COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Side
2015/CLE/gen/FP/00249

BETWEEN

TROY GARVEY
Plaintiff

AND

ELIZABETH COLLINS T/A POWER PLUS BAHAMAS
First Defendant

AND

THOMAS UPTAGRAFT
Second Defendant

AND

PETER COLLINS
Third Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Gregory K. Moss for the Plaintiff

Mr. Wendell A. Smith for the Defendants

HEARING DATE: May 28th, 2020

RULING

Hanna-Adderley, J

Application for Discovery of Particular Documents

Application for Judgment on Admissions/Summary Judgement

Introduction

1. The parties are before the Court on the hearing of several interlocutory applications all commenced by way of Summons. The Plaintiff filed two Summonses on the 25th February, 2019, the first application is pursuant to Order 24, Rule 7 of the Rules of the Supreme

Court ("**the RSC**") for an order for discovery of particular documents (that Summons was refiled on the 22nd May, 2019 by the Plaintiff). The second application is pursuant to Order 27, Rule 3 of the RSC for an order for Judgment based on admissions contained in the Defendants' Bundle of Documents filed on the 17th January, 2019 at Tab 48 and alternatively an order for Summary Judgement pursuant to Order 14, Rule 3 of the RSC.

2. The Plaintiff's applications were supported by two Affidavits filed on behalf of the Plaintiff on the 25th February and 27th May, 2019 respectively. The Plaintiff also relies on his Written Submissions filed on the 24th May, 2019. The Defendants oppose the Plaintiff's applications. While Skeleton Arguments on behalf of the Defendants were filed on the 2nd August, 2019, the Defendants for the purpose of these applications rely on their Supplemental Written Submissions filed on the 25th May, 2020.

Background

3. The Plaintiff by way of his Writ of Summons filed the 6th August, 2015 claims damages as a result of a breach of an employment contract between himself and the First Defendant in or around April, 2012; damages against the First Defendant for breach of a verbal contract for failing to pay 30% commission to the Plaintiff on the net profit of any and all completed projects resulting from the Plaintiff's introduction including but not limited to the BTC Solar Terminal AC project and the BTC LED project; damages against the First through the Third Defendants for breach of terms of a partnership agreement whereby it was agreed that the Plaintiff would receive an equal share of profits made on all projects between the First Defendant and a third party.

4. The Plaintiff subsequently filed a Statement of Claim on the 6th December, 2016 whereby he particularized his claim against the Defendants. In particular at paragraph 6 of the Statement of Claim the Plaintiff states:-

> "6. The Defendants in breached of their oral contract with the Plaintiff refused to pay the Plaintiff commission after the Plaintiff's successful introduced to them several clients/customers such as BTC Solar AC project, BTC LED project and BEC projects. The Defendants collected the sums billed to these clients/customers and has failed to pay the Plaintiff his 30% commission of the Net Profit.
>
> PARTICULAR OF BREACH OF CONTRACT

i. Failing to pay the Defendant the 30% due and owing to him from the BTC Solar AC project, BTC LED project and BEC projects.

ii. Failure to information the Plaintiff of all potential clients/customers that the was introduced to her which result in a successful business venture."

5. The Defendants filed their first Defence on the 3rd September, 2015 in response to the Plaintiff's Writ of Summons and subsequently filed a second Defence on the 1st March, 2017 in response to the Plaintiff's Statement of Claim. In particular they state at paragraphs 2-6:-

"2. Paragraph 2 of the Statement of Claim is denied. The First Defendant, Elizabeth Collins, is and was at all material times a Sole Proprietor trading as PowerPlus Bahamas in the City of Freeport on the Island of Grand Bahama, one of the Islands within The Commonwealth of the Bahamas engaged in the business of supplying alternative (solar) energy. The Second Defendant, Thomas Uptagrafft, is and was at all material times an employee of the First Defendant as a Sales and Technical Representative within the City of Freeport aforesaid. The Third Defendant, Peter Collins, is and was at all material times an independent contractor providing accounting and advisory services for the First Defendant in the City of Freeport aforesaid.

3. Paragraph 3 of the Statement of Claim is denied. The Plaintiff entered into an oral agreement with the Second Defendant in or about early 2012 whereby the Plaintiff would receive thirty percent (30%) of the Second Defendant's share of commission on the Net Profits, received by him, from his services to the First Defendant, for each client successfully introduced by the Plaintiff to the First Defendant, resulting in the purchase by that client of a supply of alternative sources of energy from the First Defendant.

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

5. Paragraph 5 of the Statement of Claim is denied and the Plaintiff is put to strict proof regarding the specific clients being alleged. The Defendants further deny that the Plaintiff received an agreed 30% commission of the Net Profits of each sale. As stated in paragraph 3 above, any funds provided to the Plaintiff were done so under the instruction of the Second Defendant to the First Defendant and Third

Defendant as the accountant who confirmed whether or not the business held Net Profits to be distributed upon payment of any and all solar supply projects and installations.

6. Paragraph 6 of the Statement of Claim is denied and the Plaintiff is put to strict proof. The Defendants deny the existence of an oral contract between the Plaintiff and any or all them given the absence of specific terms and elements making the same legally binding by law. The Defendants do aver that there was an agreement between the Plaintiff and the Second Defendant with reference to the division of the Second Defendant's commission collected on his share of commission from the Net Profits of each successfully completed transaction."

6. The parties are now before the Court in respect of the Plaintiff's two Summonses filed on the 25th February and 22nd May, 2019.

Analysis and Discussion

Order for Discovery of Particular Documents

7. In his Summons filed on the 25th February, 2019 and re-filed on the 22nd May, 2019, the Plaintiff seeks an order that "the Defendants file their respective Affidavits stating whether he/she has or has at any time had in his or her respective possession, custody or power the documents or class of documents specified in the Schedule and if the said documents or class of documents or any of them has or has been but is or are not now in his or her respective possession, custody or power stating when he or she parted with the same and what has become of the same AND stating, in each case, whether the respective Defendant objects to the production of such documents or class of documents and if so, the ground for such objection in respect of each and every such document or class of document.

8. It is noted in the Schedule of the Plaintiff's Summons he has identified numerous documents that are the subject of this application. In particular:-

"**SCHEDULE**

1. The document referred to in the Defendants' Bundle of Documents filed on the 17th day of January, 2019, at Tab 48, and entitled *"Jan-Jun Draw pdf*."
2. The document referred to in the Defendants' Bundle of Documents filed on the 17th day of January, 2019, at Tab 48, and entitled *"Jan15chqs pdf"*.

3. The document referred to in the Defendants' Bundle of Documents filed on the 17th day of January, 2019, at Tab 48, and entitled *"Sample2012 Commissions pdf"*.
4. The document referred to in the Defendants' Bundle of Documents filed on the 17th day of January, 2019, at Tab 48, and entitled *"Soldier Road Product (Check that its project) pdf".*
5. The document referred to in the Defendants' Bundle of Documents filed on the 17th day of January, 2019, at Tab 48, and entitled *"Update141215 pdf".*
6. Any letters, emails and other documents regarding negotiations and communications between any company, association, partnership or other trading entity or person, of the one part, and Power Plus Bahamas and/or the Defendants herein or any of them, of the other part, for the provision to any such company, association, partnership or other trading entity or person of solar energy equipment and/or alternative energy equipment.
7. Any agreements and contracts between any company, association, partnership or other trading entity or person, of the one part, and Power Plus Bahamas and/or the Defendants herein or any of them, of the other part, for the provision to any such company, association, partnership or other trading entity or person of solar energy equipment and/or alternative energy equipment.
8. Any cheques, receipts, wire transfers and/or other proof of payments between any company, association, partnership or other trading entity or person, of the one part, and Power Plus Bahamas and/or the Defendants herein or any of them, of the other part, for the provision to any such company, association, partnership or other trading entity or person of solar energy equipment and/or alternative energy equipment.
9. Any statements of accounts or other records showing any balance or balances due from any company, association, partnership or other trading entity or person to Power Plus Bahamas and/or the Defendants herein or any of them for the provision to any such company, association, partnership or other trading entity or person of solar energy equipment and/or alternative energy equipment.
10. Any record of any payment by any company, association, partnership or other trading entity or person to any other party whomsoever within or outside of The Bahamas including but not limited to **GENPRO ENERGY SOLUTIONS, LLC** of

the United States of America, and **POWER PLUS ELECTRIC**, also of the United States of America (hereinafter referred to as "any *such third party*"), on behalf of, or in the place of, or for the benefit of, or upon the instruction of, or as an affiliate or provider of, Power Plus Bahamas and/or the Defendants herein or any of them for the provision to any such company, association, partnership or other trading entity or person of solar energy equipment and/or alternative energy equipment.

11. Any agreements and contracts between by any company, association, partnership or other trading entity or person and any such third party on behalf of, or in the place of, or for the benefit of, or upon the instruction of, or as an affiliate or provider of, Power Plus Bahamas and/or the Defendants herein or any of them for the provision to any such company, association, partnership or other trading entity or person of solar energy equipment and/or alternative energy equipment.
12. Any cheques, receipts, wire transfers and/or other proof of payments between any company, association, partnership or other trading entity or person and any such third party on behalf of, or in the place of, or for the benefit of, or upon the instruction of, or as an affiliate or provider of, Power Plus Bahamas and/or the Defendants herein or any of them for the provision to any such company, association, partnership or other trading entity or person of solar energy equipment and/or alternative energy equipment.
13. Any statements of accounts or other records showing any balance or balances due from any company, association, partnership or other trading entity or person and any such third party on behalf of, or in the place of, or for the benefit of, or upon the instruction of, or as an affiliate or provider of, Power Plus Bahamas and/or the Defendants herein or any of them for the provision to any such company, association, partnership or other trading entity or person of solar energy equipment and/or alternative energy equipment."

9. In support of the Plaintiff's application, two Affidavits were filed on behalf of the Plaintiff on the 25th February and 27th May, 2019.
10. In his first Affidavit filed the 25th February, 2019, Mr. Garvey deposes at paragraphs 4 to 9 the circumstances under which he brings this application. He states:-

"4. From my personal recollection and from my continuing review of my emails and records, and specifically of an undated Excel Spreadsheet which I have found

on my computer entitled "PPB Main Contact List" I recall that in addition to the contracts which were negotiated by myself and the Second Defendant with entities such as Bahamas Telecommunications Company ("BTC"), Bahamas Electricity Corporation ("BEC", now Bahamas Power and Light), the Grand Bahama Port Authority and other significant entities, we also negotiated and completed many other agreements for the sale of solar air conditions, solar lighting and other solar powered and alternative energy equipment. There is now produced and shown to me marked "Exhibit TG1" a copy of the said undated Excel Spreadsheet.

5. I recall that the said undated Excel Spreadsheet was provided to me by the Second or Third Defendant. As the same is in my computer in electronic form, I recall that it was provided to me by email and I am continuing in my attempt to locate the said email.

6. I recall that the Third Defendant maintained the financial records and accounts of Power Plus Bahamas and believe that he and the Second Defendant have the original of that said undated Spreadsheet as well as other records of Power Plus Bahamas regarding negotiations, communications, agreements, contracts, cheques, receipts, wire transfers, other proof of payments, statements of accounts and other records, including record of payment to Power Plus Bahamas and to third parties outside of The Bahamas including but not limited to Genpro Energy Solutions, LLC of the United States of America, and Power Plus Electric, also of the United States of America.

7. I also recall that payments were made by Genpro Energy Solutions, LLC to the First Defendant, by deposit into her United States Dollar Account in the United States of America, on behalf of Power Plus Bahamas as direct payments by Genpro Energy Solutions, LLC to Power Plus Bahamas of agreed portions of the sales prices of solar powered and alternative energy equipment for which Power Plus Bahamas had negotiated sales to persons, companies and utility providers in The Bahamas.

8. I also recall that payments were made by customers of Power Plus Bahamas directly into the Bank of The Bahamas account of the First Defendant on behalf of Power Plus Bahamas. The $600,000.00 payment which I mentioned in my Witness Statement filed herein on 16th January, 2019 was one such payment.

9. The Third Defendant maintained records and accounts of all such payments and of all sales which were negotiated by Power Plus Bahamas on its own behalf or on behalf of any such third party."

11. It is noted however, that the Plaintiff's second Affidavit filed herein on the 27th May, 2019 is in relation to the Plaintiff's second application for judgement on admission or alternatively summary judgement.

The Law

12. Order 24, Rule 7 of the RSC provides:

"7. (1) 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.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.

(3) 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 cause or matter."

13. Mr. Moss, Counsel for the Plaintiff in his written submissions at paragraph 9 submits that the Plaintiff is entitled to the documents requested in the Schedule as the Defendants must disclose all documents which are relevant to determining the issue before the Court unless those documents are subject to litigation privilege, meaning that the "dominant purpose" for the creation of those documents was to seek legal advice "in contemplation of litigation." And therefore, contract and financial records would not fall within that scope.

14. In support of his submission, Mr. Moss relies on the House of Lords case of **Waugh v British Railways Board [1980] A.C. 521.** where the issue of litigation privilege in relation to the disclosure of documents was considered.

15. In **Waugh v British Railways Board (supra)** the appellant Plaintiff, Alice Simpson Waugh (widow of John Wallace Waugh, deceased) claimed damages against the respondent defendants, the British Railways Board, in respect of the death of the deceased under the provisions of the Fatal Accidents Acts 1846-1959, alleging that a collision between two of the Board's locomotives that had resulted in the death of the deceased, who had been employed by the Board, had been caused by the negligence of the Board, their servants or their agents. The Board denied negligence, and in their defence alleged that the collision had been caused or contributed to by the deceased's own negligence. The plaintiff sought discovery of an internal inquiry report made by two officers of the Board to which the Board refused to provide to the plaintiff on the ground of legal professional privilege. There was a note on the form stating that it had finally to be sent to the Board's solicitor for the purpose of enabling him to advise the Board. On an interlocutory application by the plaintiff for discovery of the report, the Master ordered discovery, but an appeal by the board from his order was allowed by Donaldson J, whose decision was upheld by a majority of the Court of Appeal (Eveleigh L.J. and Sir David Cairns, Lord Denning M.R. dissenting).
16. On appeal by the Plaintiff to the House of Lords, their Lordships, allowing the appeal, held that the due administration of justice strongly required that a document such as the internal inquiry report, which was contemporary, contained statements by witnesses on the spot and would almost certainly be the best evidence as to the cause of the accident, should be disclosed; that for that important public interest to be overridden by a claim of privilege the purpose of submission to the party's legal advisers in anticipation of litigation must be at least the dominant purpose for which it was prepared; and that, in the present case, the purpose of obtaining legal advice in anticipation of litigation having been no more than equal rank and weight with the purpose of railway operation and safety, the Board's claim for privilege failed and the report should be disclosed.
17. Their Lordships considered a plethora of cases on the issue of privilege and the proper test to be applied upon an application for discovery. Their Lordships approved of the test propounded by Barwick C.J. in the case **Grant v Downs 135 C.L.R. 674**. Lord Wilberforce states at paragraph 3 of his Judgement:

> "The whole question came to be considered by the High Court of Australia in 1976: Grant v Downs, 135 C.L.R. 674. This case involved reports which had "as one of

the material purposes for their preparation" submission to legal advisers in the event of litigation. It was held that privilege could not be claimed. In the Joint judgement of Stephen, Mason and Murphy JJ., in which the English cases I have mentioned were discussed and analysed, it was held that "legal professional privilege" must be confined to documents brought into existence for the sole purpose of submission to legal advisers for advice or use in legal proceedings. Jacobs J. put the test in the form of a question, at p. 692:

"... does the purpose [in the sense of intention, the intended use] of supplying the material to the legal adviser account for the existence of the material?"

Barwick C.J. stated it in terms of "dominant" purpose. This is closely in line with the opinion of Lord Denning M.R. in the present case that the privilege extends only to material prepared "wholly or mainly for the purpose of preparing [the defendant's] case."

18. In her Judgement in the case **Shepherd and others v. Public Hospitals Authority [2015] 1 BHS J. No. 88** (also relied on by Mr. Moss in his submissions), Justice Estelle Gray Evans conducted a thorough review of the relevant law on litigation privilege using as a starting point **Waugh v British Railways Board (supra)** Evans, J extracted the dicta of the Law Lords as follows:

"35 Per Lord Wilberforce:

It appears to me that unless the purpose of submission to the legal adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply. On the other hand to hold that the purpose, as above, must be the sole purpose would, apart from difficulties of proof, in my opinion, be too strict a requirement, and would confine the privilege too narrowly.

36 Per Lord Simon of Glaisdale:

Your Lordships will therefore, I apprehend, be seeking some intermediate line which will allow each of the two general principles scope in its proper sphere. Various intermediate formulae as a basis for the privilege have been canvassed in argument before your Lordships, most based on some authority – the obtaining of legal advice was "an appreciable purpose"; "a substantial purpose"; "the

substantial purpose"; it was "wholly or mainly" for that purpose; that was its "dominant" purpose; that was its "primary" purpose".

Some of these are in my view too vague. Some give little or no scope to the principle of open litigation with the minimum exclusion of relevant evidence. The one that appeals most to me is "dominant" purpose… It allows scope to each of the governing principles. It seems to me less quantitative than "mainly"; and I think it would be easier to apply."

37 Per Lord Edmund-Davies:

"Dominant purpose, then, in my judgement, should now be declared by this House to be the touchstone. It is less stringent a test than 'sole' purpose."

38 Lord Russell of Killowen

"… on reflection I am persuaded that the standard of sole purpose would be in most, if not all, cases impossible to attain, and that to impose it would tilt the balance of policy in this filed too sharply against the possible defendant. Moreover to select the standard of dominant purpose is not to impose a definition too difficult of measurement."

19. At paragraph 46 of her Judgement Evans, J set out the requirements of a claim to litigation privilege thus:

"46 The legal requirements of a claim to litigation privilege, set out hereunder, were summarized by Hamblen, J., in the case of Starbev GO Ltd v Intervew Central European Holding BV supra.

47 The onus of proving litigation privilege is, of course, on the person asserting the same. See West London Pipeline and Storage v Total UK [2008] 2 CLC 258, but an assertion of privilege and statement of the purpose of the communication over which privilege is claimed in a witness statement are not determinative, merely evidence of a fact which may require to be independently proved. Therefore, the court will scrutinize carefully how the claim to privilege is made out and witness statements should be specific as possible. See Sumitomo Corporation v Credit Lyonnais Rouse Ltd (14 February 2001) at 30 and 39 (Andrew Smith J); West London Pipeline and Storage Ltd v Total UK Ltd [2008] EWHC 1729 (Comm) at 52, 53, 86 (Beatson J); Tchenguiz v Director of the SFO [2013] EWHC 2297 (QB) at 52 (Eder J).

48 Moreover, the party claiming privilege must establish that litigation was reasonably contemplated or anticipated. It is not sufficient to show that there is a mere possibility of litigation, or that there was a distinct possibility that someone might at some stage bring proceedings, or a general apprehension of future litigation. See United States of America v Philip Morris Inc [2004] EWCA Civ 330 at 68; Westminister International v Dornoch Ltd [2009] EWCA Civ 1323 at paras 19-20. As Eder J stated in Tchenguiz supra at 48 (iii): "Where litigation has not been commenced at the time of the communication, it has to be 'reasonably in prospect'; this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility."

49 However, it is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must also show that the relevant communications were for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communication may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that the dominant purpose was litigation. If there is another purpose, this test will not be satisfied: Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) [1992] BCLC 583, 589-590 (cited in Tchenguiz at 54-55); West London Pipeline and Storage Ltd v Total UK Ltd at 52."

50 As to the court's approach to the assessment of evidence in support of a claim for privilege, Hamblen, J. said:

"It has been stated that it is necessary to subject the evidence "to 'anxious scrutiny' in particular because of the difficulties in going behind that evidence" – per Eder J in Tchenguiz at 52. "The court will look at 'purpose' from an objective standpoint, looking at all relevant evidence including evidence of subjective purpose" – ibid 48(iv). Further, as Beatson J pointed out in the West London Pipeline case at 53, it is desirable that the party claiming privilege "should refer to such contemporary material as it is possible to do without making disclosure of the very matters that the claim for privilege is designed to protect."

20. Mr. Moss also relies on the decision in **WH Holding Ltd and another company v E20 Stadium LLP [2018] EWCA Civ 2652** in support of his submission that the Plaintiff is entitled to discovery of the financial records of the First Defendant and are not exempted from such discovery due to privilege.
21. In **WH Holding Ltd and another company v Stadium LLP (supra)** a dispute arose between WH Holding Ltd and another company and its landlord E20 Stadium LLP relating to the number of seats in the London Olympic Stadium to which WH Holding Ltd was entitled to use. WH Holding Ltd made an application to the Court for inspection of documents to which E20 Stadium LLP asserted privilege over. The High Court dismissed their application and upheld E20's claim to privilege. WH Holding Ltd sought permission to appeal and was subsequently granted on several grounds including whether the scope of litigation privilege was restricted to documents concerned with obtaining advice or evidence for the conduct of litigation and the approach the Court should take to an application for it to inspect documents where a claim to privilege is challenged. The documents that E20 Stadium LLP asserted privilege over were six emails, dated 30th January, 2017 which had passed between E20 Board members and stakeholders. E20 Stadium LLP asserted privilege on the basis that those emails were composed with the dominant purpose of discussing a commercial proposal for the settlement of the dispute at a time when litigation was in reasonable contemplation. On the appeal E20 Stadium LLP's claim to privilege over the emails was rejected and determined that the scope of litigation privilege is engaged when litigation is in reasonable contemplation; once litigation privilege is engaged it covers communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with the conduct of the litigation, provided it is for the sole or dominant purpose of the conduct of the litigation; conducting the litigation includes deciding whether to litigate and also includes whether to settle the dispute giving rise to the litigation; documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by the privilege; there is no separate head of privilege which covers internal communications falling outside the ambit of litigation privilege as described above. In addition to the first ground of appeal relating to the scope of litigation privilege, the Court also considered the second ground of appeal which dealt with the Court's approach when inspecting a privileged document and held that the Court has a

wide discretion to inspect the documents over which privilege is claimed to see whether the test has been correctly applied, although it should be cautious about doing so and should be alive to the dangers of looking at documents out of context. Moreover, they held that the discretion to do so must be exercised in accordance with the overriding objective taking into consideration the relevant factors such as the nature of the privilege claimed, the number of documents involved and their potential relevance to the issues.

22. Before the Court can determine if it can exercise its jurisdiction under Order 24, Rule 7 of the RSC for the production of documents there must be sufficient evidence that the documents exist which the other party has not disclosed; the document or documents relate to matters in issue in the action; and there is sufficient evidence that the document is in possession, custody or power of the other party. Once it is established that those three conditions are met, the Court has a discretion whether or not to order disclosure. Subsequently the order granted under this provision must identify with **precision** the document or documents or categories of documents which are to be required to be disclosed (**Berkeley Administration v McClelland [1990] F.S.R. 381 at page 382- The White Book on page 471 at 24/7/2**) (**emphasis mine**).
23. Order 24, Rule 7 of the RSC makes provisions for an applicant to ask the Court to require 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 (**emphasis mine**).
24. I do believe after a cautious review of the facts of the instant case and the applicable law, this application should be divided into two parts.
25. The Plaintiff in his Summons has identified thirteen (13) documents or classes/categories of documents to which he now requires discovery in the Schedule.
26. The first five listed documents in the Schedule are documents to which he claims are referred to in the document at Tab 48 of the Defendants' Bundle of Documents filed on the 17th January, 2019.
27. Counsel for the Defendants in his Supplemental Written Submissions and during the hearing has indicated that the documents referred in the document at Tab 48 of the Defendants' Bundle of Documents can be found at Tab 65 of the said bundle and therefore submits that the Plaintiff has those documents in his possession.
28. Counsel for the Plaintiff has objected to the documents contained at Tab 65 of the said bundle being one and the same as the documents referred to in the document at Tab 48

of the said bundle as those documents lack in detail and other identifiable characteristics to which the Plaintiff could readily accept that they are the same referenced documents.

29. In response to Counsel for the Defendants submissions, Counsel for the Plaintiff submits that is it not sufficient for Counsel for the Defendants to state that the documents at Tab 65 of the Defendants Bundle of Documents are the documents referred to in the document at Tab 48 of the Defendants Bundle of Documents. He submits that the proper avenue would be to have the Affidavit verifying the same (Transcript page 54, lines 1-5).
30. I accept Counsel for the Plaintiff's submissions regarding the documents listed at numbers 1-5 of the Schedule and order that one or all of the Defendants make an affidavit in relation to those specific documents pursuant to Order 24, Rule 7 of the RSC.
31. While I accept Counsel for the Plaintiff's submissions regarding the first five documents listed in the Schedule, I have difficulty accepting that a prima facie case has been made out by the Plaintiff whereby the items listed at numbers 6-13 should be subject to an order under this provision.
32. Counsel for the Defendants in his written Submissions object to an order for discovery of particular documents in relation to the items at numbers 6-13. He submits at paragraph 7 of his Submissions that the Plaintiff's case is for a percentage of the net profits of the First Defendant arising from an alleged breach of an Agreement with the Second Defendant therefore it must be determined in relation to that Agreement what were the terms, did the parties agree those terms and is there any sum owing to the Plaintiff. He further submits that as alleged by the Plaintiff of his involvement with negotiating and completing agreements he should be able to specify the exact financial documents required, the purpose thereof and the entities to which any of those documents relate. In support of his submissions Counsel for the Defendant relies on the case of **Elmer v Creasy (1873) L.R. 9 Ch. App. 69** whereby Lord Selborne, L.C. at pages 73-74 stated that the Court must exercise proper control over any attempt on the Plaintiff's part to press for minuteness of discovery as doing such would be either vexatious or unreasonable. He further relies on the case of **Moinlycke AB v Proctor & Gamble Ltd. (No. 3) [1990] R.P.C. 498** whereby Justice Mummery at page 503 advised that the power to make such an order for specific discovery is discretionary but such an order may be refused if it is found to be unduly oppressive to the party giving the discovery. Moreover, the Court takes into account the value of the discovery to the person seeking

it and the burden imposed on the person giving it with a view to restricting the volume of documents and the labour and expense involved to that which is necessary for fairly disposing of the issues in the case.

33. Counsel for the Defendants submits that the Plaintiff's general request for specific discovery of the documents listed from 6-13 is oppressive and that even if the Court granted such an Order that it only be limited to the BTC agreements as the Plaintiff in his Statement of Claim and documents in support of his claim only refers to those agreements specifically (Transcript page 46, lines 9-19).
34. He further submits that the Plaintiff's request for specific discovery of the documents listed from 6-13 would be giving them a carte blanche approach to additional documents which do not relate to their claim. Therefore, he submits the Plaintiff would be in a position to attempt to amend their Statement of Claim to add other issues which should not be disputed as their claim as he submits is whether the Plaintiff was paid the said commission and whether that commission was paid based on the net profits of the completed project or sales (Transcript page 46, lines 20-32, page 47, lines 1-4).
35. Counsel for the Plaintiff in response to that submission states that the Plaintiff's case is not solely based on the BTC agreements as the Statement of Claim makes reference to "potential clients/customers that were introduced to her which resulted in a successful business venture" meaning that by virtue of that pleading discovery should be in relation to all contracts which generated the 24% commission (Transcript page 55, lines 25-32).
36. Counsel for the Plaintiff submits that the Plaintiff's case is not that he is entitled to commission only in respect to contracts he negotiated but in respect to contracts he introduced and brought to fruition (Transcript page 56, lines 11-18). And it is on that basis he has a right to see the documents listed at 6-13 as discovery would allow the Plaintiff to determine which contracts were brought to fruition. Moreover, Counsel for the Plaintiff submits that amendments can be made at any time during a matter and that discovery relating to those documents would allow the Plaintiff to see what contracts he brought to fruition (Transcript page 57, lines 8-17).
37. The facts of the cases relied upon by Counsel for the Plaintiff in support of this application all reference documents that had been specified or spelt out by the resisting party. Therefore, the details surrounding that particular document or documents were known to

the applicant and resisting party by way of reference in another document or through general disclosure. This is not what has happened in this case.

38. Therefore, I must look at whether a prima facie case has been made out by the Plaintiff that the other party has or has had **certain specific** documents which relate to the matter in question (**emphasis mine**) (**Astra National Productions Ltd v Neo Art Productions Ltd [1928] W.N. 218-The White Book on page 471 at 24/7/2**).
39. It is noted that the language of the provision itself and the accompanying case law continuously make reference to documents being specific, in particular the heading of the provision is for "Order for discovery of particular documents."
40. Moreover, the Plaintiff's request for the documents listed at numbers 6-13 of the Schedule all contain the same phrasing i.e. "any letters, emails and other documents; any agreements and contracts; any cheques, receipts, wire transfers and/or other proof of payments; any statements of accounts or other records; any record of any payment by any company…"
41. Additionally, in his Affidavit filed the 25th February, 2019 the Plaintiff fails to provide any specific details regarding any letter, emails and other documents, any agreements and contracts, any cheques, receipts, wire transfers and/or other proof of payments; any statements of accounts or other records or any record of any payment by any company with any significant detail such as dates, times and the parties involved.
42. Further, the Plaintiff by way of his Writ of Summons and Statement of Claim provides the names of the projects/contracts to which he alleges he had been involved with during his time with the First Defendant Company. Counsel for the Plaintiff submits that those projects were only some of which the Plaintiff had been involved in by the use of the words "including but not limited to" in the Writ of Summons and "such as" in the Statement of Claim and those identified in the pleadings were not an exhaustive list. The Plaintiff, in my view, ought to be able to identify which persons or entities he introduced to the Company even if he cannot without more information say whether the introduction culminated in a contract or "successful business venture."
43. The danger with making such an order for the documents listed at numbers 6-13 of the Schedule is that because each category or class is so wide and vague the person who must now make such a list may find himself in trouble for swearing a false affidavit even if he is trying to give honest disclosure. Moreover, there is a danger that disclosure of this

type may include documents which may not be relevant to the issue(s) (**Moinlycke AB v Proctor & Gamble Ltd. (No. 3) supra**) amounting to a "fishing expedition" by the Plaintiff.

44. In the circumstances before me, I accept Counsel for the Defendants submissions regarding the documents listed at numbers 6-13 of the Schedule and I find that discovery of those items listed at numbers 6-13 of the Schedule is not necessary as it would be unduly oppressive to the Defendants. Moreover, the labour and expense involved in providing those documents I believe are not necessary for fairly disposing of the issues in the case.
45. Both parties were partly successful on the application before me. Subsequently, in the circumstances the costs of this application will be costs in the cause.

Judgment on Admissions

46. The second Summons filed by the Plaintiff on the 25th February, 2019 is for an order pursuant to Order 27, Rule 3 of the RSC directing that judgment be entered in this action for the Plaintiff against the Defendant(s) for a Twenty-four percent (24%) interest in Power Plus Bahamas in terms of the relief sought in the Statement of Claim filed herein on the 6th day of December, 2016, upon the admissions contained in the Defendants' Bundle of Documents filed on the 17th day of January, 2019, at Tab 48.
47. In support of the Plaintiff's Summons he relies on two Affidavits filed on his behalf on the 25th February and 27th May, 2019.
48. At paragraph 10 of the Plaintiff's first Affidavit he states:-

> "10. In addition to my application against the Defenadnts for discovery of specifi documents, I am advised by my Attorneys that the Defendants have admitted, by way of their pleadings and of the documents which they have finally disclosed in their Bundle of Documents, that I am entitled to at least Twenty-four percent (24%) of the net profits of Power Plus Bahamas and that my Attorneys shall today be filing the aforesaid filing application for a Judgment on that admission upon my election (should the application be granted) to settle my entitlement at that Twenty-four percent (24%) rather than to proceed with my action for my full entitlement of Thirty percent (30%). There is now produced and shown to be marked "Exhibit TG2" a copy of Tab 48 of the Defendants' Bundle of Documents were they admitted the Twenty-four percent (24%) entitlement."

49. In his second Affidavit at paragraphs 4 to 9, the Plaintiff deposes of the facts he believes are admissions that entitle him to a judgement. In particular he states:-

> "4. I have read the email which is produced at Tab 48 of the Defendants' Bundle of Documents and exhibited as Exhibit TG2 to my said Affidavit which was filed herein on 25th February, 2019. That email was from the Third Defendant, Peter Collins, to the Attorney for the Defendants, Kirk Antoni, and was copied to the Second Defendant, Thomas Uptagrafft, otherwise known as Greg Uptagrafft.
>
> 5. In that email, under the heading of "Sample2012Commissionspdf", Mr. Collins admitted that ultimately I was to receive a percentage of all jobs undertaken by Power Plus Bahamas. That was always the position and I am not sure why he says that "originally" I only received "commission" on jobs which I introduced to Power Plus Bahamas. We were all partners and I was always entitled to Thirty percent (30%) of the net profits of Power Plus Bahamas.
>
> 6. Also in that email, under the heading of "SoliderRdProductpdf", Mr. Collins represented that I was to receive Thirty percent (30%) of Mr. Uptagrafft's Eighty percent (80%) being an admitted total due to me of Twenty four (24%) if the net profits of Power Plus Bahamas. Again, that is not correct. I was always entitled to Thirty percent (30%) of the net profits of Power Plus Bahamas. But I note that it is an admission by Mr. Collins that I was entitled to at least Twenty four percent (24%) of those net profits.
>
> 7. Similarly, in that email under the heading of "Update141215pdf" Mr. Collins at last refers to the actual "30/40/30 model" which was the true basis upon which he, myself and Mr. Uptagrafft agreed that the profits of Power Plus Bahamas would be divided, being: Thirty percent (30%) for both Mr. Uptagrafft and myself, and Forty percent (40%) combined for Mr. Collins and his wife Mrs. Collins, with Mr. Collins getting Thirty percent (30%) as an equal partner with me and Mr. Uptagrafft and Mrs. Collins getting Ten percent (10%) as the "front" person for using her name.
>
> 8. I know that I am entitled to Thirty percent (30%) of the net profits of Power Plus Bahamas but in order to avoid a protracted trial on those matter, and as I need my money, I am willing to accept Judgment for the Twenty-four percent

(24%) of the net profits of Power Plus Bahamas which Mr. Collins admitted in that email and which Mr. Uptagrafft did not dispute.

9. My entitlement to at least Twenty-four percent (24%) of the net profits of Power Plus Bahamas was also admitted by the Second and Third Defendants by way of the following individual documents and/or by reason for their combined effect as follows:

(a) By the aforesaid email dated 1st July, 2015 included at Tab 48 of the Defendants' Bundle of Documents and Exhibited to my aforesaid Affidavit as "Exhibit TG2";

(b) By paragraph 4 of the Witness Statement of Thomas Uptagrafft (the Second Defendant) filed herein on 9th January, 2019; and

(c) By paragraph 5 of the Witness Statement of Peter M. Collins (the Third Defendant) filed herein on 9th January, 2019."

50. It is noted that the Plaintiff relies on the alleged admissions found in the Second and Third Defendants Witness statements filed on the 9th January, 2019.

51. In so much at paragraph 4 of the Witness Statement of Thomas Uptagrafft he states:-

"That Troy Garvey continued to provide contact information for our technologies and products. He has been paid commissions based on Net Profits for successfully completed projects or sales, often even when he had nothing to do with it. Initially that was 30% of the commissions due to me, based on Net Profits on the jobs. This equated at the time to 24% of the Net Profit on the job, Net of Overhead Expenses. Subsequently, I requested a reduction in my commission to allow for an increase in Troy Garvey's commission to 30% of the total Net Profit on a job, Net of Overhead Expense."

52. Additionally, at paragraph 5 of the Witness Statement of Peter M. Collins he states:-

"In lieu of a salary, compensation for Mr. Uptagrafft would be based on the sharing of any profits in excess of all expenses of the business, which would include any referral commissions paid. Originally his compensation was based on 80% of such profits; after the business assumed responsibility for payment of Mr. Uptagrafft's immigration fees and national insurance contributions, he agreed that the compensation would be reduced to 70% of such profits."

The Law

53. Order 27, Rule 3 of the RSC provides:-

> "3. Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by motion, or summons."

54. Counsel for the Plaintiff relies on the case of **Ellis v Allen [1914] 1 Ch. 904** whereby the Court determined that for a party to be entitled to a judgment pursuant to Order 27, Rule 3 due to admissions made the admissions of fact relied on may be express or implied but they must be **clear and unequivocal** (**emphasis mine**).

55. The facts of **Ellis v Allen (supra)** are the Plaintiffs demised a piece of land and the house thereon by way of a lease dated the 23rd August, 1910 to the Defendant for a term of seven years. The lease contained a covenant by Allen, one of the Defendants that he would not "assign, transfer, underlet, or part with the possession of the said premises, or any part thereof, without the previous consent in writing of the lessors, such consent not to be unreasonably or vexatiously withheld in the case of a responsible and respectable person"; and also a proviso that "in the event of any breach or non-performance of any of the covenants and agreements on the part of the lessee hereinbefore contained, the lessors may re-enter on the said demised premises." However, by an agreement dated the 27th August, 1913 Allen agreed to let the said premises including the furniture to J. Johnston for a term of fifty-two weeks (less one day) from 1st September, 1913 to 29th August, 1914 at a yearly rent of 1725. Johnston was then let into possession of the said premises under that agreement. Allen had not obtained the consent of the lessors (i.e. the Plaintiffs in this action) prior to sub-letting. Therefore, the Plaintiffs commenced an action against Allen and Johnston claiming (1.) a declaration that the term of years created by the lease to Allen had ceased and determined; (2.) possession of the premises thereby demised; (3.) as against Allen, mesne profits until judgment; (4.) as against Allen, damages for breach of the covenant in the lease to yield up the premises in repair. After the Writ had been served Allen's solicitors sent a letter to the Plaintiffs solicitors in which they said:- "We must express the greatest surprise at the contents of your letter of

yesterday's date. The position appears to be this: Our client took up the lease of this property rather over three years ago, and at once laid out nearly 3000l. on improvements, a list of the most important of which we enclose. He has recently let the property, furnished, to a tenant who is a respectable and responsible person, whom your clients would have been bound to accept if their consent had been applied for. Our client's omission to apply for your clients' consent was purely a mistake. The letting was arranged hurriedly, and both he and his agents did not consider that a licence was required in the case of a short letting of the property furnished, and, as you are aware, such lettings are often excepted in this form of covenant. Our client regrets the omission, and is quite willing to pay the costs your clients have incurred, and also to pay for a short deed of waiver. Are we to understand that your clients, notwithstanding these facts, still claim to forfeit our client's lease, to cause him to lose all the money he has expended on the property, and subject him to an action for damages at the hands of his undertenant in a case where the breach of covenant was entirely accidental, and has caused your clients no damage whatever beyond the expenses they have incurred, and which we have offered to pay? It is necessary we should write to you fully so that, should your clients adhere to the position they have taken up, we may be able to prove to the Court, on an application for relief, that our client was willing to do everything reasonable to remedy the breach of covenant." The Plaintiffs subsequently made an application to the Court for directions calling on the Defendants to show cause as to why an order for direction should not be made as the Defendant Allen had admitted that he committed a breach of the covenant contained in the 1910 lease "against the assignment, transfer, underletting, or parting with possession of the premises thereby demised or any part thereof without the previous consent in writing of the lessors, declare that the term of years created by the said lease has ceased and determined and that the plaintiffs are entitled as against the said defendant to re-enter on the said premises." Sargant J at page 909 rejected Counsel for Defendant Allen's submissions that the solicitor's letter does not fall under any of the rules that were established by Order XXXII, rule 6 and the letter should not be considered an admission as provided by the rules. Therefore, Sargant J determined that rule 6 (which is Order 27, Rule 3 of the RSC) should not be confined meaning that the rule applies wherever there is a clear admission of facts in the face of which it is impossible for the

party making it to succeed. Moreover, Sargant J found that the admissions made by the letter disqualified the Defendant Allen from any defence in the matter.

56. Counsel for the Plaintiff also relies on the decisions of Madam Justice Rhonda Bain in **Ferguson v. Department of Lands and Surveys and another – [2013] 1 BHS J. No. 42** and Madam Justice Hepburn in **Forbes v Ferguson and another – [2010] 1 BHS J No. 4** whereby both Justices accepted the dicta of Sargant J in **Ellis v Allen (supra).**
57. Moreover, Mr. Moss submits that it is not possible to resist an application for Judgment on Admissions on the assertion that such admission was made by "mistake or inadvertence".
58. Counsel for the Plaintiff thereby submits that when taking into consideration the combined effect of the email at Tab 48 of the Defendants Bundle of Documents and the admissions made in the Second and Third Defendants' Witness Statements it clearly shows that the Plaintiff is entitled to at least Twenty-four percent (24%) of the net profit of Power Plus Bahamas.
59. Counsel for the Defendants however submits that the admissions of fact contained in the said documents make no admission as to the claim particularized by the Plaintiff. Moreover, the said documents show that the Plaintiff was paid for all services provided to the First Defendant and that the said documents show the terms of the Agreement (which he submits remains in dispute). Further, the Defendants submit that the admissions of fact support their position that the Plaintiff does not have a cause of action against them.
60. The Court's jurisdiction when granting an order pursuant to Order 27, Rule 3 of the RSC is discretionary. Therefore, I must consider if it would be just in granting such an order.
61. In the instant case I do not believe it would be just to grant such an order.
62. I agree with the dicta of Sargant J in **Ellis v Allen (supra)** that the rule to be applied in these circumstances is that the admissions of facts must be clear for the party to be successful on such as application.
63. I do not find that the evidence the Plaintiff relies on as admissions of fact are clear.
64. The Plaintiff's case as stated in his Writ of Summons is for damages for breach of a contract of employment; failing to pay 30% commission on the net profits for any and all completed jobs and damages for breach of terms of a partnership agreement whereby the Plaintiff would receive an equal share of the profits made on all projects.

65. Moreover, the Plaintiff further particularized his case in his Statement of Claim whereby he claimed that it was agreed he would receive 30% commission of the net profits from the Defendants following the successful introduction of clients/customers resulting in a successful business venture.
66. Additionally, I note that in the Plaintiff's Second Affidavit at paragraphs 5 to 9, the Plaintiff attempts to clarify and explain the contents of the email found at Tab 48 of the Defendants Bundle of Documents. Further, at paragraph 9 of his Affidavit the Plaintiff deposes that the email found at Tab 48 of the Defendants Bundle of Documents, paragraph 4 of the Second Defendant's Witness Statement filed on the 9th January, 2019 and paragraph 5 of the Third Defendant's Witness Statement filed on the 9th January, 2019 all admit his entitlement to at least Twenty-four percent (24%) of the net profits of Power Plus Bahamas. However, at the end of the paragraph he states "by way of the following documents and/or by reason of their combined effect" meaning that those documents must be read together.
67. The difficulty I have with relying on the paragraphs as found in the Second and Third Defendants Witness Statements is that at paragraph 4 of the Second Defendant's Witness Statement the Second Defendant states that the Plaintiff "has been paid commissions based on Net profits for successfully completed projects or sales….This equated at the time to 24% of the Net Profit on the job…". Further at paragraph 5 of the Third Defendant's Witness Statement there was no mention of the Plaintiff nor any reference to the Plaintiff's compensation or role at Power Plus Bahamas.
68. The documents relied on by the Plaintiff must be read together as indicated by the Plaintiff in his Second Affidavit ("combined effect"). Additionally, the email at Tab 48 of the Defendants Bundle makes varying references to Mr. Garvey receiving a "commission on jobs he introduced to PPB", "the structure was still 20% Collins/80% Uptagrafft (with Mr. Garvey receiving 30% of that 80%)," and "which incorporates the 30/40/30 model." However, the references are vague at best and fails to clearly show the entitlement of net profits as claimed by the Plaintiff in his pleadings and on this application and I accept as submitted by Counsel for the Defendants that the alleged admissions remain largely in dispute.
69. Therefore, the Plaintiff's application for an Order granting Judgment on admissions made by the Defendants is refused.

Summary Judgement

70. The Plaintiff in his Summons dated the 25th February, 2019 seeking an Order for Judgment on admissions contained at Tab 48 of the Defendants Bundle of Documents also seeks in the alternative an Order for Summary Judgment pursuant to Order 14, Rule 3 of the RSC.
71. In particular he seeks "final judgement in this action against the Defendant for a Twenty-four percent (24%) interest in Power Plus Bahamas in terms of the relief sought in the Statement of Claim filed herein on the 6th day of December, 2016, upon the admissions contained in the Defendants' Bundle of Documents filed on the 17th day of January, 2019, at Tab 48 thereof".
72. The Plaintiff relies on two Affidavits filed on his behalf on the 25th February and 27th May, 2019.
73. The relevant paragraphs of the Plaintiff's Affidavits in support of this application was stated in paragraphs 46 and 47 above and need not be repeated.
74. In support of the application, Counsel for the Plaintiff relies on his Written Submissions.
75. The Plaintiff submits that the Defendants' filing of their Defence is irrelevant as they have not requested leave to defend pursuant to Order 14, Rule 4 of the RSC. In support of this submission he relies on the commentary found at 14/4/3 at page 172 of The Supreme Court Practice 1999 and the case of **McLardy v Slateum (1890) 24 Q.B.D. 504**.
76. The Plaintiff further submits that leave to defend will be refused if the point is clear and the Court is satisfied that it is really unarguable. He relies on the commentary found at 14/4/12 at page 176 of The Supreme Court Practice 1999 and the case of **Cow v Casey [1949] 1 KB 474, 481** per Lord Greene, MR.
77. Therefore, the Plaintiff submits that the Defendants have failed to make an application for leave to defend nor have they filed an Affidavit or other material to "show cause" as required by Order 14, Rule 4 of the RSC and have not otherwise shown cause against the Plaintiff's application for summary judgement. Moreover, Counsel for the Plaintiff submits that the Defendants do not have an arguable defence against the Plaintiff's claim in respect of the Second and Third Defendants' admission of the obligation of Power Plus Bahamas to pay the Plaintiff at least Twenty-four (24%) of the net profits of Power Plus Bahamas.
78. Counsel for the Defendants in his Supplemental Written Submissions submits that generally an application under Order 14 of the RSC is made after the entering of an

appearance by the Defendant but before a Defence is filed. In the instant case the Defendants Defence was filed on the 1st March, 2017 and the Plaintiff's application for summary judgement was filed on the 25th February, 2019 therefore placing the burden on the Plaintiff to show why such a delay is justifiable under the special circumstances of the case. However, he submits that no special circumstances exist in this case and relies on the authority of **McLardy v Slateum supra**.

79. In support of his submissions, Counsel for the Defendants also relies on the Judgment of Justice Estelle Gray-Evans in **T.G. Investments, LLC v New Hope Holding Company Limited and another [2009] 4 BHS J No. 10** where she held:-

> "I am mindful of the principles by which I am to be guided in dealing with summary judgment applications under Order 14, namely that:
>
> (1)The purpose of Order 14 is to enable a plaintiff whose application is properly constituted to obtain summary judgment without trial, if he can prove his claim clearly, and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried. (Notes 14/3-4/5 1997 White Book - Roberts v Plant [1895] 1 QB 597 C.A.).
>
> (2)Leave to defend must be given unless it is clear that there is no real and substantial question to be tried or that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment (Jones v. StoneFootnote 15).
>
> (3)Order 14 proceedings should not be allowed to become a means for obtaining, in effect, an immediate trial of the action, which will be the case if the court lends itself to determining points of law or construction that may take hours or even days and the citation of many authorities before the court is in a position to arrive at a final decision. Home and Overseas Insurance Co. Ltd. V Mentor Insurance Co. (UK) Ltd. (in liquidation)Footnote 16.
>
> (4)Order 14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the court or to make him liable in such case to be put on terms. Thus in an action on bills of exchange where the defendant set up the plea that they were given as part of a series of Stock Exchange transactions and asked for an account,

it was held to be a clear defence, and entitled the defendant to leave to defend. (Jacobs v Booth's Distillery Co.)

(5)By Order 14 rule 3, the Court has the option of (i) giving judgment for the plaintiff for part or all of the claim; (ii) dismissing the application; or (iii) giving leave to a defendant to defend if it is satisfied that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part a claim.

(6)That where an issue of law is raised by either party on a summary judgment application, the Court has the following options:

> If a plaintiff's case or the defendant's defence is based solely on a point of law and the court can see at once that the point is misconceived, summary judgment may be given;
>
> If at first sight the point appears to be arguable but with relatively short argument can be shown to be plainly unsustainable, summary judgment may be given; or
>
> If the point of law relied upon by either party raises difficult questions of law which call for detailed argument and mature consideration, summary judgment is inappropriate. Home and Overseas Insurance Co. Ltd v. Mentor Insurance Co (UK) Ltd.Footnote 18

(7)Finally, where there is a triable issue, though it may appear that the defence is not likely to succeed, the defendant should not be shut out from laying his defence before the court either by having judgment entered against him or by being put under terms to pay money into court as a condition of obtaining leave to defend. (Jacobs v Booth's Distillery Co.Footnote .19"

80. Counsel for the Defendants further submits that a Defendant may show cause against the cause of the Plaintiff's application on the merits, for example a dispute as to the facts which ought to be tried, or a dispute as to the amount due which requires the taking of an account to determine, or any other circumstances showing reasonable grounds of a bona fide defence.
81. Moreover, he submits that leave to defend should be given where the Defendant raises any substantial question of fact which ought to be tried, in particular where an oral agreement is sued on and its terms are in dispute. The case of **Mathind v E. Turner &**

Sons (1992) 23 Con L.R. 16, CA is relied upon by the Defendants. Additionally, he submits that where there is reasonable ground for an inquiry or account in order to ascertain the amount recoverable as found in **Contract Discount Corp. Ltd v Furlong [1948] 1 All E.R. 274** leave to defend should be given.

82. Lastly, the filing of the Defendants' Defence shows that the Defendants have a defence against the Plaintiff's cause of action for breach of an oral agreement, and that there are serious disputes as to the facts surrounding the terms of that Agreement.
83. Order 14, Rule 3 of the RSC provides:-

> "3. (1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.
>
> (2) The Court may by order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action."

84. Taking into account the above provisions I am mindful of the principles by which I am to be guided in dealing with summary judgment applications under Order 14. As these principles have been recited in the above paragraphs there is no need to repeat them here.
85. It is noted that the purpose of the provisions of Order 14 of the RSC is to allow a Plaintiff to obtain summary judgement without the need of a trial if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried (**Roberts v Plant [1895 1 Q.B. 597, CA-The White Book Commentary on page 171 at 14/4/2**).
86. Given the evidence that is before the Court on this application the Plaintiff has not proven his claim clearly to which he should be given summary judgement and the Defendants have an arguable defence to the Plaintiff's claim.
87. The pleadings that are before the Court in this matter show a clear dispute of the facts between the parties.

88. The Plaintiff's claim as stated in his Writ of Summons is for damages as a result of breach of an employment contract between himself and the First Defendant around April, 2012; damages against the First Defendant for breach of a verbal contract for failing to pay 30% commission to the Plaintiff on the net profit of any and all completed projects resulting from the Plaintiff's introduction including but not limited to the BTC Solar Terminal AC project and the BTC LED project; damages against the First through the Third Defendant for breach of terms of a partnership agreement whereby it was agreed that the Plaintiff would receive an equal share of profits made on all projects between the First Defendant and a third party.

89. In his Statement of Claim the Plaintiff particularized his claim against the Defendants. In particular at paragraph 6 of the Statement of Claim the Plaintiff states:-

> "6. The Defendants in breached of their oral contract with the Plaintiff refused to pay the Plaintiff commission after the Plaintiff's successful introduced to them several clients/customers such as BTC Solar AC project, BTC LED project and BEC projects. The Defendants collected the sums billed to these clients/customers and has failed to pay the Plaintiff his 30% commission of the Net Profit.
>
> PARTICULAR OF BREACH OF CONTRACT
>
> iii. Failing to pay the Defendant the 30% due and owing to him from the BTC Solar AC project, BTC LED project and BEC projects.
>
> iv. Failure to information the Plaintiff of all potential clients/customers that the was introduced to her which result in a successful business venture."

90. However, the Defendants in their Defence (as quoted in paragraph 5 above) deny the terms of the oral agreement between the Plaintiff and the Second and Third Defendants. The Defendants also deny that any monies are owed to the Plaintiff as he already received all commissions that were owed for the projects completed as stated in his pleadings.

91. While I recognize Counsel for the Plaintiff has relied on the case of **Cow v Casey (supra)** as authority to wit summary judgement should be entered even if the issue before the court is complex, I do not find the case applicable in the circumstances.

92. The issue in **Cow v Casey supra** arose from a question of law and in the circumstances the Court will refuse leave to defend only if the point is clear i.e. the point of law and the Court is satisfied that that point of law is really unarguable.

93. I do not find that to be the case here.
94. Moreover, I accept Counsel for the Defendants' submissions that where a defendant raises any substantial question of fact it ought to be tried, especially in cases where an oral agreement is sued on and its terms are in dispute as found in **Mathind v E. Turner & Sons (1992) supra**.
95. Based on the Plaintiff's pleadings, he alleges that his entitlement to commissions, net profits, and profits all arose from an oral contract between the Plaintiff and the Second and Third Defendants. The Defendants in their Defence deny the existence of the oral contract between the parties in the absence of specific terms.
96. I do not find that the Plaintiff has satisfied the Court that he is entitled to summary judgement based on the Defendants version or that the Defendants version is not truthful or capable of belief.
97. Therefore, the Plaintiff's application for summary judgement pursuant to Order 14, Rule 3 of the RSC against the Defendants is hereby dismissed.
98. In the circumstances, as the Plaintiff was not successful on the application, costs to follow the event. Costs to be paid by the Plaintiff to the Defendants to be taxed if not agreed.

This 16th day of July, 2020

Petra M. Hanna-Adderley
Justice