

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law and Equity Side  
2015/CLE/gen/FP/00153**

**BETWEEN**

**GELTEX TRADING CORPORATION LIMITED  
Plaintiff  
AND**

**FIDELITY BANK (BAHAMAS) LIMITED  
Defendant**



BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Harvey O. Tynes, QC along with Miss Tanisha Tynes-Cambridge for  
the Plaintiff  
Mr. Kahlil Parker, QC along with Mrs. Crystal Rutherford-Ferguson for the  
Defendant

HEARING DATES: June 27, A.D. 2017

**RULING**

**Hanna-Adderley, J**

This is an application by the Defendant to strike out the Plaintiff's Writ of Summons filed May 13, 2015.

**Introduction**

1. The Defendant by way of a Summons filed March 24, 2016 seeks an Order pursuant to Order 18, Rule 19 (1)(a)(b)(c) and/or (d) of the Rules of the Supreme Court ("**RSC**") and/or Order 33, Rule 6 of the RSC and under the inherent jurisdiction of the Court that the Statement of Claim indorsed upon the Writ of Summons be struck out and the action dismissed with costs. The Defendant relies in support of its application on the following grounds:-
  - a. That the Plaintiff's claim as pleaded does not disclose a reasonable cause of action;

- b. That the Plaintiff has failed, contrary to Order 18, rule 7 of the Rules of the Supreme Court 1978 to include in its Statement of Claim a statement of its intention, with particulars, to rely on the alleged conviction of Daviea Ambrister-Carroll, who by the said Statement of Claim, is alleged to have "stolen" property of the Plaintiff. And further, the Plaintiff has not provided particulars of the issue to which the said alleged conviction would be relevant.
  - c. That the Plaintiff has failed, contrary to Order 18, rule 12 of the Supreme Court Rules, to plead the necessary particulars of the fraud alleged to have been committed by Daviea Ambrister-Carroll;
  - d. That the Plaintiff has no real prospect of succeeding on this claim;
  - e. That Section 64 (1) of the Bills of Exchange Act (the Act) provides that: "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent endorsers: Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor." That the cheques have been altered without the use of the word "avoided" rendering the said null and void and consequently there is no reasonable cause of action against the Defendant. Upon the face value of the said cheques and bank draft as they no longer constituted choses in action for the alleged sums.
2. The Defendant relies on its Submissions dated June 6, 2016 in support of its application.
  3. The Plaintiff opposes the Defendant's application and relies on Skeleton Arguments filed August 5, 2015.

### **Statement of Facts**

4. The Plaintiff filed a Specially Indorsed Writ of Summons on May 13, 2015. In its Statement of Claim it claims inter alia:-
  1. The Defendant Company are bankers carrying on business at their Branch at Freeport, Bahamas and elsewhere.
  2. The Plaintiff is the owner of a hotel resort known as Ocean Reef Yacht Club & Resort located in Freeport, Bahamas.

3. On the 4<sup>th</sup> December, 2000 the Plaintiff entered into an agreement in writing with Fidelity Merchant Bank & Trust Limited ("Fidelity Merchant") and Fidelity Pension & Investments Limited ("Fidelity Pension") (both affiliate companies of the Defendant) whereby the Plaintiff agreed to participate in The Fidelity Bahamas Pension Plan ("the Pension Plan") a pension fund organized and run by Fidelity Merchant and Fidelity Pension.

4. It was a term of the agreement that the Plaintiff should make contributions towards the Pension Plan by depositing funds at the Defendant's bank.

5. At all material times one Daviea Armbrister-Carroll was in the employment of the Plaintiff and was a customer of the Defendant at the said Branch.

6. On divers dates between the 14<sup>th</sup> October, 2009 and the 12<sup>th</sup> June, 2014 the said Daviea Armbrister-Carroll stole 66 cheques the property of the Plaintiff to the value of \$88,754.00 representing contributions to the Pension Plan drawn by the Plaintiff on FirstCaribbean International Bank and payable to Fidelity Merchant, Fidelity Bank or the Defendant. The said Daviea Armbrister-Carroll indorsed the cheques with the said Daviea Armbrister-Carroll's personal bank account numbers at the Defendant's Bank.

PARTIUCLARS

<u>Cheque date (MM/DD/YY)</u>	<u>Cheque #</u>	<u>Amount</u>
1. 10/14/09	52764	\$1,208.00
2. 10/19/10	55179	1,818.00
3. 11/9/10	55308	1,818.00
4. 11/26/10	55388	1,818.00
5. 12/10/10	55505	1,818.00
6. 12/23/10	55619	1,818.00
7. 1/21/11	55799	1,818.00
8. 2/4/11	55913	1,818.00
9. 2/16/11	56002	1,818.00
10. 3/4/11	56100	1,818.00
11. 3/31/11	56279	1,818.00
12. 4/15/11	56365	1,818.00
13. 4/29/11	56462	1,818.00
14. 5/13/11	56558	1,818.00
15. 5/27/11	56654	1,818.00
16. 6/9/11	56722	1,818.00
17. 6/24/11	56835	1,818.00
18. 7/8/11	56935	1,818.00
19. 7/19/12	59654	1,180.00
20. 8/1/12	59748	1,180.00
21. 8/16/12	59861	1,180.00
22. 8/29/12	59956	1,180.00
23. 9/12/12	60024	1,180.00
24. 9/26/12	60095	1,180.00
25. 10/9/12	60186	1,180.00

26. 10/24/12	60268	1,180.00
27. 11/7/12	60357	1,180.00
28. 11/21/12	60441	1,180.00
29. 12/5/12	60518	1,180.00
30. 12/19/12	60644	1,180.00
31. 1/3/13	60742	1,180.00
32. 1/17/13	60806	1,180.00
33. 1/30/13	60934	1,180.00
34. 2/13/13	61017	1,180.00
35. 3/14/13	61219	1,180.00
36. 3/21/13	61311	1,180.00
37. 4/11/13	61433	1,180.00
38. 4/24/13	61525	1,180.00
39. 5/9/13	61635	1,180.00
40. 5/23/13	61724	1,180.00
41. 6/10/13	61868	1,180.00
42. 6/20/13	61926	1,180.00
43. 7/4/13	62049	1,180.00
44. 7/18/13	62151	1,180.00
45. 8/1/13	62288	1,180.00
46. 8/15/13	62386	1,180.00
47. 8/29/13	62477	1,180.00
48. 9/11/13	62569	1,180.00
49. 10/10/13	62747	1,180.00
50. 10/22/13	62855	1,180.00
51. 11/7/13	62931	1,180.00
52. 11/20/13	63056	1,180.00
53. 12/4/13	63150	1,180.00
54. 12/19/13	63295	1,180.00
55. 1/2/14	63368	1,180.00
56. 1/16/14	63468	1,180.00
57. 1/30/14	63579	1,180.00
58. 2/13/14	63692	1,180.00
59. 2/27/14	63823	1,180.00
60. 3/13/14	63947	1,180.00
61. 3/26/14	64075	1,180.00
62. 4/9/14	64186	1,180.00
63. 4/22/14	64300	1,180.00
64. 5/7/14	64416	1,180.00
65. 5/21/14	64549	1,180.00
66. 6/4/14	64685	1,180.00

7. On divers dates between the 4<sup>th</sup> August, 2011 and the 28<sup>th</sup> June, 2012 the said Daviea Armbrister-Carroll stole 15 FirstCaribbean International Bank Banker's Drafts the property of the Plaintiff to the value of \$26,735.00 representing contributions to the Pension Plan and payable to Fidelity Bank. The said Daviea Armbrister-Carroll indorsed the Banker's Drafts with the said Daviea Armbrister-Carroll's personal bank account number at the Defendant's Bank.

PARTICULARS

<u>Draft date (MM/DD/YY)</u>	<u>Draft #</u>	<u>Amount</u>
1. 8/4/11	1309052	\$1,830.60
2. 8/12/11	1309097	1,830.60
3. 9/2/11	1309198	1,830.60
4. 9/16/11	1309261	1,830.00
5. 10/12/11	1309407	1,830.60
6. 10/26/11	1312251	1,830.60
7. 11/10/11	1312452	1,830.60
8. 11/24/11	1314850	1,830.60
9. 12/9/11	1312716	1,830.60
10. 12/21/11	1315004	1,830.60
11. 1/19/12	1313167	1,830.60
12. 2/15/12	1315360	1,830.60
13. 3/2/12	1315465	1,830.00
14. 6/8/12	1315995	1,763.60
15. 6/28/12	1324323	1,173.60

8. On divers dates between the 14<sup>th</sup> October, 2009 and the 12<sup>th</sup> June, 2014 the said Daviea Armbrister-Carroll handed the said 66 cheques and the said 15 Banker's Drafts to the Defendant at their said Branch for collection and the Defendant collected the proceeds of the said cheques and Banker's Drafts and placed them to the credit of the said Daviea Armbrister-Carroll's accounts.

9. In the premises, the Defendant Compan have converted the said cheques and Banker's Drafts to their own use and wrongfully deprived the Plaintiff of the same whereby the Plaintiff has suffered damages.

10. Alternatively, the said sums of \$88,754.00 and \$26,735.00 are payable to the Plaintiff by the Defendant as money had and received by the Defendant to the Plaintiff's use.

AND the Plaintiff claims:-

- (1) Under paragraph 9 hereof \$115,489.00 or alternatively damages
- (2) Under paragraph 10 hereof \$115,489.00
- (3) Further or other relief
- (4) Interest
- (5) Costs"

## The First Defendant's Application to Strike Out

### Issues

5. The issues to be determined before the Court on these applications are whether the Plaintiffs Statement of Claim discloses a reasonable cause of action or raises some question fit to be decided and/or is scandalous, frivolous or vexatious and/or may prejudice, embarrass or delay the fair trial of the action and/or is otherwise an abuse of the process of the Court.

### Analysis and Conclusion

#### The Law

6. Order 18, Rule 19 of the RSC states:-

"19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —

- (a) it discloses no reasonable cause of action or defence, as the case may be; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."

7. The power to strike out is a Draconian remedy which should be employed only in clear and obvious cases where it is possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof (per Allen, J in **Bettas Limited v Hong Kong and Shanghai Banking Corporation Limited and HSBC Bank Plc SCCiv App No. 312 of 2013**).
8. Guidance on how this rule should be applied is set out by **Osadabey, JA** in **Hamby v Hermitage Estates Ltd SCCiv App No. 21 of 2008** and also by **Auld, LJ** in **Electra Private Equity Partners v KPMG Peat Marwick (a firm) & Ors [2001] 1 BCLC 589**. Osadabey, JA states 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." At page 613 of **Electra Private Equity Partners**, Auld LJ 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 764-5 and Buckley 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 characterised as "shadowy" or where "the story told in the pleadings is a myth . . . and has no substantial foundation"; see eg **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 LJ 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."

### **Pleading Discloses No Reasonable Cause of Action**

9. Counsel for the Plaintiff, Mr. Harvey Tynes, QC submits that on an application under Order 18, Rule 19(1)(a) of the RSC no evidence is admissible. Further, he asserts that the Court is required to assume that each and every one of the facts pleaded (unless manifestly incapable of proof) is true and will be capable of proof at trial and refers the Court to **Morgan Crucible Co. plc v Hill Samuel & Co. Ltd [1991] Ch 295**. Mr. Tynes, QC also submits that a cause of action with some prospect of success will not be struck out and that provided the pleading raises some question fit to be tried, it does not matter that the case is weak or is unlikely to succeed. **See Wenlock v Moloney [1965] 1 WLR 1238, CA**. He submits that the Statement of Claim wherein the Plaintiff seeks relief for conversion or alternatively for money had and received clearly raises a question fit to be tried and manifests a cause of action with some prospect of success.
10. Mr. Tynes, QC has submitted that the Plaintiff's claim is based in the tort of conversion and alternatively sues in quasi-contract for money had and received. It is his submission that the Statement of Claim does not make any allegation of fraud against the Defendant and it does not allege that it is seeking to rely on a criminal conviction of anyone. He submits that the pleadings focus on the named Defendant, Fidelity Bank (Bahamas) Limited and it alleges against Fidelity Bank (Bahamas) Limited conversion and the right for monies to be returned to the Plaintiff on the basis that they represent money had and received. Therefore, he submits that the Defendant's references and/or grounds pursuant to Order 18, Rule 7 and Rule 12 do not arise.
11. Mr. Tynes, QC states that conversion at common law may be committed by dealing with the goods of a person which constitutes an unjustifiable denial of his rights in them or the assertion of rights inconsistent therewith and refers the Court to **Winfield & Jolowicz on Tort, Fourteenth Ed. P.490**. He continues where A, without lawful authority, transfers B's goods to C, the mere voluntary reception of them by C is in general conversion however innocent C may be and submits that this principle is abundantly supported by decisions with respect to receipt of goods by a buyer and a receipt of a cheque by a banker. **See Winfield & Jolowicz on Tort, Fourteenth Ed. P. 491**.
12. He refers the Court to Lord Justice Diplock in **Marfani & Co. Ltd. v Midland Bank Ltd. [1968] 1 WLR 956 at 971** whereby it was determined that liability in conversion is strict. Further, he submits that the act of conversion, as far as collecting banks are concerned, consists in presenting the cheque for someone who is not entitled to it and



obtaining the money. **See Kleinwort, Sons & Co. v. Comptoir National D'Escompte de Paris [1894] 2 Q.B. 157.** Moreover, it is his submission that if the customer for whom a banker collects has no title or a defective title, prima facie the banker is liable to the true owner for conversion or for money had and received to the face value of the cheque. **See Halsbury's Laws of England Fourth Edition Reissue Volume 3(1) para 220; Marfani & Company Limited v Midland Bank Limited (supra); Down v Halling (1825) 4 B. & C. 330; Arnold v Cheque Bank (1876) 1 C.P.D. 578.** Mr. Tynes, QC also refers the Court to the decision of **Lloyd's Bank Ltd. v Chartered Bank of India, Australia and China [1929] 1 K.B. 40** where the collecting bank was held liable for conversion after a customer of the collecting bank paid into his own account cheques drawn by his employer in favour of the collecting bank.

13. Mr. Parker QC, submits that the central premise of the Plaintiff's claim is found at paragraphs 6 and 7 of its Statement of Claim where the Plaintiff maintains that Ms. Daviea Armbrister-Carroll "stole" certain cheques and bank drafts from the Plaintiff but Ms. Armbrister-Carroll has not been convicted of such crime and therefore remains a stranger to the action. He contends that in the circumstances the Court is unable to answer a fundamental question raised by the Statement of Claim which is whether or not Ms. Armbrister-Carroll "stole" the said cheques and bank drafts and that the Court's inability to come to a conclusion on this essential question is fatal to the Plaintiff's claim. It is his submission that it is a fundamental principle that one cannot plead that someone has committed a crime without pleading the particulars. Further he submits that the purpose of Order 18, Rule 7 of the RSC is to ensure that the parties and the Court know exactly what is being alleged against an individual with respect to criminal activity or otherwise and refers the Court to Order 18, Rule 7 of the RSC. Additionally, he submits that in the absence of a purported fraud or theft of Ms. Armbrister-Carroll, there is no evidence that anything inappropriate was done with respect to those cheques. Mr. Parker QC submits in part that the Plaintiff's claim as against the Defendant lacks coherence, particulars and substance. He asserts that the averment at paragraph 4 of the Statement of Claim referring to a term of the agreement concerning the pension plan and that the Plaintiff "should make contributions towards the Pension Plan by depositing funds at the Defendant's bank" is wholly unsatisfactory, fails to contain the reasonable and necessary particulars to which the Court and the Defendant are entitled. Further, he submits that

the Defendant is and was at all material times a stranger to the said agreement reflected at paragraph 4(e) of the Participation Agreement at Tab-1 of the Agreed Bundle of Documents filed. He highlights the said paragraph which stipulated that "Contributions shall be forwarded to the Trustee monthly, as soon as practicable, normally within ten (10) Business Days from the last Business Day of previous month" and submits that under that agreement the Trustee is identified as Fidelity Merchant Bank & Trust Limited.

14. He seeks to distinguish the case of **Lloyd's Bank Ltd. v Chartered Bank of India, Australia and China (supra)** relied on by the Plaintiff from the instant case as in the former case the delinquent employee had been prosecuted, convicted and sentenced for the criminal breach of trust as a servant before civil proceedings were instituted against the bank in question. He submits that in the absence of a criminal conviction of Ms. Armbrister-Carroll for the alleged offences or a judgment against her in civil court with respect to the alleged frauds, the Plaintiff's case as pleaded cannot reasonably or lawfully be allowed to continue. He also seeks to distinguish the case of **Marfani & Co. Ltd. v Midland Bank Ltd (supra)** relied on by the Plaintiff and submits that the Plaintiff's submission of strict liability to which the Plaintiff says is founded by the instant case, has been mitigated by statute. In these circumstances the said statute is the Bills of Exchange Act ("the Act"). Mr. Parker QC refers the Court to Section 64(1) of the said Act and submits that it is relevant to the present action. Further he contends that the Plaintiff's pleading of Ms. Armbrister-Carroll's alleged material alteration of the said cheques and bank drafts without its assent and use of the word "avoided" in Section 64(1) of the Act rendering cheques and/or bank drafts upon which material alterations have been made null and void, there is no reasonable cause of action against the Defendant upon the face value of the said cheques and bank drafts as they no longer constituted choses in action for the alleged sums. Section 64(1) of the Act states "(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent endorsers: Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor."

15. It is also his submission that without the conviction of, and/or judgment against Ms. Armbrister-Carroll for the purported thefts/frauds alleged to have been committed by her, it cannot be definitively determined whether or not the Plaintiff had itself "made, authorized or assented to the alteration" of the said cheques and bank drafts by Ms. Armbrister-Carroll who was at all material times an employee and agent of the Plaintiff.
16. Mr. Parker QC relies on the case of **Smith v Lloyds TSB Group PLC [2001] Q.B. 541**, Pill L.J. at 553, paragraph A whereby the Lord Justice stated that "Section 64 of the Bills of Exchange Act provides that an instrument which is materially altered is avoided in the sense that it avoids all rights to sue and discharges all liabilities to pay upon the instrument as from the moment of alteration...The fact that a payment was made under a mistake of fact does not render the instrument valid: its value has completely and irrevocably gone. That result provided protection for both drawer and payee. The risk of a material alteration was upon the paying bank. It cannot debit its customer's account and the claimants in the Lloyds action had the right to have their account with the Bank of England credited. As between the parties, the instrument had no value at all, save as a piece of paper, and there were no contractual rights to sue upon it. The payee could go back to the drawer for a fresh instrument. The material alteration has the effect of avoiding all contracts then in existence upon the instrument". He submits that while the Plaintiff prove in the appropriate context that Ms. Armbrister-Carroll perpetrated the pleaded thefts/frauds by materially altering the said cheques and bank drafts, may have a right to have their account at CIBC credited, the Plaintiff does not have any right to sue the Defendant upon the alleged materially altered cheques and/or bank drafts.
17. He also submits that similarly to the finding in **Smith v Lloyds TSB Group PLC (supra)** by Pill L.J., at paragraph D whereby he quoted Finlay J in **Slingsby v Westminster Bank Ltd. [1931] 2 KB 583** while ruling for the collecting bank, the Defendant in the instant action neither dealt with a cheque nor money belonging to the Plaintiff as stated by Finlay J, that when the document came into the hands of the defendant bank, it was not a valid cheque at all, it had been avoided by the material alteration made in it. Further, he submits that the conclusions found by Pill, L.J. at page 556 paragraph H in **Smith v Lloyds TSB Group PLC (supra)** supports his submission that on the facts of the instant case CIBC First Caribbean International Bank (Bahamas) Limited is the paying bank, which bore the relevant risk whereas the Defendant as the collecting bank bears no such risk.

18. Therefore, he submits that the Plaintiff's pleaded case is therefore wholly unsustainable based upon the relevant authorities, the Plaintiff is not entitled to sue the Defendant on the materially altered cheques and bank drafts as a result of the alleged fraudulent material alteration thereof by Ms. Armbrister-Carroll as pleaded and by virtue of Section 64(1) of the Act were worthless pieces of paper before they reached the Defendant.
19. Mr. Tynes, QC in response submits that the Court should read the provisions of Section 64 of the Act in its entirety and states that the Plaintiff's position is based on conversion and what was pleaded in effect was that the Defendant bank took the Plaintiff's cheque, sent it on to collection to First Caribbean, collected the proceeds and credited the proceeds to the account of someone other than the payee. He submits that is in essence the allegation of conversion. He further submits that the Defendant's submission that the cheque once endorsed by Ms. Armbrister-Carroll became a worthless piece of paper does not seem to be consistent with or a denial of the actual pleading which is the amount of the cheque or draft was sent to the bank on whom their funds were drawn. Further, the Defendant collected but did not apply it to the account to which it was supposed to go.
20. Considering the above, I accept Mr. Tynes, QC's submission that on an application under Order 18, Rule 19(1)(a) of the RSC no evidence is admissible. The Court's duty on such an application under this ground therefore is to look at the pleadings and the pleadings alone. As previously submitted by Mr. Tynes, QC and accepted by the Court, it must look at the pleadings alone to determine whether they disclose a reasonable cause of action with some chance of success or raises some question fit to be decided by this Court.
21. As I understand the Plaintiff's case on the pleadings, there are two main allegations against the Defendant Bank. Firstly, that the Defendant Bank's actions of receiving the said cheques and banker's drafts from the Plaintiff and crediting the proceeds of the same to Ms. Armbrister-Carroll's account (who was not the original payee of the cheque and bankers drafts) makes the Defendant Bank is liable to the true owner i.e. the Plaintiff for the conversion. Secondly, that the Defendant Bank is also liable to the Plaintiff for the moneys had and received by the Defendant Bank to the Plaintiff's use, i.e. for the depositing into the Plaintiff's pension plan. If the customer for whom a banker collects has no title, or a defective title, prima facie the banker is liable to the true owner for conversion or for money had and received to the face value of the cheque, but if in collecting he acts

in good faith and without negligence he may claim statutory protection. **See Halsbury's 4<sup>th</sup> Edition, Volume 3, paragraph 108.**

22. The Court at this stage is only required to determine if the pleadings disclose a reasonable cause of action with some chance of success or raises some question fit to be decided by this Court.
23. As established by **Hamby v Hermitage Estates Ltd.** (supra), **Electra Private Equity Partners** (supra) and **Drummond-Jackson** (supra) and other cases mentioned above this is not a plain and obvious case where there is no need for a trial. Therefore, having considered the Statement of Claim and the very basic principles on the law relating to conversion and moneys had and received, I find that the Statement of Claim does disclose a reasonable cause of action and/or raises some question fit to be decided by this Court.

### **Scandalous, Frivolous or Vexatious**

24. Mr. Tynes, QC submits that allegations in a pleading are scandalous if they impute dishonesty, bad faith or other misconduct against another party or anyone else and they are immaterial or irrelevant. He further submits that whether a pleading is frivolous or vexatious depends "on all the circumstances of the case; the categories are not closed and the considerations of public policy and the interest of justice may be very material." **See Ashmore v British Coal Corp [1990] 2 QB. 338.** It is his submission that there is nothing contained in the Statement of Claim which supports the Defendant's contention that the Statement of Claim is scandalous, frivolous or vexatious.
25. Mr. Parker QC submits that the Plaintiff's failure to specifically plead the allegations of fraud as against Ms. Daveia Armbrister-Carroll as required by Order 18, Rule 12 of the RSC nor plead the convictions of Ms. Daveia Armbrister-Carroll it seeks to rely on as required by Order 18, Rule 7 of the RSC is unsustainable as a matter of law.
26. On this ground the Court must consider 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 to the relief prayed (**Commentary at 18/19/15 on page 350 in the Supreme Court Practice 1, 1999, per Selborne, L.C. in Christie v Christie (1873) L.R. 8 Ch. App at 503**). Moreover, this is applicable for cases which are obviously frivolous or vexatious, or obviously unsustainable (**Commentary at 18/19/16 on page 350 in the Supreme Court Practice 1, 1999 per Lindley L.J. in Att-Gen of Duchy of Lancaster v L. & N.W. Ry [1892] 3 Ch. 274 at 277**). The pleading must be "so

clearly frivolous that to put forward would be an abuse of the process of the Court” (**Commentary at 18/19/16 on page 350 in the Supreme Court Practice 1, 1999 per Jeune P. in Young v Holloway [1895] P. 87 at 90**). On the face of the Statement of Claim, the Plaintiff makes an allegation against the Defendant Bank for conversion and moneys had and received. The Plaintiff has not alleged that the Defendant Bank and Ms. Daveia Armbrister-Carroll were acting together to defraud the Plaintiff out of the face value of the cheques and bankers drafts deposited. Further, the Plaintiff has not alleged that Ms. Daveia Armbrister-Carroll defrauded the Plaintiff in this action. However, while the Plaintiff alleges that Ms. Daveia Armbrister-Carroll “stole” the said cheques and bankers drafts from the Plaintiff, the instant action is not an action seeking to recover the face value of the cheques and bankers drafts from Ms. Daveia Armbrister-Carroll or an action which another cause of action arises to recover the same. This action is an action in conversion and moneys had and received as against the Defendant Bank. Therefore, having found that the Plaintiff’s Statement of Claim discloses a reasonable cause of action, I find that in this case as the Plaintiff’s case is solely based in conversion and moneys had and received the Plaintiff was not required to specifically plead any allegations of fraud and/or reliance on conviction pursuant to Order 18, Rule 12 and Order 18, Rule 7 of the RSC. Further, I find that the Statement of Claim is not scandalous, frivolous or vexatious.

### **Abuse of Process**

27. Mr. Tynes, QC submits that the Plaintiff’s claim is a legitimate claim against the Defendant for the tort of conversion or alternatively in quasi-contract for moneys had and received. He refers the Court to Lord Diplock at page 536 of **Hunter v Chief Constable of the West Midlands Police [1982] AC 529** whereby he states that striking out for abuse of process is a power which any court of justice must possess to prevent misuse of its procedure in a way in which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. It is his submission that it cannot be said that the Plaintiff’s claim is an abuse of process.
28. Mr. Parker QC submits that the Plaintiff’s case is based on an alleged fraudulent material alteration of the said cheques and bank drafts by Ms. Daveia Armbrister-Carroll. He submits that this is wholly unsustainable as a matter of law and contends that Section

64(1) of the Act prohibits claims such as these based on the face value of fraudulently materially altered cheques and bank drafts now rendered worthless pieces of paper as a result of the material alterations.

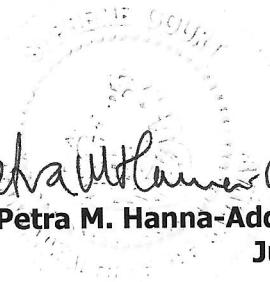
29. This ground confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appears to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will 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 (**Commentary at 18/19/18 on page 352 of the Supreme Court Practice 1, 1999 Castro v Murrery (1875) 10 Ex. 213**).
30. Having already determined that the pleadings do disclose issues fit to be tried after considering the relevant case law, and the submissions of Counsel, I find that the instant action is not a proper case to strike out the Plaintiff action as against the Defendant. The Defendant subsequently relies on Section 64(1) of the Act in its Defence and for the purposes of this application. However, I am of the opinion that the Defendant's ability to rely on that provision is a matter fit for trial, when the Court considers the evidence of the parties and arrives at its findings of fact, and determines to which extent Section 64 (1) of the Act and the proviso thereto avails either party.

### **Costs**

31. At the close of the Court's ruling on the hearing of the Plaintiff's Summons on January 16, 2017 the Court indicated that it would reserve its order as to costs following the dismissal of the Plaintiff's Summons. Therefore, I now make my order as to costs for both applications.
32. Costs are usually in the discretion of the Court and I see no reason to depart from the usual costs order. Therefore, in the Plaintiff's application filed April 14, 2016 costs are awarded to the Defendant to be paid by the Plaintiff to be taxed if not agreed and in the Defendant's application filed March 24, 2016 costs are awarded to the Plaintiff to be paid by the Defendant to be taxed if not agreed.
33. The parties may file their Bills of Costs within the time specified by the RSC, but they shall not proceed with having the same taxed until the completion of this action.

34. On one final matter that of the delay in delivering this Ruling the Court reserved the delivery of its Judgment to a date to be fixed regrettably, the extensive renovation to the Garnet Levarity Justice Centre during most of 2019 and the disruption caused by Hurricane Dorian and the Covid 19 pandemic are events which greatly interfered with the Court's writing schedule. I apologize profusely for the delay in this matter.

Dated the 21<sup>st</sup> March, 2022



*Petra M. Hanna-Adderley*  
**Petra M. Hanna-Adderley**  
**Justice**