used by Michael Flowers for the sale of the subject properties. The link and relationship (causal or not) between Michael Flowers and his several companies cannot and should not go without enquiry. In the Action 2006/CLE/gen/1303 Michael Flowers and Flowers Development Company were the Defendants. An Injunction was ordered in that action on 18<sup>th</sup> December, 2006. The Ruling of 16<sup>th</sup> June, 2021 fully sets out the Court's reasoning for piercing the corporate veil. The incorporation of the company/ies were but a sham to escape pre-existing liabilities. Lifting the veil was to show or expose the true identity of those responsible for the various sales of the subject properties and other sales, the genesis of which can be traced back to one Michael Flowers, Sr. The very fact that Michael Flowers, Sr., made a Quieting Titles Act Section 7(2) application confirmed the Court's suspicions of his and his companies' incestuous involvement in the different corporate entities.

It is not sufficient for the Petitioners to state that the learned Judge erred in law and in fact by lifting the corporate veil. The Petitioners must set out particulars of law and fact where the learned judge erred.

21. **Ground 2**

***The learned Judge failed to consider or give sufficient weight to the facts and evidence before the Court with respect to the beneficial ownership of Three M's Enterprises Limited as opposed to the evidence with respect to the Directorship of Michael Flowers (Sr.) in Three M's Enterprises Limited.***

Generally, the Court's attention was alerted to the various corporate variations used by Michael Flowers, Sr. in his several affidavits and witness statement used in the proceedings.

Appeal can properly interfere with the Court's finding. The Petitioners have failed to identify the evidence relied on and proffer reasons why the findings should be reversed on appeal.

22. **Ground 3**

***The Learned Judge failed to take into consideration the fact that the properties the subject of the quieting title action were transferred by conveyances dated 15<sup>th</sup> August, 2003 from Flowers Estate Home Owners Association Limited to Three M's Enterprises Limited and were not vested in any named defendant in the Injunction Order dated 28<sup>th</sup>, December, 2006 in 2006/CLE/gen/1303.***

Reference is again made to the Court's Ruling of 14<sup>th</sup> May, 2021. The Petitioners make no reference to the listing and copies of conveyances presented in the Bundle of Documents which show that different parcels of land were conveyed to the Petitioners by different corporate entities and persons all relating back to one Michael Flowers, Sr. No specific references were made to show the Court failed to consider the relevance of the transfer of conveyances.

23. **Ground 4**

***The Learned Judge failed to take viva voce evidence from the Adverse Claimants with respect to their claims.***

It was not necessary to take the viva voce evidence of the Adverse Claimants as the strike out application was made at the close of the Petitioners' case and a Ruling in respect of that application was made on 16<sup>th</sup> June 2021. No determination was made in respect of the Adverse Claimants' claims.

24. **Ground 5**

24. **Ground 5**

***The Application pursuant to Order 18 Rule 19 (Rules of the Supreme Court) was not properly before the Court in accordance with the provisions of the Rules of the Supreme Court.***

The Petitioners made no objection to the application being made orally (on his feet) by counsel for the Adverse Claimant, South Andros International Company. The application was made and supported by the other Adverse Claimant, Grand Bahamas Development Company Limited. The Petitioners begged the leave of the Court to put in written submissions in respect of the application. No mention was made in the submissions of 3<sup>rd</sup> June, 2021 that the strike out application was not properly before the Courts.

25. **Ground 6**

***The Adjudication of the Petition and the Adverse Claim is of public importance to all persons who are residents and descendants of South Andros and accordingly, ought to be fully ventilated.***

In the Ruling of 16<sup>th</sup> June 2021, the Court stated the following:

*“The present application, if successful, would have serious economic consequences for the Petitioners and Michael Flowers Sr., the extent of which have yet to be assessed. The Court is mindful of imposing such a draconian measure as an Order under Order 18/19. Given the very nature of a Quieting action which is for the most part investigative, it is important to put the application in its rightful context. This is a matter of great public importance to the community of South Andros and to the foreign purchasers of land in the Flowers Estate Subdivision. The land claimed by the parties encompasses vast tracts of land in South Andros.”*

The Court was ever mindful of the effect any ruling or determination in respect of the Petition herein. Regrettably, the present Petition relates only to the interest of the Petitioners and not the other residents/occupants of land in South Andros and who may have a claim as against the Petitioners' purported predecessor/s in title who claim greater tracts of land in South Andros. The Court did raise the question as to why the predecessor/s in title did not initiate a proper Quieting Action in respect of the land he/they claim as theirs by way of a possessory title. If the latter action were begun then the entire community of South Andros would be affected. As it stands the present action relates to specific tracts of land particular only to the Petitioners. If this were an action of great public importance or gave rise to exceptional circumstances then there would be many more adverse claimants other than the two Adverse Claimants vying in the present action. The Petition is narrow and has no application to the many other possible claims that may/could arise. It is only of significance to the Petitioners. Moreover, the Petitioners have given no specifics of why the appeal would be of great public importance nor have they presented any examples of why this is a case of exceptional circumstances. There is no real prospect of the Petitioners succeeding on this ground.

26. **Ground 7**

***The Ruling of the Learned Judge is perverse in law and unreasonable and is manifestly unsafe.***

Again, the Petitioners failed to set out the particulars of what was in the Ruling that was perverse in law, unreasonable or is manifestly unsafe. Without the particulars the Court of Appeal would have nothing to consider or set aside when making an intervention by way of allowing an appeal.

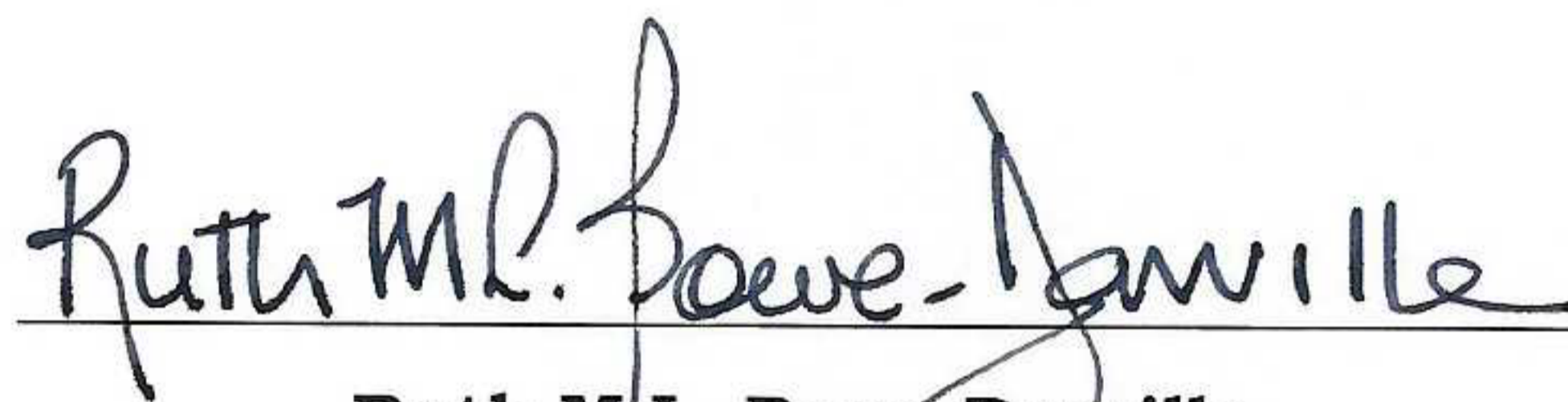
27. The reliefs claimed by the Petitioners include a prayer for the restoration of the Petition when only certain properties were struck from the Petition as being invalid.

28. While it is within the Court's absolute discretion to refuse an application for leave, it must consider the grounds advanced and any supporting submissions. Having reviewed the proposed grounds of appeal as set forth, the Court finds that there is no realistic prospect of success in progressing an appeal. The leave to appeal as applied for is refused.

29. The Petitioners shall pay the Adverse Claimants costs of this application to be taxed if not agreed.

30. The Court wishes to set a date for the continuation of the quieting action as per its earlier directions.

**DATED this** 13<sup>th</sup> **day of October, 2021.**



**Ruth M.L. Bowe-Darville**  
**Justice of the Supreme Court**