COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 112 of 2015

B E T W E E N

TOMASSO QUEIRAZZA

Appellant

AND

DOMINIQUE QUEIRAZZA LEDAY

First Respondent

AND

BANQUE PRIVÈE EDMOND de ROTHSCHILD LTD

Second Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Ms. Justice Crane-Scott, JA
The Honourable Mr. Justice Jones, JA

APPEARANCES: **Mr. Brian Simms, QC with Mrs. Sophia Rolle-Kapousouzoglou, Counsel for the Appellant**
Mr. Sean Moree with Mrs. Vanessa Smith, Counsel for the First Respondent
Mrs. Tara Cooper-Burnside with Ms. Bradia Demeritte, Counsel for the Second Respondent

DATES: **22 February 2017; 22 June 2017**

Civil Appeal-Interlocutory Applications-Stay-Admission of Fresh Evidence- Trust - Fraud-Undue Influence

In 2013 the second respondent filed an Originating Summons seeking to settle various claims to funds held on an account at their institution. The matter came on for hearing in 2015 and the sole issue before the Supreme Court was whether the trust documents stipulating the beneficial owner of the funds constituted a valid and enforceable trust. The trial judge granted a declaration in favour of the first respondent; declaring that the settlement was indeed valid. The appellant seeks a stay of that decision and an order allowing further evidence to be adduced on appeal.

Held:- applications dismissed, costs are the respondents to be taxed if not agreed

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

It seems clear from paragraph 18 of his affidavit that the appellant had the Settlement document when the interpleader action was in train. Indeed, he questioned the signature of his father; although he later ceased to impugn its genuineness. What is evident, however, is that he would also have had the opportunity to investigate the other handwriting on the Settlement document which he claims is that of the first respondent. Further, he was in a position to challenge the involvement of Mr. R Sparcia in the proceedings in the court below at the time of the interpleader hearing. His reason for not having done so was on the advice of someone unknown. The fact that the appellant could have but did not raise the issue of the first respondent's handwriting and the involvement of R. Sparacia in the execution of the Settlement document during the interpleader action is, to our mind, fatal to his application to adduce further evidence and to his application to add new grounds based on that evidence.

In the circumstances of this case, granting a stay for the commencement of another action would be manifestly unjust as this would merely be the rehearing of an issue which was already before the court below. While I do not agree entirely with this submission, I hold the view that to stay the effect of the judge's decision for the speculative purposes of deciding whether or not there has been undue influence and/or forgeries involved in the production of the Settlement is unjustifiable in the circumstances. The judge has determined the Settlement is a valid trust. This enables the Bank to divest itself of responsibility for it and to carry out the intention of the settlor.

If the appellant wishes to challenge the validity of the trust on other grounds, namely undue influence or forgery, he may do so; but not in this appeal. I note that the Italian authorities have been investigating the appellant's allegations since 2016 but there has been no evidence adduced to suggest this investigation has progressed at all; or at what stage it has reached. It would be unfair for the first respondent to have to await an investigation whose termination is unknown; and it would place an onerous duty on the second respondent to maintain control of money in circumstances where they have done all within their power to resolve the dispute over the validity of the trust.

Barrow v. Bankside Agency Ltd. [1996] I WLR 257 mentioned
Bethel v. Cable Bahamas Ltd and Another [2013] 2 BHS J. No. 25 mentioned
Brown v Dean [1910] AC 373 mentioned
Bulale v Home Secretary [2008] EWCA Civ 806 mentioned
Couwenbergh v Valkova [2005] All ER D 98 (Feb) mentioned
Henderson v Henderson (1843) 3 Hare 100 mentioned
Hip Foong Hong v H. Neotia & Co. et al [1918] AC 888 mentioned
Ladd v Marshall [1954] 3 All ER 745 mentioned
Midland Bank plc v Shephard [1988] 3 All ER 17 mentioned
Miskovic v Secretary of State for Work and Pensions [2011] EWCA Civ 16 mentioned

Murray Group Holdings Ltd and others v Revenue and Customs Commissioners [2016] STC 468 mentioned
Noble v Owens [2010] 3 All ER 830 mentioned
Slack v Cumbria [2009] EWCA Civ 293 mentioned
Tycoon Management Ltd v Barrett [2016] 1 BHS J. No. 129 mentioned
Yat Tung Investment Company Ltd. v. Dao Heng Bank Ltd. [1975] AC 581 mentioned

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JUDGMENT

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

1. There were two interlocutory applications before us. One filed by the appellant on 7 February 2017, which is a supplementary notice of motion; and then there is a notice to take preliminary objections by the first respondent filed on 15 February 2017.

2. On 22 February 2017, we heard the application by the appellant relating to his supplementary notice of motion for an Order for the admission of fresh evidence; and that the Order of Senior Justice Stephen Isaacs (the Judge) below be stayed; and a stay of the appeal be granted. We reserved our decision. We render it now. For reasons which appear below, we do not grant the application for a stay; nor do we grant the application to adduce further evidence.

Summary

3. On 27 April 2007, Mr. Francesco Queirazza (Mr. Queirazza), an apparently successful antique dealer and the father of the appellant, opened an account with the second respondent. It was referred to as "Account M" in the court below hence we maintain the name.

4. On 12 July 2011, Mr. Queirazza executed a Declaration of Trust ("the Settlement") in relation to Account M. Clause 2 of the Settlement provided that the assets contained in Account M were to be held by Mr. Queirazza on trust for the benefit of his wife, the first respondent, and upon his death the second respondent would be the Successor Trustee and the assets in Account M would be paid to the first respondent.

5. After the death of Mr. Queirazza, the second respondent arranged for the transfer of the assets in Account M to the account of the first respondent ("Account F") under the terms of the Settlement.

6. Before all of the assets in Account M could be transferred to Account F, the appellant, Mr. Quierazza's son from an earlier marriage, as the purported executor of the estate of Mr. Queirazza ("the Estate"), challenged the ownership of Account M. Specifically, the appellant alleged that Mr. Queirazza executed an Italian Will dated the 9 March 2006 whereby he devised his assets in "Rothschild Bank" to his first wife, Ms. Raffaella Ravano, and the appellant. In addition to the Will, the appellant alleged that under Italian law the heirs of Mr. Queirazza have a predetermined right to the estate as a result of a forced heirship regime. This meant that even in the absence of a will, the appellant, as Mr. Quierazza"s son, and the first respondent, as Mr. Quierazza"s wife would benefit from his estate.

7. In an effort to resolve the competing claims to the funds in Account M, on 17 October 2013, the second respondent filed an Originating Summons in the Supreme Court ("the Originating Summons"); and on 26 February 2014 the parties to the action appeared before the Court on a directions hearing with an agreed position in hand, that is to say, the following two issues were to be determined by the Court:

    a. Was the Settlement valid and enforceable?
    b. If the answer to (i) was no, who were the rightful beneficiaries of the assets of the bank account held at Banque Privee Edmond de Rothschild Ltd?

8. It was also agreed that under Order 17 rule 5(1)(b) of the Rules of the Supreme Court the appellant would be the plaintiff and the first respondent would be the defendant. The terms of the agreement were perfected in a Consent Order dated 26 February 2014 ("the Consent Order").

9. After the Consent Order was granted, the parties appeared before the Court on 10 March 2014; and the substantive hearing of the Originating Summons was adjourned to 26 June 2014. On that date, counsel for the appellant advised the court that he received instructions from the appellant that the signature of Mr. Queirazza may have been forged. Counsel requested an adjournment to adduce additional evidence to support that contention. The Court acceded to the appellant's request and the hearing of the Originating Summons was adjourned to August, 2014 to allow counsel for the appellant to file an additional affidavit, if needed. However, no affidavit was ever filed and the appellant abandoned the point. The hearing of the Originating Summons proceeded on the issues in the Consent Order.

10. The sole issue before the court below was whether the Settlement constituted a valid and enforceable trust. This merely involved a point of construction based on content of the Settlement and neither the appellant nor the first respondent filed any evidence in support of their case, rather they relied upon the facts set out in and documents exhibited to the Affidavit of Nikolai Sawyer filed on the 17 October 2013 ("the NS Affidavit").

11. On 16 April 2015, the judge granted a declaration that the Settlement was a valid and enforceable trust in favour of the first respondent. The appellant filed his Notice of Appeal against the decision of the judge on 26 May 2015.

12. The grounds of appeal are as follows:

> **1. The learned judge erred in law and in fact in ruling that the non-imperative precatory words in the Recital "desirous of holding the account upon Trust imposed an enforceable obligation of trust when they were not so capable.**
>
> **2. The learned judge erred in law and fact in failing to rule that the declared imperative trust of the account was as set out in the operative clause 2.1 which stated that the account was to be held on trust hereafter set out.**
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> **3. The learned judge erred in law in failing to rule as a matter of construction that although the account holder was desirous of holding the account upon trust for the purpose of providing for the benefit of himself, the beneficiary and the contingent beneficiary, if any, the only trust set out in the instrument was in favour of the named beneficiary only.**
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> **4. The learned judge erred in not ruling that the only imperative obligation of trust set out in the instrument was that upon the death of the account holder, the Successor Trustee shall pay the assets of the account to the beneficiary absolutely.**
>
> **5. The learned judge erred in law and fact in failing to rule that there was no trust of the account under which Dominique Leday acquired any proprietary beneficial interest in the account during the lifetime of the Settlor.**
>
> **6. The learned judge erred in law and fact in failing to rule that the named beneficiary was on the terms of the instrument only intended to have rights arising upon the exercise of the mere power to appoint**

under Clause 2.1 until such appointment the beneficiary acquired no rights or interest in the account.

7. The learned judge erred in law and fact in not ruling that the provisions of the instrument excluding the duty to account and exempting the Trustee from liability in respect of the exercise in the Settlors lifetime of the powers granted were repugnant to an inter vivos trust and only consistent with a testamentary disposition.

8. The learned judge ought to have ruled that the absolute dispositive powers over the account in the Settlor for his own exclusive benefit only was consistent only with a retention of a proprietary interest and this was wholly repugnant to an inter vivos trust.

9. The learned judge erred in law in failing to determine that the effect of the powers of the account holder to assign transfer pledge or otherwise hypothecate the account as security for his own debt or obligations which subordinated any interest of the beneficiary or, to pay or apply funds from the account for his own exclusive benefit was inconsistent with an inter vivos trust for the beneficiary.

10. The learned judge erred in law and fact in not holding that there could be no inter vivos trust of the account where the beneficiary's interest was made subject to the Settlor's discretionary dispositive powers and the prospective interest of the beneficiary did not carry any rights enforceable against the Settlor in his lifetime.

11. The learned judge erred in law in failing to rule that the condition against alienation in Clause 2.2, 2.12 coupled with the dispositive powers for the Settlor's exclusive benefit was strong indication that any inter vivos trust was illusory.

l2, The learned judge ought to have ruled that even assuming the Settlor to be a beneficiary, as there was nothing to indicate he suffered from any disability, the absolute dispositive powers would nevertheless render the trust illusory.

13. The learned judge ought to have ruled that the retention of the absolute powers to use the account for his own exclusive benefit coupled with the direction to the Bank to pay the funds standing in the account to the beneficiary absolutely upon the death of the account holder was cogent evidence of an intention that any beneficial should take effect only upon his death.

l4. The learned judge ought to have ruled that the tenor of the document when properly construed showed a clear intention to make a testamentary instrument which was rendered invalid by reason of the failure to meet the formal requirements of a will.

15. The learned judge erred in law in failing to determine that the large beneficial powers and interest retained by the Settlor over the account for his own exclusive benefit coupled with the powers of revocation reserved, rendered the instrument an illusory inter vivos trust.

16. The learned judge erred in law in failing to consider and determine that the provisions of Section 3 of the Trustee Act did not intend to overturn established law on illusory trusts in the sense that the Legislature did not intend to make illusory trusts valid and effective.

13. The first respondent filed a preliminary objection to the appeal; and said as follows:

> **"(1) Grounds 1,2,3,4, 5, 6,9, 10, 11, 12, 14 of the Notice of Appeal Motion filed on the 26th May, 2015 are new points raised for the first time in the Court of Appeal and were not pled in the Court below or pursued by the Appellant in written or oral submissions.**
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> **(2) Grounds 1(i)—(iv) of the Supplementary Notice of Motion filed on the 7th February 2017, are new points raised for the first time in the Court of Appeal and were not pled in the Court below or pursued by the Appellant in written or oral submissions."**

14. The grounds for the objection were stated to be as follows:

> **"(1) The Court of Appeal is a court of rehearing;**
>
> **(2) A party to an Appeal will not normally be allowed to raise for the first time a point which was not taken in the Court below; and**
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> **(3) The Court of Appeal should not decide an issue which was not the subject of a factual or legal assessment in the Court below."**

Appellant's Application

15. On 14 February 2017, Tomasso Queirazza filed an affidavit in support of his application filed on 26 May 2015 and supplementary notice of motion filed on 7 February 2017 (the Tomasso Affidavit). The application sought: (i) an Order for the admission of fresh

evidence and, (iii) that the Order of the Judge below be stayed and a stay of the appeal be granted.

16. The Applicant also wanted to be granted leave to amend his appeal Motion to include the following grounds:

> **"1.(i) That the purported trust document dated 12th July 2011 entitled (Declaration of Trust) (the purported trust document') was inadmissible in evidence as a matter of law as it failed to comply with the requirements of Section 92 of the Trustee Act.**
>
> **(ii) That the purported trust document was inadmissible in evidence as a matter of law as it was not a valid document, and even if it was admissible it is invalid by virtue of Section 92 of the Trustee Act.**
>
> **(iii) That the judge erred in law when he ordered the Applicant/Appellant to be the Plaintiff in the interpleader proceedings as this placed an impossible burden on him to prove a negative, that is to say that a document was not a genuine document.**
>
> **(iv) The judge erred in law in failing to order that the interpleading party the Second Respondent, Banque Privee Edmond de Rothschild Limited, should have established the validity of the document before the parties proceed to contest the interpleader issues.**
>
> **2. An Order for the admission of lies/evidence obtained following the interpleader proceedings for the purpose of establishing that the document relied on by the Respondents as constituting a valid inter vivos trust is a forgery by which means, a fraud was committed on the Court below.**
>
> **3. Alternatively, that the Order of the Judge below be stayed and a stay of the appeal be granted pending a determination of the validity of the document in proceedings commenced by way of Writ action to determine if the purported trust document was a forgery or was covered by undue influence.**
>
> **4. Further, in the event the Court orders any matters to be determined by the Supreme Court those proceedings should he stayed pending the outcome of criminal proceedings instituted in Monaco by the Prosecuting Authority against the First Respondent and the Monaco affiliate of the Second Respondent."**

17. Mr. Simms stated the case in the court below quite succinctly; **"Now, the issue that was put before the court was one simply of construction"**. He said that at some point during the hearing the appellant took a position that he did not believe that that was his father's signature on the Settlement document and the judge gave him–because when they came for directions on how this should be dealt with–gave him two weeks to file evidence to support his belief Mr. Quierazza's signature was forged.

18. In the Tomasso Affidavit he avers:

> **"18. I had engaged the services of Callenders & Co. to pursue the matter further. The interpleader Summons was served on them. But the summons and the purported trust document which is the subject matter of the proceedings did not come into my possession. Sometime later when I reviewed the purported trust document I immediately observed that the handwriting in the spaces for the information concerning the designated beneficiary appeared to be Dominique Leday but I could not be certain of this fact.**
>
> **19. The name R. Sparacia on the purported trust document seemed familiar but I could not be sure at the time whether it was the brother-in-law of Dominique Leday. I was advised that in any event if it was Dominique Leday's brother-in-law this evidence without more was not sufficient to test the genuineness of the document.**
>
> **20. I was aware that my father was ill but had no knowledge of the seriousness of his illness. It was not until the 18th August 2015 when I received the medical records of my father from the hospital that questions were raised concerning the circumstances in which this document came to be made. These documents reveal that at the time of the making of the purported declaration my father was seriously ill and suffered from the condition from which he died just three (3) months later. Mr. Sawyer the witness for the Second Respondent, did not at any time explain how and when the purported trust document came to have the different handwriting in the spaces even though it was obviously different from that of the signatory. Now produced and shown to me marked, 'TQ.5' is a copy of a Communication of Medical Documents requests which reflects when I requested some of father's files which were subsequently given to me in August 2015 and the English translation and the hospital records received.**

21. The issue as to the genuineness of the document itself is a fundamentally different one from whether it evidences an inter vivos trust or testamentary disposition. The medical evidence brought the former into sharp focus. I had no knowledge of nor could I possibly have known at the time of the hearing below of the circumstances in which this document came into existence. The appearance of the handwriting of Dominique Leday in the spaces for designated beneficiaries and Successor Trustee in the context of the medical condition of my father raises an issue as to whether undue influence was asserted on my father or whether or not he knew of the names of the beneficiary being inserted given his medical condition. This information was inserted by Dominique Leday without his consent and approval. There are no initials on the document which would suggest that this was so" -- In other words, the father did not initial the changes. "Secondly, the role of R. Sparacia in signing as a witness to the document remains unexplained as well as the seal of the Monaco branch. If my father had consented to the execution of the purported trust document it is not clear what R. Sparacia was indeed being a witness to.

22. The real issue which arises therefore is not as to whether my father signed the document but the circumstances given his health under which it came to become completed by Dominique Leday."

23. The medical record of my father did not come into my possession until August of 2015. The handwriting expert's report confirming that the handwriting on the document was that of Dominique Leday was issued in 2016. Now produced and shown to me marked 'TQ.6' is a copy of the handwriting expert's report.

24. At the conclusion of the hearing on the 25th June 2014 my Counsel was given only fourteen (14) days to file an Affidavit to establish that the purported trust document was not my father's document. This was an impossible timeframe within which to obtain the evidence which only became available in 2015 and 2016.

25. However, Mr. Sawyer did not explain how and when" or the circumstances in which the purported trust document came to have a different handwriting in spaces even though it was obviously different from that of the signatory. Nor did he give any reason for the appearance of the signature of the witness R. Sparacia with the seal of the Monaco affiliate of the Bank or how it came to be on a document

emanating from the Nassau Bank. Further he did not say who R. Sparacia was and his connection with the Bank. Finally, Mr. Sawyer did not account for the fact that the stamps on the purported trust document were not cancelled by putting the initials of the Trustee or the person executing the Trust document on the stamp and dating it. This should have been verified by the Second Respondent after becoming Successor Trustee as a matter of due diligence and prior to seeking to refer to the purported trust document in these legal proceedings.

26. The fact that the stamp of the Bank Rothschild, Monaco, appears beside the signature R. Sparacia and not that of Banque Privee Edmond de Rothschild Limited, Nassau, raises grave suspicion as to the circumstances in which this document came to be signed by the Account Holder/Trustee. The high probability is that the document was completed after the Account Holder's signature was placed on the document.

27. There can be little doubt that the purported trust document was signed, if at all, by my father the Account Holder/Trustee in Monaco when my father was seriously ill and under the care of Dominique Leday. As an officer of the Bank Rothschild, R. Sparacia, if present, ought to have ensured that it was the Account Holder/Trustee who completed the document and if not, that the insertions in the handwriting of Dominique Leday were acknowledged by the Settlor, as if not done this could render the document invalid.

28. The document evidencing the settlement is on its face a document of the Nassau Bank Rothschild. But the stamp on the document beside the signature of R. Sparacia indicates that it was not witnessed by an officer of the Nassau Bank. The role played by R. Sparacia may amount to one of aiding and abetting the forgery.

29. These circumstances are now the subject matter of a criminal complaint in the Law Courts of Monaco against Dominique Leday and the Monaco affiliate of the Second Respondent which is exhibited at 'TQ.1'. Proceedings have been instituted for abuse of Trust, forgery, use of forged document and concealment of these acts. The complaint is due to be heard by an instructing judge sometime this year.

30. The circumstances do indicate that Francesco Queirazza had placed his trust and confidence in Dominique Leday when he became ill and unable to manage his affairs himself. But Dominique Leday has abused this trust in getting him to sign documents with the intention of benefitting herself.

31. The very fact that the handwriting of Dominique Leday appears on the document in the absence of any explanation from the Bank points irresistibly to the conclusion that the senior was unduly influenced to place his signature on it when his health was seriously deteriorating and his will weakened and when he had placed every trust and confidence in Dominique Leday to take care of his affairs. Alternatively, my father may have signed the purported trust document but never added a beneficiary so that the beneficiaries would be the contingent beneficiaries i.e. the heirs and Dominique Leday inserted her name without any authority of my father to do so.

32. The placing of her name in the relevant portions of the document as beneficiary raises a presumption that my father had appended his signature to the document as a result of undue influence on the part of Dominique Leday."

19. It seems clear from paragraph 18 of his affidavit that the appellant had the Settlement document when the interpleader action was in train. Indeed, he questioned the signature of his father; although he later ceased to impugn its genuineness. What is evident, however, is that he would also have had the opportunity to investigate the other handwriting on the Settlement document which he claims is that of the first respondent. Further, he was in a position to challenge the involvement of Mr. R Sparcia in the proceedings in the court below at the time of the interpleader hearing. His reason for not having done so was on the advice of someone unknown.

The Preliminary Objection

20. Counsel for the respondent submitted that the appellant ought not to be allowed to argue the grounds not raised in the court below on which no arguments had been made or considered by the judge.

21. He contended that the doctrine relating to raising issues in subsequent proceedings which could have been litigated in earlier proceedings was first addressed in **Henderson v Henderson** (1843) 3 Hare 100. The Henderson rule was set out in the Privy Council case of **Yat Tung Investment Company Ltd. v. Dao Heng Bank Ltd.** [1975] AC 581 where Lord Kilbrandon noted at page 590:

"But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram V.C. in Henderson v. Henderson [1843] 3 Hare 100, 115, where the judge says:

"...where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same pa flies to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

The shutting out of a "subject of litigation"–a power which no court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances" are reserved in case justice should be found to require the non-application of the rule...

The Vice-chancellor's phrase "every point which properly belonged to the subject of litigation" was expanded in Greenhalgh v. Mallard [1947] 2 All E.R. 255, 257, by Somervell L.J.:

'...res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but.., it covers issues or facts which are so clearly part of the subject mailer of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.'"

22. The Henderson rule being wider that res judicata was confirmed in **Barrow v. Bankside Agency Ltd.** [1996] I WLR 257. At page 260 Bingham MR stated:

> **"The rule in Henderson v. Henderson... requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."**

23. Still, if the Court is satisfied that the justice of the case merits it, the appellant should be allowed to raise his grounds before us. Section 24 of the Court of Appeal Act is sufficiently broad to enable this to be done. Moreover, in **Bethel v. Cable Bahamas Ltd and Another** [2013] 2 BHS J. No. 25 which was cited with approval in **Tycoon Management Ltd v Barrett** [2016] 1 BHS J. No. 129 this Court recognised and applied the principle found in section 24.

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

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

25. In the English Court of Appeal case of **Miskovic v Secretary of State for Work and Pensions** [2011] EWCA Civ 16 one of the appellants sought to raise an argument that was not raised in the Courts below. The Court of Appeal held that it had the jurisdiction to entertain new arguments not raised in the lower Courts. Sedley J considered the comments of the Courts in **Bulale v Home Secretary** [2008] EWCA Civ 806, [2009] QB

536, [2009] 2 WLR 992,and **Slack v Cumbria** [2009] EWCA Civ 293, [2009] ICR 1217, para. 29, [2009] IRLR 463; and stated at paragraph 124:

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

See also **Murray Group Holdings Ltd and others v Revenue and Customs Commissioners** [2016] STC 468 at 485 (para. 39).

26. The appellant asks that the Court allow him an opportunity to put fresh evidence before us because when the matter was before Isaacs, Sr J the evidence was not then available to him. It was not until the judge had given his decision on the interpleader action that certain documents, financial and medical, came into the appellant's possession; and he became apprised of information which suggested to him that the Settlement document contained handwriting which was forged. Moreover, he was concerned that given his late father's medical condition, he was vulnerable to undue influence from the first respondent. He therefore wants an opportunity to place these matters before the Court to impugn the validity of the trust document.

27. The nature of the case before the judge in the court below must be borne in mind, namely, it was an action commenced by the second respondent for the court to answer a discrete question, namely, were the funds held by the Bank subject to a valid trust. The judge discharged the only obligation he had to perform and determined affirmatively, the validity of the trust.

28. The appellant raised allegations of undue influence and fraud but it should be noted that the only suggestion of either occurring in this case comes from the appellant alone. There is no independent evidence of same. This is not to suggest that a court may not act on the sole allegation of a party, but there must be a solid basis to support the allegation. The appellant's case lacks such a basis.

Undue Influence

29. In respect to the allegation of undue influence, there is only the assertion that because the handwriting of the first respondent appears on the Settlement document in spaces meant

for the settlor to sign and Mr. Quierazza was ailing, the Court must infer there has been some undue influence.

30. In **Midland Bank plc v Shephard** [1988] 3 All ER 17, Neill LJ stated at page 21:

> **"The confidential relationship between husband and wife does not give rise by itself to a presumption of undue influence. I can refer, first, to the judgment of Dillon LJ in Kingsnorth Trust Ltd v Bell [1986] 1 All ER 423 at 427, [1986] 1 WLR 119 at 123 where he said:**
>
> **'...it is as well to have clearly in mind at the outset that there is no presumption of law that a transaction between husband and wife for the husband's benefit was procured by undue influence on the part of the husband and there is no rule that such a transaction cannot be upheld unless the wife is shown to have had independent advice: See generally Shears & Sons Ltd v Jones [1922] 2 Ch 802, [1922] All ER Rep 378 and Bank of Montreal v Stuart [1911] AC 120'**

31. Beyond the suspicion of the appellant there is nothing to suggest any hint of undue influence in this case such that would cause this Court to bestir itself as he requests.

Fraud

32. In relation to the allegation of fraud, Mr. Simms referred to **Noble v Owens** and **Hip Foong Hong v H. Neotia & Co., et al**. The facts in **Noble** are gleaned from the headnote of the case:

> **"In 2003, the claimant was seriously injured when his motorcycle was in collision with a car driven by the defendant. Liability was admitted and, on the basis that the claimant's mobility was severely restricted, damages were assessed in the sum of over £3.3m. The medical evidence adduced indicated that the claimant was dependant on crutches and a wheelchair, that he would never work again and would require a great deal of assistance with daily living. The defendant's insurers did not appeal the judgment. In 2008, the insurers received confidential information to the effect that the claimant was not as seriously disabled as he had claimed. The claimant was secretly filmed on various occasions and could be seen in the film on his premises walking short distances outside with an elbow crutch and a gutter crutch, holding his dog, reaching up to the spotlights on the top of his vehicle and using his wheelchair. The insurers took the view that the pictures presented on the films were so different from that presented at trial that the only inference was that the claimant had deliberately**

misled the court. The insurers obtained an order freezing the damages received by the claimant. The insurers appealed to the Court of Appeal) based on fraud. The Court of Appeal held that the allegations of fraud ought to be heard as a preliminary issue by the High Court before it could be decided that the award of damages to the claimant could be interfered with. The instant matter was the determination of the preliminary issue. The main issue was therefore whether any significant part of the damages had been fraudulently obtained by the claimant. The court ruled, on the evidence at the time of the quantum trial, the claimant had been determined to try to walk unaided and might have been confident that somehow he would succeed in doing so, but he had not dishonestly concealed from the court or the expert witnesses his then true state of disability or dishonestly emphasised his disability. The claim that the claimant had dishonestly misled the court at the quantum trial would accordingly be dismissed."

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

34. At page 1421 Lord Buckmaster opined:

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

35. I hold the view that it was open to the appellant to institute his writ action in relation to the fraud and undue influence allegations since 2016 once he became aware of the facts contained in his affidavit sworn to on 7 February 2016. The fact that he has yet to do so

suggests the present applications to adduce new evidence and for a stay do not spring from a sincerely held belief in the righteousness of his case.

36. Moreover, the appellant could have raised the issues of undue influence and fraud during the interpleader action because he was aware his father was ill at the time of the execution of the Settlement document, he was aware of Mr. R. Sparacia's involvement and he ought to have been aware of the first respondent's handwriting on the document. It is notable that the appellant says at paragraph 18 of his affidavit that his lawyers were served with the interpleader summons and the trust document but does not state when exactly he received them for his perusal.

37. We are able to infer however, that he received them during the interpleader action since he did take issue with the genuineness of his father's signature on the Settlement document before the court below. He could have raised the issue in relation to both matters at the same time as he did in relation to his father's signature.

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

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

39. The fact that the appellant could have but did not raise the issue of the first respondent's handwriting and the involvement of R. Sparacia in the execution of the Settlement document during the interpleader action is, to our mind, fatal to his application to adduce further evidence and to his application to add new grounds based on that evidence.

The Stay

40. The first respondent submitted that the Court has a discretionary power to grant a stay of proceedings if when taking all of the circumstances of the case into consideration it believes there is a risk of injustice in the event a stay is not granted. However, in these circumstances, granting a stay for the commencement of another action would be manifestly unjust as this would merely be the rehearing of an issue which was already before the court below. While I do not agree entirely with this submission, I hold the

view that to stay the effect of the judge's decision for the speculative purposes of deciding whether or not there has been undue influence and/or forgeries involved in the production of the Settlement is unjustifiable in the circumstances. The judge has determined the Settlement is a valid trust. This enables the Bank to divest itself of responsibility for it and to carry out the intention of the settlor.

41. If the appellant wishes to challenge the validity of the trust on other grounds, namely undue influence or forgery, he may do so; but not in this appeal. I note that the Italian authorities have been investigating the appellant's allegations since 2016 but there has been no evidence adduced to suggest this investigation has progressed at all; or at what stage it has reached.

42. It would be unfair for the first respondent to have to await an investigation whose termination is unknown; and it would place an onerous duty on the second respondent to maintain control of money in circumstances where they have done all within their power to resolve the dispute over the validity of the trust.

43. Before concluding this judgment we wish to refer to two decisions, one of which was cited in **Ladd v Marshall** (Supra), that is, **Brown v Dean** [1910] AC 373; and **Couwenbergh v Valkova** [2005] All ER D 98 (Feb). Both cases speak to the matter of adducing further evidence in an appellate court.

44. In the premises therefore, we do not allow the appellant's applications to adduce fresh evidence; and we do not grant his application for a stay of the judge's decision. Cost of the applications are the respondents to be taxed if not agreed.

The Honourable Mr. Justice Isaacs, JA

45. I agree.

The Honourable Ms. Justice Crane-Scott, JA

46. I also agree.

The Honourable Mr. Justice Jones, JA