COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp Supreme Court Civil Appeal Side

SccAppCais No. 0024/2018

BETWEEN

COURT OF APPEAL
REGISTRY
NOV 04 2019
Claughton House
Shirley & Charlotte Streets
Nassau, Bahamas

Junkanoo Estates Ltd

First Appellant

Yuri Starostenko

Second Appellant

Irina Tsareva-Starostenko

Third Appellant

AND

UBS (Bahamas) Ltd (In Voluntary Liquidation)

Respondent

THIRTEENTH SKELETON ARGUMENTS

This *Skeleton* with list of authorities to support an oral argument by the Plaintiffs on both their application set out in the Notice of Motion filed on 15th February 2018 and Appeal set out in the Notice of Appeal Motion filed on 1st February 2018.

Speech against UBS' application for a stay of the competent Appeal

1. Article 20(8) of the Constitution of The Bahamas.

2. Section 10 of the Court of Appeal Act, 1964

3. Privy Council judgment of 3 April 2017

4. ***Killing v. Killing*** *(1821) (quoted brevitatis causa)*

"Non-payment of costs per se is not a ground for staying proceedings"

5. ***Kelly v.Albury*** - [1992] No.1154

6. **The Imperial Life Assurance Company of Canada v. Hanna** - SCCivApp No.63 of 2004 *(quoted brevitatis causa)*

> ***10*** *While declaratory orders or judgments are expressly provided for in PART IV of the Supreme Court Act Cap 53 and in the Rules of the Supreme Court (see O. 15 Rule 17 of the RSC), there are no similar provisions in the Court of Appeal Act Cap 52 of the Laws of the Bahamas (the Court of Appeal Act) and Rules. Therefore, the declarations sought from this court are more properly sought in the Supreme Court and not in the Court of Appeal. This Court would be usurping the*

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the original jurisdiction of the Supreme Court if it were to entertain the application to interpret sections 2 and 3 of the Civil Procedure (Award of Interest) Act and make a declaration of the same at this stage. Moreover, ***cost orders are enforced by the Supreme Court in accordance with its Rules of Procedure.***

115. ***This was not a case of the applicant being greedy,*** *that is, having been paid his taxed costs, he now wants more. Those costs were the price he paid for the litigation to vindicate his rights. The award of costs in his favour resulted in a judgment debt on which he was entitled to interest as a matter of law. The interest on those costs is his due by law.*

7. ***Martin v. Earl Beauchamp*** *(1883) 25 Ch.D. 12 and M'Cabe v. Bank of Ireland (1889) 14 App.Cas. 413 (quoted brevitatis causa)*

Failure to pay only occurs when a previous final action for substantially the same cause has been adjudicated upon and dismissed on the merits*: see* ***James M'Cabe (Pauper) Appellant: and the Governor and Company of the bank of Ireland Respondents -*** (1889) 14 App.Cas. 413

8. ***M'Cabe v. Bank of Ireland*** *(1889) 14 App.Cas. 413." ((quoted brevitatis causa)*

"M'Cabe, 14 App.Cas. 413 ***is clear and binding authority for the rule to be applied where an action has been finally disposed*** *of and the costs of it have not been paid."*

9. ***Northern Ireland housing executive and another v. Fox and others -*** *[1981] Chancery Division*

10. ***White v Brunton*** *[1984]*

11. ***Thames Investment and Securities plc v Benjamin and others*** - [1984] 3 All ER 393

12. ***Hines v. Birbeck and another (No. 2)*** [1989 H. No. 5407] - [1992] Ch. 33

13. ***Harbour Lobster Fish Co v AG*** [1998] BHS J No 15

14. ***Belgravia International Bank & Trust Company Limited (by itself and in its capacity as Trustee of the Trusts Listed In Appendix A of the Statement of Claim) and others v.***

Cibc Trust Company (Bahamas) Limited (in its capacity as Trustee of the Trusts Listed In Appendix A of the Statement of Claim) - [2012] 1 BHS J. No. 84

15. ***PPL (Nassau) Ltd. v. Baha Mar Ltd. and another*** - [2015] 2 BHS J. No. 90

16. ***B.E. Holdings Limited v. Lianji (also known as Linda Piao-Evans or Lian Ji Piao-Evans)*** - [2017] 1 BHS J. No. 28

Speech against Sir Michael Barnett's JA refusal of stay

17. Child Protection Act 2007

> *"3.* ***(2) In all matters relating to a child, whether before a court of law or before any other person, regard shall be had to the guiding principle mentioned in subsection (1) and that any delay in determining the question is likely to be prejudicial to the welfare of the child.***
>
> *4. A child shall have the right —*
>
> ***(a) of leisure which is not normally harmful, and the right to participate in sports and positive cultural and artistic activities;***
>
> *(c) to exercise, in addition to all the rights stated in this Act, all the rights set out in the United Nations Convention on the Rights of the Child (the Convention) subject to any reservations that apply to The Bahamas and with appropriate modifications to suit the circumstances that exist in The Bahamas with due regard to its laws.*
>
> *5. (1) A child is entitled to live with his parents or guardian save as provided by this or any other Act.*
>
> *(2) It shall be the duty of any person having the charge, care or custody of a child to use his best efforts —*
>
> *(a) to protect the child from discrimination, violence, abuse and neglect;*
>
> *(b) to ensure that the child is enrolled at, and attends school."*

18. ***Major v. Citibank, N.***A. - [1996] BHS J. No. 66 (quoted brevitatis causa)

> ***"8*** *On behalf of the mortgagees, Citibank, it was submitted that a mortgage's right to possession is a legal right and not a remedy, and can be exercise at anytime after the execution of the mortgage. Reliance was placed on the opinion of* **Harman J. in Fourmaids***, Ltd v. Dudley Marshall 1957 1 AER 35 at pg. 36 where he states:*
>
> > *"... the right of the mortgagee to possession in the absence of some specific contract has nothing to do with default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry*

on the mortgage ***unless by a term expressed or necessarily implied in the contract he has contracted himself out of that right."***

9 *Subject to the caveat that the mortgagees right to possession is also subject to statute, I would agree with the opinion expressed by Harman, J. as representing the law with respect to the right of mortgagee to possession."*(Emphasis added)

19. ***Citibank, N.A. v. Major*** - [2001] BHS J. No. 6 (quoted brevitatis causa)

"The cases cited on the impeachment of mortgage securities, all show that ***unless there is a mortgage action in which is raised a serious question to be tried, involving either the validity of the mortgage transaction itself or fraud*** *or* ***irregularity in the exercise of the power of sale****, the Courts will not intervene to prevent a mortgagee from exercising his lawful rights under the mortgage deed."* (Emphasis added)

20. Hioihohio **Arawak Homes Ltd v. Dean -** [2002] BHS No. 1883 (quoted brevitatis causa)

Thompson J.

9 *In dealing with* ***The Law with injunctions it is a fundamental rule that the court will grant an interlocutory injunction only to support a legal right Montgomery vs. Montgomery [1977] 3 All E.R. 70. H.L.***

10 If the plaintiff is likely to suffer unquantifiable damages e.g. by disruption of his business, the damages would not be an adequate remedy at the trial and the balance of convenience is in the plaintiff's favour see Merchant Adventurers Ltd. vs. M. Green & Co. Ltd. [1971] 2 All E.R.page 657.

> ***"The remedy by interlocutory injunction should be left flexible and discretionary and in considering whether to grant an interlocutory injunction the right course is for the judge to look at the whole case, and have regard for the strength of the claim as well as of the defence and therefore it is not enough merely for the plaintiff to show that he has an arguable case that the defendant has infringed his right."*** *Hubbard M. Vosper [1972] 2 All E.R. 1023.*

21. Smith v. Bahamas Bar Council - [2003] BHS J. No. 77 (quoted brevitatis causa) **Lyons J.**

25 *It seems to me somewhat incongruous that if I were not to grant a stay, he would be suspended from practice pending the outcome of his appeal.* ***Then, if his appeal were successful, the matter would come back to this court*** *for the primary issue of his Judicial Review application to be considered.* ***This could take some***

time. *More likely than not that decision would then be appealed.* ***All the while, of course, the applicant would be restricted from following his livelihood.***

26 If at the end of the day he were to be successful then he would have to pick up and start his practice all over again.

27 I think ***it very clear that if this were to be the case, then he would suffer irreparable financial harm. It could be that he would be suspended from practice in effect from twelve (12) to eighteen (18) months. I understand he is a sole practitioner.***

28 *In effect,* ***any appeal process, which ended up in his favour, would be a hollow victory, indeed. In the interim, if not granted a stay, be could well have suffered considerable harm, both financially and professionally. Added to this, of course, the Respondent will not suffer any great hardship or prejudice by my granting a stay.***

22. ***Barbara Pintard Bastian and Kennedy Bastian and Family Guardian Insurance Company Limited*** - SCCivApp No. 176 of 2010

The Hon. Mr. Justice Conteh, JA

Pg.3 ***There are grave matters which I bear in mind in granting leave to the applications to appeal out of time, bearing in mind that the property in question is their matrimonial home and principal residence and if, as they claim (which I am not in position to judge at the present time),*** *that there were omissions or omissions by their former attorney resulting in their being out of time to appeal the order for possession, I think it is only fair that they be given time to appeal out of time. Of course, in the end it will all come out in the wash.*

Pg.4 Consequently, the order is stayed until the determination of the appeal.

23. **Philip Edward Davis and Amit Peretz Weissfisch and others** *SCCivApp no. 137 of 2011*

The Hon. Mr. Justice Conteh, JA

Pg. 4

I have not been persuaded or referred to any prejudice that would be wrought against the first respondent, in particular, or any of the respondents if the temporary stay of the discharge of the confidentiality order were to be continued until the application for leave to appeal that order is heard and determined by this court. On the other hand instead, there is, I believe, all the prejudice in the world

Pg.5

<u>to weigh against the trustee if matters which stayed under wraps, as it were, since 2006 were now by a side wind of some procedural entanglement and the lack of time to hear his application timely, were to be put out in the public domain.</u>

<u>Accordingly, I grant the order that the judge's order discharging confidentiality order shall stay suspended, as he originally himself had granted, until the application by the applicant trustee for leave to appeal that discharge order can be heard and determined.</u>

*24. **ABS Ocean city Ltd and City Service Ltd** SCCivApp No. 94 of 2012*

The Hon. Mr. Justice Conteh, JA

Pg.2

3) The judge in effect in this matter granted 4) summary judgment in favour of the plaintiff, but she 5) had recognised at paragraphs 73, 74 and 75 of her 6) ruling that the defendant had by its counterclaim a 7) triable issue which entitled it to leave to defend. It 8) is therefore baffling why in the circumstances under an 9) Order 14 application the learned judge proceeded to 10) enter judgment in the full amount claimed subject to be 11) paid within 30 days of her ruling and subsequently 12) granted to the appellant to appeal. This is not 13) a tidy way of setting about an Order 14) application, 14) the whole purpose of which is to avoid trial where, on 15) the issue joined between the parties on their 16) pleadings, it is so clear that judgment

Pg. 3

<u>1) In the light of the leave therefore granted by 2) the learned judge to the appellant, I order that the 3) entry of judgment be stayed until the appeal in this 4) matter, which has been granted by the judge herself, is 5) finally determined. This, of course, is not to say 6) under order 14 application conditions cannot be 7) attached for defending. But the condition granted in 8) this case would certainly seem to pre-empt the final 9) judgment when issues have been finally joined and 10) triable inter parties. Accordingly, I grant the 11) application for stay until the appeal is heard in this 120 matter.</u>

<u>Costs are to be in the cause.</u>

25. ***Laurence A.Jupp and Lashan Jupp ne'e Cooper SCCivApp Np. 37 of 2011*** *(quoted brevitatis causa)*

Before: The Hon. Mr. Justice Contech, JA pg.3

"In the instant application before me the respondent to the appeal, in effect, to the application in opposition, Lashan Jupp, has deposed why the application should not be granted. Ms. Stephanie Wells for the applicant, intended appellant, has, however, refrained from adverting to the possible prospectus of the success of the appeal by the applicant/appellant. I note, however, in all 22 grounds have been filed against the judge's decision. That will await another day as to the chances of success at the full hearing beyond the Court of Appeal. However, presently I see no reason why I should stay the judge's order ordering a payment of $1,200.00 per month for the maintenance of the two children of the marriage. Given the evidence before me, that they are both attending secondary or tertiary education institutions and not in employment, as orally contended for by Ms. Wells for the applicant/appellant without any supporting evidence.

I have before me exhibits by Mrs. Lashan Jupp that the children are at school, one at the College of the Bahamas and the other at a school in Florida. I ***therefore see no reason to stop that order from being put into effect, particular as the judge below was very careful in making the maintenance payment to run for so long as the children pursue education of the Bachelor's level. "***

26. ***Standard_Chartered_Bank_(Switzerland)_SA_v._UBS*** SCCiv App No. 222 of 2012 (quoted brevitatis causa)_

Judgment Delivered by the Honourable Mrs. Justice Allen, President:

The question of law raised on this application is not ***one of general public importance****.* ***Further the questions of fact raised cannot be properly answered by the JCPC until there is a proper trial in the court below of the issues raised.***

5 *The Court clearly pointed out at paragraph 34 of its decision that the contentious arguments surrounding points as basic as the proper construction of the contract between the parties, and the plethora of authority submitted by each party in support of their legal positions, demonstrate that the case was not a plain and obvious one for strike out, and remitted the matter to be heard on its merits.*

12 *Consequently, we believe* ***it would be premature to send the matter to the JCPC when all of the facts have not been established.***

27. ***R.B (a juvenile) v. Attorney General*** - [2016] 1 BHS J. No. 128 (quoted brevitatis causa)

per Allen, P

It is clear that subsections 3(1), 3(2) and 3(3) of the ***Child*** *Protection Act relate to a determination regarding the upbringing of a* ***child****; and the administration of a* ***child****'s property or the application of any income arising therefrom. In my view the purpose of subsection 3(2)* ***is to clearly state that in deciding these types of matters whether before a court of law or before any person the child's welfare shall be of paramount consideration.***

This interpretation of section 3 does not mean that in matters outside of the purview of the section the guiding principle mentioned therein does not maintain. Section 4(c) of the ***Child*** *Protection Act incorporated into Bahamian law the United Nations Convention on the Right of the* ***Child*** *("the Convention"), subject to any reservations that apply to The Bahamas and with the appropriate modifications to suit the circumstances that exist in The Bahamas with due regard to its laws.*

Notwithstanding the side note to section 3 describing the section as The Guiding Principle, it is, in my view, section 4(c) of the ***Child*** *Protection Act that incorporates into Bahamian law, for all matters outside of those described in* ***section 3(1) of the Child Protection Act, the guiding principle enunciated in the Convention.***

per Isaacs, JA

My interpretation of section 3(2) of the ***Child*** *Protection Act (the CPA) differs from the interpretation adopted by the learned President and is in alignment with the views expressed by Crane-Scott, JA; with whose conclusions on the meaning of the section I agree. Sub-section 2 is not limited by the preceding sub-section 1.* ***The reference to "all matters relating to a child" clearly admonishes that those persons dealing with children whether in a court or not, must do so with the welfare of the child as the paramount consideration.***

per Crane-Scott, JA

As can be seen, subsection 3 of the ***Child*** *Protection Act is very widely drawn.* ***Subsection 3(2) clearly states that the "guiding principle" in subsection (1) is to be applied in every situation where all matters relating to a "child" are under consideration and its application is not limited solely to those matters referenced in subsection 3(1).***

28. The Court of Appeal in its Judgment of 9th March 2016 in ***The Bahamas Real Estate Association v. Smith*** - [2016] 2 BHS J. No. 36 (quoted brevitatis causa) delivered by the Honourable Mr. Justice Isaacs, JA held:

*"**11** The principles which guide a court when considering applications for a stay may be found in Order 59, rule 13 of the 1982 English Rules of the Supreme*

Court which states inter alia that even though the court should not make a practice of depriving a successful party of his winnings, the court should ensure that in the event the appealing party succeeds his judgment on appeal is not rendered nugatory.

12 *Further guidance as to matters the Court must take into account may be derived from the authorities. Some have been helpfully set out in the appellant's submissions, for example, (a) whether the appellant is entitled to appeal as of right; see also* ***Wilson v. Church (No.2)*** *(1879) 12 Ch 454; (b) whether the appellant has an arguable case; see* ***Mandeer Holidays Ltd v Civil Aviation Authority*** *Official Transcripts (1980-1989); (c) whether the absence of the stay would render a successful appeal nugatory; See* ***City Services Limited v. AES Ocean Cay Limited*** *[2012] 1 BHS J. No. 85 at para. 15 at TAB 8; see also* ***Wilson v. Church*** *supra; (d) whether there is a risk of injustice to one or other of the parties if it grants or refuses a stay; see* ***Hammond Suddards Solicitors v Agrichem Holdings Ltd*** *[2001] EWCA Civ 2065; and (e) whether the appellant has given sufficient evidence by affidavit as to why a successful appeal could be rendered nugatory; see* ***City Services*** *supra at para. 16.*

13 *We are unable to see how a stay not being granted by this Court, in reference to the judge's order that BREA consider the respondent's applications, will render nugatory a successful appeal by the appellant. Should the appellant prevail on appeal, the Court can order the respondent to return the certificates and/or licences to BREA if in the interim a decision had been made to issue same.*

14 *We hold the view that the prejudice which may be experienced by the respondent in not being able to pursue his chosen field of endeavour pending the determination of the appeal outweighs any which may inure to the appellant. This balance of convenience favours the respondent. Hence, we do not stay the learned Judge's decision which requires the appellant to consider the respondent's application for restoration.*

15 ***<u>We were not convinced by the appellant's arguments that they may encounter difficulties in recovering the assessed damages should their appeal ultimately prove to be successful. The Court may have ordered the sums assessed to be placed in an account in Counsel's names with dispensation of same to await the outcome of the appeal.</u>***

16 ***<u>However, we were satisfied that no prejudice will inure to the respondent if a stay was granted</u>*** *in respect of the assessment of damages ordered by the learned judge since, if the appeal is unsuccessful, interest may be awarded to reflect the time the respondent has been out of his funds which represent the assessed damages.*

17 ***<u>In the premises, we granted the stay of the learned Judge's decision</u>*** ***"****that the damages were to be assessed by the Registrar of the Supreme Court".”*

29. The Court of Appeal in its Judgment of 11th May 2016 in Cummings and another v. Sumner Point Properties Limited - [2016] 2 BHS J. No. 81 (quoted brevitatis causa) delivered by the Honourable Mr. Justice Isaacs, JA held:

> *"**14** T**__he principles for granting a stay pending appeal have been enunciated many times before. It is, I think, accepted by the parties that the Court has the jurisdiction to grant a stay of the proceedings whilst an appeal against it is pending. It is a discretion that should be exercised where a failure to grant a stay would result in the appeal being rendered nugatory__**. In* ***Wilson v. Church (No 2)*** *[1879] 12 Ch D 454 at 458 - 459, Cotton LJ stated:*
>
> > *"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory."*
>
> ***15*** *And per Brent LJ at page 459:*
>
> > *"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 the judicial discretion that where the right of appeal exists...the Court as a general rule ought to exercise its best discretion in a way so not to prevent the appeal, if successful, from being nugatory."*
>
> ***16*** *Further guidance was given by the English Court of Appeal in Leicester Circuits Ltd v Coates Brothers plc [2002] EWCA Civ 474 (per Potter LJ at para 13):*
>
> > *"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 least 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..."”*

Skeleton 12 no Summary Judgment when there are triable issues and especially No Summary Judgment for possession of residential premises in mortgage action

30. **Article 20(8) of the Constitution of The Bahamas.**

31. ***Bank of Montreal Bahamas Ltd. v. Brict*** - [1986] BHS J. No. 82

32. ***Glanrafon Investments Ltd. v. Efficient Management and Industrial Relations Consultants Ltd.*** [1987] BHS J. No. 81

33. ***St. John's Particular Church of Native Baptist's in The Bahamas (Trustees of) v. Jones*** - [1989] BHS J. No. 134

34. ***Canadian Imperial Bank of Commerce v. Wells*** - [1996] BHS J. No. 17

35. ***Kohlrautz v. Kohlrautz and others*** **-** [1998] No. FP/81

Moore J., as he was then

> ***37*** *Something must now be said about the Courts and the judges of The Bahamas. The Courts at every level are fully free open and public forums which operate with open doors through which the media (including the International news Media) and representatives of public, civic and non governmental organisations may enter without hindrance. The proceedings of our Courts may be freely and fully reported.*
>
> ***46*** ***<u>The basic rule of Bahamian law is that no order may be made against a person or party to any proceedings unless that party or person was given a full opportunity of being heard by the Court or other Tribunal making the order. This is the audi alteram partem rule which lies at the very bedrock of our jurisprudence.</u>*** *There are, however, exceptions to this rule and, in appropriate circumstances, the law allows for the making of ex parte orders, that is to say, orders based upon the hearing of only one party to the dispute in the absence of the other party who would have had no opportunity of being heard before the making of the order. But the party against whom an ex parte order is made may apply to have it set aside at short notice and is entitled to an expeditious hearing.*

36. ***Citibank, N.A. v. Major*** - [2001] BHS J. No. 6

37. ***<u>Arcari v. J.S.Johnson & Co Ltd</u>*** - [2011] No. FP(139

Moore, J., as he was then

> ***57*** *And to cap it all, at page 204, B, Lord Ackner wrote:*
>
> > *"I accept that it is an anomaly that an order for payment of costs to be taxed is construed for the purpose of Section 17 as a judgment debt even though before taxation has been completed there is no sum for which execution can be levied. However, the Courts have accepted since its enactment that Section 17 does apply to such an order and for the reasons set out in my speech in Hunt's case, [1988] 3 All England Reports 823 at 833, [1990], 1 Appeals Cases, 398 at 415, the balance of justice favours continuing so to treat such an order".*
>
> ***58*** *From these clear, powerful statements by Lord Ackner, it is beyond question that under Section 17 of the English Act of 1838, which is the equivalent to all intents and purposes of Section 2(1) of our Civil Procedure (Award of Interest)*

*Act, 1992, the expression **"judgment debt"** and everything flowing therefrom includes an order for costs even if the quantum of costs has not been declared simultaneously with the making of that order. The expression "judgment debt" is expansive enough to include an order for costs to be taxed if not agreed and retains its full potency and efficacy until the taxation takes place and the quantum of costs has been ascertained.*

59 *In these circumstances, therefore, the draftsman of our Civil Procedure (Award of Interest) Act, 1992, bearing in mind Lord Ackner's judgments, which preceded the passage of our Act, saw no need to enact into our law an equivalent of Section 18 of the English Act of 1838.*

60 <u>The order, then, is that the application for summary judgment is refused, the matter is to take its normal course, and costs of the application for summary judgment are to be costs in the cause.</u>

38. ***Citibank, N.A. v. McDonald*** - [2004] BHS J. No. 442

39. Hoh **T.G. Investments, LLC v. New Hope Holding Company Limited and another**

2008/CLE/gen/FP00215

Evans, J.

20 *I find support for this position in the case of Harness v. Bell's Asbestos and Engineering Ltd[3] where Denning, MR said:*

> ***<u>"Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice.</u>*** *It can at last be asserted that "it is not possible... for an honest litigant in Her Majesty Supreme Court to be defeated by any mere technicality, and step, any mistaken step in litigation."*

<u>51 I am mindful of the principles by which I am to be guided in dealing with summary judgment applications under Order 14, namely that:</u>

97 *In that regard, Mr Adams referred the Court to the note that appears at paragraph 14/2/8 in the English Rules (Supreme Court Practice 1997 White Book) where the learned authors said:*

> *"Deposing to belief that there is no defence. This statement is an essential part of the affidavit. The usual words in the affidavit are "I verily believe that there is no defence to this action." This form is supported by the Irish decision in Manning v Moriarty [1883] 12 L.R. Ir 372.*

> ***Where, however, the application relates to one of several claims or to part of a claim the words in the affidavit should be correspondingly apt., e.g. I verily believe that there is no defence to the claim" (identify or describe the***

same) or "to the following part of the claim." (identify or describe the same) namely (identifying the part referred to).

If the claim is for damages, the deponent should swear to his belief that there is no defence except as to the amount of damages claimed (see Dummer v Brown [1953] 1 QB 710; [1953] 1 All ER 1158"

101 *That may be so, but to my mind it seems to lend support to the defendant's contention that* ***there is more to the matter than simply the promissory notes and that that "more" cannot or ought not to be determined summarily.***

108 From the foregoing, I am not able to say that it is clear that there is no real or substantial question to be tried or that there is no reasonable doubt that the plaintiff is entitled to summary judgment against the defendants on its case as pleaded.

110 In any event, having read the said first affidavit of the second defendant and the documents exhibited thereto, including the draft defence and counterclaim, and having heard counsel, I am of the view that to attempt to determine the issues raised by the defendants at this point would require me to do what the authorities warn against: allow Order 14 proceedings 'to become a means for obtaining, in effect, an immediate trial of the action" and in this case on the basis of affidavit evidence without seeing and hearing witnesses, particularly on cross examination, and without the benefit of discovery.

111 I am satisfied therefore that the issues raised by the defendants are such that there ought to be a trial and that since all of these matters are so intimately interrelated they are best resolved by a single trial at which they can be fully argued and determined.

112 The plaintiff's application for summary judgment is therefore refused, the defendants are given leave to defend and the action is to take its normal course.

40. ***ABS Ocean city Ltd and City Service Ltd*** *SCCivApp No. 94 of 2012* (quoted brevitatis causa)

The Hon. Mr. Justice Conteh, JA

3) The judge in effect in this matter granted 4) summary judgment in favour of the plaintiff, but she 5) had recognised at paragraphs 73, 74 and 75 of her 6) ruling that the defendant had by its counterclaim a 7) triable issue which entitled it to leave to defend. It 8) is therefore baffling why in the circumstances under an 9) Order 14 application the learned judge proceeded to 10) enter judgment in the full amount claimed subject to be 11) paid within 30 days of her ruling and subsequently 12) granted to the appellant to appeal. This is not 13) a

tidy way of setting about an Order 14) application, 14) the whole purpose of which is to avoid trial where, on 15) the issue joined between the parties on their 16) pleadings, it is so clear that judgment must 17) ineluctably be entered for one or the other. This 18) evidently manifestly was not the case before the judge. 19) She proceeded to grant leave to the appellant to 20) appeal, no doubt mindful of the fact that order 14 21) ruling was interlocutory one correctly. Therefore, 22) in the circumstances, to require the appellant to pay 23) the full sum plus whatever interest thereon if not 24) agreed and costs to be taxed is, in effect, entring 25) judgment for the plaintiff, now proposed respondent.

41. **Coral Beach Management Company Limited v. Anderson and another** SCCivApp & CAIS No. 140 of 2014 (quoted brevitatis causa)

The oral judgment of the court was delivered by Conteh, JA:

2 ***Initially, I was troubled when I read the application on the papers where they had given that the substance of the summary judgment application, namely, for possession, could have been properly moved under Order 14, when in the face of the provisions of the rules of the Supreme Court, Order 19(5) states expressly where an application is for possession of land only (as in the instant case) that is the rule that is applicable.***

4 *From a perusal of* ***the papers put before the judge and the arguments and submissions before us, it is manifest that the issues joined between the parties need to be ventilated with the assistance of full pleadings, as the judge ordered.***

ISAACS, JA:

7 Speaking for myself, I tend to support the application. It is a simple process. The respondents were made parties to the action. ***They could, quite properly, have ventilated all of these issues at that time. Obviously, it is to their advantage for a multiplicity of actions to occur.***

CRANE-SCOTT, JA:

11 I would add that the policy of Order 14 is to prevent delay where there is no defence. This is well known. And that once a court concludes that there is no triable issue or question or that for some other reason there ought to be a trial, it would normally give judgment for the plaintiff.

42. ***Farquharson v. Hamilton -*** [2019] 1 BHS J. No. 20 *(quoted brevitatis causa)* Justice Keith H. Thompson

"20 *In the case of* ***WESLEY INTERNATIONAL LIMITED and others vs. ARTIS CONSUMER GROOMING PRODUCTS Ltd.*** *[2018] 1 BHS J. No. 1 Winder J. stated at paragraphs 13 - 14:*

13. "There is little dispute between the parties as to the law relative to non-disclosure/failure to be full and frank on an ex parte application. I need only refer to the oft cited dicta of Ralph Gibson LLJ in the case of Brink's Mat Ltd. v Elcombe [1998] 1 WLR 1350 at 1356.

> ***"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (1) The duty of the applicant is to make "a full and fair disclosure of all the material facts." See Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486, 514, per Scrutton L.J.***

14. In this jurisdiction, the decision in Brinks Mat Ltd. v. Elcombe was confirmed by the Privy Council in the decision of Walsh v. Deloitte and Touche Inc. 59 WIR 30.

<u>Conclusion</u>:

24 We therefore find that;

1. ***The Applicant failed to make full and frank disclosure upon applying for the eviction order;***

2. Failed to comply with the rules governing the commencement of issuance of proceedings in the Supreme Court;

3. Failed to comply with the rules governing the granting of interlocutory injunctive relief.

<u>Speech-skeleton against decisions without merits been heard</u>

43. ***Paradise_Island_Ltd._v._Adderley***_[1996] BHS J. No. 75

Barnett J. , as he was then

<u>15 This case involves the balancing of two principles.</u> *The first is the need for finality in litigation and the avoidance of re-opening cases which, for all intents and purposes, have been dealt with by the Court.* ***<u>The second is to ensure that matters are decided on their merits and not to bind litigants to consents not properly made and where the Court itself has not determined the lis on its merits.</u>***

16 *In Shepherd v. Robinson (1919) 1 K.B. 474 at p. 477, Bankes L.J. said,*

> *"There are two distinct lines of authority relating to compromises said to have been made by counsel against the wishes or instructions of their clients. The first is that represented by Strauss v. Francis; Matthews v. Munster and Welsh v. Roe. In all those cases the question was whether the act of counsel had been within the scope of his authority. It is clear that counsel has an apparent authority to compromise in all matters connected with the action and not merely collateral to it; and if he acts within his apparent authority and the other party has no notice of any limitation or restriction on that authority, the client will be bound by the agreement made by his counsel and embodied in some order or judgment of the Curt. If Mr. Powell could bring this case within that line of decisions I should agree that this compromise must stand.*
>
> *<u>"But there is a second and different line of cases which decide that before a **consent order** has been drawn up and perfected the consent given by counsel or solicitor may be withdrawn by the client if the counsel or solicitor gave it under a misapprehension. In such cases the Court will not proceed further with the drawing up and perfecting of the order</u>, and will not lend its authority to compel observance of an agreement arrived at through a mistake. This is the line represented by Holt v. Jesse and by Neale v. Gordon-Lennox, where Lord Halsbury L.C. said: "The Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on; and to suggest to me that a Court of justice is so far bound by the authorized act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I have ever heard".*

26 The Order of the Court was not filed until 22nd April, 1996. On the very same day, however, the Defendant filed the Summons for a stay, filed his Affidavit and instituted action No. 422 of 1996.

27 The Court's file indicates that the Plaintiff's attorney on the 22nd April, 1996 was aware of the Defendant's position. There is a copy of a letter from the Plaintiff's attorney to the Defendant's attorney, which was copied to the Clerk of the List, in the following terms:

"It is our understanding that you intend to make an Ex parte application to request a stay of execution of the Order dated the 26th March,

1996. Be advised that if such application is indeed made we would require that we are heard on the same."

28 *Against that background this Court is prepared to consider the Defendant's application as one that has been made before the Order was perfected. It is apparent that the Plaintiff's attorney must have been aware of the Defendant's position on the "consent" if not before the 22nd April, 1996, certainly on the 22nd April, 1996 when the Order was perfected. In this regard, I adopt the approach of Watkins J. in Marsden v. Marsden (1972) 2 All ER 1162 where an application to set aside a* ***consent order*** *was made on the same day as the order was perfected. At p. 1166 he said,*

"The facts relevant to the question of whether this application can be entertained at all are as follows. I pronounced a decree nisi on 24th February, 1972, but the other orders of which complaint is made in this application were not perfected until 14th March. I have not been able to ascertain the precise time of day on 14th March when this happened. It is not necessary for me to enquire into, nor do I think it relevant to enquire into, why the orders were not perfected sooner. On the previous day, or the day before that, the solicitor for the wife informed the court that the application which is before me would be made. In the afternoon of 14th March the application was made before Lane J. The matter was then referred to me since I had originally been seised of it. Having regard to those facts. I have come to the conclusion that the high probability is that the application was made, if not contemporaneously with the order being perfected, then at some time before it. In any event, where circumstances are to the effect that action was taken of informing the court of the intention to make an application before the perfection of the order and the application is actually made on the day of perfection of the order, it seems to me to be a manifest injustice to an applicant to exclude her application from consideration on the basis that she may not have made it before the order was perfected." [my emphasis]

29 *In my judgment, this approach applies with equal force when action was taken to inform the other party* ***(if not the Court as well)*** *of the intention to make application before the perfection of the Order.*

30 *I accept that it is not the law that a consent given by the authority of the client can be arbitrarily withdrawn at any time before the order was drawn up. The English Court of Appeal in Harvey v. Croyden Union Rural Sanitary Authority (ibid) made that very clear. However, the Court was also very clear that "if the consent is given through error or mistake, there can be no doubt that the Court will allow it to be withdrawn if the Order has not been drawn up". See Cotton L.J. at p. 255.*

__34__ In this regard, I can do no better than refer to the comments of the learned authors of Halsbury's Laws of England, Vol. 3(1), 4th ed. At para. 520:

> *"Questions of difficulty have arisen where the authority of counsel to compromise a case has been expressly limited by the client, and counsel has entered into an agreement or consented to an order or judgment in spite of the dissent of the client, or on terms differing from those which the client authorised.*
>
> *If the limitation of authority is communicated to the other side, consent by counsel which exceeds the limits of his authority will be of no effect.*

***35** In the present case, with some reluctance, I find that the Defendant's attorney acted under a misapprehension as to the scope of his authority and that it would be unfair and a "grave injustice" to the Defendant to hold him bound by the **Consent Order** made without his knowledge. His attorney really ought to have consulted with him and if he did not agree he should have been permitted to have a judicial consideration of his "defence" to the claim for possession.*

***36** Mr. McCartney has submitted that I should decline to exercise my discretion to set aside the Order on the ground that there is really no bona fide defence to the claim for possession. I am not unmindful of the force of the Plaintiff's case. I am not, however, prepared to deny the Defendant the opportunity to make his case and have a judicial determination of the same.*

44. ***Standard_Chartered_Bank_(Switzerland)_SA_v._UBS*** SCCiv App No. 222 of 2012_(see supra para 8)

45. ***Jupp_v._Jupp***_-_[2013]_1_BHS_J._No._131_ *(quoted brevitatis causa)*

Judgment Delivered by The Honourable Mrs. Justice Allen, President:

> ***Without stating clear reasons for coming to a decision an appellate court can not determine whether the requirements of the statute have been met by a distributing judge. In the present case insufficient reasons were provided by the learned trial judge to determine whether the decision was one that was fair in all the circumstances. From the decision given it would appear that the judge placed too much emphasis on*** *equally sharing each of the assets individually rather than considering the circumstances as a whole.*

9 It must be remembered that authorities from the United Kingdom can not trump what the statue law of The Bahamas says. It is only if these cases are consistent with the statue law can they apply.

19 In the premises, we allow the appeal and set aside the decision of the learned trial judge. *We further order that the evidence required to properly and fairly divide the assets be ascertained by the parties to this matter. Once this evidence has been produced, we order that the matter be set down for rehearing before a different judge of the Supreme Court. Each party is to bear their own costs of the appeal and of the original hearing below.*

Speech-skeleton additional grounds of Appeal

46. ***Whall and another . Bullman*** - [1953] 2 Q.B. 198

Evershed M.R., Denning and Romer L.JJ.

Pg.4 The rule has been laid down as long ago as 1891, in Smith v. Charles Baker & Sons,1 that on appeals from the county court (which are confined by Parliament in accordance with the terms of section 105 of the County Courts Act, 1934) this court will not entertain a ground for supporting an appeal which was not taken in the court below, and that rule is one which is strictly and regularly applied in this court. ***The peculiarity of this case is, as I have already indicated, that the real point, which on the face of the claim is fatal to its success, was never apprehended and is not even now raised in the notice of appeal. In such very exceptional circumstances it does not seem to me that this court should allow the matter to stand. It is not a question of taking a new point in support of the appeal. The point is that the order made does not bear any relation to the claim as alleged.***

Pg.5 *In the circumstances, I should, obviously, not be justified in expressing any further opinion on the question whether there is any covenant or condition relating to user, and whether in the absence of either this claim for possession can succeed, though these points have been discussed before us. Since the point was not taken by the defendant, either here or in his notice of appeal, it would not, in my judgment, be right to allow him costs in this court or in the court below. It is an unfortunate state of affairs, for both parties seem to me to be to blame in that, on the one hand, the plaintiff failed to put forward a sustainable cause of action, and on the other, the defendant failed to observe the fact.* ***Unfortunately, the judge was allowed by counsel who appeared before him to deal with the matter on a false premise.***

47. ***Snell v Unity Finance Ltd -*** [1963] 3 All ER 50 *(quoted brevitatis causa)*

Willmer LJ

<u>The principle on which this court acts is based on the fact that the right of appeal from a county court is the creature of statute, and this court is limited by the terms of the enabling statute</u>**, which is now the County Courts Act, 1959, s 107 to s 114, which are the sections dealing with appeals. **<u>It is true that subsequent cases have shown that there are exceptions to this rule. One exception arises when it is made to appear to the Court of Appeal that the order made by the county court judge was made without jurisdiction.</u>** It is probably true to say that most of the cases which have arisen for decision under this head have arisen in relation to appeals under the Rent Acts where, of course, the jurisdiction of the county court judge to make an order is confined within strictly defined limits. **<u>Secondly, there is an exception in cases where the court is being invited to enforce an illegal contract, and of that an illustration is to be found in the case of Snell v Unity Finance Ltd.</u>

<u>What Denning LJ said was this ([1953] 2 All ER at p 309; [1953] 2 QB at p 202.):</u>

> *"**<u>What, then, is to be done? This point was not taken below nor in the notice of appeal. Can this court itself take it? I think so,</u>** for the reason that the case comes before the court as if the parties had said to one another: 'Although there is no forfeiture clause, we agree that the court should treat the case as if there were one'. If the parties had knowingly made such an agreement, this court would not adjudicate on it. This court is here to try real cases, not hypothetical ones. The parties cannot agree on a false hypothesis and ask the court to adjudicate upon it."*

*It is said that that is exactly the same as happened in the present case; but, with all respect, I do not think that that is so. It seems to me that **Whall v Bulman** **<u>was a different case from the present one. In that case the court was being invited to deal with the matter on a completely hypothetical basis of fact.</u>** Here, as it appears to me, all that can be said is that the argument below proceeded on what is now alleged to be an erroneous view of the law. I do not think that it is a parallel case with **Whall v Bulman**. **<u>In the present case what was tried by the judge was in no sense an unreal case.</u>** He applied his mind to the actual facts disclosed in the evidence. If he reached a wrong conclusion in law because his mind was not directed by counsel to what is now said*

*I come then to the third question which I posed. This judge found in favour of Mr Thomas that there was a tenancy of the residential accommodation. **<u>On the notice of appeal, as originally filed, no point was taken that what Mr Thomas had was not a tenancy. In the course of the hearing yesterday, however, when it was sought to raise this point, we directed that the new ground should be put into writing, and this morning we have been presented with further grounds of appeal which, after discussion, we granted leave to add.</u>***

48. _***Oscroft_and_Others_v_Benabo_and_Another_***[1967] 2 All ER 548

Willmer LJ

The principle on which this court acts is based on the fact that the right of appeal from a county court is the creature of statute, and this court is limited by the terms of the enabling statute*, which is now the County Courts Act, 1959, s 107 to s 114, which are the sections dealing with appeals.* ***It is true that subsequent cases have shown that there are exceptions to this rule. One exception arises when it is made to appear to the Court of Appeal that the order made by the county court judge was made without jurisdiction.*** *It is probably true to say that most of the cases which have arisen for decision under this head have arisen in relation to appeals under the Rent Acts where, of course, the jurisdiction of the county court judge to make an order is confined within strictly defined limits.* ***Secondly, there is an exception in cases where the court is being invited to enforce an illegal contract, and of that an illustration is to be found in the case of Snell v Unity Finance Ltd.***

What Denning LJ said was this ([1953] 2 All ER at p 309; [1953] 2 QB at p 202.):

> ***"What, then, is to be done? This point was not taken below nor in the notice of appeal. Can this court itself take it? I think so,*** *for the reason that the case comes before the court as if the parties had said to one another: 'Although there is no forfeiture clause, we agree that the court should treat the case as if there were one'. If the parties had knowingly made such an agreement, this court would not adjudicate on it. This court is here to try real cases, not hypothetical ones. The parties cannot agree on a false hypothesis and ask the court to adjudicate upon it."*

It is said that that is exactly the same as happened in the present case; but, with all respect, I do not think that that is so. It seems to me that ***Whall v Bulman*** ***was a different case from the present one. In that case the court was being invited to deal with the matter on a completely hypothetical basis of fact.*** *Here, as it appears to me, all that can be said is that the argument below proceeded on what is now alleged to be an erroneous view of the law. I do not think that it is a parallel case with* ***Whall v Bulman****.* ***In the present case what was tried by the judge was in no sense an unreal case.*** *He applied his mind to the actual facts disclosed in the evidence. If he reached a wrong conclusion in law because his mind was not directed by counsel to what is now said*

I come then to the third question which I posed. This judge found in favour of Mr Thomas that there was a tenancy of the residential accommodation. ***On the notice of appeal, as originally filed, no point was taken that what Mr Thomas had was***

not a tenancy. In the course of the hearing yesterday, however, when it was sought to raise this point, we directed that the new ground should be put into writing, and this morning we have been presented with further grounds of appeal which, after discussion, we granted leave to add.

49. ***Kinglocke_and_another_v._Culmer_and_another***_[2014] 3 BHS J. No. 1 *(quoted brevitatis causa)*

Michael Barnett, Chief Justice, as he was then

> ***17*** *This view was supported by* ***Adams J in Leach v Culmer (op cit)*** *when he said at paragraph 18, "On principle it appears to me that what J.A. Smith J. said was correct. Fraud or falsehood as contemplated by section 27 of the Quieting Titles Act envisages a Derry v. Peek situation.* ***Fraud is proved when it is shown on a high probability that a false representation has been made (1) knowingly or (2) without belief in its truth, or (3) recklessly."***
>
> ***18*** *In my judgment, the certificate was obtained by fraud as the Defendants not only failed to disclose to the Court very material facts, namely that the Defendants had a conveyance of only a part of Lot 32 and that the Plaintiffs had built a triplex on the property and that they had not served the Plaintiffs as required by the Order of the court but also that the affidavit of 1st February., 2012 was materially false as it wrongfully said that the First Defendant had received the entirety of lot 32 from Tiffany* ***Kinglocke****-Johnson when he only received the northern portion of Lot 32 and it was false as wrongfully said that up to that date, "that no one has ever interfered with our peaceful and continuous occupation and enjoyment of this property". The Plaintiffs had a triplex on the property and that fact should have been disclosed to the Court. The Abstract of Title ought to have disclosed the transaction with the land after 1964.*

50. ***Queirazza v. Leday and another*** - [2017] 2 BHS J. No. 14 *(see below point 28)*

Speech-skeleton point of law of general public interests

51. ***American Life Insurance Co. v. National Insurance Board*** [1984] BHS J. No. 26 *(quoted brevitatis causa)*

Adams J.

> ***12*** *In R. v. Guy (1972) 20 W.I.R. 437, Georges J.A. said that the Court had to decide only two questions:-*
>
> *"(1) Does the decision turn on an arguable point of law?*
> ***(2) Can it be regarded as a point of exceptional public importance?"***

13 *He stated that an analysis of the.cases showed that in the United Kingdom before October 1960 a fiat was granted in two sets of circumstances under the Criminal Appeal Act 1907:*

"(1) where there was an important statutory provision to be interpreted; and

(2) ***where there was need for a positive pronouncement in disputed areas of the common law.****"*

52. ***Fund_Haven_Limited_ (formerly known as Accuvest Fund Services Limited) and another v. The Executive Director of the Securities Commission of the Bahamas***_[2016] 1 BHS J. No. 97 *(quoted brevitatis causa)*

Judgment delivered by the Honourable Ms. Justice Crane-Scott, JA:

19 *On the one hand, the statutory filter in section 11 (e) and (f) requiring leave to appeal is imposed, as Lord Bingham of Cornhill observed in* ***R v. Secretary of State for Trade and Industry, ex parte Eastway*** *[2001] 1 All E.R. 27* ***"primarily to protect the courts against the burden of hearing and adjudicating on appeals with no realistic chance of success".*** *While Lord Bingham's observations in* ***Eastway*** *were made in the course of a comparison between the legislative purposes of the requirement of permission to apply for judicial review vis-a-vis the requirement for leave to appeal, we consider that the foregoing observation satisfactorily explains the underlying rationale for the leave to appeal provisions found in our Act.*

20 *On the other hand, the requirement for certification in section 21(1) involves, as observed in* **Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone** *[2013] Civil Appl'n No. 4 of 2012,* ***"a filtering process"*** *designed to ensure that only appeals which clearly raise points of law of general public importance reach the next appellate level.*
Bahamas Law Reports/2016/Volume 1/Fund Haven Limited (formerly known as Accuvest Fund Services Limited) and another v. The Executive Director of the Securities Commission of the Bahamas - [2016] 1 BHS J. No. 97

40 *Section 7 of the IFA provides that upon its election to be licensed as an investment fund, a company shall from the date of licensing be deemed an investment fund for purposes of the IFA. Once licensed, an investment fund is, as the section expressly states, subject to the provisions of the IFA, and becomes obligated to comply with the applicable regulatory provisions. A reading of the Act suggests that its obligations include such matters as keeping and maintaining proper books of accounts and records and documents, notifying the Commission of the surrender of its licence and where applicable, the notifying the Commission if it ceased to trade or has become dormant.*

53. ***Ladd_v_Marshall_***-_[1954]_3_All_ER_745 *(quoted brevitatis causa)*

DENNING, HODSON AND PARKER LJJ

In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

The principles on which further evidence is admitted have been recently discussed by this court in Braddock v Tillotsons Newspapers Ltd. I wish to make only a brief reference to the well-known case of Brown v Dean where the House of Lords affirmed to decision of the Court of Appeal and gave guidance on this topic. The passage which is often discussed and may be said, perhaps, to have been modified in part, is the portion of the speech of Lord Loreburn LC where he says ([1910] AC at p 374):

> *"When a litigant has obtained a judgment in a court of justice, whether it be a county court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds; and* ***where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive."***

Lord Shaw of Dunfermline doubted in the same case whether he could accept the word "conclusive", and the more modern cases have proceeded on the view that perhaps "conclusive" is too strong a word. But none of their Lordships dissented in any way; in fact, they agreed with the earlier part of the Lord Chancellor's proposition that ***new evidence must at least be such as is presumably to be believed.***

54. ***Queirazza v. Leday and another*** - [2017] 2 BHS J. No. 14 *(quoted brevitatis causa)*

Judgment Delivered by The Honourable Mr. Justice Jon Isaacs, JA:

While there is no golden rule for the admission of new issues on appeal; an assumption exists within the case law that there is no jurisdictional bar to these issues being entertained in cases where the interest of justice so demand and a consideration of the new issues are not statute barred.

24 In the case of Bethel v. Cable Bahamas Ltd. And another (Supra) the Court of Appeal permitted the respondent to rely on a new ground which was not before the court below on the basis that it was in the interests of justice. Madame President Allen at paragraph 25 stated that,

> ***"Admittedly, this issue was not raised in the Court below. However, in the interest of justice, and given the latitude of the Courts powers under rule 24 of the Court of Appeal Rules to allow the appeal, or affirm or vary the decision of the court below even where the ground for so doing is not specified in the Notice of Appeal or in a respondents notice, the Court brought the issue to the attention of Counsel and sought their further submissions, before resolving the appeal."***

25 *In the English Court of Appeal case of* ***Miskovic v Secretary of State for Work and Pensions*** *[2011] EWCA Civ 16 one of the appellants sought to raise an argument that was not raised in the Courts below. The Court of Appeal held that it had the jurisdiction to entertain new arguments not raised in the lower Courts. Sedley J considered the comments of the Courts in* ***Bulale v Home Secretary*** *[2008] EWCA Civ 806, [2009] QB 536, [2009] 2 WLR 992,and* ***Slack v Cumbria*** *[2009] EWCA Civ 293, [2009] ICR 1217, para. 29, [2009] IRLR 463; and stated at paragraph 124:*

> *"None of these cases sets out a golden rule for the admission of new issues on appeal, but all proceed on the assumption that there is no jurisdictional bar to their being entertained in proper cases. It is an assumption which in my judgment can be made good on a simple constitutional basis. The Court of Appeal exists, like every court, to do justice according to law. If justice both requires a new point of law to be entertained and permits this to be done without unfairness, the court can and should entertain it unless forbidden to do so by statute."*

33 In Hip Foong Hong, there was an application for a new trial. It was not based upon any complaint in connection with the original hearing, but upon the ground that further matter had been disclosed which showed that the defendants' case was so tainted with fraud and dishonesty that, in the interests of justice, the appellants were entitled to have the matter reheard*. The material upon which this charge of fraud was framed in part consisted of the affidavits of certain witnesses, one of whom had given evidence at the earlier trial; but chiefly of certain documents of which possession was secured by the issue of a search warrant against one Karanje, one of the respondents' witnesses, who was charged with perjury and absconded from the charge.*

34 *At page 1421 Lord Buckmaster opined:*

"They have only to add that where a new trial is sought upon the ground of fraud, procedure by motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved; and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud, when the whole issue can be properly defined, fought out and determined, though a motion for a new trial is also an available weapon and in some cases may be more convenient." *(Emphasis added)*

38 *In* **Ladd v Marshall** *[1954] 3 All ER 745 the English Court of Appeal considered guidelines for the admission of new evidence on an appeal against the background of its availability at the first hearing. At page 748, Denning, MR said:*

"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."

Speech-skeleton duty-power of Court of Appeal

55. ***Nocton_v_Lord_Ashburton_-_*** [1914-15] *(quoted brevitatis causa)*

VISCOUNT HALDANE LC, LORD DUNEDIN, LORD ATKINSON, LORD SHAW AND LORD PARMOOR

*P**g.10 Derry v Peek (1) simply illustrates the principle that honesty in the stricter sense is by our law a duty of universal obligation.** This obligation exists independently of contract or of special obligation. If a man intervenes in the affairs of another he must do so honestly, whatever be the character of that intervention. If he does so fraudulently, and through that fraud damage arises, he is liable to make good the damage. A common form of dishonesty is a false representation fraudulently made, and it was laid down that it was fraudulently made if the defendant made it knowing it to be false, or recklessly, neither knowing nor caring whether it was false or true. That is fraud in the strict sense.*

The courts had also power to rescind contracts of many kinds obtained by an innocent misrepresentation, *so long at least as the contract had not been superseded by being carried into effect. The condition attached to the plaintiff's right was that he should be able and willing to make restitution in integrum. If so, however free the defendant might have been from any intention to deceive, he was not allowed to retain what he had obtained* *from the plaintiff by a material mis-statement on which the latter was entitled to rely as being true. This, like the obligation to be honest, was a principle of general application, which did not depend on any special relationship of the parties or duty arising from it.*

But side by side with the enforcement of the duty of universal obligation to be honest and the principle which gave the right to recision, the courts, and especially the Court of Chancery, had to deal with the other cases to which I have referred, cases raising claims of an essentially different character, which have often been mistaken for actions of deceit. ***Such claims raise the question whether the circumstances and relations of the parties are such as to give rise to duties of particular obligation which have not been fulfilled.*** *Prior to Derry v Peek (1) the distinction between the different classes of case had not been sharply drawn, and there was some confusion between fraud as descriptive of the dishonest mind of a person who knowingly deceives, and fraud as the term was employed by the Court of Chancery and applied to breach of special duty by a person who erred, not necessarily morally but at all events intellectually, from ignorance of a special duty of which the courts would not allow him to say that he was ignorant. Such a special duty may arise from the circumstances and relations of the parties. These may give rise to an implied contract at law or to a fiduciary obligation. If such* ***a duty can be inferred in a particular case of a person issuing a prospectus,*** *as, for instance, in the case of directors issuing to the shareholders of the company which they direct a prospectus inviting the subscription by them of further capital, I do not find in Derry v Peck (1) an authority for the suggestion that an action for damages for misrepresentation without an actual intention to deceive may not lie.*

56. ***O'Shea_v._Grand_Bahama_Hotel_and_Country Club*** [1989] BHS J. No. 22 *(quoted brevitatis causa)*

Henry P., Smith and Melville JJ.A.

6 *In Edwards v Bairstow (1955) 3 All E.R. 48, 53, Lord Radcliffe said:*

"If the Case contains anything ex facie which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. *But without any such misconception appearing ex facie,* ***it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination****. So there, too, there has been error in point of law."*

57. ***Smith v. Regina SCCrApp No. 156 of 2010*** *(quoted brevitatis causa)*

Justice Blackman, J.A.; Justice Conteh, J.A.; Justice Adderely, J.A.

> ***74*** *As Lord Chief Justice Woolf explained in that case, after a hearing by an en banc English Court of Appeal:*
>
> *"If, as we believe it is necessary to do, we go back to first principles, we start with the fact which is uncontroversial, that the court of appeal was established with a broad jurisdiction to hear appeals. Equally it was not established to exercise an original jurisdiction. It is therefore appropriate to state that in that sense it has no inherent jurisdiction. It is, however, wrong to say that it has no implicit or implied jurisdiction arising out of the fact that it is an appellate court.* ***As an appellate court it has the implicit powers to do that which is necessary to achieve the dual objectives of an appellate court..."***
>
> ***75*** *Lord Woolf had earlier in the judgment identified the dual rationale for establishing the Court of Appeal when he stated at paragraph 26 of page 540:*
>
> *"...even if the Court of Appeal has no 'jurisdiction,' it does not necessarily follow that there* ***<u>are not other situations where serious injustice may occur if there is no power to reopen an appeal. We stress this point because this court was established with two principal objectives. The first is a private objective of correcting wrong decisions so as to ensure justice between the litigants involved. The second is a public objective, to ensure public confidence in the administration of justice not only by remedying wrong decisions but also by clarifying and developing the law and setting precedents."</u>***

<u>Speech-skeleton ***the Courts no longer act on technicalities***</u>

58. ***Baker_and_others_v._The_Minister Responsible for Acquisition and Disposition of Lands and another*** _[2014] 3 BHS J. No. 2 *(quoted brevitatis causa)*

Michael Barnett, Chief Justice, as he was then

> ***19*** *The issue before that Court was framed as follows:*
>
> *Then to the second major issue: assuming, but not agreeing, that the property in question could have been acquired compulsorily, was it acquired as provided by law? The gist of the complaint of the Respondent in this respect is the Court of trial was that no personal or any due notice as prescribed by law was served on him before the Appellants wrested the possession of his property from him. The case of the Appellants is that they sent a registered letter to him and then*

published notices of the acquisition in the Observer newspaper and the Government Gazette. Nothing was served before the publications. The Respondent denied receipt of the letter or seeing any notice of the acquisition. The learned trial Judge found that the registered letter was returned unclaimed and that no certificate of title was tendered. The courts below held that there was no proper notice of the acquisition according to law.

Before us, the learned Counsel for the appellants has submitted:-

- *(i) that formalities of service of notice should not be allowed to defeat justice and public good;*
- *(ii) that the decisive factor should be whether the acquisition was for a public purpose;*
- *(iii) that publication in the Gazette was notice to the whole world;*
- *(iv) that issue be made of service of notice only where a claimant is refused compensation on the ground that his claim is statute - barred; and*
- *(v) that service of notice is a mere technicality and that there is now, relying on English authorities, a movement away from using such technicalities to defeat public good.*

She cited ***the case of Munich v. Godstime R.D.C. (1966) 1 W.L.R. 427. at p.435 where Denning, L.J. stated that the courts now move away from the rigid adherence to technicalities as advocated and applied in East Riding Council V. Park Estate (Bridlington) Ltd. (1957) A.C. 223,*** *where an insistence on compliance will cause a defeat of public good. The Respondent has not been prejudiced by the mere fact that notice of the intention to acquire his property has not been personally served on him: In re Bowman (1932)2K.B.621. She therefore sought to distinguish the case of Alhaji Bello V. Diocesan Synod of Lagos & Ors. (1973)3 S.C. 103.*

In sum, learned Senior Advocate for the Respondent submitted that on the facts summarized by me above, the Respondent was not served with any notice of acquisition. This made the alleged acquisition invalid, null and void.

*21. …….. T****<u>his brings me to the contention of the learned Counsel for the Appellants that the law has now changed (in England); that the Courts no longer act on technicalities;</u>*** *and that we should adopt that trend and pronounce the notice served on the Respondent in this case as valid in the interest of public good.*

59. ***Nocton_v_Lord_Ashburton_-_***_[1914-15] *(quoted brevitatis causa)*

VISCOUNT HALDANE LC, LORD DUNEDIN, LORD ATKINSON, LORD SHAW AND LORD PARMOOR

An action for deceit cannot be maintained without ***proof of actual fraud, i.e, proof of mens rea - that a false representation was made knowingly, or without belief in its truth, or recklessly without caring whether it was true or false: Derry v Peek (1) (1889) 14 App Cas 337; but where a duty is laid on one person to give information or advice to another, on which that other is entitled to rely as the basis of a transaction, responsibility for error amounting to misrepresentation in any statement made will attach to the adviser or informer although the information or advice has been given, not fraudulently, but in good faith, and the recipient of the information or advice will be entitled to compensation for any loss which he has suffered, by reason of the misrepresentation.***

What requires closer consideration is the generality of the language used in some of the opinions of this House in Derry v Peek (1) to the effect that in such a case there is no legal as distinguished from moral duty to be careful. Soon after the decision the legislature, in the Directors' Liability Act, 1890, ***imposed a statutory obligation on those who issue prospectuses.*** *But in other cases the decision remains binding as to what it really established, and its principle stands.*

To what cases, then, does that principle extend? In his opinion LORD HERSCHELL (14 App Cas at p 360) carefully excluded from it

> *"those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course."*

Pg.9 Fraud in such cases is, as JAMES, LJ, said in Torrance v Bolton (12) (8 Ch App at p 124)

> *"nomen generalissimum, and it must not be construed so as to mislead persons into the notion that contracts for the sale and purchase of lands are in any respect privileged, so as to be free from the ordinary jurisdiction of the court to deal with them as it deals with any instrument, or any other transactions in which the court is of opinion that it is unconscientious for a person to avail himself of*

the legal advantage which he has obtained. Indeed, the books are full of cases in which the court has dealt with contracts of that kind - contracts obtained by persons from others over whom they have dominion, contracts obtained by persons in a fiduciary position, contracts for the sale of shares ***obtained by directors through misrepresentation contained in the prospectus, in respect of which it was never necessary to allege or prove that the directors were wilfully guilty of moral fraud in what they had done."***

Pg. 10 ***His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression "constructive fraud" came into existence.***

Pg.10 Derry v Peek (1) simply illustrates the principle that honesty in the stricter sense is by our law a duty of universal obligation. *This obligation exists independently of contract or of special obligation. If a man intervenes in the affairs of another he must do so honestly, whatever be the character of that intervention. If he does so fraudulently, and through that fraud damage arises, he is liable to make good the damage.* ***A common form of dishonesty is a false representation fraudulently made, and it was laid down that it was fraudulently made if the defendant made it knowing it to be false, or recklessly, neither knowing nor caring whether it was false or true. That is fraud in the strict sense.***

The courts had also power to rescind contracts of many kinds obtained by an innocent misrepresentation, *so long at least as the contract had not been superseded by being carried into effect.* ***The condition attached to the plaintiff's right was that he should be able and willing to make restitution in integrum. If so, however free the defendant might have been from any intention to deceive, he was not allowed to retain what he had obtained from the plaintiff by a material mis-statement on which the latter was entitled to rely as being true.*** *This, like the obligation to be honest, was a principle of general application, which did not depend on any special relationship of the parties or duty arising from it.*

But side by side with the enforcement of the duty of universal obligation to be honest and the principle which gave the right to recision, the courts, and especially the Court of Chancery, had to deal with the other cases to which I have referred, cases raising claims of an essentially different character, which have often been mistaken for actions of deceit. Such claims raise the question whether the circumstances and relations of the parties are such as to give rise to duties of *particular obligation which have not been fulfilled. Prior to Derry v Peek (1) the distinction between the different classes of case had not been sharply drawn, and there was some confusion between fraud as descriptive of the dishonest mind of a person who knowingly deceives, and fraud as the term was employed by the Court of Chancery and applied to breach of special duty by a person who erred, not necessarily morally but at all events intellectually, from ignorance of a special duty of which the courts would not allow him to say that he was ignorant. Such a special duty may arise from the circumstances and relations of the parties. These may give rise to an implied contract at law or to a fiduciary obligation. If such* ***a duty can be inferred in a particular case of a person issuing a prospectus,*** *as, for instance, in the case of directors issuing to the shareholders of the company which they direct a prospectus inviting the subscription by them of further capital,* ***I do not find in Derry v Peck (1) an authority for the suggestion that an action for damages for misrepresentation without an actual intention to deceive may not lie. …..***

….. I have only to add that the special relationship must, whenever it is alleged, be clearly shown to exist.

Pg 16 ***fiduciary position imposes on him the duty of making a full and not a misleading disclosure of facts known to him when advising his client.***

Pg. 19 Derry v Peek (1) in certain quarters under protest. When LORD HERSCHELL said (14 App Cas at p 376):

"I think those who put before the public a prospectus to induce them to embark their money into a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, *and I should be very unwilling to give any countenance to the contrary idea," he may have seemed to be giving an apt illustration of the general rule of liability to make good an assurance given. But it appeared it was not so; the decision was the other way, and this position was only changed by Parliament in the Directors Liability Act, 1890. And it should not be forgotten that Derry v Peek (1) was an action wholly and solely of deceit, founded wholly and solely on fraud, was treated by this House on that footing alone, and that this being so what was decided was that fraud must ex necessitate contain the element of actual moral delinquency. Certain expressions by learned lords may seem to have made incursions into the region of negligence, but Derry v Peek (1) as a decision was directed to the single and specific point just set out. But, although the principle was not applied to the position of directors, the principle itself was not abandoned, but was, as has been mentioned, distinctly enunciated.*

Page 20 There is a passage, my Lords, in an argument used by SIR ROUNDELL PALMER in Peek v Gurney (22) (LRep 13 Eq at p 97) which may well afford guidance as to the antecedent state of the law of equity. "Equity will interfere only in the following cases:

First, wherever a contract is to be rescinded; secondly, where fraud in the proper sense of the word is to be redressed; ***thirdly, where a representation has been made which binds the conscience of the party and estops and obliges him to make it good. In the last case the representation in equity is equivalent to a contract and very nearly coincides with the warranty at law, and in order that a person may avail himself of relief founded on it he must show that there was such approximate relation between himself and the person making the representation as to bring them virtually into the position of parties contracting with each other."*** *These principles still remain.*

I ***purposely avoid the term "estoppel," but the principle to be found running through this branch of the law is, in my opinion, this. Once the relations of parties have been ascertained to be those in which a duty is laid upon one person of giving information or advice to another upon which that other is entitled to rely as the basis of a transaction, responsibility for error amounting to misrepresentation in any statement made will attach to the adviser or informer, although the information and advice have been given, not fraudulently, but in good faith.*** *It is admitted in the present case that misrepresentations were made; that they were material; that they were the cause of loss; that they were made by a solicitor to his client in a situation in which the client was entitled to rely, and did rely, upon the information received. I, accordingly, think that the situation is plainly open for the application of the principle of liability to which I have referred - namely, liability for the consequences of a failure of duty in circumstances in which it was a matter equivalent to contract between the parties that that duty should be fulfilled.*

Page 20 ***Once the relation of parties has been so placed, it becomes manifest that liability upon the part of an adviser upon whom rests the duty of doing things or making statements by which the other is guided or upon which that other justly relies, can and does arise irrespective of whether the information and advice given have been tendered innocently or with a fraudulent intent****.*

Page 21 ***The question of fraud cannot be determined apart from the oral evidence…"***

60. ***Queirazza v. Leday and another*** - [2017] 2 BHS J. No. 14 *(quoted brevitatis causa)*

Judgment Delivered by The Honourable Mr. Justice Jon Isaacs, JA:

33 In Hip Foong Hong, there was an application for a new trial. It was not based upon any complaint in connection with the original hearing, but upon the ground that further matter had been disclosed which showed that the defendants' case was so tainted with fraud and dishonesty that, in the interests of justice, the appellants were entitled to have the matter reheard*. The material upon which this charge of fraud was framed in part consisted of the affidavits of* *certain witnesses, one of whom had given evidence at the earlier trial; but chiefly of certain documents of which possession was secured by the issue of a search warrant against one Karanje, one of the respondents' witnesses, who was charged with perjury and absconded from the charge.*

EXHIBITS

1. The Appellants wish to rely on the evidence taken by affidavit in the courts below bearing on questions of fact involved in this Appeal exhibited to this Affidavit; and bring before this Honorable Court by the production of office copies of these affidavits pursuant to Sub-Rule 18(a) of the Court of Appeal Rules, 2005.

2. In relation to this Appeal this Honorable Court draws inferences of fact and gives a judgment and makes an order which ought to have been given or made, and makes such further or other order as this case may require, having the power to do that under Sub-Rule 24(3) of the Court of Appeal Rules, 2005.

3. The following exhibits in this Skeleton representing the evidence taken by affidavit in the courts below listed herein in reverse chronological order of filling dates:

   3.1. AFFIDAVIT OF SEARCH of Yuri Starostenko certifying defaults to appear by John Delaney et al. filed in the Supreme Court (the "SC") on 22nd October 2019;

   3.2. 26TH AFFIDAVIT - ORDER RESTRAINING UBS FROM MAKING APPLICATIONS filed in the SC on 21st October 2019;

   3.3. AFFIDAVIT OF CORPORAL ROLLE, #1297 filed in the SC on 30th September 2019;

   3.4. 24TH AFFIDAVIT - PAYMENT OF US$11,281,645.00 INTO COURT filed in the SC on 17th September 2019;

   3.5. AFFIDAVIT OF RENATE RAEBER filed in the SC on 1st August 2019;

   3.6. 20TH AFFIDAVIT - THE COURT DEALS WITH APPLICATION ON WRITTEN REPRESENTATIONS filed in the SC on 4th June 2019;

   3.7. AFFIDAVIT OF SEARCH of Yuri Starostenko certifying default of appearance by Jack Davis filed in the SC on 31st May 2019;

3.8. 18TH AFFIDAVIT - RESTORE APPLICATION - LEAVE TO SERVE INTERROGATORIES filed in the SC on 17th May 2019;

3.9. AFFIDAVIT OF RENATE RAEBER filed in the SC on 17th May 2019;

3.10. 17TH AFFIDAVIT - STRIKING OUT DEFENCE - GROUND II - FRIVOLITY - ABUSE OF PROCESS filed in the SC on 29th January 2019;

3.11. AFFIDAVIT OF RENATE RAEBER filed on 13th December 2018 in the SC;

3.12. SECOND AFFIDAVIT OF LENA BONABY filed in the SC on 10th December 2018;

3.13. THIRTEENTH AFFIDAVIT - DISMISSAL OF APPLICATION FOR RELIEFS UNDER ORDER 31 filed in the SC on 3rd December 2018;

3.14. NINTH AFFIDAVIT - STRIKE OUT AFFIDAVIT OF LENA BONABY - RE-SWORN BY JOHN DELANEY filed in the SC on 23rd November 2018;

3.15. EIGHTH AFFIDAVIT - REMOVAL OF LIQUIDATORS - APPOINTMENT OF PROVISIONAL LIQUIDATOR(S) filed in the SC on 22nd November 2018;

3.16. SEVENTH AFFIDAVIT - ORDER THAT DEFENDANT SURRENDERS BENEFITS OF EXECUTION filed in the SC on 20th November 2018;

3.17. SIXTH AFFIDAVIT - OFFENCES UNDER THE PENAL CODE - BREACH OF UNDERTAKING GIVEN TO COURT filed in the SC on 12th November 2018;

3.18. FIFTH AFFIDAVIT - ACTIVITIES IN SECURITIES - REGISTRATIONS REQUIRED - OFFENCES UNDER CH. 363 filed in the SC on 8th November 2018;

3.19. AFFIDAVIT OF LENA BONABY filed in the SC on 7th November 2018;

3.20. THIRD AFFIDAVIT of Sergeant Cooper filed in the SC on 6th June 2018;

3.21. AFFIDAVIT of Martin Albury filed in the SC on 18th May 2018;

3.22. FOURTH AFFIDAVIT of Yuri Starostenko for a stay of Writ of Possession of 14th February 2018 filed in the SC on 16th February 2018;

3.23. THIRD AFFIDAVIT of Yuri Starostenko for leave to appeal from Order of 21st December 2017 filed in the SC on 26th January 2018;

3.24. SECOND AFFIDAVIT of Yuri Starostenko for setting aside Order of 23rd March 2015 filed in the SC on 15th May 2017.

Dated the 4th November of 2019.

Respectfully submitted,

Irina Tsareva *pro se*