COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2020/CLE/gen/00272

IN THE MATTER OF THE ESTATE OF CORAL LOUISE GOODING, DECEASED

BETWEEN

RALPH GOODING

(In his capacity as Widower, Heir-at-Law and Administrator of the Estate of Coral Gooding, Deceased)

Plaintiff

AND

ELIZABETH ELLIS

1st Defendant

AND

NATIONAL WORKERS CO-OPERATIVE CREDIT UNION LTD.

(NWCCU)

2nd Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Roger Minnis for the Plaintiff

Ms. Rhchetta Godet for the Second Defendant

Hearing Date: 22 April 2021

Practice – Pleadings - Defence – Defendant neither admitting nor denying but put Plaintiff to strict proof – Whether defendant "unable to admit or deny" all allegations - Allegation of fraud – Fraud must be strictly pleaded and proved – Whether defence to be struck out – RSC O. 18 r. 19, O. 31A, r. 20, O. 18 r. 13(3)

Pursuant to RSC O. 18 r. 19 and the inherent jurisdiction of the court, the Plaintiff brought the present application to strike out the 2nd Defendant's Defence on the grounds that (i) it discloses no reasonable defence to the Plaintiff's statement of claim; (ii) it may prejudice, embarrass or

delay the fair trial of the action and (iii) it is otherwise an abuse of the process of the court. The 2nd Defendant challenges the application, contending that the Plaintiff has raised allegations of fraud, negligence and /or dishonesty on the part of the 1st Defendant and the facilitation thereof by negligence and breach of fiduciary duty by the 2nd Defendant. Therefore, the Plaintiff has a duty to prove his case and the 2nd Defendant does not have a duty to assist him. In this regard, the 2nd Defendant has neither admitted nor denied and has put the Plaintiff to strict proof of every single allegation in his Statement of Claim.

HELD: Finding that the 2nd Defendant's Defence did not comply with the modern practice relative to the contents of a defence, the Court dismisses the striking out application and grants leave to the 2nd Defendant to amend its defence within 14 days hereof.

1. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader: **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018 and **Montague Investments Limited v (1) Westminster College Ltd and (2) Mission Baptist Church** [2015/CLE/gen/00845] relied upon.

2. O. 18, r. 13(3) appears to be geared towards minimising the mischief created by vague and evasive pleadings. The modern approach to pleadings requires a more structured approach to a proper pleading in order to avoid vague and evasive pleadings.

3. It is well-established that a defendant simply cannot deny an allegation and ask the plaintiff to prove it. Those bad days are long over. Where there is a denial, it must be accompanied by the defendant's reasons for the denial. If the defendant wishes to put forward a different version of events from that given by the plaintiff, he must state his own version: Mendonca JA in **M.1.5 Investigations Limited v The Centurion Protective Agency Limited** [Civil Appeal No. 244 of 2008] [Trinidad & Tobago] and **Elwardo Lynch v Ralph Gonsalves** (St. Vincent & The Grenadines Civil Appeal No. 18 of 2005) (Judgment delivered on 18 September 2006) applied.

4. The Defence must set out all the facts on which the defendant relies to dispute the claim. Such statement must be as short as practicable. A defendant is under a positive duty to admit or deny pleaded allegations where he is able to do so and could only put the plaintiff to proof of a fact where he was unable to admit or deny it. In the case of a corporate defendant, which can only act through human agents and has no mind of its own, its actual knowledge must clearly be understood as that of its individual officers, employees or other agents whose knowledge is for the purposes of applying rule 16.5 to be attributed to it, in accordance with the relevant rules of attribution….": **SPI North Limited v Swiss Post International (UK) Ltd and another** [2019] 1 WLR 2865.

5. A defendant may state that it is "unable to admit or deny" an allegation where the truth or falsity of the allegation is "neither within the actual knowledge (including attributed knowledge in the case of a corporate defendant) nor capable of rapid ascertainment from documents or other sources of information at his ready disposal". It is not required to undertake investigations beyond that level, including consulting with any third parties: **SPI North Limited v Swiss Post International (UK) Ltd and another** [2019] 1 WLR 2865.

RULING

Introduction

[1] In **Montague Investments Limited v (1) Westminster College Ltd and (2) Mission Baptist Church** [2015/CLE/gen/00845], Judgment delivered on 31 May 2020, this Court dealt with the purpose of pleadings. I stated at paragraphs [15] to [18[as follows:

> **"[15] The purpose of pleadings in civil cases is to identify the issue or issues that will arise at trial. This is in order to avoid the opposing parties and the court taken by surprise. The pleadings must be precise and disclose a cause or causes of action. Evidence need not be pleaded, because that will come from the affidavits and cross-examination thereon or by oral evidence.**
>
> **[16] In *Bahamas Ferries Limited v Charlene Rahming* SCCivApp & CAIS No. 122 of 2018, our Court of Appeal held that the starting point must always be the pleadings. At para. 39 of the judgment, Sir Michael Barnett JA (as he then was) stated:**
>
> > **"The starting point must always be the pleadings. In Loveridge and Loveridge v Healey [2004] EWCA Civ. 173, Lord Phillips MR said at paragraph 23:**
> >
> > **"In *Mcphilemy vs Times Newspapers Ltd. [1999] 3 ALL ER 775* Lord Woolf MR observed at 792-793:**
> >
> > > **'Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.' "[Emphasis added]**
>
> **[17] At paragraph 40 of the Judgment, Sir Michael went on to state:**
>
> > **"It is on the basis of pleadings that the party's decide what evidence they will need to place before the court and what preparations are necessary for trial."**
>
> **[18] Thus, pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise. They are still vital to identify the issues and the extent of the dispute between the parties. What is important is that**

> **the pleadings should make clear the general nature of the case of the pleader and the court is obligated to look at the witness statements to see what are the issues between the parties."**[Emphasis added]

[2] Before the Court is an application by the Plaintiff, filed on 13 January 2021, to strike out the 2nd Defendant's Pleadings (Defence) pursuant to Order 18 rule 19(1)(a),(b), (c) and (d) of the Rules of the Supreme Court ("RSC O. 18 r. 19 (1)(a), (b), (c) and (d)") or under the inherent jurisdiction of the Court. The grounds for the striking out are that (i) the 2nd Defendant's Defence discloses no reasonable defence to the Plaintiff's statement of claim; (ii) it may prejudice, embarrass or delay the fair trial of the action and (iii) it is otherwise an abuse of the process of the court.

[3] The 2nd Defendant challenges the application, contending that the Plaintiff has raised allegations of fraud, negligence and/or dishonesty on the part of the 1st Defendant and the facilitation thereof by negligence and breach of fiduciary duty by the 2nd Defendant. Therefore, the Plaintiff has a duty to prove his case and not for the 2nd Defendant to assist him. In that regard, the 2nd Defendant has neither admitted nor denied and has put the Plaintiff to strict proof of every single allegation in his Statement of Claim.

Court's power to strike out

[4] RSC O. 18 r. 19(1) allows a party to attack the validity of its opponent's pleadings which may result in part or the whole of the pleadings being struck out. It provides:

> **"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."**

[5] In addition, O. 31A r. 20(1) provide further grounds for striking out a pleading or part of a pleading. It states:

> **21. (1) In addition to any other powers under these Rules, the Court may strike out a pleading or part of a pleading if it appears to the Court-**
>
> > **(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the Court in the proceedings;**
> >
> > **(b) that the pleading or the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings;**
> >
> > **(c) that the pleading or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or**
> >
> > **(d) that the pleading or the part to be struck out is prolix or does not comply with the requirements of any rule."**

[6] In **B.E. Holdings Limited v Piao Lianji** [2014/CLE/gen/01472], this Court set out the powers of the court to strike out at paras [7] to [10] as follows:

> **"[7] As a general rule, the court has the power to strike out a party's case either on the application of a party or on its own initiative. Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. Therefore, it should be taken only in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this discretion deprives a party of his right to a trial and his ability to fortify his case through the process of disclosure and other procedures such as requests for further and better particulars.**
>
> **[8] In *Walsh v Misseldine* [2000] CPLR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial.**

[9] It is also part of the court's active case management role to ascertain the issues at an early stage. However, a statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence: *Ian Peters v Robert George Spencer*, ANUHCVAP2009/016 - Antigua & Barbuda Court of Appeal - per Pereira CJ [Ag.] - Judgment delivered on 22 December 2009.

[10] <u>The court, when exercising the power to strike out, will have regard to the overriding objective of RSC O. 31A r. 20 and to its general powers of management. It has the power to strike out only part of the statement of claim or direct that a party shall have permission to amend</u>. Such an approach is expressly contemplated in the RSC: see Order 18 Rule 19." [Emphasis added]

Contents of defence

Defendant's duty to set out case

[7] The Defence must set out all the facts on which the defendant relies to dispute the claim. Such statement must be as short as practicable.

[8] The Civil Procedure Rules (UK) provides some helpful guidance on the content of a defence. It states:

"(1) In his defence, the defendant must state –

(a) which of the allegations in the particulars of claim he denies;

(b) <u>which allegations he is unable to admit or deny, but which he requires the claimant to prove; and</u>

(c) which allegations he admits.

(2) Where the defendant denies an allegation –

(a) <u>he must state his reasons for doing so; and</u>

(b) <u>if he intends to put forward a different version of events from that given by the claimant, he must state his own version.</u>

(3) A defendant who-

1. fails to deal with an allegation, but

2. has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant; shall be taken to require that allegation to be proved."

(4) …….

(5) Subject to paragraphs (3) and (4) a defendant who fails to deal with an allegation shall be taken to admit that allegation."[Emphasis added]

[9] A defendant may not rely on any allegation or factual argument which is not set out in the defence but which could have been set out there, unless the court gives permission. The court may give permission at the case management conference.

[10] A defendant may not meet the plaintiff's particulars of claim with a bare denial; he must state which allegation he admits, **which he denies (with reasons for doing so)** and which allegation he is unable either to admit or deny but nevertheless requires the plaintiff to prove.

Discussion

[11] Learned Counsel Ms. Godet made brief submissions. Essentially, she submitted that this is not a case fit for dismissal as it is the duty of the Plaintiff to prove his case and not the duty of the 2nd Defendant to assist him with the same. She also submitted that the 2nd Defendant considers the allegation of fraud to be very serious and therefore, puts the Plaintiff to strict proof of the allegations. Ms. Godet argued that the 2nd Defendant's Defence is not a bare denial but it contains allegations which the 2nd Defendant neither admits nor denies but puts the Plaintiff to strict proof of every one of them.

[12] According to learned Counsel Mr. Minnis who appeared for the Plaintiff, the English Courts were keen to rid the civil proceedings of this opaque approach to pleading a Defence by introducing new Civil Procedure Rules to curtail this defect which only served to hinder and frustrate the smooth flow of the proceedings. Although The Bahamas has not yet introduced the new Civil Procedure Rules ("CPR"),

pursuant to RSC O. 31A, the approach of our courts is similar. This is an accurate statement.

[13] Mr. Minnis referred to the English case of **SPI North Ltd v Swiss Post International (UK) Ltd and another** [2019] EWCA Civ 7 which I find to be very instructive. In **SPI**, the claimant company brought proceedings against the defendant companies for breach of contract. The defendants served a defence in which they stated that they were "unable to admit or deny" various of the claimant's allegations. The claimant applied for the defence to be struck out unless certain of those pleadings were amended, arguing that the defendants would, or at least might, have been able to admit those allegations had they taken reasonable steps to make enquiries of key former employees. The strike out application was refused at first instance. On appeal, the Court of Appeal upheld the High Court decision, agreeing with the trial judge's assessment of the circumstances in which a defendant is entitled to neither deny nor admit an allegation. Specifically, the court held that a defendant may state that it is "unable to admit or deny" an allegation where the truth or falsity of the allegation is "neither within the actual knowledge (including attributed knowledge in the case of a corporate defendant) nor capable of rapid ascertainment from documents or other sources of information at his ready disposal". It is not required to undertake investigations beyond that level, including consulting with any third parties.

[14] Henderson LJ had this to say at [49]:

> **"In my judgment, a number of factors point towards the conclusion that a defendant is "unable to admit or deny" an allegation within the meaning of rule 16.5(1)(b) where the truth or falsity of the allegation is neither within his actual knowledge (including attributed knowledge in the case of a corporate defendant) nor capable of rapid ascertainment from documents or other sources of information at his ready disposal. In particular, there is no general obligation to make reasonable enquiries of third parties at this very early stage of the litigation. Instead, the purpose of the defence is to define and narrow the issues between the parties in general terms, on the basis of knowledge and information which the defendant has readily available to him during the short period afforded by the rules for filing his defence."** [Emphasis added]

[15] Strictly-speaking, although the above excerpt applies to the new CPR in England, it is equally applicable to The Bahamas. RSC O. 18, r.13 provides that:

> **"(1) Subject to paragraph (4), any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it.**
>
> **(2) A traverse may be made either by a denial or a statement of non-admission and either expressly or by necessary implication.**
>
> **(3) Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be, and a general denial of such allegations, or a general statement of non-admission of them is not a sufficient traverse of them".** [Emphasis added]

[16] As Mr. Minnis properly extrapolated, O. 18, r. 13(3) appears to be geared towards minimising the mischief created by vague and evasive pleadings. According to him, the 2nd Defendant's defence fits this description.

[17] In **SPI**, Henderson LJ addressed this issue at [34 -36] as follows:

> **"34 In interpreting the provisions of rule 16.5, the court is obliged by rule 1.2 to "seek to give effect to the overriding objective". The overriding objective is formulated in rule 1.1(1) as "enabling the court to deal with cases justly and at proportionate cost", and this is amplified in rule 1.1(2) which states that:**
>
> > **"Dealing with a case justly and at proportionate cost includes, so far as practicable – (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate – (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring it is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and (f) enforcing compliance with rules, practice directions and orders."**
>
> **35 Since the CPR introduced "a new procedural code" with the overriding objective which I have just quoted, it is doubtful whether**

any real help in interpreting the requirements of rule 16.5(1)(b) can be gained from a comparison with the provisions of the RSC which it replaced, or even from the analysis and recommendations of Lord Woolf in his Interim and Final Access to Justice Reports in 1995 and 1996 respectively, important though they are by way of general background. Nevertheless, I think it is instructive to compare the wording of CPR rule 16.5(1) with RSC Order 18 rule 13, headed "Admissions and denials", which provided that:

> **"(1) Any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it.**
>
> **(2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.**
>
> **(3) Every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them."**

36 Those provisions thus enabled a defendant to "traverse" any allegation of fact in the statement of claim either by denying it or by not admitting it, and although there was authority to the effect that a defendant ought to admit facts which were not controversial, or were known to him, practitioners whose memory stretches back that far will remember the stonewalling defences, replete with non-admissions, which obstructive defendants were prone to plead, relying on the choice of response afforded to them by rule 13. This was clearly part of the mischief that Lord Woolf's reforms were designed to address, as may be seen from Chapter 20 of his Interim Report. Similarly, in paragraph 16 of Chapter 12 of his Final Report, Lord Woolf proposed that:

> **"The defence must: (a) indicate (i) which parts of the claim the defendant admits, (ii) which parts he denies, (iii) which parts he doubts to be true (and why), (iv) which parts he neither admits nor denies, because he does not know whether they are true, but which he wishes the claimant to prove; (b) give the defendant's version of the facts in so far as they differ from those stated in the claim…."** [Emphasis added]

The Defence of the 2nd Defendant

[18] In order to have a better appreciation of the present action, it is helpful to reproduce the 2nd Defendant's Defence in full.

"1. Paragraphs 1 and 2 of the Statement of Claim are neither admitted nor denied and the Plaintiff is put to strict proof of the same.

2. Paragraph 3 of the Statement of Claim is neither admitted nor denied and the Plaintiff is put to strict proof of the same.

3. Paragraphs 4 through 8 of the Statement of Claim are neither admitted nor denied and the Plaintiff is put to strict proof of the same.

4. Paragraph 9 of the Statement of Claim is neither admitted nor denied and the Plaintiff is put to strict proof of the same.

5. Paragraphs 10 through 13 of the Statement of Claim are neither admitted nor denied and the Plaintiff is put to strict proof of the same.

6. Paragraphs 9 and 10 of the Statement of Claim are neither admitted nor denied and the Plaintiff is put to strict proof of the same.

7. **Paragraphs 14(1) through (6) of the Statement of Claim <u>is denied</u> and the Plaintiff is put to strict proof of the same.**

8. **Paragraphs 15(1) through (11) of the Statement of Claim <u>is denied</u> and the Plaintiff is put to strict proof of the same.**

9. Save as hereinbefore specifically admitted, the 2nd Defendant denies each and every allegation contained in the Statement of Claim as if the same were herein set and traversed seriatim."

[19] In every single paragraph of its Defence, the 2nd Defendant has neither admitted nor denied the Plaintiff's allegations but has put him to strict proof. The main contention of the 2nd Defendant is that it is under no obligation to assist the Plaintiff with his case.

[20] On the other hand, the Plaintiff submitted that, in certain circumstances, the 2nd Defendant is quite "able" to admit or deny the allegations made against it in the Plaintiff's statement of claim as the information ought to be readily available to its employees, agents and, to some degree, the general public. According to the

Plaintiff, the 2nd Defendant took the position of evasiveness because it is a corporate entity.

[21] Like the 2nd Defendant, **SPI** was also a corporate entity. Thus, the dicta of Henderson LJ are not only relevant but illuminating. At [46], he stated:

> **"Megarry V-C went on to hold that the person answering the interrogatories was bound to make all reasonable enquiries likely to reveal what is known to the company, and that the answers should include a statement showing that the person swearing the answers has applied his mind to the duty and attempted to discharge it. He added, at p 571:**
>
> > **"If the answers do not at least state in general terms that the person swearing to them has made diligent enquiries of all officers, servants and agents of the company who might reasonably be expected to have some knowledge relevant to the questions, the party administering the interrogatories may justifiably question whether the company has discharged its obligations in answering the questions. In particular, if any person is an obvious source of knowledge, he must be questioned. If he is not, the company should say why."**

[22] Henderson LJ continued at [48] to [49] of the judgment:

> **"48 These submissions were persuasively advanced by Mr Sachdeva, but I find them unconvincing. I do, however, agree with his starting point, which is the significant difference between the language and structure of rule 16.5(1) on the one hand, and the position which obtained under the RSC on the other hand. Continuing use of the language of non-admission, convenient though it may be, must not be allowed to blur the distinction, or still less to encourage a reversion to the bad old days when a defendant could get away with a stonewalling defence full of indiscriminate non-admissions. Clearly, a defendant is now under a positive duty to admit or deny pleaded allegations where he is able to do so and he may only put the claimant to proof of a fact where he is unable to admit or deny it. But that does not answer the question of what "unable" means in this context.**
>
> **49 In my judgment, a number of factors point towards the conclusion that a defendant is "unable to admit or deny" an allegation within the meaning of rule 16.5(1)(b) where the truth or falsity of the allegation is neither within his actual knowledge (including attributed knowledge in the case of a corporate defendant) nor capable of rapid**

> **ascertainment from documents or other sources of information at his ready disposal. In particular, there is no general obligation to make reasonable enquiries of third parties at this very early stage of the litigation. Instead, the purpose of the defence is to define and narrow the issues between the parties in general terms, on the basis of knowledge and information which the defendant has readily available to him during the short period afforded by the rules for filing his defence".** [Emphasis added]

[23] Henderson LJ further stated at [54]:

> **"…In order to justify such a draconian remedy, submits Mr Drake, it would have been necessary for the claimant to establish, to the civil standard of proof, that the defendants actually could have had available to them knowledge (whether or not derived from third parties) which meant that they were in fact able to admit or deny specific allegations which they had chosen not to admit. In other words, it would not be enough merely to show that the defendants failed to make reasonable enquiries of third parties which they ought to have made. It would be necessary to go further, and to establish that the impugned non-admissions were in fact improper because the relevant allegations should have been either admitted or denied".**[Emphasis added]

[24] Mr. Minnis correctly submitted that the appearance of reasonableness emanates from the pleading itself. In this regard, he referred to the case of **B. E. Holdings Limited** [supra] at [16] to [17]:

> **"[16] Reasonable cause of action means a cause of action with some chances of success when only allegations in the pleadings are considered: *Drummond-Jackson v British Medical Association* (1970) 1 All ER 1094 is sound authority for this principle.**
>
> **[17] A reasonable cause of action, according to Pearson LJ in *Drummond-Jackson* connotes a cause of action which has some chance of success when only the allegations in the pleading are considered. As long as the statement of claim discloses some cause of action, or raises some question fit to be decided at the trial, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out. Where a statement of claim is defective only in not containing particulars to which the defendant is entitled, the application should be made for particulars under O 18 r 12 and not for an order to strike out the statement".**

[25] Mr. Minnis argued that the same reasoning ought to apply to the 2nd Defendant's Defence. The Defence has some chance of success when only its contents are taken into consideration. The question then becomes whether or not the 2nd Defendant's Defence falls under this category of pleadings even with intense scrutiny there is no display of any case for the 2nd Defendant or its position with regards to the allegations raised against it in the Plaintiff's Statement of Claim.

[26] Mr. Minnis further asserted that the Court ought not to be guessing as to which direction any party to an action is heading, especially in answer to specific pleadings where the facts in issue can easily be verified by the affected party.

[27] According to him, to file an unreasonable pleading can be seen to be an embarrassment or tends to delay the trial of this action as there would definitely be a need for an interlocutory hearing where the same could be avoided especially where the material to plead a proper defence is deemed to be in the possession of the affected party. In this instance, the 2nd Defendant so happens to be a company which, by law, ought to be in possession of the requisite information.

[28] In **SPI**, Henderson LJ further stated at [3] and [5]:

> **"[3] Plainly, a defendant is able to admit or deny facts which are within his own actual knowledge, or which he is able to verify without undue delay, difficulty or inconvenience, by reference to records and other sources of information which are under his control or otherwise at his ready disposal. Furthermore, in the case of a corporate defendant, which can only act through human agents and has no mind of its own, its actual knowledge must clearly be understood as that of its individual officers, employees or other agents whose knowledge is for the purposes of applying rule 16.5 to be attributed to it, in accordance with the relevant rules of attribution…."**
>
> **[5] After hearing oral argument for the best part of a day, the judge gave an extempore judgment of which we have the approved transcript [2018] EWHC 1706 (Ch). He expressed his conclusion as follows, at para 18:**
>
> > **"Taking all these matters into account, as a matter of principle, I have concluded that a defendant is not required, before being able to make a non-admission, to have made reasonable**

> **enquiries. Instead, in my view, consistent with Mr Drakes submission, I have concluded that a defendant can properly make a non-admission based on his own knowledge. In the case of an individual that would be his own knowledge and may well be, as Mr Drake contends, information he has reminded himself of by looking through and making reasonable enquiries of his records. In the case of a corporate defendant, the non-admissions are based on the corporate knowledge".** [Emphasis added]

[29] Mr. Minnis submitted that for the 2nd Defendant to simply plead that parts of the Statement of Claim is "*neither admitted nor denied and the Plaintiff is put to strict proof of the same*," is deemed unacceptable. For example, at paragraph 3 of the Statement of Claim, the Plaintiff pleads the following:

> **"The 2nd Defendant is and was at all material times a duly incorporated Credit Union under the Laws of The Commonwealth of The Bahamas and carrying on a banking business therein, and was also at all material times the employer of the 1st Defendant."**

[30] At paragraph 2 of the Defence, the 2nd Defendant in response thereto pleads:

> **"Paragraph 3 of the Statement of Claim is neither admitted nor denied and the Plaintiff s put to strict proof of the same."**

[31] Mr. Minnis, quite correctly stated, that such an approach, on the surface, sets up the trial for an unavoidable delay, such as the parties are experiencing now. Fortification of this issue is derived from the case of **Elwardo Lynch v Ralph Gonsalves** (St. Vincent & the Grenadines Civil Appeal No. 18 of 2005) (Judgment delivered on 18 September 2006). The Eastern Caribbean Court of Appeal upheld the decision of the trial judge that a defendant in a defamation case was not permitted, the circumstances of that case, to "not admit" the publication of the offending words that he uttered in a radio broadcast and to strike out that part of the defence. The court agreed that the defendant could not claim not to know that he had published the words. If the defendant wishes to put forward a different

version of events from that given by the claimant (plaintiff) then he must state that version.

[32] In addition, at paragraphs 7 and 8 of the Defence, the 2nd Defendant averred:

> **"7. Paragraphs 14(1) through (6) of the Statement of Claim is denied and the Plaintiff is put to strict proof of the same.**
>
> **8. Paragraphs 15(1) through (11) of the Statement of Claim is denied and the Plaintiff is put to strict proof of the same.**

[33] It is well-established that a defendant simply cannot deny an allegation and ask the plaintiff to prove it. Those bad days are long over. Where there is a denial, it must be accompanied by the defendant's reasons for the denial. If the defendant wishes to put forward a different version of events from that given by the plaintiff, he must state his own version: see the dicta of Mendonca JA in **M.1.5 Investigations Limited v The Centurion Protective Agency Limited** [Civil Appeal No. 244 of 2008] [Trinidad & Tobago].

[34] Mr. Minnis next argued that to plead in the manner in which the 2nd Defendant has, amounts to an abuse of the process. He correctly submitted that the 2nd Defendant has adopted a tactical approach to pleading which does not accord with modern practice. Modern approach requires a more structured approach to a proper pleading in order to avoid the very same mischief this action is experiencing at this stage of the proceedings. He referred to paragraph 42 of the judgment of Henderson LJ in **SPI**:

> **"We were also taken to the familiar observations of Lord Woolf MR in McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775, 792-793:**
>
> > **"The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being**

> **taken by surprise. <u>This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party</u>. In particular they are still critical to identify the issues and the extent of the dispute between the parties. <u>What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules</u>.** [Emphasis added]

[35] In my judgment, there must be some definitive pleading in response to the Plaintiff's Statement of Claim in order to assist the Court with its deliberation and management of the case before it. In the present case, the 2nd Defendant's Defence is quite vague and evasive.

[36] Also, Whipple J. in **Yu-Ting Cleeves v. The Chancellor**, **Masters and Scholars of the University of Oxford** [2017] EWHC 702 approached this predicament in the following manner by stating:

> **"34. But in any event, I conclude that this claim cannot proceed because it is abusive in nature and/or otherwise likely to obstruct the just disposal of the proceedings. It is on this point that I rest my decision, and accede to the Defendant's application. The Defendant relies on three authorities to support its submission that this claim is abusive: Towler v Wills [2010] EWHC 1209 (Comm), Cohort Construction (UK) Ltd v M Julius Melchior (A Firm) [2001] CP Rep 23, and Eatwell v Smith and Williamson [2003] EWHC 2098 (Ch)."**
>
> **"35. Those authorities establish the following propositions:**
>
> > **1) <u>A pleading which is unreasonably vague or incoherent is abusive and likely to obstruct the just disposal of the case……</u> "**
>
> **"36. Those propositions are all relevant in this case:**
>
> > **1) The Particulars of Claim as drafted are vague and incoherent. In consequence, the Defendant does not know the case it has to meet and the Court does not know the case it has to decide. "**

[37] It is beyond dispute that where it is plain and obvious that the pleading is incurably defective then it should be struck out. This view was held in the recent case of **Aven et al v Orbis Business Intelligence Limited** [2020] EWHC 523 (QB) in which Warby J said at [52] - [53]:

> **"52 In any event, I am not concerned with the Particulars of Claim but with the Defence. The general principles are clear: it is open to a defendant to require a claimant to prove their pleaded case by means of a non-admission, or alternatively to deny the pleaded case. The problem, or part of the problem, in the present case stems from the fact that this defendant has done both. A denial by the nature goes beyond a non-admission."**
>
> **53. True it is that a bare denial of an allegation of inaccuracy is, in the old language, " pregnant with" an affirmative case that the matter is in fact accurate; but such a denial will often be insufficient to provide the notice to which a claimant is entitled, and indeed requires in order to understand and prepare to meet the defendant's case. That is the position here. Taking by way of example, the first of the alleged inaccuracies (the allegation of mutual favours), proof that the proposition was accurate would necessarily involve evidence of particular incidents or instances of conduct that serve to show the truth of the proposition. Details of the facts to be proved in support of such a positive case would necessarily be required by a claimant in order to prepare for trial. A bare denial, as pleaded here, could not provide the claimants with any notion of what factual case might be advanced to support the assertion of accuracy."** [Emphasis added]

[38] Even where a slightly more pleaded Defence is challenged the same may be struck out for inadequate or marginal pleadings: See Bean J. in **Dil et al v Commissioner of Police of the Metropolis** [2014] EWHC 2184 (QB) at [22] and [23]. See also: **Petrona Russell and anor v Anthony Thompson (carrying on the practice of Counsel and Attorney under the name Anthony Thompson & Co) and Cleopatra Thompson** [2018/CLE/gen/01500 – Written Ruling delivered on 26 April 2021].

Conclusion

[39] Notwithstanding that the new Civil Procedure Rules have not yet been introduced in The Bahamas, judges do have wide discretionary power in their arsenal under

RSC O. 31A to ensure that cases are managed actively and properly in order to curtail too many interlocutory applications which, often times, derail trial dates. Our courts are less tolerant to encourage a reversion to the bad old days when a defendant could get away with a stonewalling defence full of indiscriminate non-admissions or bare denials.

[40] That being said, I will not strike out the Defence filed by the 2nd Defendant as sought by the Plaintiff. Learned Counsel for the 2nd Defendant urged this Court to grant the 2nd Defendant an opportunity to amend its Defence which clearly requires amendment. Since this action has just commenced and a trial date slated for 2022 is not likely to be compromised, I will grant leave to the 2nd Defendant to file an Amended Defence within fourteen days hereof.

[41] In the premises, I will make the following order:

1. **The Summons, filed on 13 January 2021 by the Plaintiff, to strike out the 2nd Defendant's Defence, is dismissed;**

2. **The 2nd Defendant shall file and serve an Amended Defence within fourteen days hereof; failing which Judgment will be entered for the Plaintiff as against the 2nd Defendant with costs;**

3. **The matter will take its natural course in accordance with the RSC;**

4. **The 2nd Defendant shall pay costs to the Plaintiff in the sum of $3,500;**

5. **The matter is adjourned to 8 June 2021 at 2.30 p.m. for case management directions.**

6. **Trial dates of 20 and 21 April 2022 are confirmed.**

Dated this 29th day of April, A.D., 2021

Indra H. Charles
Justice