COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 74 of 2023

B E T W E E N

DENNIS WILLIAMS

ROSALIE MCKENZIE
(As Trustees of The Bahamas Supermarkets Employee Retirement Fund Trust)

Appellants

AND

AML FOODS LIMITED

1st Respondent

BSL RETIREMENT PLAN LTD

2nd Respondent

WHANSLAW TURNQUEST

3rd Respondent

ABDAB PROPERTIES LTD

4th Respondent

BEFORE: **The Honourable Madam Justice Crane-Scott, JA**
The Honourable Mr. Justice Smith, JA
The Honourable Mr. Justice Turner, JA

APPEARANCES: **Mr. Roger Minnis for the Appellants**
Mr. Marco Turnquest with Ms. Chizelle Cargill for the 1st Respondent
No appearance by or on behalf of the 2nd Respondent
Mr. Rouschard Martin for the 3rd Respondent
No appearance by or on behalf of the 4th Respondent

DATES: **18 October 2023; 6 December 2023; 7 February 2024; 9 May 2024**

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Civil Appeal – Sale by Trustees of trust property to a Purchaser – Purchaser subsequently discovering that part of the property may have been sold – Purchaser commenced an action seeking declarations as to the validity of the earlier transactions, Claim for specific performance or alternatively for a return of the purchase price – Interim Injunction granted in Supreme Court

pending hearing of substantive action – Appeal Against Interlocutory Ruling dismissing Appellants' Summons to Discharge or Vary Interim Injunction – Application for leave to amend Notice of Appeal – Order 27 Rule 3 Rules of the Supreme Court, 1978.

The Appellants appealed against a written Ruling of the Hon. Diane Stewart (retired) handed down on the 27 March 2023 following the hearing of the Appellants' application for the discharge and/or variation of an interim injunction which the Judge had initially put in place on 6 February 2019 pending the trial of a Supreme Court action brought by AML Foods Limited against the Appellants and other named defendants.

After hearing arguments from counsel in relation to the complaints identified in sub-grounds 7.4; 7.5 and 7.6 of the Amended Notice of Appeal, the Court reserved its decision.

Held: Appeal dismissed. The usual rule is that costs follow the event. It is a matter of record that neither the 2nd nor the 4th Respondents appeared or took any part in the appellate process. In the circumstances, unless written submissions on costs are filed on or before the 23 May 2024, seeking a different order, the Appellants shall pay the costs of the 1st and 3rd Respondents respectively, to be taxed, if not agreed.

The learned Judge's conclusion is based on the evidence and the facts as she found them. She was entitled to have regard to the contents of the Martin affidavit and no error of law has been disclosed. In the result, there is no merit in sub-ground 7.4 of the appeal and it is accordingly dismissed.

Notwithstanding that the appropriateness of the joinder of the other defendants had been foreshadowed by the learned Judge who had signaled the possibility of an appropriate application being made before her, the Appellants never filed a formal application seeking to strike out any of the other defendants to the action. Instead following the case management discussions of 19 July 2019, the Appellants sat back for well over two years during which the various parties (including the other defendants) proceeded to file affidavits opposing the application to discharge the injunction.

As we see it, if indeed a procedural misstep occurred in the court below it was made by the Appellants and not by the Judge. As the other defendants opposed the discharge of the injunction and participated in the hearing of the contested discharge application, the learned Judge cannot be faulted for awarding costs to the other defendants, who to this day, still remain proper parties to AML's substantive proceedings in the court below. Ground 7.5 is dismissed.

Based on the pleadings, we are satisfied that the question whether "The Fund" in fact owned the entire 6.52 acres of land on the East West Highway on 21 September 2016 on the date when the Appellants purported to sell the property to AML, is the crucial issue which lies at the heart of the substantive dispute between the various parties.

On a proper reading of the written Ruling, we are satisfied that the learned Judge never purported to make a positive finding of fact in relation to that crucial disputed issue. Rather, the learned Judge's reference in paragraph 55 of the Ruling to "the Fund" *owning* the subject property is merely a reference to the *undisputed fact* (expressly admitted in the Appellants' Defence) that on or about 11 April 1985, the former trustees of BSERF had on behalf of "the Fund" taken a conveyance of the 6.52 acres of land on the East West Highway (being the subject property).

Having essentially sat on their hands and allowed the discharge application to proceed to a contested hearing before the Judge, the Appellants took a conscious risk that costs might be awarded against them if the application failed.

In the circumstances, following the dismissal of the Appellants' discharge application, the learned Judge cannot be faulted for having awarded costs of the application to all of the other defendants.

American Cyanamid Co v. Ethicon Ltd [1975] A.C. 396*;* mentioned.
Griffiths v. TUI (UK) Ltd [2021] EWCA Civ 1442*;* mentioned.

JUDGMENT

Judgment delivered by The Hon. Madam Justice Crane-Scott, JA

Introduction

1. By Notice of Appeal Motion filed out-of-time on 6 April 2023 (but extended by Order on 18 October 2023 and amended on 7 February 2024) Dennis Williams and Rosalee McKenzie ("the Appellants") appealed against a written Ruling of the Hon. Diane Stewart (retired) handed down on the 27 March 2023 ("the Ruling").

2. As will shortly appear, the Ruling was handed down following the hearing of the Appellants' application for the discharge and/or variation of an interim injunction which the Judge had initially put in place on 6 February 2019 pending the trial of Supreme Court action (2018/CLE/gen/00169) commenced by AML Foods Limited ("AML") against the Appellants and other named defendants.

3. As appears from their Amended Notice of Appeal Motion the Appellants have taken issue, *inter alia*, with the following portions of the Ruling whereby the Judge held:

> **" 78. Having reviewed all of the evidence and heard all of the submissions I am satisfied that this injunction should be continued. There is already evidence that some of the Purchase Money has been disbursed to third parties. While I make no**

> **finding as to whether these were proper transfers or not, the fact is that the monies have left the control of the Trustees, and should a decision be made that they be returned to the Plaintiff there will be challenges in recovering these monies.**
>
> **79. While I normally would not vary this injunction due to the lack of evidence provided as to why it should be varied, I am aware, having reviewed the affidavit evidence that only $2,287,757.57 was in fact received by the First Defendants and accordingly the injunction is varied to freeze $2,287,757.57.**
>
> **80. <u>Accordingly the First Defendants' application is dismissed with costs of the Plaintiff and the other Defendants to be paid by the First Defendants to be taxed if not agreed</u>."** [Emphasis added]

4. When the appeal first came on for substantive hearing before us on 6 December 2023, counsel for the Appellants, Mr. Roger Minnis, withdrew grounds 1 through 6 of the Notice of Appeal. Due to the vagueness of the remaining ground[1] (which had simply complained that *"the Judge made an error of law")* Mr. Minnis sought leave to file a formal application to amend ground 7 of the Notice of Appeal to particularize the alleged error of law which the Appellants wished to have reviewed on the appeal.

5. The Appellants were then granted leave to file a formal application to amend ground 7 of the Notice of Appeal; and the matter was adjourned to 7 February 2024. The Amendment application was filed on 19 December 2023 supported by an affidavit of Dennis G. Williams to which was exhibited a draft of the proposed Notice of Appeal for which leave to amend was sought.

6. When the matter resumed before us on 7 February 2024, counsel for the Appellants, Mr. Minnis abandoned[2] sub-grounds 7.1; 7.2; 7.3 and 7.7 respectively of the proposed Amended Notice of Appeal – all 4 of which (as he ultimately conceded) raised matters which had no bearing on the Judge's written Ruling of 27 March 2023.

[1] Ground 7 of the Notice of Appeal filed on 6 April 2023.

[2] See page 45 (lines 2-3) and (lines 11-15) of the transcript of the appellate hearing on 7 February 2024 where counsel for the Appellants confirmed: *"I will abandon the other ones, my Lady, and just concentrate on 7.4, 7.5 and 7.6".*

7. Following the withdrawal of these 4 intended sub-grounds, we allowed the amendment application as varied[3] and invited Mr. Minnis to move the substantive appeal in relation to sub-grounds 7.4; 7.5 and 7.6 respectively of the Amended Notice of Appeal.

8. After hearing arguments from counsel in relation to the complaints identified in sub-grounds 7.4; 7.5 and 7.6 of the Amended Notice of Appeal, we reserved our decision.

9. We have dismissed the appeal. Our reasons follow.

Background facts

10. The following facts will provide the background necessary for a fuller understanding of the nature of AML's pending action in the Supreme Court against which the interim injunction was put in place by the learned Judge. The background facts will further set the stage for appellate consideration of the correctness or otherwise of the learned Judge's Ruling refusing the Appellants' application for the discharge/variation of the injunction.

11. On 21 September 2016, AML entered into an agreement for sale with the Appellants to purchase 6.52 acres of land on East-West Highway ("the property"). The property was ostensibly owned by The Bahamas Supermarkets Employee Retirement Fund Trust ("BSERF") for which the Appellants purported to act as trustees.

12. By a Deed of Conveyance dated 28 July 2017 ("the July 2017 Conveyance") the Appellants (in their capacity as trustees of the BSERF) purported to convey the property to AML in consideration of the sum of $2,437,757.57 ("the purchase money") receipt of which the Appellants acknowledged.

13. Subsequently, AML became aware[4] that an incorporated entity ("ABDAB Properties Limited") claimed to have purchased a part of the property which AML had purchased from the Appellants.

14. On 15 February 2018, AML filed an Originating Summons in Supreme Court action (2018/CLE/gen/00169) against the Appellants, the BSL Retirement Plan Ltd ("BSL"), Mr. Whanslaw E. Turnquest and ABDAB Properties Limited, respectively.

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[3] See page 47 (lines 16-22) of the transcript of the appellate hearing on 7 February 2024 where this Court said: *"And so, Mr. Minnis, we have now finally understood your application and basically narrowed your application to amend down to 7.4, 7.5 and 7.6; and so the court allows the amendment application as varied; and places on record that the only grounds to be urged now are 7.4, 7.5 and 7.6. You may do so now, and that is the position in respect of the application to amend."*

[4] Paragraph 5 of the affidavit of Gavin Watchorn filed on 21 October 2021 in Supreme Court Suit No. 2018/CLE/gen/00169 at Tab 7 of Volume 1 of the Record.

15. By order dated 30 September 2019 AML's proceedings were continued as an action commenced by Writ of Summons.[5] Thereafter, the parties to the action commenced the process of filing their respective pleadings[6] in preparation for the substantive trial of AML's claim.

16. After setting out particulars of the Deed of Trust and detailing a number of purported conveyances dated 1 May 2014[7] and 12 December 2017[8] respectively (particulars of which appear in AML's Statement of Claim[9] filed on 29 November 2019) AML, claimed, *inter alia*, the following relief:

> **1. A declaration that the 2014 and December 2017 Conveyances are void and of no effect;**
> **2. An order that the Second and Fourth Defendants deliver up the original copies of the 2014 and December 2017 Conveyances to the Plaintiff within seven days of judgment for the purpose of enabling the Plaintiff to cancel the same by the destruction thereof;**
> **3. A declaration that the July 2017 Conveyance is valid and effective to transfer the property to the Plaintiff [i.e. AML];**
> **4. A declaration that no Trustee for the being of the Trust nor any of the beneficiaries of the Trust was a foreign person for the purposes of the Immovable Property (Acquisition by Foreign Persons) Act 1981 or a non-Bahamian for the purposes of the International Persons Landholding Act 1993;**
> **5. An order that the Defendants and each of them do all acts or things necessary to vest the property in the Plaintiff [i.e. AML];**
> **6. In the alternative, an order that Court do vest the said property in the Plaintiff [i.e. AML]**
> **7. In the alternative, if, which is denied, the 2014 Conveyance was valid and effective or, if, for some other reason, the 2017 Conveyance is not valid and effective, the Plaintiff [AML] is**

[5] Paragraph 6 of the affidavit of Gavin Watchorn filed on 21 October 2021 in Supreme Court Suit No. 2018/CLE/gen/00169 at Tab 7 of Volume 1 of the Record.
[6] See AML's Statement of Claim filed on 29 November 2019 at Tab 12; and the Defendants' respective Defences and Amended and Re-Amended Defences at Tabs 15, 16, 17, 18, & 19 of Volume 1 of the Record of Appeal.
[7] An unrecorded and unstamped indenture of Conveyance made between Christine Turnquest-Knowles and Christine Rolle as the then Trustees of BSERF as vendors of the property and the 2nd Respondent (BSL) as purchaser referenced at paras 17-18 of AML's Statement of Claim.
[8] An unrecorded and unstamped indenture of conveyance made between the 2nd Respondent (BSL) as vendor and the 4th Respondent (ABDAB) as purchaser referenced at para 22 of AML's Statement of Claim.
[9] Paragraphs 6-22 of AML's Statement of Claim filed 29 November 2019.

> **entitled to the return of the purchase price of $2,437,757.57 paid by it to the First Defendants together with interest thereon…"**

17. On 6 February 2019 the learned Judge (ostensibly acting on her own motion) granted an interim injunction ("the Order").

18. On its face, the learned Judge's Order of 6 February 2019 was made after hearing from Counsel for AML; BSL; and Mr. Whanslaw Turnquest; respectively. On that date, there was no appearance on behalf of the First Defendants (now "the Appellants").

19. The recitals to the Order rehearsed the following facts:

> **"…**
> **AND WHEREAS the Plaintiff entered into a Sales Agreement with the First Defendants wherein the Plaintiff agreed to purchase property known as the East West Highway Industrial Park Warehouse Trust Property being lots 6, 7 and 8 ("East West Highway Trust Property") for the purchase price of $3,000,000 ("the Purchase Price").**
>
> **AND WHEREAS on 21 September 2016 the Plaintiff's then attorneys, C.F. Butler & Associates, paid on behalf of the Plaintiff, 5% of the Purchase Price to the attorney for the First Defendants, Minnis & Co., in the sum of $150,000, as a deposit for the purchase of the East West Highway Trust Property and on 28 July 2017 the First Defendants executed a conveyance for the East West Highway Trust Property in favour of the Plaintiff.**
>
> **AND WHEREAS on 9 August 2017 C.F. Butler & Associates, on behalf of the Plaintiff, paid the sum of $2,287,757.57 to Minnis & Co. for the purchase of the East West Highway Trust Property, and the balance of the Purchase Price in the sum of $862,287.43 was retained by C.F. Butler & Associates.**
>
> **AND WHEREAS the First Defendants and their attorney have distributed a substantial portion of the $2,287,757.57, received for the purchase of the East West Highway Trust Property (as outlined in the 15 February 2018 Affidavit of Rosalie McKenzie filed in Action 2012/CLE/gen/FP/00041).**

AND WHEREAS after a dispute arose regarding the sale of the East West Highway Trust Property and the distribution of the $2,287,757.57 by the First Defendants and their attorneys, the Deputy Registrar, Camille Darville-Gomez on the 5th February, 2018 ordered the First Defendants and their attorney, Minnis & Co, to pay the remaining $732,064.50 into Court."

20. The relevant portions of the Judge's Order provided:

"IT IS HEREBY ORDERED THAT:

PROPRIETARY INJUNCTION

1. **Until the determination of the Action or further order of the court, the First Defendants, whether by themselves, their servants, agents, employees or otherwise whomsoever, must not without prior consent in writing of the Plaintiff's attorneys remove from the Commonwealth of The Bahamas, if they are in the Commonwealth of The Bahamas, or in any way deal with or dispose of or otherwise diminish the value of the purchase money paid by or on behalf of the Plaintiff to the First Defendants as a result of the purported sale of the East West Highway Trust Property to the Plaintiff or the fruits or proceeds, including any interest earned or other income received or derived from the said purchase money.**

2. **Until the determination of the Action or further Order of the court, C.F. Butler & Associates, whether by itself, its servants, agents, employees or otherwise whomsoever, must not without the prior consent in writing of the Plaintiff's attorneys, or order of the court, remove from the Commonwealth of The Bahamas, if they are in the Commonwealth of The Bahamas, or in any way deal with or dispose of or otherwise diminish the value of the balance of the Purchase Price paid by or on behalf of the Plaintiff to C.F. Butler & Associates for the purported purchase of the East West Highway Trust Property or its fruits or proceeds, including any interest earned or other income received or derived from the said purchase money.**

3. **Until the determination of the Action or further order of the court, the Plaintiff, whether by itself, its servants, agents,**

employees or otherwise whomsoever must not deal with or dispose of the title deeds arising from the purported sale of the East West Highway Trust Property to it.

VARIATION OR DISCHARGE OF THE ORDER

4. **Anyone served with or notified of this order may apply to the court <u>at any time</u> to vary or discharge this order or so much of it as affects that person, upon 48 hours' notice of any such application being given to the Plaintiff's attorneys. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Plaintiff's attorneys in advance……. "** [Emphasis added]

21. The Appellants subsequently appeared before the learned Judge on 18 March 2019 and 18 April 2019 respectively, when counsel for the Appellants, Mr. Roger Minnis, requested the Judge to recuse herself.

22. At the hearing on 18 April 2019, Mr. Minnis was directed by the Judge to make a formal application setting out the reasons for her recusal. Despite the Judge's direction, no formal recusal application was ever made by or on behalf of the Appellants.

23. Thereafter the Appellants continued to appear before the Judge on numerous subsequent occasions without further objection. In short, notwithstanding the Judge's express direction, the Appellants continued to participate in various ongoing interlocutory proceedings before the learned Judge and never raised the issue of her recusal again.

24. On 6 January 2020, the Appellants made a formal application to strike-out AML's action on the basis that it disclosed no reasonable cause of action against them. The strike-out application was heard by the Judge on 19 May 2020; and on 17 June 2020 the learned Judge dismissed the application finding that: *"there is a cause of action against the First Defendants in seeking declaratory relief as well as the alternative claim seeking the return of the monies should the declaratory relief sought fail."*[10]

25. The Appellants then applied by Summons filed on 18 August 2020 seeking to discharge or vary the interim injunction. The Appellants relied on: (i) an affidavit of Dennis Williams filed on 18 April 2020; and on (ii) an affidavit of Rosalie McKenzie filed on 3 December 2020.

[10] See para [40] Strike-Out Ruling dated 17 June 2020 attached to the Affidavit of Gavin Watchorn filed on 21 October 2021 in Supreme Court Suit No. 2018/CLE/gen/00169 at Tab 7 of Volume 1 of the Record.

They further relied on (iii) a subsequent affidavit of Dennis Williams filed on 1 December 2021.

26. By the time the Appellants' Summons came on for substantive hearing before the learned Judge in December 2021, the following affidavits opposing the discharge of the injunction had been filed. These were: (i) two affidavits sworn by Mr. Whanslaw Turnquest filed on 5 March 2020 and 25 March 2020 respectively; (ii) an affidavit of Mark Findlayson filed on 26 August 2020 on behalf of BSL; (iii) an affidavit of Carlton Martin filed on 30 November 2020 on behalf of the beneficiaries of the Fund; and (iv) an affidavit of Gavin Watchorn filed on 21 October 2020 on behalf of AML.

27. The Appellants' application to discharge and/or vary the injunction was heard before the learned Judge as a contested matter. Based on the available transcripts, the hearing appears to have commenced on or about 7 December 2021[11] and to have resumed part-heard on 28 February 2022[12] and again on 14 March 2022 when the learned Judge reserved her decision[13].

28. Following the hearing, the Judge's written Ruling dismissing the application and continuing the injunction was handed down approximately one year later on 27 March 2023. As noted, the Ruling is now the subject of this appeal.

The Appeal

29. As we have already indicated,[14] when the appeal first came on for substantive hearing before us, counsel for the Appellants, Mr. Minnis, withdrew ground 1- 6 of the appeal.[15] Subsequently, at the hearing of the Appellants' application to amend the Notice of Appeal, Mr. Minnis subsequently abandoned sub-grounds 7.1; 7.2; 7.3 and 7.7 respectively of the proposed Amended Notice of Appeal.[16] Thereupon, the substantive appeal proceeded before us on 7 February 2024 on the basis of the 3 remaining sub-grounds of the Amended Notice of Appeal. The 3 remaining grounds of appeal are as follows:

> **"(7.1)** ***(abandoned)***
>
> **7.2)** ***(abandoned)***
>
> **(7.3)** ***(abandoned)***

[11] See transcript of 7 December 2021 at Tab 23 of Volume 2 of the Record of Appeal.
[12] See transcript of 28 February 2022 at Tab 27 of Volume 2 of the Record of Appeal.
[13] See line 6 on page 38 of the transcript of 14 March 2022 at Tab 28 of Volume 2 of the Record of Appeal.
[14] See paras [4]-[8] above.
[15] On 6 December 2023.
[16] The proposed Amended Notice of Appeal is attached to the Affidavit of Dennis G. Williams filed on 19 December 2023 in support of the Appellants' Motion for leave to amend.

(7.4) The learned Judge made an error of law by failing to take into consideration the fact that Counsel for the 3rd Defendants swore a substantive affidavit in these proceedings which she relied upon to (sic) in paragraph 16 of her ruling to the Appellants prejudice and without acknowledging that it was not the usual practice and failing to provide a reasoned decision for accepting the contents thereof in part or in its totality. (Practice Note No. 1 of 1995)

(7.5) The learned Judge failed to establish whether or not the 2nd and 4th Defendants had a proprietary right to the claim of the purchase money or the subject property. The confusion is evident by the learned Judge's omission to include the 2nd Defendant in her deliberations at paragraph 69 to 72 of her ruling. Especially having regard to the fact that the learned Judge found as a matter of fact the 3rd Defendants were also purported shareholders of the 2nd Defendant.

(7.6) The learned Judge erred in law when she found in her ruling at paragraph 55 that "The Fund" owned the 6.52 acres of land which is the subject property. Nevertheless, the learned Judge entertained the 2nd, 3rd and 4th Defendants in this action and awarded costs against the 1st Defendants which would not have been necessary for them to pay if the learned Judge had removed them as parties to this action."

(7.7) *(abandoned)*."

<u>Ground 7.4</u> – *Did the judge err in law in relying on the Carlton Martin affidavit contrary to Practice Note No. 1 of 1995?*

30. The Appellants' complaint on this ground is that at paragraph 16 of her Ruling the Judge: (i) erroneously "*relied upon"* the affidavit of counsel for the 3rd Respondent, Mr. Carlton A. Martin to their prejudice; (ii) *"failed to acknowledge that it was not the usual practice"*; and (iii) further *"failed to provide a reasoned decision for accepting the contents thereof in part or in its entirety."*

31. Ground 7.4 is founded on the premise that the learned Judge erred in law in *relying on* the affidavit of Carlton A. Martin filed on 30 November 2020 because Carlton Martin was also counsel who appeared in the proceedings before the Judge.

32. The Appellants contend that in the face of Practice Note No. 1 of 1995 the learned Judge ought not to have placed reliance on the contents of the Martin affidavit (as she did in her Ruling[17]) and, having done so, committed an error of law.

33. Mr. Minnis set the stage for his submissions by referring us to a discussion[18] which had taken place at the start of the hearing in the court below. The discussion followed an objection by counsel for AML regarding an affidavit which counsel for BSL, Mr. Desmond Edwards, had sworn and filed on behalf of BSL. As appears from the transcript, the learned Judge had expressly advised Mr. Edwards that he could not be both counsel and witness in the same matter.

34. Mr. Minnis submitted that the above discussion clearly shows that the Judge was well aware of the rule of practice contained in Supreme Court Practice Note No. 1 of 1995 and that despite being aware of the rule, the learned Judge nonetheless erred in law by failing to apply the same rule in relation to the Carlton Martin affidavit[19] thereby unfairly prejudicing the Appellants' discharge application.

35. In response counsel for AML, Mr. Marco Turnquest, submitted that the ground is without merit and should be dismissed. He contended that as the Appellants had not objected to the use of the Carlton Martin affidavit in the court below, it was impermissible for the issue to be raised for the first time on appeal.

36. Mr. Turnquest further submitted that in any event, paragraph 16 of the Ruling had merely summarized the contents of the Martin affidavit evidence on which Mr. Whanslaw Turnquest had relied in opposing the Appellants' discharge application. He further contended that nowhere in her Ruling did the Judge expressly indicate that she had relied on the contents of the Martin affidavit in reaching her ultimate decision to dismiss the application.

37. We have considered the respective submissions and are satisfied that there is no merit whatsoever in ground 7.4 of the appeal.

38. In the first place, as we pointed out to Mr. Minnis at the hearing[20], the Appellants' complaints on ground 7.4 appeared to be founded on the erroneous premise that contrary to the prohibition in Supreme Court Practice Note No. 1 of 1995 attorney-at-law, Mr. Carlton A. Martin had impermissibly acted both as counsel and as a witness during the hearing. Mr. Minnis was advised that the premise of the ground was factually inaccurate as it was clear from the

[17] See paragraphs 16 and 78 of the Ruling.
[18] See page 8 (line22) through page 9 (line 13) of Supreme Court transcript of 7 December 2021 at Tab 23 in Volume 2 of the Record of Appeal.
[19] Affidavit of Carlton A. Martin filed 30 November 2020 filed on behalf of the beneficiaries of the Fund opposing the discharge of the injunction located at Tab 5 of Volume 1 of the Record of Appeal.
[20] Pages 53-58 of the transcript of the appellate proceedings of 7 February 2024.

transcript that counsel who appeared had in fact been Mr. Rouschard Martin and not Mr. Carlton Martin.

39. At this stage Supreme Court Practice Note No. 1 of 1995 issued on 20 March 1995 by then Chief Justice Gonsalves-Sabola may usefully be reproduced. It provides:

> **"The Attorney as a Witness**
>
> **"Instances have occurred where, in matters heard in Chambers, an attorney sought to rely on affidavits sworn by himself, as to contentious matters between the parties.**
>
> **"While there may be little objection to affidavits sworn by an attorney deposing to purely formal matters, it is well to bear in mind the following instruction which appears in paragraph 3 of the Commentary to Rule VIII of The Bahamas Bar Code of Professional Conduct:**
>
> **" 'If the attorney is a necessary witness he should testify and the conduct of the case should be entrusted to another attorney.'**
>
> **"An attorney who is acting as an advocate in a case, should therefore advise himself accordingly."**

40. Practice Note No. 1 of 1995 has been in place in the Supreme Court of The Bahamas now for a period of almost 30 years. As is well known, the rule prohibits counsel who acts as advocate in contentious proceedings involving parties to civil litigation from relying on an affidavit sworn by him or herself. The rule further provides that if it becomes necessary for an advocate in such proceedings to testify as a witness, the conduct of the case must be entrusted to another attorney.

41. While accepting that it was in fact Mr. Rouschard Martin and not Mr. Carlton Martin who had appeared as counsel of record for the 3rd Defendant at the hearing of the Summons, Mr. Minnis indicated that he had misapprehended the scope of the Practice Direction. He explained that he had erroneously believed that the prohibition had extended to the partners in the firm of Martin & Martin irrespective of whether they appeared as counsel or not.

42. He further conceded that despite his submissions, he was unable to positively establish *by evidence* that Mr. Carlton Martin had in fact acted both as advocate and as witness when the Appellants' contested application to discharge/vary the injunction was heard.

43. In the face of Mr. Minnis' concessions, coupled with page 1 of the Judge's written Ruling which unequivocally confirms that the 3rd Defendant was represented by Mr. Rouschard Martin, we are satisfied that Mr. Carlton A Martin did not act as advocate and as witness at the hearing of the application in breach of the rule.

44. Quite simply, the prohibition in Practice Note No. 1 of 1995 against counsel acting as advocate and as witness in contentious proceedings was never in play and the learned Judge was therefore entitled to consider (as she did) the Martin affidavit for what it was worth.

45. The role of judges in the evaluation of evidence in reaching conclusions on factual issues is described by Nugee LJ in **Griffiths v. TUI (UK) Ltd** [2021] EWCA Civ 1442 where at paragraph 81 he explained:

> **"81. As a matter of basic principle, it is the function of trial judges to evaluate all the evidence before them in reaching their conclusions on the factual issues. That includes deciding what weight should be given to the evidence…"**

46. In considering the Appellants' Summons and whether to discharge and/or vary the injunction as prayed, the learned Judge was entitled, *inter alia*, to refer (as she does in her written Ruling)[21] to the contents of the various filed affidavits (including the Carlton Martin affidavit) and to give the evidence before her such weight as she considered it deserved. As appears from paragraphs [52] through [80] of her Ruling, in arriving at her decision the learned Judge dutifully considered all the evidence, making the necessary findings of fact, before ultimately determining that the injunction should be continued and not discharged.

47. At paragraph [78] the Judge concluded as follows:

> **"78. Having reviewed all of the evidence and heard all of the submissions I am satisfied that this injunction should be continued. There is already evidence that some of the Purchase Money has been disbursed to third parties. While I make no finding as to whether these were proper transfers or not, the fact is that the monies have left the control of the Trustees, and should a decision be made that they be returned to the Plaintiff there will be challenges in recovering these monies."** [Emphasis added]

[21] See paras 16-21 of the Judge's written Ruling.

48. As I see it, the learned Judge's conclusion is based on the evidence and the facts as she found them. She was entitled to have regard to the contents of the Martin affidavit and no error of law has been disclosed.

49. In the result, there is no merit in sub-ground 7.4 of the appeal and it is accordingly dismissed.

50. We turn now to grounds 7.5 and 7.6 which may be considered together as they both challenge the learned Judge's award of costs against the Appellants following the dismissal of the discharge application.

Ground 7.5 – *Did the Judge err in failing to establish whether the 2nd and 4th Defendants had a proprietary right to the claim of the purchase money or the property?*
Ground 7.6 – *Did the Judge err in failing to remove the 2nd, 3rd and 4th Defendants from the action and in awarding them costs?*

51. *Ground 7.5:* The complaint on this ground is that the learned Judge made a procedural error of law by failing to establish whether or not the 2nd and 4th Defendants held a proprietary interest in the purchase money or the subject property.

52. Lying at the heart of this ground is the Appellants' belief that the Judge's failure to resolve the issue as to whether the 2nd and 4th defendants were proper parties to the proceedings, resulted in the Appellants being faced with additional costs as both the 2nd and 4th Defendants are now represented by two separate firms notwithstanding the 4th Defendant's insistence that it holds a majority interest in the 2nd Defendant.

53. Mr. Minnis cited no legal authority in support of the above proposition. Instead, he referred us to the transcripts of a lengthy case management hearing held on 19 July 2019 where counsel for the various parties held discussions with the Judge on a number of matters, including, *inter alia*, whether it was appropriate for *both* the 2nd and the 4th Defendants to have been joined in the proceedings.

54. As we understand the submission, the Appellants' complaint is that Judge's failure to address the issue of the proper parties to AML's action is a procedural error which, following the subsequent dismissal of their application to discharge the injunction, has proved costly to them as they have since been ordered to pay costs of the application to AML and to the other defendants to be taxed if not agreed.

55. In his brief response, Mr. Turnquest simply submitted that at no time during the discharge application did the Appellants argue that the 2nd and 3rd defendants had no proprietary right to the purchase money of the property. In the light of this, he contends, the learned Judge could hardly be criticized for failing to consider a point that was not raised.

56. Having considered the parties' submissions, we are satisfied that ground 7.5 has no merit and should be dismissed.

57. In the first place, it was clear from the transcript of the case management proceedings of 19 July 2019 that in the face of a discussion between counsel and the Judge as to who were the proper parties to AML's substantive action, the learned Judge expressly counseled the parties in the following terms:

> **"THE COURT: But I do not need to know that Mr. Martin. What I need to know is that the appropriate parties are before me in order for me to determine the application by the plaintiffs. And if that means that there is a duplication or a fight or an issue, then you need to resolve that between you. *I don't move on my own*. I can rule on applications made before me."** [Emphasis added]

58. Pressed by the panel during the hearing as to whether the Appellants had ever applied to strike out the other defendants as parties, Mr. Minnis stated that the Appellants had applied for a strike-out of AML's action against them.

59. He acknowledged that there is a procedure provided for in the Supreme Court Rules facilitating objections to the joinder of parties in civil proceedings but conceded[22] that the Appellants had not made an application to strike-out any of the other defendants.

60. He took issue with the learned Judge's statement that the issue of who were the appropriate parties to the action was a matter to be resolved between the various parties and suggested that the issue instead was a matter for the judge. He, however, accepted that until such time as a party to proceedings was struck-out, they were properly before the court.

61. It is clear to us that notwithstanding that the issue of appropriateness of the joinder of some of the other defendants had been foreshadowed by the learned Judge who had signaled the possibility of an appropriate application being made before her, the Appellants never filed a formal application seeking to strike out any of the other defendants to the action. Instead following the case management discussions of 19 July 2019, the Appellants effectively sat back for well over two years during which the various parties (including the other defendants) proceeded to file affidavits opposing their application to discharge the injunction.

62. In the end, there is no question that the Appellant permitted their discharge application to proceed as a contested hearing before the learned Judge without raising the issue of the appropriateness of the joinder of the various defendants ever again.

[22] Pages 64-65 of the transcript of the appellate proceedings of 7 February 2024.

63. As we see it, if indeed a procedural misstep occurred in the court below it was made by the Appellants and not by the Judge. As the other defendants opposed the discharge of the injunction and participated in the hearing of the contested discharge application, the learned Judge cannot be faulted for awarding costs to the other defendants, who to this day, still remain proper parties to AML's substantive proceedings in the court below. Ground 7.5 is dismissed.

64. *Ground 7.6:* As framed, the complaint on this ground is constructed on paragraph 55 of the Ruling where (according to the Appellants) the learned Judge *"concluded"* that "The Fund" owned the 6.52 acres of land on the East West Highway (being the subject property).

65. The Appellants suggest that notwithstanding the learned Judge's *"conclusion"* at paragraph 55 of the Ruling, the learned Judge erroneously entertained all 3 of the defendants at the hearing and ultimately ordered them to receive costs from the Appellants. The Appellants further claim[23] that the costs order against them *"would not have been necessary if the Judge had removed them* [i.e. the 2nd, 3rd and 4th defendants*] as parties to the action."*

66. In their written submissions the Appellants further complain that the learned Judge erred in law *"there being no written reason for as to how she "concluded" that "the Fund" owned the subject property*.[24]

67. In its response, AML suggests that ground 7.6 is confused, making it difficult for it to respond. In any event, AML contends that the learned Judge had previously refused the Appellants' application to strike-out the claim against them and that decision had not been appealed.[25]

68. As we see it, this ground has no merit and may be disposed of shortly.

69. At the outset it must not be forgotten that in the exercise of her discretion whether to discharge the interim injunction or continue it, the learned Judge necessarily had to consider, *inter alia,* whether there is a serious issue to be tried, the adequacy of damages as well as the balance of convenience. **American Cyanamid Co v. Ethicon Ltd** [1975] A.C. 396. As appears between paragraphs [63] through [74] of her Ruling the learned Judge was acutely aware of the task before her and addressed each of these issue in turn.

70. As Mr. Turnquest correctly submitted, in a previous written ruling handed down on 17 June 2020, the learned Judge (without examining the merits of AML's claim) held that based on its Statement of Claim AML had viable cause of action against the Appellants for declaratory

[23] See sub-ground 7.6.
[24] Page 8 of the Appellants Skeleton Arguments filed on 17 January 2024.
[25] Paras 47-48 of AML's Supplemental Submissions filed on 24 January 2024.

relief in relation to the validity of its conveyance, as well as an alternative claim for the return of the purchase money in the event that its claim for declaratory relief failed.[26]

71. As is well known, a court which is hearing an application to continue or to discharge an interim injunction is not required to embark on anything like a trial of the action on conflicting affidavits to determine the relative strengths of the parties' cases. We are satisfied that in her Ruling the learned Judge correctly focused on the issues relevant to the application before her and made no final *"conclusions"* on the disputed issues which had to be ultimately resolved at the trial.

72. Contrary to the Appellants' contention, paragraph 55 of the Ruling cannot be interpreted as the learned Judge having reached a final *"conclusion"* regarding the ownership of the property at the material time. Based on the pleadings, we are satisfied that the question whether "The Fund" in fact owned the entire 6.52 acres of land on the East West Highway on 21 September 2016 on the date when the Appellants purported to sell the property to AML, is the crucial issue which lies at the heart of the dispute between the various parties. Even following the Judge's Ruling that issue still remains as a fact to be finally determined at trial.

73. On proper reading of the written Ruling, we are satisfied that the learned Judge never purported to make a positive finding of fact in relation to that crucial disputed issue. Rather, the learned Judge's reference at paragraph 55 of the Ruling to "the Fund" *owning* the subject property is merely a reference to the *undisputed fact* (expressly admitted in the Appellants' Defence[27]) that on or about 11 April 1985, the former trustees of BSERF had on behalf of "the Fund" taken a conveyance of the 6.52 acres of land on the East West Highway (being the subject property).

74. Furthermore (as we have already observed in relation to ground 7.5) the 2nd, 3rd and 4th defendants all appeared at the hearing and opposed the discharge of the interim injunction. They filed affidavits and all made submissions before the learned Judge. In short, they effectively contested the discharge application without the Appellants either applying for any of the other defendants to be struck out or without making a formal objection to their participation at the hearing.

75. As we see it, having essentially sat on their hands, and allowed the discharge application to proceed to a contested hearing before the Judge, the Appellants took a conscious risk that costs might be awarded against them if the application failed.

[26] The Ruling of 17 June 2020 is located at Exhibit GW-2 attached to the Affidavit of Gavin Watchorn filed on 21 October 2021.

[27] See paragraph 4 of the Defence filed on behalf of the 1st Defendants on 20 July 2020.

76. In the circumstances, following the dismissal of the Appellants' discharge application, the learned Judge cannot be faulted for having awarded costs of the application to all of the other defendants.

77. There is no merit in ground 7.6 and it is similarly dismissed.

Disposition

78. For all the foregoing reasons, the appeal is dismissed.

79. As presently advised, the usual rule is that costs should follow the event. It is a matter of record that neither the 2nd nor the 4th Respondents appeared or took any part in the appellate process. In the circumstances, unless written submissions on costs are filed on or before the the 23 May 2024, seeking a different order, the Appellants shall pay the costs of the 1st and 3rd Respondents respectively, to be taxed, if not agreed.

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Smith, JA

The Honourable Mr. Justice Turner, JA