

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION**

2013/CLE/gen/01658 and 2015/CLE/gen/00857

BETWEEN

LOUIS M. BACON

Plaintiff

-and-

(1) JONES COMMUNICATIONS LIMITED

First Defendant

(2) WENDALL JONES

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mrs. Janet "Lisa" Bostwick-Dean of Bostwick & Bostwick for the Plaintiff
Mr. Owen C.B. Wells of McKinney Turner & Co. for the Defendants

Hearing Dates: 22 August, 5 October, 22 November 2017

Practice and Procedure – Defamation – Qualified privilege- Reynolds privilege - Disclosure of documents – Pre-trial disclosure – Relevance – Fishing Expedition – Order 24 Rules 7 and 8 of the Rules of the Supreme Court, 1978 – Case of *Berkeley Administration v McClelland [1990] F.S.R. 381 applied.*

The Plaintiff seeks orders that the Defendants (i) give particular discovery of all documents that are, or have been, in their possession, custody or power and which fall within the categories set out in the attached Schedule One; (ii) make an affidavit addressing the matters set out in the attached Schedule Two and (iii) pay indemnity costs to the Plaintiff, if successful, in these applications.

The Defendants object to such discovery and submit that the alleged documents which the Plaintiff seeks are not relevant and do not assist whether directly or indirectly in the determination of the facts in issue in either action. The Defendants submit that the current applications should not be used as a fishing expedition to obtain evidentiary material for other extant proceedings and/or to frame a new case.

HELD: making the Order for particular discovery in respect of the smear campaign and the Audubon Award and Acceptance Speech and no Order with respect to the novel “Gone WithThe Wind”:

- [1] The jurisdictional basis to make orders for discovery of particular documents is Order 24 rules 7 and 8 of the Rules of the Supreme Court.**
- [2] O. 24 r. 7 of the RSC provides for discovery of particular documents and O. 24 r. 8 provides for discovery to be ordered if necessary. Thus, disclosure is not automatic and, in its case management role, the court controls its extent.**
- [3] There is no jurisdiction to make an order under R.S.C., Order 24, rule 7, for the production of documents unless (a) there is sufficient evidence that the documents exist which the other party has not disclosed; (b) the document or documents relate to matters in issue in the action; (c) there is sufficient evidence that the document is in the possession, custody or power of the other party: *Berkeley Administration Inc. v McClelland* [1990] F.S.R. 381 at 382 per Mustill LJ. applied.**
- [4] Where a defendant has pleaded qualified privilege, he will have to disclose all documents which support or undermine his case that he was under a duty to publish, or had an interest in publishing, the words complained of. In the case of a plea of Reynolds privilege, that is liable to include disclosure of journalists’ notes and other material relied on as giving rise to the existence of a duty to publish and as supporting a case of responsible journalism.**
- [5] The Plaintiff has satisfied the Court that the three prerequisites as laid down in *Berkeley Administration* have been made out namely: (i) there is sufficient evidence that the documents exist which the other party has not disclosed; (ii) the documents relate to matters in issue in both actions; and (iii) there is sufficient evidence that the document is in the possession, custody and power of the other party.**
- [6] The Court finds that documents pertaining to the smear campaign and the Audubon Award and Acceptance Speech are relevant for a fair trial of both actions and are not a fishing expedition and/or for the Plaintiff to frame a new case and/or use it in extant proceedings before the Court.**
- [7] The Court orders the Defendants to disclose the documents stated in [6] above within fourteen (14) days hereof. The Court further orders that the Second Defendant swears, within fourteen (14) days hereof, an affidavit explaining whether any document, or class of document specified and/or described in Schedule One has at any time been in his possession, custody or power but no longer is and he details when he parted with it and what has become of it.**
- [8] Finding that the Defendants have disclosed the novel “Gone With The Wind”, the Court is unable to discern what research, notes, correspondences and other documents could be relevant. Taken at its highest, this request appears to be highly speculative.**

RULING

CHARLES J:

Introduction

[1] On 27 March 2017, the Plaintiff filed two identical Summonses in Actions 2013/CLE/gen/01658 (“the 2013 Action”) and 2015/CLE/gen/00857 (“the 2015 Action”) seeking orders that the Defendants:

- (i) give particular discovery of all documents that are, or have been, in their possession, custody or power and which fall within the categories set out in the attached Schedule One;
- (ii) make an affidavit addressing the matters set out in the attached Schedule Two;
- (iii) pay the Plaintiff’s costs of and occasioned by the application.

[2] Both summonses for discovery are made pursuant to Order 24 Rule 7(3) of the Rules of the Supreme Court (“RSC”). The summonses are supported by the first affidavit of Jane S. Evans filed on 7 April 2017. More importantly, in her first affidavit, is appended the affidavit of Jenny Afia sworn to on 27 March 2017. Ms. Evans also swore a second affidavit on 24 July 2017 and filed on 25 July 2017. For convenience, the two summonses are dealt with together as they raise the same issue for particular discovery.

Jurisdiction

[3] It is common ground that the jurisdictional basis to make orders for discovery of particular documents is Order 24 rule 7 (1) of the RSC which provides as follows:

“Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.”

[4] O. 24 r. 7(3) states:

“An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document specified or described in the application and that it relates to one or more of the matters in question in the cost or matter.”

[5] Learned Counsel Mrs. Bostwick-Dean correctly submitted that O. 24 r. 7 recognises that there are exceptions to the rule that statements in a person’s affidavit of documents are conclusive.

[6] One such exception is where it appears on the face of the list already served or on the face of disclosed documents or on an admission that, in all probability, the party has or has had other relevant documents beyond those disclosed: **The Supreme Court Practice 1999** at p. 471.

[7] Another is that an application can be made under O. 24 r. 7 for an affidavit as to a specific document or classes of documents provided the application is supported by an affidavit which makes out a *prima facie* case for (a) possession, custody or power; and (b) relevance of the specified documents. In **Berkeley Administration Inc. v McClelland** [1990] F.S.R. 381 at 382, Mustill LJ (with whom Legatt LJ agreed) sitting in the Court of Appeal for England and Wales set out the relevant principles in respect of the same rule in the then English Rules of the Supreme Court as follows:

(1) **“There is no jurisdiction to make an order under R.S.C., Order 24, rule 7, for the production of documents unless (a) there is sufficient evidence that the documents exist which the other party has not disclosed; (b) the document or documents relate to matters in issue in the action; (c) there is sufficient evidence that the document is in the possession, custody or power of the other party.**

(2) **When it is established that those three prerequisites for jurisdiction do exist, the court has a discretion whether or not to order disclosure.**

(3) **The order must identify with precision the document or documents or categories of document which are required to be disclosed, for otherwise the person making the list may find himself in serious trouble for swearing to a false affidavit, even though doing his best to give an honest disclosure. [Emphasis added]**

(4)

(5) **It is not an answer to an assertion that documents falling within a particular category are disclosable that no such documents are in the other party's possession or power, although if this information has already been conveyed on oath in the course of the proceedings this would furnish a reason why, in the exercise of the court's discretion, it might well not make an empty order."**

[8] The third exception is where the other side is or comes into possession of documents and can tell from being so that the other side has failed to comply with his disclosure obligations.

[9] O. 24 r. 8 provides for discovery to be ordered only if necessary. It reads:

"On the hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

Pleadings in a nutshell

[10] Both actions are predicated on libel. In the 2013 Action, the Plaintiff, a businessman, sues the Defendants in respect of three episodes of a television talk show called 'The Platform' broadcast by the Defendants on JCN Channel 14 and hosted by the Second Defendant. It is the Plaintiff's case that the broadcasts made seriously defamatory and false claims that he is a racist and a supporter of the Ku Klux Klan; a member of the Ku Klux Klan; and that he sought to ban black Bahamian people from Clifton Bay. It is also part of the Plaintiff's pleaded case that these false and defamatory allegations were published as part of a sustained smear campaign designed to discredit him and to damage his character and his personal and professional reputations.

- [11] A claim for damages is also pleaded which relies upon the Defendants' admission that they were involved in a smear campaign orchestrated by Peter Nygard. As Ms. Afia points out, at paragraph 6 of her affidavit, the First Defendant settled a defamation action against it brought by the Plaintiff in 2012 in which it admitted in a Statement in Open Court that it had been used by persons who had an agenda against the Plaintiff and its Bahama Journal newspaper had been used as a conduit for a smear campaign against the Plaintiff.
- [12] The Defendants filed their Defences on 24 November 2014 in the 2013 Action and on 27 April 2016 in the 2015 Action.
- [13] In the 2013 Action, in respect of the first publication, the Defendants do not admit that the words complained of are defamatory of the Plaintiff: paragraph 3; they deny responsibility for publication on the basis that the words were spoken by Peter Nygard and he appeared live on the programme: paragraph 3; they take issue with the pleaded meanings: paragraph 3; and they aver that the words were published on an occasion of qualified privilege. Particulars of qualified privilege are pleaded referring to an interview conducted by the Second Defendant with Peter Nygard: paragraphs 3(a) and (c); and the novel 'Gone With The Wind': paragraphs 3(d) to (f).
- [14] In respect of the second publication, the Defendants do not admit that the words complained of are defamatory: paragraph 5; they deny responsibility for publication on the basis that the words were spoken by Peter Nygard and he appeared live on the programme: paragraph 3; they take issue with the pleaded meanings: paragraph 5; and they aver that the words were published on an occasion of qualified privilege. Particulars of qualified privilege are pleaded making reference to an interview conducted by the Second Defendant with Peter Nygard which refers to 'Gone With The Wind' and a speech the Plaintiff made at the Audobon Society: paragraphs 5(a) to (c).

- [15] In respect of the third publication, the Defendants deny that the words are defamatory: paragraph 6; they deny responsibility for publication on the basis that the words were spoken by Miss Phillipa ‘Lady’ Russell and she appeared live on the programme: paragraph 7; they take issue with the pleaded meanings: paragraph 6; and they allege that the words were published on an occasion of qualified privilege. Particulars of qualified privilege are pleaded making reference to an interview conducted by the Second Defendant with Miss Russell which refers to a feud between the Plaintiff and Peter Nygard: paragraphs 7(a) and (b); and assertions that the Plaintiff was the great grandson of a former US General who was said to be involved in a massacre of black people and a member of the Ku Klux Klan: paragraphs 7(c) to (e).
- [16] In their response to the plea of damages, the Defendants deny, at paragraph 9(c) that they *‘have conducted and/or continue to conduct a smear campaign against the Plaintiff.’*
- [17] In the Reply filed on 19 December 2014 issue is joined and the Plaintiff disputes that the Defendants are entitled to succeed on defences of qualified privilege to the world at large: see paragraphs 3.4 to 3.4.5, 4.4, 5.4 and 6.
- [18] In respect of the first publication in the 2015 action, the Defendants do not admit that the words complained of are defamatory of the Plaintiff: paragraph 3; they deny responsibility for publication on the basis that the words were spoken by Mr. Keod Smith and he appeared live on the programme: paragraph 3; they take issue with the pleaded meanings: paragraph 3; and they aver that the words were published on an occasion of qualified privilege. Particulars of qualified privilege are pleaded referring to an interview conducted by the Second Defendant with Mr. Keod Smith: paragraphs 3(a) and (b); and the novel ‘Gone With The Wind’: paragraphs 3(d) to (f).
- [19] In respect of the second publication, the Defendants deny that the words bore or were understood to bear or were capable of bearing or being understood to bear

the meaning complained of by the Plaintiff: paragraph 5 (1); they deny responsibility for any statements attributed to Mr. Keod Smith as words set out under “Defamatory Publications 2” are fair comment made without malice upon a matter of public interest namely the conduct of the Plaintiff in his purported civil and or social acts and undertakings within the Bahamas: paragraph 5 (2); they take issue with the pleaded meanings: paragraph 5 (3); and they aver that the words were published on an occasion of qualified privilege. Particulars of qualified privilege are pleaded making reference to an interview conducted by the Second Defendant with Mr. Keod Smith.

Scope of Discovery

- [20] At common law, qualified privilege is accorded to statements made to the world at large through the media: see **Reynolds v Times Newspapers Ltd and others** [2001] 2 AC 127; **Jameel (Mohammed) v Wall Street Journal Europe SPRL** [2007] 1 AC 359 and **Flood v Times Newspapers Ltd** [2012] 2 AC 273.
- [21] The defence has been adopted in a plethora of Caribbean authorities: see **Bonnick v Morris** [2003] 1 AC 300; **Panday v Gordon** [2006] 1 AC 427; **Pinard-Byrne v Linton** [2016] EMLR 4 and **Seaga v Harper** [2008] UKPC 9.
- [22] A reading of these cases demonstrate that the purpose for which the law grants privilege is to permit the media to carry out its primary function of disseminating information to the public on matters of public interest without running the risk that – because of innocent factual misstatements – the owners, employees and/or contributors to the media would become liable in damages and otherwise, to any person who felt aggrieved by the disseminating information. Simultaneously, the law continues to seek to protect the reputation of persons from unwarranted attacks. The balance to be struck between two competing objectives is to be found in the concept of responsible journalism. The defence is available to the media if the author and/or publisher of the information conformed to the standard of responsible journalism.

[23] In the seminal judgment of the House of Lords in **Reynolds v Times Newspapers Ltd** [supra], it is now established that the protection accorded by the defence of qualified privilege to statements made to the world at large through the media does not just depend on whether the maker (or publisher) of the statement acted without malice but also whether the maker (or publisher) of the statement had made proper investigations prior to the making/publishing of the statement.

[24] As learned Counsel Mrs. Bostwick-Dean correctly submitted, even if the basis of the qualified privilege defence is said to be different, the Defendants still must disclose all relevant documents: see **Gatley on Libel and Slander** (12th Ed.) at 31.7 where the learned author said:

“Qualified Privilege

31.7

Equally, where the defendant has pleaded qualified privilege, he will have to disclose all documents which support or undermine his case that he was under a duty to publish, or had an interest in publishing, the words complained of. In the case of a plea of Reynolds privilege, that is liable to include disclosure of journalists’ notes and other material relied on as giving rise to the existence of a duty to publish and as supporting a case of responsible journalism.”[Emphasis added]

[25] Learned Counsel Mr. Wells who appeared for the Defendants accepts that all parties to an action are required to disclose or give discovery of all documents relating to the matters in question that he had or has in his possession, custody or power.

[26] He correctly submitted that the term “*relating to matters in question*” limits the scope of documents that fall within the proper realm of discovery. In short, the document must be relevant.

Documents sought in the Summons

Schedule One

[27] By Summons dated 27 March 2017, the Plaintiff seeks particular discovery of the following documents namely:

- a. Documents (including but not limited to, electronic and hardcopy correspondence notes, contracts and invoices); communications (including, but not limited to, emails, text messages, voicemail messages and communications via Blackberry Messenger, Twitter and Facebook); interview notes and transcripts; contracts; documents, communications and records relating to all payments made and received and all invoices submitted and received in relation to the Plaintiff and/or Peter Nygard and/or the Smear Campaign which is pleaded at paragraph 8 (c) of the Plaintiff's Writ of Summons dated 19 June 2015.
- b. Documents, communications and records relating to the Plaintiff's acceptance speech at the ceremony in New York at which he was given the Audubon Award which is pleaded at paragraphs 3 (a) to 3 (c) of the Defendant's Defence dated 27 April 2016 and/or to the allegations pleaded at the same paragraphs of the Defendants' Defence; and
- c. Documents, communications and records relating to the novel "Gone With The Wind" by Margaret Mitchell which is pleaded at paragraphs 3(d) and 3(f) of the Defendants' Defence dated 27 April 2016 and/or to the allegations pleaded at the same paragraphs of the Defendants' Defence.

[28] Learned Counsel Mrs. Bostwick-Dean submitted that the number of documents disclosed and the fact that no correspondence was disclosed is sufficient for the Court to conclude that, in all probability, the Defendants have or have had other relevant documents beyond those disclosed: see Ms. Afia's affidavit at paragraph 23.

[29] On the second exception set out at paragraph 7 [supra], Ms. Afia explains why the Plaintiff reasonably believes that the Defendants are likely to have relevant documents in the following categories:

1. The smear campaign: see Ms. Afia's affidavit at paragraphs 4 to 13 and Schedule 1, paragraph (a) of the Summons:
 - a. No documents have been disclosed by the Defendants in these actions on the smear campaign.

- b. The smear campaign is pleaded and is in issue: see Statement of Claim at paragraph 9(c) and Defence at paragraph 9(c).
 - c. There is sufficient evidence that documents identified in Schedule 1, paragraph (a) of the Summons are in the possession of the Defendants. This is for the reasons set out in paragraph 6 of Ms. Afia's affidavit.
 - d. The Defendants have already admitted in earlier litigation to have been used by persons with an agenda against the Plaintiff.
2. The Audobon Award Acceptance Speech: see Ms. Afia's affidavit at paragraphs 14 and 15 and Schedule 1, paragraph (b) of the Summons.
- a. No documents have been disclosed by the Defendants in these actions on the smear campaign.
 - b. The Audobon Award Acceptance Speech is pleaded as part of the Defendants' qualified privilege plea: see Defence at paragraphs 3(a) and (b) where parts of the Speech are quoted and paragraph 5(d) where reliance is placed on paragraphs 3(a) and (b) in respect of the second publication; and Reply at paragraph 3.4.4 where the Plaintiff admits making the speech but denies it supports the point being made in the Defence; paragraph 4.4 where issue is taken with reliance upon this plea in respect of the second publication.
 - c. There is sufficient evidence that documents identified in Schedule 1, paragraph (b) of the Summons, are in the possession of the Defendants. This is for the reasons set out in paragraphs 14 and 15 of Ms. Afia's affidavit.
3. 'Gone With The Wind' – see Ms. Afia's affidavit at paragraphs 16 and 17.

[30] On the third exception, elaborated in paragraph 8 [supra], as the affidavit of Ms. Jane S. Evans explains, the Plaintiff can tell from the documents he has managed to obtain from third parties that the Defendants must be in possession of documents which they have failed to disclose. The Plaintiff filed an updated Disclosure List identifying documents he obtained from third parties.

- [31] The Plaintiff alleges that these documents are, or have been in the Second Defendant's possession, custody or power.
- [32] The Defendants oppose the Plaintiff's application for further or additional discovery. The Defendants relied on the affidavit of Wendall K. Jones filed on 18 August 2017 and other documents namely:
- (1) Defendants' List of Documents filed on 18 November 2016;
 - (2) Supplemental List of Documents of the Defendants filed on 27 July 2017;
 - (3) Plaintiff's Supplemental List of Documents filed on 18 August 2017.
- [33] The Defendants' initial discovery list filed on 18 November 2016 contained 17 documents which included 11 statements of case from previous proceedings: and Schedule Two contains various emails between McKinney, Turner & Co. to the Defendants: see Defendants' List of Documents filed on 18 November 2016.
- [34] On 27 July 2017, the Defendants filed a Supplemental List of Documents. Schedule 1 Part 1 consists of the novel "Gone With The Wind" and some other documents.
- [35] Learned Counsel Mr. Wells submitted that the documents which are sought in the Summons are not relevant and do not assist directly or indirectly in the determination of the facts and issues in either action. He quoted from Halsbury's Laws of England (4th Ed.), Volume 13 at paragraph 38 where the learned authors stated as follows:

"Discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which, even if substantiated, could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to "fish" for witnesses or for a new case, that is to enable him to frame a new case. Each case must be considered according to the issues raised; but where there are numerous documents of slight relevance and it would be oppressive to produce them all, some limitation may be imposed."
[Emphasis added]

Analysis and Findings

- [36] O. 24 r. 7 of the RSC provides for discovery of particular documents and O. 24 r. 8 provides for discovery to be ordered if necessary. Thus, disclosure is not automatic and, in its case management role, the Court controls its extent.
- [37] An application for specific disclosure will involve questions as to its reasonableness. The application should contain the reason why the applicant is not satisfied with the disclosure afforded so far by the respondent and why the applicant anticipates that specific disclosure ought to be worthwhile. Where specific disclosure is ordered it should be precise as to the description of documents to be disclosed.
- [38] An order for specific disclosure should not be made in relation to unpleaded matters: **Amoco (UK) Exploration Co. v British American Offshore Ltd** (2000) February, (Trans Ref 1999 Folio 1159), per Longmore J. When asked to make an order for specific disclosure the Court should be particularly conscious of the requirement of proportionality as well as the overriding objective of Order 31A of the RSC.

(a) The Smear Campaign

- [39] In both actions, the Plaintiff seeks at Schedule One (a) documents (including but not limited to, electronic and hardcopy correspondence notes, contracts and invoices); communications (including, but not limited to, emails, text messages, voicemail messages and communications via Blackberry Messenger, Twitter and Facebook); interview notes and transcripts; contracts; documents, communications and records relating to all payments made and received and all invoices submitted and received in relation to the Plaintiff and/or Peter Nygard and/or the Smear Campaign which is pleaded at paragraph 8 (c) of the Plaintiff's Writ of Summons dated 19 June 2015.
- [40] Learned Counsel Mr. Wells questions the relevance of such documents and submits that the Plaintiff should not be permitted to utilize the present application

as a fishing expedition to obtain evidentiary material for other existing proceedings or to frame a new case. He cautioned the Court not to countenance such request for wide-ranging discovery as it would be oppressive to produce such a wide range of documents.

[41] Learned Counsel Mrs. Bostwick-Dean submits that such documents are relevant as they show how the defamatory words came to be published, who authorized and/or participated in their publication and who paid for them to be published which go towards the circumstances of publication and/or towards the issue of malice on the part of the Defendants in relation to the smear campaign pleaded at paragraph 8(c) of the Plaintiff's Statement of Claim.

[42] The Plaintiff believes that such documents exist and are in the possession of the Defendants. Paragraph 6 of Ms. Afia's affidavit and Ms. Evans' affidavit of 27 July 2017 provide further evidence.

[43] Mrs. Bostwick-Dean submits that the Plaintiff is now in possession of documents, in particular, emails, which were sent to and from, or were copied to the Second Defendant and/or other employees or agents of the First Defendant and so which are and/or were in their possession, custody or power which relate to the issues in question and which the Defendants have not disclosed. According to the Plaintiff, the Defendants' discovery was plainly deficient. Learned Counsel submits that the Defendants' failure to disclose any electronic documents or emails whatsoever (paragraph 3 of Ms. Afia's affidavit) stands in stark contrast to the "at least several hundred documents" referred to by Ms. Evans: paragraph 11 of her affidavit.

[44] As I examine the pleadings and the disclosed documents in the two actions, I am of the considered view that there are documents that fall squarely within the category of documents sought at Schedule 1, paragraph 1 of the Summons, which, as they are from and/or to the Second Defendant, are and/or were in the Defendants' possession, custody or power which have not been disclosed but

ought to be disclosed. I agree with learned Counsel, Mrs. Bostwick-Dean that, in the light of the material provided by two non-parties when those individuals settled libel actions brought by the Plaintiff, the three pre-requisites for jurisdiction as laid down in **Berkeley Administration v McClelland** [supra] are even more plainly made out namely:

- a. There is sufficient evidence that the documents exist which the other party has not disclosed;
- b. The document or documents relate to matters in issue in this action;
- c. There is sufficient evidence that the document is in the possession, custody and power of the other party.

[45] In the circumstances, I will order that the Defendants disclose the documents sought in Schedule One, paragraph (a) of the Summons within fourteen (14) days hereof.

(b) The Audubon Award Acceptance Speech

[46] The Plaintiff seeks discovery of documents, communications and records relating to the Plaintiff's acceptance speech at the ceremony in New York at which he was given the Audubon Award which is pleaded at paragraphs 3 (a) to 3 (c) of the Defendant's Defence dated 27 April 2016 and/or to the allegations pleaded at the same paragraphs of the Defendants' Defence.

[47] Learned Counsel Mrs. Bostwick-Dean believes that such documents exist because the Defendants cannot have formed the view that the Audubon Speech supports the defamatory allegations broadcasted by the Defendants without such documents being in their possession, custody and power.

[48] Learned Counsel for the Defendants, Mr. Wells was terse in his submissions. He questions the relevance of these documents and characterizes each application as a "fishing expedition". However, I agree with Mrs. Bostwick-Dean that discovery of documents relating to the Plaintiff's acceptance speech are relevant to the matters which are in issue pleaded in the Defendants' Defence and I so

find. I will therefore order that the Defendants disclose the documents sought in Schedule One, paragraph (b) of the Summons within fourteen (14) days hereof.

(c) Gone WithThe Wind

[49] The Plaintiff seeks discovery of documents relating to Gone With The Wind by Margaret Mitchell and the allegations relating thereto which are pleaded at paragraphs 3(3)(d) to 3(3)(f) of the Defendants' Defence including any documents which are or would have been in the possession, custody and power of the Defendants and relate to Gone With The Wind, including a copy of the novel itself and further including research, notes, correspondence and other documents.

[50] Learned Counsel for the Plaintiff, Mrs. Bostwick-Dean submits that such documents exist because the Defendants cannot have formed the view that the novel Gone With The Wind supports the defamatory allegations published by the Defendants without such documents having come into the possession, custody or power of the Defendants.

[51] On 27 July 2017, the Defendants filed a Supplemental List of Documents. Schedule 1 Part 1 consists of the novel "Gone With The Wind" and some other documents.

[52] For present purposes, I am of the opinion, that this is sufficient for the issue at hand. I am unable to discern what research, notes, correspondences and other documents can be relevant and which is in the Defendants' possession, custody and power. Taken at its highest, this request appears to be highly conjectural.

Documents no longer in the Defendants' possession or control

[53] The Plaintiff seeks an order that the Second Defendant swears an affidavit addressing the matters set out in Schedule Two namely: whether any document, or class of document, specified and/or described in Schedule One has at any

time been in his possession, custody or power but no longer is and details of when he parted with it and what has become of it.

[54] Learned Counsel Mrs. Bostwick-Dean submits that if the Defendants cannot provide the documents sought because they say they are no longer in their possession, custody or power, then the Plaintiff seeks an affidavit explaining the position. The jurisdiction to do so exists under O. 24 r. 7 and is supported by Ms. Afia's affidavit at paragraphs 19 to 21. As the Court of Appeal said, at paragraph 5 of **Berkeley Administration v McClelland**, [supra], it is no answer to an application that the documents no longer exist. Where relevant and disclosable documents no longer exist, the party to whom they would have been disclosed is entitled to an explanation.

[55] In the circumstances, I hereby order that the Second Defendant swears an affidavit, within fourteen (14) days hereof, explaining whether any document, or class of document specified and/or described in Schedule One has, at any time been in his possession, custody or power but no longer is and he details when he parted with it and what has become of it.

Conclusion

[56] Based on the applicable legal principles and the evidence as it relates to the present summonses, I make the following orders namely:

- 1) The Defendants are to disclose all documents that are, or have been, in their possession, custody and power as set out in Schedule One namely:
 - a) Documents (including but not limited to, electronic and hardcopy correspondence notes, contracts and invoices); communications (including, but not limited to, emails, text messages, voicemail messages and communications via Blackberry Messenger, Twitter and Facebook); interview notes and transcripts; contracts; documents, communications and records relating to all payments made and received and all invoices submitted and received in relation to the Plaintiff and/or Peter Nygard

and/or the Smear Campaign which is pleaded at paragraph 8 (c) of the Plaintiff's Writ of Summons filed on 19 June 2015 and;

- b) Documents, communications and records relating to the Plaintiff's acceptance speech at the ceremony in New York at which he was given the Audubon Award which is pleaded at paragraphs 3 (a) to 3 (c) of the Defendant's Defence dated 27 April 2016 and/or to the allegations pleaded at the same paragraphs of the Defendants' Defence.
- 2) The Second Defendant swears, within fourteen (14) days hereof, an affidavit explaining whether any document, or class of document specified and/or described in Schedule One has at any time been in his possession, custody or power but no longer is and he details when he parted with it and what has become of it.

Indemnity costs

[57] As the successful party, the Plaintiff seeks an order that the Defendants pay him a full indemnity for his costs of this application. The Plaintiff has submitted comprehensive submissions. The Defendants are given twenty-one days hereof to provide written submissions to the Court on this issue. I will briefly hear the parties on costs on Wednesday, 7th day of February, A.D., 2018 at 2.30 p.m.

Dated the 9th day of January, A.D., 2018

**Indra H. Charles
Justice**