COMMONWEALTH OF THE BAHAMAS **2018/CLE/gen/00100**

IN THE SUPREME COURT

Commercial Division

BETWEEN:

DARRON BOWE

Plaintiff

And

SCOTIABANK (BAHAMAS) LIMITED

Defendant

Before: The Honourable Mr. Justice Keith H. Thompson

Appearances: **Mr. Michael Scott of Counsel for the Plaintiff**

Mr. Robert Adams along with Mr. Samuel Brown of Counsel for the Defendant.

Dates of Hearing: **February 12th, 2019**

February 13th, 2019

RULING

[1] This action was commenced by Writ of Summons filed January 30th, 2018. A Defence was filed February 16th, 2018. A Reply to Defence was filed March 16th, 2018. The Case Management Order was filed October 03rd, 2018.

[2] Two summonses were filed subsequently, one on January 28th, 2019 by the Defendant and the other on February 05th, 2019 by the Plaintiff.

[3] The summons filed by the Defendant seeks the following:

COMMONWEALTH OF THE BAHAMAS 2018/CLE/gen/00100

IN THE SUPREME COURT

Common Law and Equity Division

B E T W E E N

DARRON BOWE

Plaintiff

AND

SCOTIABANK (BAHAMAS) LIMITED

Defendant

SUMMONS

LET ALL PARTIES CONCERNED attend before the Honourable Mr. Justice Keith Thompson of the Supreme Court, at the Supreme Court, situate at Ansbacher Building, in the City of Nassau, on the Island of New Providence, one of the Islands in the Commonwealth of The Bahamas on the day of A.D., 2019 at - o'clock in the -noon on the hearing of an application by the Defendant pursuant to Order 18 Rule 19 (1) (b), (c) and (d) of the Rules of the Supreme Court and or under the inherent jurisdiction of this Honourable Court **FOR AN ORDER** that paragraphs 4, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the Plaintiff's Statement of Claim herein be struck out on the grounds that the allegations contained therein are (i) scandalous, frivolous or vexatious, (ii) may prejudice, embarrass, or delay the fair trial of this action (iii) otherwise an abuse of the process of this Honourable Court and the Statement of Claim be amended accordingly **AND FOR AN ORDER** that the costs of and occasioned by this application be paid by the Plaintiff to the Defendant, to be taxed if not agreed.

Dated the 28th day of January, A. D., 2019

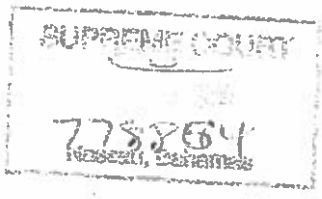
REGISTRAR

[4] The Summons filed on February 05th, 2019 seeks the following:

COMMONWEALTH OF THE BAHAMAS 2018

IN THE SUPREME COURT CLE/Gen/00100

Commercial Division



BETWEEN

DARRON BOWE

Plaintiff

-and-

SCOTIABANK (BAHAMAS) LIMITED

Defendant

SUMMONS

LET ALL PARTIES concerned attend before, His Lordship, the Honourable Mr Justice Keith Thompson, a Justice of the Supreme Court, Nassau, New Providence, the Bahamas on the 11th day of February 2019 at 10 am/pm on the hearing of an application on behalf of the Plaintiff pursuant to Order 24 Rules 7 and 11 RSC and under the inherent jurisdiction of the Court for an Order that:

1) The Defendant do produce an Affidavit stating whether or not the following documents are in its possession and if they are not why they are not and when they were last in its possession and why the Defendant parted with them:

   a. A copy of the Plaintiff's Employment Contract with the Defendant;

   b. A copy of the Construction Contract between the Defendant and any and all construction companies and contractors employed to carry out construction works at the Rawson Square, Nassau Branch of Scotiabank; and

   c. Any and all reports produced by Mr Palacious relating to the Rawson Square, Nassau Branch of Scotiabank and relating to the Plaintiff's employment and specific PBOs and PARs and to the policy of the Defendant towards selling products to customers, especially where those products had not been sought by the customer.

2) The Defendant do produce copies of the above listed documents (and all related documents) to the Court and for the Plaintiff's review.

3) Any further Orders that the Court deems appropriate.

4) Costs.

Dated the 5th day of February 2019

[5] This Summons was taken out by Scott & Co., Old Fort Bay Town Centre, B 1 Unit 12, Nassau, Bahamas P. O. Box SP60606 Attorneys for the Plaintiff.

[6] The Defendant therefore is seeking to strike out various paragraphs of the Plaintiff's Statement of Claim pursuant to Order 18 Rule 19(1), (b), (c) and (d) of the Rules of the Supreme Court and/or under the inherent jurisdiction of the Court.

[7] In the circumstances, I think it prudent to deal with the striking out Summons first.

[8] The relevant paragraphs of the Plaintiff's SOC provide:

STATEMENT OF CLAIM

"1. The Plaintiff, Mr. Darron Bowe, was an employee of the Defendant between 1 September, 1989 (prior to this date Mr. Bowe had worked as a summer student for 2 years) and August 2016, when he tendered his resignation following a repudiatory breach of his employment contract by the Defendant. During the period of his employment, the Plaintiff was Branch Manager, inter alia, of the flagship branch of Scotiabank in the Bahamas. It was an implied term of the Plaintiff's contract of employment that the Defendant would not act in a manner calculated or likely to destroy the relationship of trust and confidence between employer and employee.

2. The Defendant is the Bahamian subsidiary of Scotiabank a Canadian retail bank.

3. At the time of his resignation the Plaintiff was Branch Manager of the main or flagship branch at Rawson Square, Nassau, The Bahamas (the Main Branch).

4. **Sometime in late October 2014, major renovation works were commenced at Main Branch which were not completed until February 2016. These works impacted severely on the ability of Main Branch to operate at full capacity. This fact is singularly recorded as early as the 23rd March 2015 by Coleen Daniels, Manager Sales and Service Coach at the Managing Director's Office, Nassau, Bahamas in her Branch Review Tool Report who noted "... major renovations which have significantly impacted the customer experience." These vital details would have been available significantly to the regional offices of the Bank in Jamaica and at the head office of the Bank in Toronto through the Bank's portal system.**

11. **In this correspondence with Mr. Porter the Plaintiff raised very serious concerns about health and safety issues and specifically about the fact that customers and staff alike were being exposed to hazardous materials, including asbestos.**

12. **In the first paragraph of that letter, the Plaintiff clearly stated that he felt that his name had been muddied within the bank. He went on to state that the PAR as presented to him made no mention of the hazardous conditions that existed at Main Branch in 2015, which had a direct impact not only on the working conditions of staff but more pertinently, upon the financial performance of Main Branch. These conditions included:**

- **Members of staff (banking staff) performing janitorial duties in a vain attempt to make Main Branch look presentable to customers;**

- **A lack of both telephone and computer services at certain times of the working week;**

- **Main Branch being without ceiling lighting for several weeks;**

- **Long periods of construction work being carried out during working hours exposing staff and customers to unacceptable noise levels. Exposure to dust and odours well in excess of acceptable industry standards not to mention Health and Safety guidelines;**

- **Exposing the staff and branch customers to potentially hazardous materials, including asbestos;**

- **A lack of basic HVAC during peak summer months, contributing to the unacceptable working conditions;**

- **Attempts by the staff to catch up on lost work by coming into Main Branch on the weekends (even when Main Branch was closed) only to be met with the same construction work being carried out;**

- **During the same period, several other branches closed with the relevant work and files being transferred to Main Branch, whilst it was still in the state of construction. One staff member who the Managing Director's Office had no space for was assigned to work from a desk at the Main Branch in its back office. He stayed at the Main Branch for only two hours and requested to be moved as he could not stop coughing due to the dust from the construction works. He could not work safely or comfortably in those conditions. These were the same conditions that the Plaintiff and his members of staff had been working in and continued to do so.**

13. **The letter concluded with the Plaintiff highlighting the fact that the dust and odours the bank exposed the staff and customers to (over several years) were potentially hazardous to their health and could**

cause and/or exacerbate conditions such as asthma and chronic lung conditions. The potential for toxic material such as asbestos being released into the open air and thus in danger of adversely affecting the health of staff and customers was also prevalent and the Plaintiff stated that no coherent plan had been put in place to minimize or prevent such exposure. There was no containment plan put in place to stop occupied areas being at risk to such exposure to potentially toxic and harmful substances. It was stated that not only were the conditions clearly in breach of health and safety standards but carried with them the potential of adverse litigation against the bank from employees (and perhaps even customers) as a consequence of its failures in this regard.

14. **Mr. Bowe went on to highlight the fact that the Cable Beach and Freeport branches also did not meet their financial goals (despite not having to endure heavy construction work) and yet were both rated as "Meeting Expectations" in their PARs.**

15. **The letter clearly and coherently set out the Plaintiff's concerns about the way in which Main Branch had been managed and how those conditions had not been taken into account when producing the PAR.**

16. **The Plaintiff never received a response from Mr. Porter (or anyone in Canada) to his letter. Instead, what he received was a letter from Mr. Keenan Johnson, dated 12th February 2016, in the Bahamas saying that the letter had been referred back to Nassau. This was an incredible state of affairs given the fact that the Plaintiff's letter was complaining about the Nassau management team and how poorly Main Branch had been managed. This response was a short letter that merely stated that the PAR stood as drafted. It did not address any of the specific concerns and complaints raised by the Plaintiff in his letter to Mr. Porter.**

17. As an example of how perverse it was that the that the Plaintiff's complaint should have been referred back to Nassau and as an example of how biased the process was, on the same day as the Plaintiff received Mr. Johnson's response letter, he also received an email from the same Mr. Johnson informing him that the bank wished him to take 60 days' vacation. This was clearly in response to his concerns about Main Branch and the PAR and is evidence that the Defendant was beginning the process that would result in his constructive dismissal.

18. Mr. Bowe also believes this request was also linked not only to his concerns about the PAR and the safety conditions of Main Branch but also because he had refused to partake in a sales scheme (similar in nature to the Wells Fargo scandal in the United States of America (the Wells Fargo scheme) whereby the bank encouraged its staff to sell products to customers which they did not necessarily need. The staff member in question would be paid a commission calendar years end incentive based on the number of financial products he or she sold to a customer. If the member of staff exceeded his or her dollar and unit goals (annual target) then they would receive an increase in salary and rewarded with an incentive pay (bonus) at the end of the calendar year. Therefore, many members of staff in other branches forced products onto customers and were encouraged to do so by the Defendant. The mandate was a minimum of three units per customer. Units help the Bank earn non-interest revenue and if the member of staff did not do this they were placed on the Performance Improvement Program (PIP). This program prevented the member of staff from getting any loans, salary increases or bonuses from the Bank. The program would then be used to fire that member of staff the following year if he or she did not achieve 100% in all areas. An example of how this worked in practice and affected customers was in one instance where a customer came into the bank wishing to open a deposit account. The

customer wished to deposit $10,000 with the Bank. Instead of opening one deposit account that customer was convinced to open up ten separate accounts, thereby earning the staff member ten separate units and credit accordingly. Mr. Bowe had vocally refused to implement that policy and believes as a result he was seen as a problem within the Bank.

19. **On 17th May 2016, after being forced to take 60 days' vacation, the Plaintiff replied to Mr. Johnson's letter of 12 February 2016. In that letter, he stated his deep disappointment with the response and the way the Defendant had handled his complaint to Mr. Porter. He claimed that his concerns had been swept under the carpet and his complaint dealt with "in-house". He again re-iterated the fact that the managers of the Cable Beach and Freeport branches had not been treated in the same way as he had and been downgraded. The Plaintiff was not being treated in a fair and impartial manner but rather there was ample evidence that the Defendant had an agenda which it wished to follow, namely forcing the Plaintiff to resign as a direct result of the it's behavior.**

20. **The Plaintiff, yet again, referenced the serious health risks that the Defendant had exposed not only him to but also Main Branch staff and indeed, the Defendant's customers. These concerns had still not been addressed, instead a throw away remark was included in Mr. Johnson's letter that the conditions had been appraised by the bank and not thought to be serious. The Plaintiff responded by stating that nobody, as far as he was aware as Branch Manager, had visited the bank in an official capacity in order to reach that conclusion and asked how the Defendant had come to the conclusion it had, especially in light of his comments and remarks.**

[9] The SOC sets out the commencement of the relationship between the Plaintiff and the Defendant up to the time they parted ways.

ARGUMENTS OF THE DEFENDANT:

[10] On the 20th September the parties appeared before me for case management. It was ordered inter alia that each party was to file and serve a list of documents to be relied upon at trial. The Plaintiff filed a list of documents on November 22nd, 2018. The Defendant then filed its list of documents on December 4th, 2018. Both parties subsequently appeared before me on January 17th, 2019 for a pre-trial review.

[11] The Defendant then filed, on the 28th January, 2019 a Summons pursuant to Order 18 Rule 19(1), (b), (c) and (d) of the Rules and/or under the inherent jurisdiction of the court to strike out several paragraphs from the Plaintiff's SOC. This summons was supported by an affidavit sworn by one Chaquita Taylor and filed on the 8th February, 2019.

[12] On the 5th February, 2019 the Plaintiff had filed a summons pursuant to Order 24, Rules 7 and 11 of the Rules and under the inherent jurisdiction of the court for an Order that the Defendant produce an affidavit.

> **"Stating whether or not specific documents are in its possession and if they are not why they are not and when they were last in its possession and why the Defendant parted with them"**

[13] As I understand it the documents include;

a) a copy of the plaintiff's contract of employment;

b) a copy of the construction contract between the Defendant and any and all construction companies and contractors involved in the works at the main branch Rawson Square;

c) a copy of any and all reports produced by Mr. Palacious relating to the Rawson Square Branch.

[14] The Defendant agrees that the Plaintiff's contract of employment is a necessary document in the circumstances but does not agree that the other documents are either relevant or necessary to the issues in the instant matter.

[15] The Defendant is of the view that it has been constrained to make the application at this late stage because to allow discovery of the plainly irrelevant matters raised in the Plaintiff's SOC, would lead to a waste of time and money, amounting to an abuse of the process of the court.

[16] The Plaintiff says that everything he has sought is relevant to his case.

[17] The crux of the matter however, as it relates to the application of the Defendant is to strike out certain paragraphs of the SOC.

[18] A starting point is in the case of **CARIBBEAN MINING GROUP LTD V O'BRIEN and another [2013] 1BHS J. No. 103**, where Gray Evans J. in her dictum stated at paragraph 29:

"Although it is preferable that such applications be made as soon as possible, THERE IS NO BAR (my emphasis) to the application being made after the Defendant has filed a defence, as the rule allows for the application to be made at any stage of the proceedings."

[19] I am of the view that since there is provision for such an application, then the court must give such an application its attention in the first instance and thereafter follow the rules and applicable authorities where and when necessary.

SCANDALOUS, FRIVOLOUS OR VEXATIOUS:

[20] In this regard, the court has a general jurisdiction to expunge scandalous matters in any record or proceeding (see Re MILLER (1884) 54 – LJ Ch. 205). The sole question here is whether the matter alleged to be scandalous would be admissible in evidence to SHOW THE TRUTH OF ANY ALLEGATION (my emphasis) in the pleadings which is material with reference to the relief prayed. (See per **LORD SELBOURNE L.C**. in **CHRISTIE V. CHRISTIE (1873) .L.R. 8 CH. App. 499 p. 503).**

FRIVOLOUS OR VEXATIOUS:

[21] In this regard the court will be concerned with cases or matters in a pleadings which would be obviously unsustainable. (See **LINDLEY L.J. in ATT. GEN OF DUCSPY OF LANCASTER V. L. & N. W. Ry [1892] 3 CH. 274 p. 277**).

TEND TO PREJUDICE, EMBARRASS OR DELAY THE TRIAL OF THE ACTION:

[22] Order 18 Rule 6 (1) of our rules which is identical to Order 18 Rule 7(1), in the 1988 White Book provides;

> "23. Order 18, Rule 6 (1) of the Rules provide as follows:-
>
> **"Subject to the provisions of this rule, and rules 7, 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits."**

[23] I take special note of this particular application in that on the face of it, the Defendant appears to be saying that some or all of the paragraphs under attack go too far.

[24] In the case of **DAVY V. GARRETT [1877] L.R.** 7 Ch. D. 473 at page 483 JAMES L.J. observed in delivering the leading judgment;

> **"Now nothing is more embarrassing to a Defendant than a number of statements which MAY (my emphasis) be irrelevant, and with which he therefore does not know what to do. Almost every statement in this claim appears calculated to embarrass the Defendant in ascertaining what case it has to meet."**

[25] In the same case **THESIGNER L.J.** observed further;

"I am disposed to agree with the contention that the mere stating material facts at too great length would not justify striking out a Statement of Claim. B*ut when in addition to the lengthy statement of material facts we find long statements of immaterial facts, and of documents which are only material as evidence, a Defendant is seriously embarrassed in finding out what is the case he has to meet."*

[26] The Court has a general jurisdiction to expunge scandalous matters in any record or proceedings. However, allegations of dishonesty and outrageous behavior are not scandalous; if relevant to the issue (see **EVERETT V. PRYTHERGCH (1841)** 6 Q.B. D. 190 at page 196.

[27] The sole question is whether the matter alleged to be scandalous would be admissible in evidence **TO SHOW THE TRUTH** of any allegation in the pleading which is material with reference to the relief prayed. (See SELBORNE L.C. in **CHRISTIE V. CHRISTIE (11873) L.R. 8 Ch. App 449 p. 503.)**

[28] The Court is also "disposed to give liberal interpretation" to the words "TEND TO PREJUDICE, EMBARRASS OR DELAY THE FAIR TRIAL OF THE ACTION"; however, at the same time parties must not be too ready to find themselves embarrassed. It is to be remembered that the rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved "SACRED". BUT the rule is of course subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then

becomes a pleading which is beyond his right. (See **BOWEN L.J. in KNOWLES ROBERTS (1888) 38 Ch. D. 263, p. 270).**

[29] More pertinent to the instant case is the fact that the mere fact that the Plaintiff's pleading may contain or contains some unnecessary matter IS NOT SUFFICIENT GROUND for an application under Order 18 Rule 19. Under Order 18, Rule 19/16 under the rubric "TEND TO PREJUDICE, EMBARRASS, OR DELAY THE FAIR TRIAL OF THE ACTION" it provides;

> **"Thus, if material facts be pleaded at unnecessary length or with unnecessary detail the pleading will not be struck out; such prolixity will be left for the taxing master to deal with as a question of costs. (See WEYMOUTH V. RICH (1885) I. T.L.C. 609)"**

[30] Further, under Order 18, Rule 19/16 it provides;

> **"The mere fact that a Defendant is called upon to meet allegations of fact of which he had no previous knowledge does not appear ..... to constitute an embarrassment justifying the striking out of a statement of claim so long as the facts pleaded are relevant to what is claimed against the defendant."**

[31] When it comes to an abuse of process, the term itself connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will in applicable circumstances prevent the improper use of its machinery, and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (See **CASTRO V. MORRAY (1875) 10 EX 213).**

[32] The summons to strike out is also made under the inherent jurisdiction of the court. In this regard it is trite that firstly despite Order 18, Rule 19 itself, the Court has an inherent jurisdiction to stay all proceedings before it which are OBVIOUSLY frivolous, or vexatious or an abuse of its process. (See **REICHEL V. MAGRATH (1889) 14 App. (at 665).**

[33] When an application is made under the inherent jurisdiction of the Court, all the facts can be gone into, an affidavit as to the facts are admissible (See WILLIS V. EARL HOWE [1893] 2 Ch. 545 PP. 551; 554).

[34] It is to be remembered that the inherent jurisdiction will not be exercised except with GREAT CIRCUMSPECTION and UNLESS IT IS PERFECTLY CLEAR THAT THE PLEA CANNOT SUCCEED.

[35] I have had an opportunity to review the relevant paragraphs, the Defendant is seeking to strike out and I have concluded that based on the various authorities relied upon by both parties but more particularly those set out in the White Book under Order 18 Rule 19 that the following paragraphs would be struck, namely paragraphs 11, 13, 18 and 20.

[36] In this regard I take the position of **HALL VC in DAVY V. GARRETT (1877)** C.A. 473 as to those paragraphs which I have refused to strike.

[37] The facts and circumstances of this particular case can be distinguished from DAVY (supra) in that in the instant case there is a claim for constructive dismissal and while not seeking to decide the case prematurely on a strike out application, I

must be cognizant of the nature of the claim which is based on the behavior of an employer which said behavior becomes wide open as the claim in simple words involves any and all actions of an employer to frustrate the employee to the point where the employee makes a decision based on such actions of the employer.

HALL VC opined;

> **"This motion must be refused with costs.**
>
> **The Plaintiffs' case is one of a very special and peculiar character, and it appears to me that if they are entitled to relief under the circumstances which they have alleged in this statement of claim, it is right and proper, and I think necessary, that they should state in very considerable detail the nature of the case upon which they seek that relief. It appears to me that under the circumstances this statement of claim is reasonable and proper, and certainly within the provisions of Order X1X., rule 18, which require a party to state the facts on which he means to rely, so as to shew his case, and to prevent the opposite party being taken by surprise. I think that without great detail of the nature of this case the Defendants might have been able to say, "I never knew that I came here to meet this sort of case." The case, it must be observed, is one of liability founded upon a series of transactions, and upon conduct, not merely in reference to one particular person, but with regard to others in respect of matters that will have to be gone into, shewing, as it is said, that with reference to dealings and transactions in relation to this firm, or at all events, one of them. And although it be true that Party personally may not have been implicated in some of these transactions, or that the case may not succeed against him, yet it may succeed as to others. I cannot**

strike out these allegations if they are relevant or material with regard to any one of the Defendants.

Under these circumstances, although I am not all prepared to say that this pleading might not have been curtailed to some extent, or, as it is expressed in one of the cases upon this subject, that it might not be "pared away" in certain particulars, still I am not prepared to say that there has been such prolixity in the statement of claim as would lead me to require either that the whole be taken off the file or struck out; or that I should require it to be amended so as to curtail it. I think that would be a useless and idle course to take in the present case. The letters, or some of them, are set out more in detail, and some of the accounts are stated more in detail than they might have been. But from that having been done, the Defendants will, at all events, have the advantage of knowing that nothing has been kept back; that it is all there; and they will be able to judge what sort of case there is against them. As an instance of the length in detail of the statement of claim I think the observation with reference to setting out the release at great length was a just one; it might have been stated more shortly."

[38] In looking at the Statement of Claim in its entirety, I have concluded to strike out some of the paragraphs which I deem to be irrelevant or repetitious but not prolix. It is my opinion that if I did in fact accede to the Defendant's application to strike all the paragraphs sought to be struck; then the statement of claim could very well take the Defendant by surprise at trial.

[39] I am reminded of what Justice Allen, President of The Court of Appeal said in **WEST ISLAND PROPERTIES LIMITED V. SABRE INVESTMENT LIMITED and others [2012] 3 BHS J. No 57** at paragraph 30;

> **"Concerning Order 18; Rule 19 (1), (d), R.S.C., both Branwell B. and Blackburn J. in the cases of CASTRO V. MURRAY Law Rep. 10 Ex. 213, 218 and DAWKINS V. PRINCE EDWARD of Saxe – Wermar 1 Q.B. D. 499, 502 respectively, underscored the fact that the court possessed a discretion to stop proceedings which are groundless and an abuse of the Court's process. The discretion must be exercised carefully and with the objective of saving precious judicial time and that of the litigant."**

[40] Mr. Justice Osadebay provided guidance as to how Order 18, Rule 19 ought to be applied in the case of **HAMBY V. HERMITAGE ESTATES Ltd. SCC IV App No. 21 of 2008** and also by AULD, L.J. in **ELECTRA PRIVATE EQUITY PARTINERS V. K.P.M.G. Peat Marwick (a firm) & Ors [2001] 1 BCLC 589** where he stated in **HAMBY:**

> **"It is well settled that the jurisdiction to strike out is to be used sparingly and limited to plain and obvious cases where there is no need for a trial. There is no doubt that the exercise of that jurisdiction may deprive a party of the examination and cross examination of witnesses which can change the result of a case."**

[41] At page 613 of **Electra Private Partners**, Auld L.J. stated;

"It is trite law that the power to strike out a claim under RSC Ord. 18, r. 19 or in the inherent jurisdiction of the Court should only be exercised in "plain and obvious" cases. That is particularly so where there are issues as to material primary facts and the inferences to be drawn from them, and when there has been no discovery or oral evidence. In such cases, as Mr. Aldous submitted, to succeed in an application to strike out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits. See *Goodson v Grierson* [1908] 1 KB 761, CA, per Fletcher Moulton LJ at 766; *Wenlock v Moloney*, per Sellers LJ at 1242G-1243D and Danckwerts LJ at 1244B ([1965] 1 WLR 1238); and *Torras v Al Sabah & others* (unreported) 21 March 1997 CA, per Saville LJ. There may be more scope for early summary judicial dismissal of a claim where the evidence relied on by the plaintiff can properly be characterized as "shadowy" or where "the story told in the pleadings is a myth ... and has no substantial foundation"; see e.g. *Lawrance v Lord Norreys* (1890) 15 App Cas 210, per Lord Herschell at 219-220.

However, the court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in a state of development. It should only strike out a claim in a clear and obvious case. Thus, in *McDonald's Corporation v Steel [1995]* 3 All ER 615, [1995] EMLR 527, CA Neill LJ, with whom Steyn and Peter Gibson LJJ agreed, said, at 623e-f of the former report, that the power to strike out was a

Draconian remedy which should be employed only in clear and obvious cases where it was possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof."

[42] This therefore brings me to the Plaintiff's application for discovery under Order 24 Rules 7 and 19 of the Rules of the Supreme Court wherein the Plaintiff seeks the following;

1. **"Darron Bowe's employment contract. You will note that Mr. Bowe would have been locked out of the Bank's digital portal and records system in February 2016 when Mr. Bowe was directed to take a vacation as a ruse and a set up (to scour the relevant files for evidence of misfeasance or non-feasance) or pretext for constructive dismissal. He does not have his employment file.**

2. **The construction contract for the renovations referred to in paragraph 4 of the Statement of Claim.**

3. **You have been served with the Plaintiff's witness statements (though we have yet to see the Defendant's) which includes the witness statement of Cleveland Palacious. We refer to paragraphs 10 & 11 of this statement which deposes that Mr. Palacious carried out a review and an analysis of the sales and marketing activities of 13 or 14 specific PBOs. We are instructed that this review or reviews were metastasized into written reports. Please produce these reports and itemize them in your further and better list. Please also record the relevant PARs in respect of each PBO, and details of consequential salary adjustments.**

4. **Please also disclose and produce the Branch Review Tool Report of Colleen Daniels dated the 23rd of March 2015 and referred to in paragraph 4 of the Statement of Claim.**

[43] These were set out in a letter dated January 11th, 2019.

[44] The Defendant's counsel responded by way of letter dated January 18th, 2019 wherein the client in essence was asked to review their records to locate the employment contract of the Plaintiff. As to the construction contract the position was that it was unnecessary since the construction to the main branch was not a matter in question in this action and that the Plaintiff was not a party to the construction contract. As to item (3) of the Plaintiff's letter, the Defendant's position is that the reports of Mr. Palacious regarding specific PBO's or the relevant PARS in respect of each PBO (inclusive of any salary adjustments) would result in the Defendant breaching its confidentiality obligations to those PBO's.

[45] I am of the considered opinion that as it relates to items 1-4 the following should be the position of the Court;

1. The Plaintiff's contract of employment is to be produced;
2. Only the PBO and PAR for the Plaintiff is to be produced;
3. The Branch Review Tool Report of Colleen Daniels dated 23rd March 2015 is to be produced for the main branch of the Defendant.

[46] I take special note of what Lord Wilberforce would have stated in **SCIENCE RESEARCH COUNCIL V NASSE [1980] A.C**. 1028 at page 1065:

"There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone. But there is no reason why, in the exercise of its discretion to order discovery, the [court] should not have regard to the fact that the documents are confidential, and that to order disclosure would involve a breach of confidence. In the employment field, the [court] may have regard to the sensitivity of particular types of confidential information, to the extent to which the interests of third parties (including their employees on whom confidential reports have been made, as well as persons reporting) may be affected by disclosure, to the interest, which both employees and employers may have in preserving the confidentiality of personal reports, and to any wide interest which may be seen to exist in preserving the confidentiality of systems of personal assessments." **[Emphasis Supplied]**

Additionally, Lord Wilberforce stated at Page 1065,

"**As a corollary to the above, it should be added that relevance alone, though a necessary ingredient, does not provide an automatic sufficient test for ordering discovery. The [court] always has a discretion.**

[46] Therefore in light of the foregoing and in light of all the circumstances of the case and based on the authorities and not falling into the trap of prematurely trying the matter, I make the following orders.

1. Paragraphs 11, 13, 18 and 20 are hereby struck pursuant to the Defendant's application under Order 18 Rule 19 (1), (b), (c) and (d) of the Rules of the Supreme Court and/or under the inherent jurisdiction of the Court.

2. The following are to be produced pursuant to the Plaintiff's application under Order 24 Rules 7 and 11 and under the inherent jurisdiction of the Court.

    a) The Plaintiff's contract of employment is to be produced.

    b) Only the PBO and PAR for the Plaintiff is to be produced.

    c) The Branch Review Tool Report of Colleen Daniels dated 23rd March, 2015 for the Main Branch (only) of the Defendant is to be produced.

3. Costs in the cause.

I so order.

Dated this 24th day of February, 2021

Keith H. Thompson
Justice