COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp & CAIS No. 23 of 2021

BETWEEN

GREGORY COTTIS

(as Executor of the Estate of Raymond Adams)

Intended Appellant

AND

ROBERT ADAMS

(a beneficiary of the Estate of Raymond Adams)

Intended Respondent

Before: **The Hon Mr. Justice Jones, JA**
The Hon Mr. Justice Evans, JA
The Hon Madam Justice Bethell, JA

Appearances: **Mr. Damian Gomez, QC, with Ms. Paula Adderley, Counsel forAppellant**
Mr. Christopher Jenkins, with Mr. Sebastian Masnyk, Counsel for Respondent

Dates: **22 April 2021; 10 May 2021; 7 October 2021**

Civil Appeal- Application for leave to appeal- Non Compliance with Unless Order- Order 31A Rule 25(3)-Sanctions- Prospects of Success

On 29 December 2020 the Honorable Madam Justice Charles refused the intended appellant's request for a relief of sanctions imposed by the learned judge for non-compliance with an Unless Order. The intended appellant now seeks leave of this Court to for an extension of time to appeal the said Order on the grounds that, inter alia, the learned judge erred in punishing the intended appellant for non-compliance with the Unless Order, that the learned judge erred in law when she adopted her interpretation of Order 31A Rule 25(3) of the RSC and she erred in fact and law when she failed to advert properly or at all to the myriad of emergency regulations promulgated by the Competent Authority during the State of Emergency and the universal extensions of time for the doing of acts required by the Supreme Court and considering their respective and cumulative affection upon the intended appellant and his ability to perform them. The Court heard the parties and reserved its decision.

Held: Application for leave to appeal dismissed. The intended appellant is to pay the costs of this application to the respondent.; Such costs to be taxed if not agreed.

The learned judge's reasons for dismissing the intended appellant's action have been set out fully in her judgment and are in my view clearly reasoned and discloses no error of law. The intended appellant has had a long and blemished history of non-compliance with court orders, as well as non-cooperation with the Judicial Trustee. There is no reason to suppose that this conduct may change and every reason to surmise that this conduct is part of an intentional strategy to delay the action from proceeding.

The learned judge clearly acted consistent with the powers granted to her and there was evidence to support her findings. As an appellate court being cognizant of the principles in **Hadmor Productions Ltd v Hamilton** which has been consistently applied by this Court I can see no reason to interfere with the exercise of that discretion.

Darlene Allen-Haye v Keenan Baldwin and Brittany Baldwin SCCivApp. No. 186 of 2019 considered
Smith v Cosworth Casting Processes Limited (1997) 4 All ER 840 considered
Keod Smith v Coalition to Protect Clifton Bay (SCCivApp No. 20 of 2017 considered
Darlene Allen-Haye v Keenan Baldwin and Brittany Baldwin SCCivApp. No. 186 of 2019.
G v G [1985] 2 All ER 225 (HL) considered
Hadmor Productions Ltd v Hamilton [1983] A.C. 191 (HL). considered

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J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Milton Evans, JA:

1. This is an application made by the intended appellant Gregory Cottis by Notice of Motion herein filed on the 12 February 2021 for leave to appeal the interlocutory order of the Honourable Madam Justice Indra Charles dated 29 December 2020. By that aforesaid Order the learned judge ruled that, the intended appellant's application for relief from sanctions made by summons filed on 6 November 2020 '*is hereby dismissed and the Defendant's Defence filed on 11 June 2019 remains struck out as of 13 November 2020 by operation of the Unless Order filed on 24 September 2020'*.

2. The intended appellant applied to the Court below for leave to appeal, to which the application was refused on the 5 February 2021. Having failed to obtain leave from the Court below, Mr. Cottis has renewed his application to this Court of Appeal for leave to appeal**.** Attached to an affidavit sworn by him and filed on the 12 March 2021 was a draft of a Notice of Motion containing the proposed grounds of appeal which the intended appellant proposed to rely upon. These were as follows:

> **"1. That the learned and Honourable Madam Justice Indra Charles erred in law by in effect punishing the Appellant for his non-compliance with an Unless Order dated the 7th day of September A. D., 2020 when the evidence of the Appellant's blindness showed that it incapacitated the Appellant from a date in December, 2019 and continues to so afflict the Appellant and prevented the Appellant from complying with any of the Orders dated the 17th day of December, 2019 and the 7th day of September A. D., 2020 such that the said non-compliance was neither intentional nor contumacious.**
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> **2. That the learned and Honourable Madam Justice Indra Charles erred in law and adopted an interpretation of Order 31A Rule 25(3) of the Rules of the Supreme Court, 1978 as circumventing the curative powers of the Honourable Supreme Court to enable a party in the circumstances of the Appellant to be heard on the merits of his Defence when his blindness negated his ability to comply with the said orders recited in ground 1 hereof so as to deprive the Appellant of the right to a hearing as guaranteed by Article 20(8) of the Constitution, 1973. Alternatively, the learned and Honourable Madam Justice Indra Charles ought to have held that Order 31A Rule 25(3) of the Rules of the Supreme Court, 1978 infringed the Appellant's right to a hearing at trial as guaranteed by Article 20(8) of the Constitution of The Bahamas, 1973 and to further have held that the Honourable Supreme Court continues to have the unfettered discretion to relieve a person in the circumstances of**

the Appellant from sanctions and ought further to have extended the time for the Appellant to file and serve his List of Documents.

3. The Learned Madam Justice Indra Charles erred in fact and in law in failing to advert properly or at all to each of the Covid-19 pandemic, the Declaration of a State of Emergency on the 17th March, 2020, the myriad plethoric Emergency Regulations promulgated by the Competent Authority during the continuing State of Emergency, and universal extensions of time for the doing of acts required by, inter alia, orders of the Supreme Court whether filed or unfiled and all of them AND their respective and cumulative affection upon the Applicant herein as a legally blind person to comply with any order whether filed or unfiled requiring the Applicant to compile his List of Documents of documents located at the Applicant's chambers AND not at his residence. The learned Madam Justice Charles ought to have so adverted and to have granted the relief from sanctions sought by the Applicant or alternatively, to have extended the time for filing the Applicant's List of Documents pursuant to the Constitutional jurisdiction of the Supreme Court and her Constitutional duty to uphold the Applicant's right to a fair hearing of his Defence in the circumstances of the proceedings before her".

3. This application arises from a matter in which Robert Adams, the principal beneficiary of the Estate of his late Father Raymond Adams commenced an action in August 2018 against Gregory Cottis, then the sole Executor of the Estate. The Statement of Claim sets out a detailed claim against Mr. Cottis, alleging negligence and other misconduct in the administration of the Estate, which has been ongoing since 2004, and remains unresolved. The Statement of Claim also sought Mr. Cottis' removal as Executor.

4. The intended appellant's Defence was not filed until the 11 June 2019 although an extension had been granted by the Court on 8 May 2019, requiring the Defence to be filed by 6 June 2019.

5. The learned judge in her written ruling dated the 29 December 2020 set out the background as to what lead to the order which is the subject of the intended appellant's challenge as follows:-

"Directions Order

[4] At the hearing on 17 December 201 9, when Mr. Cottis was represented by his Counsel, Mr. Loren Klein (as he then was), the Court made an order requiring both parties to file and

exchange their Lists of Documents by 20 March 2020 with inspection to occur within 14 days thereafter. The Court also directed that there be a further case management hearing on 25 March 2020 at 10:00 a.m. ("the December 2019 Order'). At the hearing, Mr. Klein informed the Court that Mr. Cottis had an eye condition and was not present in Court as he was unable to drive. Mr. Klein also advised that Mr. Cottis would be changing attorneys. It was for this reason that the Court gave a generous 12-week period to allow for exchange of Lists of Documents.

[5] Mr. Adams complied in full with the December 2019 Order and filed his List of Documents on 20 March 2020. On the same day, Mr. Jenkins appearing as Counsel for Mr. Adams, emailed Mr. Cottis' new attorney Mr. Gomez QC, indicating that his client was ready to exchange his List of Documents on that day. Mr. Gomez QC responded stating as follows:

"Due to the declaration of a state of emergency and the attendant regulations, our client is unable to comply with the Court order. Our offices are closed until the emergency expires. Moreover, you are aware of our client's eye problems."

[6] The Court takes judicial notice that the Declaration of the State of Emergency and Emergency Powers (Covid-19) Order came into effect on or about 20 March 2020, the date of the deadline for compliance. Mr. Cottis has not (either before or since) applied for an extension of time or any relief from sanctions. It is beyond question that an application for relief from sanctions must be made promptly. Indeed RSC O.31A r. 24 speaks to that. Mr. Cottis had at this stage never produced any evidence that his eye problem would prevent him with the assistance of his office and/or his attorneys from complying with the December 2019 Order.

[7] Six months later on 17 June 2020, Mr. Adams issued a Summons for an Unless Order since Mr. Cottis had still not complied with the December 2019 Order and no application for Extension of Time had been made.

[8] The Unless Order Application was heard on 7 September 2020 in the presence of learned Queen's Counsel Mr. Gomez who appeared for Mr. Cottis ("the Unless Order"). The Unless Order included an order that Mr. Cottis was to pay Mr. Adams' costs fixed in the sum of $3,000 forthwith.

[9] The Unless Order was filed and served on 13 October 2020. A further letter demanding payment of the costs as ordered was sent on 15 October 2020. To date, Mr. Cottis has not complied with the Unless Order".

The Application for relief from Sanction

6. By Summons filed on 5 November 2020, the intended appellant sought an order of the Court relieving him from sanctions pursuant to Order 31A rule 25A of the Rules of the Supreme Court ('RSC 0. 31A r.25A"). The Summons was supported by an Affidavit of Anthony McKinney QC which was sworn to on 22 November 2020 and filed on 24 November 2020. The aforesaid affidavit exhibited a letter dated 10 November 2020 from Dr. William E. Smiddy of the Bascom Palmer Eye Institute, Miami, Florida, United States of America.

7. In referring to the letter from Dr.Smiddy the learned Judge observed as follows:-

"[2] The essence of Dr. Smiddy's letter is that Mr. Cottis is unable to perform his usual duties since he has had retinal detachments and surgeries in both eyes and has and is still very limited in his visual function. According to the doctor, Mr. Cottis still is legally blind. The doctor further wrote:

"We are hoping that the surgeries on both eyes that were most recently done yesterday and about a week prior will restore some vision but this will take at least another month."

[3] It is upon these brief facts that Mr. Cottis seeks relief from sanctions. The Plaintiff ("Mr. Adams") vehemently opposes the application and asserts, in a nutshell, that Mr. Cottis, a member of the Bahamas Bar and no stranger to litigation, has failed to give a good reason for the failure to comply when he has a legal team and administrative staff. In addition, Mr. Cottis has intentionally and consistently breached orders of the Court. Mr. Adams further contends that ((i) to grant relief would undermine the administration of justice and encourage other litigants to follow suit; (ii) the failure was not due to his counsel; (iii) no evidence was adduced to demonstrate that the failure to comply can be remedied without compromising the impending trial dates and (iv) if the Court declines to grant relief, Mr. Adams will still have to prove his case."

8. After hearing submissions from Counsel the learned judge made the following findings:

"[45] In the present case, Mr. Cottis is unable to satisfy the three mandatory requirements at RSC O. 31A r. 25(2). As the evidence unfolded, it is plain that Mr. Cottis has had a long and blemished history of non-compliance with court orders, as well as non-cooperation with the Judicial Trustee. As Mr. Jenkins correctly submits, there is no reason to suppose that this conduct may change and every reason to surmise that this conduct is part of an intentional strategy to delay the action from proceeding. Furthermore, notwithstanding his medical condition, Mr. Cottis has offered no explanation as to why he has been unable to progress the work of drafting the List of Documents with the assistance of his very capable legal team and his own administrative staff. To date, Mr. Cottis has proffered not a shred of evidence as to when he intends to comply with the December 2019 Order.

[46] I therefore agree with Mr. Jenkins that to grant the relief from sanctions in the face of such brazen and consistent non-compliance would not be in the interests of the administration of justice. Orders must be obeyed, otherwise the rule of law tends to be undermined. The breaches have not and cannot be blamed on Mr. Cottis' legal team. Were relief to be granted, the March 2021 trial dates would be compromised and any extended deadline would, in all likelihood, also be compromised, given Mr. Cottis' past conduct. Another trial date in 2021 (of four days) would be an impossibility.

[47] Furthermore, even if the application for relief from sanctions is dismissed, Mr. Adams will still have to prove his case that he is entitled to the relief sought, and damages would still need to be assessed." [Emphasis Added]

9. The intended appellant as indicated made an unsuccessful application to the Court below. The intended appellant in his application for leave before the Court below relied on the following proposed grounds:

"1. The learned judge erred in law by in effect punishing Mr. Cottis for his noncompliance with the Unless Order dated 7 September 2020 when the evidence showed that Mr. Cottis was incapacitated by blindness from 3 December 2019 and the blindness prevented him from complying with the 4 Orders dated 17 December 2019 and 7 September 2020 such that the said non-compliance was neither intentional nor contumacious; and

> **2. The learned judge erred in law and adopted an interpretation of Order 31A rule 25(3) of the Rules of the Supreme Court ("RSC") as circumscribing the curative powers of the Court to enable a party in the circumstances of Mr. Cottis to be heard on the merits of his Defence when his blindness negated his ability to comply with the said orders recited in ground 1 so as to deprive him of his right to a fair hearing as guaranteed by Article 20(8) of the Constitution of The Bahamas ("the Constitution"). Alternatively, the judge ought to have held that Order 31A rule 25 (3) infringed Mr. Cottis' right to a fair hearing as guaranteed by the Constitution and further that the Court had and continues to have unfettered discretion to relieve a person in the circumstances of Mr. Cottis from sanctions and ought further to extend the time for him to file and serve his List of Documents".**

10. The learned judge dismissed the intended appellant's application finding that the proposed appeal had no prospects of success. The intended appellant now renews his application for leave to appeal before this Court.

THE LEGAL POSITION

11. In ***Smith v Cosworth Casting Processes Limited*** (1997) 4 All ER 840 **Lord Wolff,** opined as follows:

> **(1) "The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.**
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> **(2) The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying."**

12. In ***Keod Smith v Coalition to Protect Clifton Bay*** **(**SCCivApp No. 20 of 2017), Isaacs JA adopting the guidance from Lord Wolff noted at paragraph 23 of the Judgment:

> **"The test on a leave application is whether the proposed appeal has realistic prospects of success or whether it raises an issue that should in the public interest be examined by the court or whether the law requires clarifying: per Lord Woolf in *Smith v Cosworth Casting Process Ltd* [1997] 4 All ER 840."**

PROSPECTS OF SUCCESS

13. Mr.Gomez, QC submitted that the intended appeal has a real prospect of success while also raising a point of public interest to wit. access to justice in the pandemic circumstances of the last year, together with the interpretation of O31A Rules 1 and 25.

14. In support of the application before us the intended appellant relies on his Affidavit in support of the Notice of Motion which was filed on the 12th March, 2021. Attached to that affidavit was a bundle of documents comprising the documents filed in the Court below by the parties up to date of that affidavit.

15. The written submissions of the intended appellant was comprised of his understanding of the facts and legal submissions based on those facts. I find it helpful to set out the salient portions of those submissions as follows:

> **"13. On the 3rd December, 2019, Mr. Cottis suffered from detached retinas and is operated on. He is incapacitated. So much so, that he was unable to attend Court on the 17th December, 2019, when the Court ordered him to file and serve his List of Documents by the 20th March, 2020. During the year 2020, Mr. Cottis' eye problems worsened. In addition, his Attorney, Loren Klein withdrew as Counsel to take up a Judicial Appointment.**
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> **14. Mr. Cottis engaged the services of Damian Gomez QC and McKinney Turner and Co. On the 17th March, 2020, a State of Emergency was declared in The Bahamas and restrictions imposed on the opening of businesses and on the ability of persons to be outside their residential property. The evidence of these regulations is exhibited as GC5 tabs 1 through 131. Amongst the regulations were certain Supreme Court Protocols issued by the Honourable Chief Justice, Sir Brian Moree, who was also Mr. Cottis' first Counsel in this litigation.**
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> **15. On the 1st April, 2020, the Honourable Chief Justice promulgated SI No. 35 of 2020, the Supreme Court (Covid19) Rules, 2020. (Tab 112 of Exhibit GC5) Rule 1(2): "These Rules shall be deemed to have come into force on the 17th day of**

March, and shall remain in effect for fourteen days following the cessation of the public emergency declared by the Proclamation of Emergency made the 17th March, 2020...or any extension thereof ...or such other date as may be specified by the Rules Committee.

16. Rule 2 EXTENSION OF TIME FIXED UNDER RULES OF THE SUPREME COURT "Any period of time fixed by the Rules of the Supreme Court...Court order or direction for filing any document or...doing any act or thing under such Rules, which would expire during the aforesaid period of emergency, shall be extended to fourteen days following the cessation of the public emergency."

17. Similar rules were subsequently made extending the time fixed for complying with Court Orders and Directions. See tabs 113 and 114 to Exhibit GC5. On the 10th August, 2020, the time for complying with the order dated the 17th December, 2019, had been extended to the 7th September, 2020.

18. Notwithstanding the legal effect of the said extensions of time, the Respondent purported to complain that Mr. Cottis was in breach of the Order of the 17th December, 2019, and Her Ladyship accepted the same. Yet, this was a legal and factual impossibility!

19. On the 17th June, 2020, the Plaintiff filed its Summons for the Unless Order supported by the Affidavit of Sebastian Masnyk (see tabs 34 and 35 of Exhibit GC1)

20. The Affidavits of Anthony McKinney QC (tabs 36, 39 and 43 to Exhibit GC1) and the Affidavit of Gregory Cottis (at tab 41to Exhibit GC1) detail the eye problems of the Applicant and their contribution to his inability to file his List of Documents as contemplated by the Order of the 17th December, 2019.

21. Also, there were a number of Regulations which impeded the function of Attorneys who were all restricted from working in Chambers. The following are examples attached to Exhibit GC5:- Tab 2 March 19th, 2020, Order suspending the operation of ALL establishments, businesses etc.; Tab 4 March 23rd, 2020, Order Authorized operation of Business only by working remotely; Tab 34 May 29", 2020, Order permitted Law Firms to work in Chambers 9:00 am and 5:00 pm; Tab 64 August, 4th, 2020, Order introduced 24 hour curfew; Tab 83 August, 19th, 2020, Order extended 24 hour curfew; Tab 87 August, 25th,

2020, Order permitted Attorneys to work in Chambers for urgent civil cases; Tab 89 August 30, 2020, Order permitted Law Firms to open between 9:00 am and 5:00 pm, with no more than two partners permitted to be present. (Still in effect).

22. Also of note, are the Protocols affecting the Courts' operations. Trials were adjourned and rescheduling of such trials foreshadowed.

23. The Applicant applied for relief from sanctions on the 6th November, 2020 (at Tab 37 of GC1), immediately after being operated on about the 2™ November, 2020 in respect of the two detached retinas. Indeed the only medical evidence confirmed the operations AND that it would take at least one month before Dr. Smiddy would be in a position to give a prognosis, AND that the Applicant was legally blind i.e. unable to read. In the face of this unchallenged evidence, Her Ladyship found that the Applicant was to be blamed for his inability to provide a List of Documents!

24. Her Ladyship opined that the Applicant's legal team could have compiled the List of Documents and confirmed its veracity without the input of the Applicant. This was most unfortunate, in that implicit in that opinion is the assumption that Counsel for the Applicant would be prepared to review files of the Applicant in his absence and brave the possibility of invading the confidences of non-beneficiaries of the Raymond Adams' Estate. This assumption imputes to Counsel a willingness to expose himself to third party lawsuits and contempt proceedings, a most unreasonable proposition.

25. The Learned Madam Justice Indra Charles heard and dismissed the application for relief from sanctions. The Applicant now seeks leave to appeal from Her Ladyship's Order.

26. It is clear that as at the 7th September, 2020, the Applicant was not in breach of the Order dated the 17th December, 2019, AND that Her Ladyship apprehended that he was in breach of the 17th December, 2019, Order. It is also clear that this misapprehension of the facts prevailed in her determination of the application for relief from sanctions and the subsequent leave to appeal application. The Applicant relies on this misapprehension as a basis for leave being granted to him. For

clarity, the Applicant maintains that there was no legal basis for the Unless Order and that it ought never to have been made!

27. It is also clear from the Regulations that ordinary legal services provided from Chambers were impaired, a factor affecting the listing of documents for Mr. Cottis even on the earlier criticized assumption of the Learned Judge.

28. It is submitted that Her Ladyship paid too little advertence to the State of Emergency and its impact on the litigation affecting the Appellant and the Respondent herein in her determination to refuse relief from sanctions. This was a significant error affecting all of the intended grounds of appeal.

29. In the reasons given by the Learned Judge, she paid very little attention to the effect of the myriad of Emergency Regulations which affected the litigation. Quite plainly, she erred in finding that after the declaration of the State of Emergency, Mr. Cottis was required to seek an extension of time for compliance when the Supreme Court Protocols had negated that requirement up until she made the Unless Order on the 7th September, 30. 2020. Indeed, up until that date, the Applicant was not in breach of the Order of the 17th December, 2019, and the business restrictions imposed on the public was an additional basis for establishing that there was NO intention to ignore the Order of the 17th December, 2020.

30. Order 31A Rule 25 RSC, 1978 is the Bahamian equivalent of the English CPR 3.9. The Bahamian provision is set out at paragraph 20 on page 8 of Her Ladyship's ruling. Her Ladyship accepted that the application satisfied the formalities of Rule 25(1), but held that Mr. Cottis failed to show any of the "mandatory" matters listed in Rule 25(2)(a), (b), and (c). Her Ladyship then considered the factors set out in Rule 25(3) and ruled against Mr. Cottis in respect of each of the five factors.

31. It is submitted that the Ruling of Her Ladyship completely and errantly failed to advert to the numerous regulations which prevented Mr. Cottis from providing a List of Documents between 17th March, 2020 and 7th September, 2020. Her Ladyship further erred in not finding that Mr. Cottis had the benefit of a statutory extension of time up to the date of the Unless Order of the 7th September, 2020. Further, Her Ladyship erred in not accepting the only medical evidence of Mr. Cottis' detached retinas and of surgeries to correct the same

during the periods 17th December, 2019 to the 17th March, 2020, and the 17th March, 2020 up to the date of the Unless Order and thereafter and of his being legally blind during those periods and the inability of the doctor to give any further prognosis for a month following the 10th November, 2020 Medical Report.

32. On the medical evidence there was ample evidence that the delay was neither intentional nor attributable to Mr. Cottis. Yet inexplicably, the Learned Judge ignored this evidence.

33. Further, the Learned Judge failed to advert to the impact of the Emergency Orders and Supreme Court Protocols upon the Courts Calendar nor how this separate affectation mitigated the impact of the delay in the production of the List of Documents. Her Ladyship's failure to take judicial notice of these matters was an error affecting the exercise of her discretion.

34. Moreover, in the face of the Applicant's detailed Defence, Her Ladyship made a finding of negligence against him without any trial or any hearing of evidence on his behalf. This is yet a further matter upon which the Applicant relies for the grant of leave to appeal.

35. It is further submitted that Her Ladyship was not as restricted in the exercise of her discretion as she found herself to be by Order 31A, Rule 25(2) RSC, 1978".

16. Mr. Jenkins in response contended that the proposed appeal is hopeless and that the Court should dismiss the intended appellant's Motion, and refuse the extension of time and leave to appeal.

17. Counsel submitted that this Court should first of all consider that this application relates to an application for leave to appeal the Relief Ruling. It is not an appeal of the decision of the Court on 7 September 2020 to make an Unless Order; nor is it an appeal of the decision of the learned judge not to give leave to appeal. He argues that the intended appellant in his written submissions has conflated these three decisions as one.

18. Mr. Jenkins further submitted that the intended appellant as a result of that conflation has impermissibly sought to rely on documents which were not before the learned judge during the application for relief from Sanction. Counsel noted that at the hearing for relief from Sanction the Court had before it from Mr. Cottis: (a) a summons filed on 5 November 2020 (though dated 6 November 2020)16, seeking relief from sanction; and (b) a very brief affidavit sworn by Anthony McKinney on 24 November 2020, containing only general averments as to Mr. Cottis' medical condition, which itself simply exhibited a 6 line letter

from Dr. William Smiddy, Mr. Cottis' eye doctor in Florida dated 20 November 2020; This Counsel said was the evidence for the intended appellant.

19. Mr. Jenkins asserted that the Court also had from the respondent the affidavit of Sebastian Masnyk filed on 17 June 2020, which set out detailed evidence of the history of Mr. Cottis' non-compliance with Court Orders and directions in the matter. The evidence of Mr. Masnyk had not been challenged by any affidavit evidence for or on behalf of the Appellant and at the Relief Hearing was undisputed. Counsel further noted that since the determination of his application for leave below, the intended appellant has purported to file a List of Documents which was filed over a year after discovery was Ordered in December 2019. Mr.Jenkins contends that this has no relevance to Mr. Cottis' application, and should also be disregarded. Further that the List is, in any event, woefully inadequate and incomplete.

20. Mr. Jenkins submitted that all other documents on which the intended respondent now seeks to rely should be disregarded by this Court in assessing the merits and strength of the underlying appeal as no explanation has been proffered as to why the evidence was only provided after the Relief application had been determined.

21. This is an opportune point at which to consider the legal principles which apply when a court is considering an application for relief from Sanction. RSC O.31A r. 25 provides for relief from sanctions. The Court may grant relief from sanction if the defaulting party is able to satisfy the prescribed test, which is set out as follows:

> **"25. (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be —**
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> **(a) made promptly; and**
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> **(b) supported by evidence on affidavit.**
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> **(2) The Court may grant relief only if it is satisfied that —**
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> **(a) the failure to comply was not intentional;**
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> **(b) there is a good explanation for the failure; and**
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> **(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.**
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> **(3) In considering whether to grant relief, the Court must have regard to —**
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> **(a) the interests of the administration of justice;**
>
> **(b) whether the failure to comply was due to the party or that party's counsel and attorney;**

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party.

(4) The Court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

22. This Court (differently constituted) recently had occasion to speak to these principles in the case of **Darlene Allen-Haye v Keenan Baldwin and Brittany Baldwin** SCCivApp. No. 186 of 2019. In delivering the Judgment of the Court Crane-Scott JA stated as follows:

"**45. We commence our consideration of the prospects of success of the intended appeal recognizing that the imposition of the strike-out sanction at the Case Management Conference on 29 March 2018, as well as the learned judge's subsequent refusal to grant relief from sanction are both case management decisions made under the authority of the Supreme Court (Amendment) Rules, of 2004 and 2010 respectively. See S.I. No. 44 of 2004 and S.I. No. 11 of 2010. These amendments revolutionized civil proceedings in this jurisdiction by introducing a case management regime into the existing Rules of the Supreme Court, 1978. The amendments effectively placed the conduct of civil proceedings under the control of the Court and brought The Bahamas in line with similar reforms which since 1999 have been undertaken in the United Kingdom and across the Commonwealth. See O. 31A RSC – *Case Management by the Court.***

46. Under O. 31A, judges of the Supreme Court are expressly mandated to actively manage civil cases before them and, inter alia, may give directions to ensure that the trial of the case proceeds quickly and efficiently and that no party gains an unfair advantage by reason of that party's failure to give full disclosure of all relevant facts prior to the trial or the hearing of any application. See for example: O. 31A r. 1(l) and (m).

47. While we appreciate that we are not hearing the appeal and are merely assessing the prospects of success of the intended appeal, we have nonetheless adverted to the following principle stated by Lord Justice Lawrence Collins in *Walbrook Trustee*

(Jersey) Ltd & ors v. Fattal & ors **[2008] EWCA Civ 427. Writing for the England and Wales Court of Appeal, Lord Justice Collins explained:**

"33…These were case management decisions. I do not need to cite authority for the obvious proposition that an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge. **" [Emphasis ours]**

48. At paragraph 6 of her affidavit-in-support, Mrs. Allen-Haye asserts that the prospects of success of the intended appeal are very good. However, as is obvious from the affidavit itself, rather than discussing the chances of success of her appeal against the judge's decision, she chose instead to focus on the prospects of success of her Defence to the Writ action in the court below. In so doing, Mrs. Allen-Haye evidently lost sight of the reality that her intended appeal is against an interlocutory decision made within the context of the judge's case management powers under O. 31A. As such, it is, accordingly, limited only to a request for an appellate review of the correctness (or otherwise) of the judge's decision to refuse relief from the strike-out sanction imposed at the Case Management Conference held before her on 29 March 2018.

49. In her Notice of Appeal Motion Mrs. Allen-Haye seeks the following relief namely: (i) an order from this Court quashing the learned judge's written Ruling handed down on 10 October, 2019 in which the judge refused to grant relief from the sanction which she had imposed on 29 March, 2018 by which Mrs. Allen-Haye's Defence was ordered struck-out if she failed to file a List of Documents within the time limited for so doing; (ii) an order restoring the Defence; and (iii) an order remitting the Writ action to the Supreme Court for hearing and determination before another judge.

50. The Notice of Appeal Motion identifies some 12 complaints about the learned judge's Ruling. There is no need to reproduce them here as we are not satisfied that any of the intended grounds has any realistic prospect of success for the further reasons which now follow.

51. On close review, grounds 1 and 2 are not in fact challenges to the judge's Ruling of 10 October, 2019 at all. They both overlapped and seek instead to challenge the propriety of the strike-out sanction which the judge had imposed at the 29 March 2018 Case Management Conference. As Mrs. Allen-Haye's intended appeal is clearly expressed to be from the judge's written decision handed down on 10 October 2019 refusing relief from the strike-out sanction already in place, grounds 1 and 2 have absolutely no prospects of success.

52. At grounds 3 through 6 of the intended appeal Mrs. Allen-Haye seeks to impugn the exercise of the judge's discretion to refuse relief on the basis that in her written Ruling the judge failed to consider or to give reasons for failing to apply the principles contained in any of the case law authorities which had been cited to her at the hearing, including one case cited on behalf of the Baldwins which, she claimed, was favourable to her. It was obvious that the four grounds overlapped and made the same broad complaint. The complaint that the judge did not consider the authorities which were cited to her, however, is unlikely to succeed since the parties' respective submissions (including the authorities they relied on) were clearly summarized at paragraphs 10 and 11 of the written Ruling. Furthermore, at paragraph 23 of her Ruling, the learned judge clearly stated that she had considered the authorities cited by the respective parties.

53. As for the individual grounds, we are also satisfied that none of the four intended grounds has any realistic chance of success. As we see it, none of the authorities cited on Mrs. Allen-Haye's behalf related to the exercise of the courts powers during case management proceedings to impose sanctions or to give relief from sanctions under the CPR. The cases had absolutely no bearing on the exercise of the judge's power to grant relief from sanction and as such were clearly irrelevant both on the facts as well as on the law from the application which the judge was considering.

54. Re Martin Corey [2013] UKSC 76 cited on Mrs. Allen-Haye's behalf for example, involved an appeal to the English Supreme Court from judicial review proceedings instituted by Corey, a life prisoner (who had been convicted of the murder of two police officers and sentenced to life imprisonment; and subsequently released on licence by the Secretary of State for

Northern Ireland) who was recalled to prison some 18 years following his release. A panel of parole commissioners sat in a closed hearing to consider certain confidential information provided by the security services, and determined that his release on licence should be revoked. Corey then initiated judicial review proceedings in which he challenged the proposed revocation of the licence and alleged that his article 5 rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms had been violated. Clearly, Corey established no principle of law which is remotely relevant to the application and the judge could not be faulted for not relying on the case.

55. In ground 5 Mrs. Allen-Haye complains that the learned trial judge erred in failing to consider or to apply the principle laid down in *Husband's of Marchwood Ltd v. Drummond Walker Developments Ltd* [1975] 1 WLR 603, as applied in *Arrow Nominees Inc v. Blackledge* [1999] EWHC Ch. 198 to the facts of the case. The specific principle which counsel for Mrs. Allen-Haye contends the learned judge failed to apply is that found at paragraph 41 in Arrow, namely, that the object of order 24 rule 16 of the English RSC is not to punish the offender for his or her conduct but to secure the fair trial of the action in accordance with the due process of the court.

56. Unfortunately, what counsel for Mrs. Allen-Haye fails to recognize is that these two authorities were decided against the background of order 24 r. 16 of the 'old' English R.S.C. and were decided before the advent of the case management procedures introduced by the English Civil Procedure Rules, 1999. The principle in Arrow undoubtedly still applies in this jurisdiction in those situations where a party has failed to comply with the discovery and inspection rules in O. 24, or with an order for discovery made by a judge in pursuance of O. 24. However, the case law applicable to O. 24 r. 16 of the Bahamas RSC, 1978, does not govern the wide case management powers conferred on the Supreme Court by O. 31A to actively manage the conduct of civil proceedings during the course of case management proceedings before it.

57. Under O. 31A, the Supreme Court now has power to, inter alia, give directions to ensure that the trial of the case proceeds quickly and efficiently. As the learned judge correctly held, O. 31A empowered her in the exercise of her discretion in

<u>case management proceedings, to impose strike-out sanctions to ensure compliance with her directions; and in appropriate cases, to grant relief from any sanction so imposed.</u> Once again, the judge cannot be faulted for not applying nor seeking to distinguish principles laid down in cases which had no relevance to the matter before her. As we see it, there is no merit in ground 5 which has no realistic chance of success on appeal.

58. In similar vein, at ground 6 of the intended appeal, Mrs Allen-Haye complains that the learned judge erred by failing to apply or to give any reasonable consideration to the case of *Samuels v. Linzi's Dresses Ltd* [1981] Q.B. 115 (cited by counsel for the Baldwins) which, Mr. Wallace-Whitfield contends, was favourable to her. As we noted earlier, there is little merit in the complaint that the judge failed to consider the case in the light of paragraph 23 of the written ruling where the judge clearly indicated that she had considered all the authorities cited to her by the respective parties.

59. Samuels was decided in 1981, several years before the introduction into English civil practice and procedure of the case management procedures by way of the Civil Procedure Rules. The case revolved around the scope of O. 3 r. 4 of the 'old' Rules of the English Supreme Court (corresponding to our RSC O.3 r. 4) and the question whether the court had jurisdiction under the rule to enlarge or abridge the time fixed in an "unless" order which had not been complied with. The issue was settled by the English Court of Appeal in the following dictum of Roskill LJ who, after a comprehensive review of relevant authorities, stated:

"*41. In my judgment, therefore, the law today is that a Court has power to extend the time where an "unless" Order has been made but not been complied with; but that it is a power which should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored. Presumably, it is a question for the discretion of the Master or the Judge in Chambers whether the necessary relief should be granted or not.*" [Emphasis added]

60. In *Biguzzi v. Rank Leisure plc* [1999] 1WLR 1926 Lord Woolf MR endorsed the view that decisions under the former Rules of the Supreme Court were likely to be of limited assistance in construing the Civil Procedure Rules which had given the court broader and more flexible powers to manage

proceedings. Some years later, in *Marcan Shipping (London) Ltd v. Kefelas and another* [2007] 1 WLR 1864, the English Court of Appeal found that conditional orders were not a recent phenomenon. Delivering the Court's decision, Moore-Bick LJ examined the earlier authorities and made the following observation:

***"14….both prior to and after the decision in Samuels v. Linzi Dresses Ltd [1981] QB 115, that a failure to comply with an "unless" order caused the sanction to become effective without the need for any further order, and although this court held that there is jurisdiction to grant relief by extending time for compliance, it appears also to have accepted that the onus was on the person against whom the sanction operated to seek relief. Although…the distinction between the operation of the sanction and the exercise of the court's discretion to grant relief may subsequently have become blurred, it does not appear to have been altogether lost.*" [Emphasis added]**

61. The English Court of Appeal also adverted to the provisions of Part 3 of the CPR (corresponding to O. 31A of our Rules) and made the following observation which, in our view, apply with equal effect to the court's powers under O. 31A of our Rules:

***"16. Perhaps the first thing to note about Part 3 is that it is concerned with the courts powers of management generally. The court's power under rule 3.1(3) (b) to impose sanctions for the failure to comply with an order is but one of a wide range of powers designed to ensure that proceedings are conducted efficiently, not only in the interests of the parties themselves, but also in the wider interests of the administration of justice and the furtherance of the overriding objective. Of particular relevance to the present case are the powers to extend time for compliance with any rule, practice direction or court order, even where time has already expired (rule 3.1(2)(a) and the court's power to make orders of its own initiative: rule 3.3. The general power to strike out a party's statement of case for failure to comply with a rule, practice direction or court order (rule 3.4(2) (c)) must be viewed in this context.*" [Emphasis added]**

62. Between paragraphs 34 through 36 of its decision in *Marcan*, the English Court of Appeal explained the consequences which flowed from non-compliance with a sanction imposed pursuant to court's case management powers

under Part 3 of the CPR. It is unnecessary to extract the relevant guidance for purposes of our Judgment. We would simply say that it provides useful guidance to us here in this jurisdiction in any case where a sanction or other conditional order is embodied (or is proposed to be embodied) in a case management order made under O. 31A of our current Rules.

63. As we have already noted, in her Notice of Appeal, Mrs. Allen-Haye is not appealing the judge's order of 29 March 2018 in which the strike-out sanction was imposed. Indeed, she seeks only to impugn the written Ruling of 10 October 2019 refusing relief from the sanction. For the reasons we have just outlined, we are satisfied that the learned judge was not wrong in not applying the principles in the cases cited to her, or in not distinguishing them in the course of her written Ruling. In the circumstances, we are satisfied that grounds 3 through 6 of Mrs. Allen-Haye's intended appeal have no real prospects of success.

64. Ground 7 of the intended appeal, Mrs. Allen-Haye complains that at paragraph 21 of her written Ruling the judge erroneously found that Mrs. Allen-Haye's application for relief from sanction had not been made promptly. As the judge's Ruling clearly shows, Mr. Wallace-Whitfield appeared at the Pre-Trial Review hearing on 21 June, 2018 where he was formally served with a copy of the March CMO and was alerted to the necessity for his client to file an application for relief from the strike-out sanction. The record clearly shows that while the Summons for relief from sanctions was filed on 13 August, 2018, the necessary supporting affidavit was not filed until 29 August, 2018 – this effectively meant that the application was not properly made until some 69 days after the Pre-Trial Review hearing. Given this lapse of time in filing the application, we cannot say the judge's finding that the application for relief had not been promptly made was unreasonable or was a finding that she could not properly make. We are therefore of the view that it is highly improbable that such a finding would be overturned on appeal are satisfied that this ground has no realistic prospect of success on appeal.

65. Ground 8 is an unspecified and somewhat vague complaint that the judge failed to properly consider the relevant facts of Mrs. Allen-Haye's case. The factual background against which the application for relief from sanctions was made is, in our view, adequately set out in the judge's written Ruling which,

at paragraph 13, correctly identified the issues which she was required to consider on the application. The intended ground fails to identify any factual matters which the judge failed to take into account in arriving at her decision to refuse relief. In the circumstances, we were unable to find any obvious error in the judge's Ruling and were satisfied that intended ground 8 has no real prospects of success.

66. Ground 9 alleges that the judge's discretion was erroneous because the judge failed to take account of the fact that apart from one document, namely, the List of Documents which Mrs. Allen-Haye eventually filed was substantially identical to the List of Documents filed by the Baldwins and that accordingly, the late filing had caused them no prejudice whatsoever. As is clear from paragraph 22 of her written Ruling, the learned judge adverted to the fact that Mrs. Allen-Haye had since filed and served all outstanding documents save for the Listing Questionnaire. The learned judge was therefore clearly aware of the filed List of Documents and the steps that Mrs. Allen-Haye had taken (albeit months later) to comply with her CMC order of 29 March 2018. It is clear from the Ruling, that following the guidance laid down in the English Court of Appeal in Hytec (above), the learned judge balanced (as she was obliged to do) the relative risks of injustice caused by Mrs. Allen-Haye's delay. In the deliberate exercise of her discretion, she determined that the scales of justice between the parties tipped in the Baldwins' favour. She was entitled to make such a finding. We are unable to find any obvious error in the exercise of the judge's discretion and are satisfied that ground 9 also has no realistic prospects of success.

67. Grounds 10 and 11 of the intended appeal seek to impugn the judge's Ruling in alternative ways. On the one hand, the thrust of ground 10 is that the judge failed to take Mrs. Allen-Haye's impecuniosity into account as a reason why she had not moved expeditiously to seek relief from the strike-out sanction. On the other hand, ground 11 complains that the judge was wrong to have found that Mrs. Allen-Haye's impecuniosity did not constitute a valid excuse for her failure to comply with the stipulation set out at item 2 of her Case Management Order of 29 March 2018 which required the List of Documents to be filed by 19 April 2018.

68. As we see it, neither of these grounds has any realistic prospect of success. At paragraph 20 of her Ruling, the judge expressly adverted to Mrs. Allen-Haye's excuse that, inter alia, she had not been in a position financially to retain counsel any earlier than she had done. The judge further found the impecuniosity excuse, as well as the excuse that Mrs. Allen-Haye was unrepresented and unaware of the implications of the strike-out order to be not exceptional or compelling reasons for the delay in view of the fact that Mrs. Allen-Haye had been present in court when the March CMO was pronounced; and the judge had gone to great lengths to explain to her the ramifications of the 'unless' order which she had imposed. Against that background, we cannot say that the judge's exercise of discretion was unreasonable or patently wrong and are of the view that her finding that impecuniosity was not a valid excuse for the delay which had transpired in complying with her order is unlikely to be overturned on appeal.

69. Finally, ground 12 seeks to impugn the judge's decision to refuse relief from the strike-out sanction. The ground obviously overlaps with the complaints in grounds 7, 10 and 11 and alleges that the judge failed to have regard to the fact that once retained counsel for Mrs. Allen-Haye had acted expeditiously and had done all that could reasonably have been done to discharge the terms of the strike-out sanction. For all the reasons already set out in relation to grounds 7, 10 and 11, this ground also has no realistic prospects of success.

70. Prejudice: At paragraph 7 of her affidavit-in-support, Mrs. Allen-Haye claims that the Baldwins would suffer no prejudice if time were extended to permit her intended appeal to be heard. Admittedly, the Baldwins filed no affidavit to establish any specific or actual prejudice they would suffer if time were to be extended to allow the appeal to be heard. However, it is well established that mere delay can amount to prejudice and there is inevitably always some element of prejudice inherent in any delay, including the further delay which will arise if the application is granted. Pamplin (above); and *Yasmine Michelle Johnson* (above). Furthermore, prejudice may be presumed from delay for which there is no justification. Colebrooke (above.)

71. In this case, we are satisfied that the prejudice which the Baldwins will suffer is patently obvious from the many delays

they have been forced to endure as a result of Mrs. Allen-Haye's failure to comply not only with the CMC orders in the court below, but with the applicable rules governing the prosecution of appeals in this Court. In balancing the four factors, and in the exercise of our broad discretion, we have also considered the further delay and prejudice which the Baldwins will endure if the extension of time application were granted and Mrs. Allen-Haye's intended appeal allowed to proceed to a substantive hearing on grounds all of which (as we have found) have no real prospects of success.

72. In the end, and for all the foregoing reasons, we are satisfied that the intended appeal has no realistic prospects of success. No error has been disclosed in the learned judge's written Ruling dismissing the intended appellant's application for relief from sanction. Furthermore, we are unconvinced that any of the intended grounds establishes that the learned judge failed to apply the correct principles, or that she took into account matters which should not have been taken into account, and left out of account matters which were relevant to the application for relief from the strike-out sanction; or again, that the judge's Ruling is so plainly wrong that it would be regarded as outside the wide scope of the case management discretion entrusted to the judge by O. 31A r. 25 of the Rules". [Emphasis Added]

23. It is against the backdrop of the aforesaid principles applied to the evidence as accepted by the learned judge that the prospects of success must be determined.

24. As submitted by the intended appellant in order to succeed in challenging the exercise of a judicial discretion an applicant must persuade the Court that the learned judge exercised the discretion under a mistake of law or; or in disregard of principle; or under a misapprehension as to the facts; or that she took into account irrelevant matters; or that she failed to exercise her discretion; or finally that the conclusion which she reached in the exercise of her discretion was outside the generous ambit within which a reasonable disagreement is possible. See **G v G** [1985] 2 All ER 225 (HL); **Hadmor Productions Ltd v Hamilton** [1983] A.C. 191 (HL).

25. As noted earlier the learned judge made specific findings which I set out here for convenience as follows:

"**[45] In the present case, Mr. Cottis is unable to satisfy the three mandatory requirements at RSC O. 31A r. 25(2). As the**

evidence unfolded, it is plain that Mr. Cottis has had a long and blemished history of non-compliance with court orders, as well as non-cooperation with the Judicial Trustee. As Mr. Jenkins correctly submits, there is no reason to suppose that this conduct may change and every reason to surmise that this conduct is part of an intentional strategy to delay the action from proceeding. Furthermore, notwithstanding his medical condition, Mr. Cottis has offered no explanation as to why he has been unable to progress the work of drafting the List of Documents with the assistance of his very capable legal team and his own administrative staff. To date, Mr. Cottis has proffered not a shred of evidence as to when he intends to comply with the December 2019 Order.

[46] I therefore agree with Mr. Jenkins that to grant the relief from sanctions in the face of such brazen and consistent non-compliance would not be in the interests of the administration of justice. Orders must be obeyed, otherwise the rule of law tends to be undermined. The breaches have not and cannot be blamed on Mr. Cottis' legal team. Were relief to be granted, the March 2021 trial dates would be compromised and any extended deadline would, in all likelihood, also be compromised, given Mr. Cottis' past conduct. Another trial date in 2021 (of four days) would be an impossibility.

[47] Furthermore, even if the application for relief from sanctions is dismissed, Mr. Adams will still have to prove his case that he is entitled to the relief sought, and damages would still need to be assessed." [Emphasis Added]

26. There was evidence before the learned judge on which she could reasonably arrive at the conclusions. In her written decision the learned judge noted the following:

"History of non-compliance

[10] In the Affidavit of Sebastian A. Masnyk, then a pupil at Lennox Paton, filed on 17 June 2020 in support of the Unless Order, Mr. Masnyk detailed the history of noncompliance with orders of the Court which commenced long before any eye problems: see paragraphs 11 to 18 of Mr. Masnyk's affidavit. I shall merely repeat them.

[11] Mr. Cottis has been ordered to provide disclosure of the documents relating to the administration of the Estate on three separate occasions and has not complied with any of those orders.

[12] The first such Order was made on 22 August 2018, which required, at paragraph 4, that Mr. Cottis:

"provide to the Judicial Trustee (with a copy to the Plaintiff's attorneys, Lennox Paton) within 14 days of the date of this Order a 6 copy of all books and records of the Administration of the Estate in his possession or control, from 24 February 2004 to present, including all bank statements in relation to any bank account held in the name of the Testator, the Estate or the Defendant in his capacity as Executor or Co-executor (or which has been used by the Defendant for any transactions involving or on behalf of the Estate)".

[13] Mr. Cottis did not comply with this obligation, providing almost no documentation to Mr. Adams and very limited documentation to Mr. Wizman ("the Judicial Trustee"). Specifically, Mr. Cottis failed to provide Mr. Adams with any of the following:

1. Invoices, receipts, timesheets and other back-up to the cheques Mr. Cottis has written on the Scotiabank Account;

2. Correspondences produced during Mr. Cottis' tenure as Co-Executor;

3. Documents relating to Sulgrave Manor, its service providers, utilities, insurance;

4. Documents relating to the employees of the Estate;

5. Corporate files for the many companies forming a part of the Estate including:

i. Dusbram Unternehmensbeteiligung GmBH ("the IBC"); and

ii. Bellwood Limited.

6. Details of any investigations undertaken into the assets of the Estate.

[14] In respect of this failure, an application for leave to commence committal proceedings for breach of the ex parte order was filed on 5 March 2019.

[15] On 10 May 2019, Mr. Cottis resigned as Adminsitrator of the Estate. On 20 May 2019, in the presence of his then Counsel, Mr. Moree QC, this Court ordered and directed that:

"4. The former Co-Executor of the Estate shall file an affidavit within thirty (30) days from the date of this Order containing an explanation as to the variance between the reconciliation of the assets circulated 7 on 06 March 2019 and the former Co-Executor's Affidavit filed on 24 November 2005".

[16] In his Affidavit filed on 12 July 2019, Mr. Cottis stated that the Order was only filed on 9 July 2019 and a copy provided to him and his Counsel by email on the afternoon of 9 July 2019. He seemed to be complaining about the date when he received the Order but I should add that he was represented by learned Queen's Counsel, Mr. Moree on that day. That said, Mr. Cottis stated that he has been engaged throughout in an iterative and cooperative process with the Judicial Trustee seeking clarification of matters antecedent to addressing any concerns raised, as is evident in the correspondence which is exhibited.

[17] Also, on 20 May 2019, the Court made another Order in the presence of his Counsel as follows:

"2. The Judicial Trustee is entitled to take possession, custody and control of all the books and records (collectively "Records") of the Estate, and the former Co-Executor (including his employees or agents) will deliver up to the Judicial Trustee the Records within his possession, custody or control within twenty-one (21) days from the date of this Order."

[18] However, in his Fifth Report of the Judicial Trustee to the Court dated 11 March 2020, the Judicial Trustee stated, at pages 19-20 under the "Books and Records" section, that:

"The May Order directed the Executor deliver up to me all records in his possession….However, the Executor was not compliant with this order and we did not receive all the records within the ordered period….During the month of September 2019, the Executor delivered two boxes…high-level review indicates they primarily contain billing invoices and receipts…we anticipated that more voluminous records would exist, however the documents received are limited."

[19] As can be seen above, there has been a chain of non-compliance with Orders of the Court which existed prior to Mr. Cottis' medical disability".

27. It is apparent that at the heart of her rationale for refusing relief from sanction was her finding that '***it is plain that Mr. Cottis has had a long and blemished history of non-compliance with court orders, as well as non-cooperation with the Judicial Trustee. As Mr. Jenkins correctly submits, there is no reason to suppose that this conduct may change and every reason to surmise that this conduct is part of an intentional strategy to delay the action from proceeding.'***

28. As was noted in **Allen-Haye** under O. 31A, the Supreme Court now has power to, inter alia, give directions to ensure that the trial of the case proceeds quickly and efficiently. As such a judge is empowered in the exercise of his/her discretion in case management proceedings, to impose strike-out sanctions to ensure compliance with directions given by the Court; and in appropriate cases, to grant relief from any sanction so imposed.

29. I note that Mr. Gomez argued before us that the learned judge did not give due consideration to the fact that the Bahamas was under a State of Emergency and that there were in existence **the Supreme Court (Covid19) Rules, 2020** which imposed restrictions on litigants and their attorneys. Counsel takes the view that these factors should also give rise to this court finding that this issue should in the public interest be examined by this court. We note however, that neither the State of Emergency nor the Covid-Rules were relied on before the learned judge during the application for relief from Sanction. It follows that it is not open to the intended appellant to complain that the judge failed to consider those points if he did not rely on them.

30. I also note that since the determination of his application for leave below, the intended appellant has purported to file a List of Documents which was filed over a year after discovery was ordered in December 2019. This, in my view, does not assist him and may have had significance if it had been done after the striking out but prior to the application to the learned judge for relief from Sanction.

31. I have carefully reviewed the learned judge's reasons for dismissing the intended appellant's action. These reasons have been set out fully in her judgment and are in my view clearly reasoned and discloses no error of law. The essence of her finding was that the intended appellant has had a long and blemished history of non-compliance with court orders, as well as non-cooperation with the Judicial Trustee. Further that there is no reason to suppose that this conduct may change and every reason to surmise that this conduct is part of an intentional strategy to delay the action from proceeding.

32. I am unable to find that the intended appellant has any good chance of success on his proposed appeal. The learned judge clearly acted consistent with the powers granted to her and there was evidence to support her findings. As an appellate court being cognizant of the principles in **Hadmor Productions Ltd v Hamilton** which has been consistently applied by this Court I can see no reason to interfere with the exercise of that discretion.

33. In these circumstances I can see no realistic prospects of success in the intended grounds of appeal. Those grounds in my view raises no issue which requires this Court's attention in the public interest nor is there a point of law which requires clarification.

34. The intended appellant is to pay the costs of this application to the respondent.; Such costs to be taxed if not agreed.

The Honourable Mr. Justice Evans, JA

35. I agree.

The Honourable Mr. Justice Jones, JA

36. I also agree.

The Honourable Madam Justice Bethell, JA