

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Side
2018/CLE/gen/FP/00100**

BETWEEN

**JOHN PINTARD
Plaintiff**

AND

**BUCKEYE BAHAMAS HUB
Defendant**



BEFORE: The Honourable Justice Petra M. Hanna-Adderley
APPEARANCES: Mr. Simeon Brown for the Plaintiff
Ms. Karen Brown for the Defendant
HEARING DATES: December 10, 2019

RULING

Hanna-Adderley, J

There are three applications before the Court. The first is an application by the Plaintiff to amend his Writ of Summons and Statement of Claim filed March 29, 2019. The second is an application by the Defendant to strike out the Plaintiff's Statement of Claim filed July 26, 2018. The third is an application by the Defendant to strike out the Plaintiff's Statement of Claim filed May 3, 2018.

Introduction

1. The first is an application filed by the Plaintiff on November 18, 2019 by way of a Summons seeking leave to Amend the Writ of Summons and Statement of Claim pursuant to Order 20, Rule 5 of the Rules of the Supreme Court ("**RSC**"). The Plaintiff's application is supported by the Affidavit of the Plaintiff filed November 18, 2019.
2. The second is an application filed by the Defendant by way of Summons ("**the Second Summons**") on November 8, 2018 pursuant to Order 19, Rule 19(1)(b) and (d) of the RSC and/or the inherent jurisdiction of the Court seeking an Order that the Court strike out the Plaintiff's Statement of Claim filed on July 26, 2018 to which the Defendant alleges is an Amended Statement of Claim ("**the Second Statement of Claim**") and the purported amendments made be disallowed on the grounds that the Second Statement of Claim sought to amend the Statement of Claim filed on May 3, 2018 which the

Defendant joined issue with and/or sought to have struck out pursuant to the First Summons; and the Plaintiff's conduct in purporting to amend the Statement of Claim notwithstanding the extant Summons was vexatious and/or an abuse of the process of this Court; an Order pursuant to Order 18, Rule 19(1)(a)(b)(c) and (d) of the RSC and/or the inherent jurisdiction of the Court that the Second Statement of Claim be struck out on the grounds that it discloses no reasonable cause of action; is scandalous, frivolous, and vexatious; and/or an abuse of the process of the Court; an Order pursuant to the inherent jurisdiction that the Second Statement of Claim be struck out on the grounds that the Plaintiff failed to indorse the same with a statement that it has been amended, or the rule pursuant to which the purported amendment was made, as required by Order 20, Rule 9(2) of the RSC; an Order pursuant to Order 31A, Rule 18(2)(d) and/or (s) of the RSC and/or the inherent jurisdiction of the Court that all proceedings herein be stayed pending the determination of the instant application; costs. Both of the Defendant's Summonses are supported by the Affidavits of Nickesha Strachan filed May 16 (the "**First Affidavit**") and November, 2018 (the "**Second Affidavit**").

3. The third is an application filed by the Defendant on May 16, 2018 by way of a Summons ("**the First Summons**") pursuant to Order 18, Rule 19(1)(b), (c) and (d) of the RSC to strike out the Plaintiff's Statement of Claim ("**the First Statement of Claim**") filed on May 3, 2018 on the grounds that it fails to set out clear, coherent, full and/or proper particulars of the Plaintiff's claim against the Defendant, which can be properly traversed by way of a Defence, and is therefore vexatious, frivolous, and/or an abuse of process; an Order pursuant to Order 31A, Rule 18(2)(s) of the RSC and/or the inherent jurisdiction of the Court that the First Statement of Claim alleges that the Plaintiff wrongfully terminated without having been given reasonable notice, but fails to offer any particulars as to what would have constituted reasonable notice in the circumstances, contrary to Order 18, Rule 12 of the RSC; an Order pursuant to Order 31A, Rule 18(2)(d) of the RSC and/or the inherent jurisdiction of the Court that the filing of a Defence and all further proceedings herein be stayed pending the determination of the instant application; costs.

Statement of Facts

4. The Plaintiff filed a Writ of Summons on March 29, 2018 whereby page three is titled "General Endorsement". The Plaintiff claims inter alia:-
 - "1. THE PLAINTIFF is and was at all Material times a qualified Boat Captain. The defendant is a Company incorporated in the Bahamas, who's registered office is at Higgs & Johnson and is and was at all Material times carrying on business as Oil Produces.
 2. By an agreement between the Plaintiff and the defendant, the Plaintiff entered into a contract of service with the defendant, by which the Plaintiff agreed to serve the defendant as a boat Captain at it's business and the defendant agreed to pay the Plaintiff in consideration of such service as aforesaid the salary of \$2,541.67 per month. The agreement further contained inter alia the following terms:

i. That the defendant may terminate the agreement if an employee fails to call in and/or report to work for two (2) consecutive days or shifts will be deemed to have abandoned their position and this voluntarily terminated their employment.

ii. That the defendant wrongfully terminated the plaintiff employment without giving him reasonable notice and alternatively not adhering to company's policy regarding the termination of an employee.

iii. That on the date of termination the defendant did not conduct a due diligence check as to the truthfulness of the plaintiff's actions. The directions to terminate the plaintiff's employment was unlawful and negligent.

iv. Further in the circumstances the plaintiff is entitled against the defendant to damages by reason of their oppressive action as set out in paragraph 5 hereof.

v. Further pursuant to Section 35A of the Supreme Court Act 181 the plaintiff is entitled to, and hereby claims interest on the amount found to be due to him at such rate and for such periods as the court shall think fit.

AND THE PLAINTIFF CLAIMS

(i) Damages

(ii) Interest and costs.

(iii) Such further or other relief as the court deems just."

5. The Plaintiff subsequently filed the First Statement of Claim whereby he claims inter alia:-
"

STATEMENT OF CLAIM

(1) That on the 23rd day of June, 2017 by letter sent to the Plaintiff terminating his employment.

(2) That the letter alleged that the Plaintiff refused an assignment as an able bodied seaman on the contract Launch.

(3) That the Plaintiff refused to take part in the daily shift briefings and safety meeting.

(4) That on the 14th day of June, 2017 the Plaintiff was told by the shift supervisor that the plaintiff was suspended until further notice and that he must leave the property.

(5) That the Plaintiff was guilty of gross insubordination, gross misconduct and job abandonment.

(6) At page 81 of the employee hand book states that "In every case, a thorough investigation will be made before any disciplinary action is taken." June 29th 2017

(7) That the defendant Servant or agent indicated that the officer discharging the termination was unaware of a number of critical facts pertaining to the case clearly indication that he was not fully apprised of despite or action over which he made Judgement. In particular he was unaware of a written statement of fact requested by his assistant and provided by the Plaintiff outlining the dispute from the Plaintiff's point of view.

(8) That the defendant wrongfully terminated the plaintiff employment without giving him reasonable notice and alternatively not adhering to the company's policy regarding the termination of an employee.

(9) That on the date of the termination the defendant did not conduct a due diligence check as to the truthfulness of the Plaintiffs actions. The direction to terminate the Plaintiffs employment was unlawful and negligent.

AND THE PLAINTIFF CLAIMS

- (i) Damages
- (ii) Interest and costs.
- (iii) Such further or other relief as the court deems just."

6. The Plaintiff also filed the Second Statement of Claim whereby he claims inter alia:-

STATEMENT OF CLAIM

(1) THE PLAINTIFF is and was at all Material times a qualified Boat Captain. The defendant is a Company incorporated in the Bahamas.

(2) By an agreement between the Plaintiff and the defendant, the Plaintiff entered into a contract of service with the defendant, by which the Plaintiff agreed to serve the defendant as a boat Captain at its business and the defendant agreed to pay the Plaintiff in consideration of such service as aforesaid the salary of \$2,541.67 per month. The agreement further contained inter alia the following terms:

- i. That the defendant may terminate the agreement if an employee fails to call in and/or report to work for two (2) consecutive days or shifts will be deemed to have abandoned their position and this voluntarily terminated their employment.
- ii. Page 81 of the employee handbook states "in every case, a thorough investigation will be made before any disciplinary action is taken".

iii. That the defendant wrongfully terminated the plaintiff employment without giving him reasonable notice and alternatively not adhering to company's policy regarding the termination of an employee.

iv. That on the date of termination the defendant did not conduct a due diligence check as to the truthfulness of the plaintiff's actions. The directions to terminate the plaintiff's employment was unlawful and negligent. The Dismissal was unfair.

v. That the Plaintiff was terminated by Mr. John Brown on 23rd June, 2017. However, the Plaintiff did not get a letter confirming such Termination until 28th June, 2017.

vi. That on the 28th of June 2017 the Plaintiff received a letter from Mr. John Brown the Director of Marine Operations. Indicating that he was terminated from the 23rd of June, 2017.

vii. The reason for the termination letter was that the Plaintiff left the work place without authorization which was not true.

viii. The Plaintiff left the work place because he was suspended by Mr. Greg Larado Jr. the assistant Marine Director.

ix. Therefore when Mr. John Brown terminated the Plaintiff employment. He was acting unfairly because he did not inquire nor was he aware that the Plaintiff was suspended, hence he had to leave the work place.

x. Further the other reason for the Plaintiff termination was that he refused an assignment on the contract launch.

xi. That the Plaintiff acted as able Seaman Handy Man, pulling ropes tie up Jetty for over nine months. That he never refused an assignment or instructions from his superiors.

xii. That the defendant unfairly dismissed the Plaintiff and is breach of the contract herein.

xiii. By reason of breach the Plaintiff has suffered Loss and Damages.

AND THE PLAINTIFF CLAIMS

- (i) Damages
- (ii) Interest and costs.
- (iii) Such further or other relief as the court deems just."

7. The Plaintiff also filed a Summons seeking an amendment to the Writ of Summons and Statement of Claim and relies upon the evidence in his Affidavit in support. He states that in March, 2018 he instructed Mr. K. Brian Hanna, to prepare and file a Writ of Summons against the Defendant for wrongful and unfair dismissal from his employment with the Defendant. That he was dissatisfied with his Attorney's willingness to properly discuss his case with him and the lack of progress and as such he terminated his Attorney's services and requested his file. That after consulting with another Attorney and reviewing his file it was discovered that there were several defects in the Writ of Summons and Statement of Claim which require correction. That he now seeks the leave of the Court to amend his Writ of Summons to amend the name of the Defendant to "Buckeye Bahamas Hub Limited"; amend the name and title "His Lordship the Honourable Sir Hartman Longley Our Chief Justice" to "Her Ladyship the Honourable Estelle Gray-Evans Our Acting Chief Justice" or currently "His Lordship the Honourable Brian Moree Our Chief Justice"; and amend the Statement of Claim as it appears in the draft exhibited as "Exhibit J.P.2" to the Affidavit. That he seeks the leave of the Court to withdraw and abandon the Second Statement of Claim and replace it with the draft exhibited as "Exhibit J.P.2" and that the aforementioned defects are procedural and unintentional and due to the carelessness of his former Attorney. That he has a good and strong case substantively against the Defendant for its wrongful and unfair dismissal from his employment and granting the leave would enable the determination of the real substantive issues between the parties.
8. The Defendant filed two Summonses whereby it seeks to strike out both Statements of Claim filed by the Plaintiff in this action pursuant to Order 18, Rule 19 of the RSC and Order 31A, Rule 18(2)(d) and (s). The Defendant filed two Affidavits in support of its Summonses. The evidence of Ms. Nickesha Strachan in the First Affidavit is that the Plaintiff's Statement of Claim contains incomplete sentence paragraphs from which she is unable to discern a clear, cogent, and coherent basis for any claims the Plaintiff has against the Defendant and refers to paragraph one of the First Statement of Claim. She further states that the remaining paragraphs are the same as being incomplete single sentence paragraphs and/or are vague and lacking any or any proper sufficient particulars against the Defendant and as such she believe that the allegations arising out of the paragraphs cannot be traversed properly and that the Defendant cannot plead an adequate Defence.
9. The evidence of Ms. Strachan in her Second Affidavit is that the First Summons and First Affidavit in Support was served on Counsel for the Plaintiff on May 16, 2018 and by letter dated June 7, 2018 the Defendant attempted to request convenient dates from Counsel for the Plaintiff to set a date for the hearing of the First Summons to no avail. She states that while awaiting a date from the Court, the Defendant was served with a further Statement of Claim, (i.e. the Second Statement of Claim) and upon review of the same it was noted that the Plaintiff failed to state anywhere that the same was an amended Statement of Claim; the rule pursuant to which any amendment reflected thereby was

made and; the nature of any purported amendments to the Statement of Claim by the appropriate colour coded markups, or otherwise.

Issues

10. The issues to be determined by the Court on these applications are:-
- (i) Whether the Plaintiff should be granted leave to amend his Writ of Summons and Statement of Claim;
 - (ii) Whether the Plaintiff's First Statement of Claim is scandalous, frivolous or vexatious and/or may prejudice, embarrass or delay the fair trial of the action and/or is otherwise an abuse of the process of the Court;
 - (iii) Whether the Plaintiff's Second Statement of Claim discloses no reasonable cause of action, is scandalous, frivolous or vexatious and/or may prejudice, embarrass or delay the fair trial of the action and/or is otherwise abuse of the process of the Court.

Analysis and Disposition

Amendment Application

The Law

11. Order 20, Rule 5 of the RSC states:-
- "(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."

Submissions

12. Counsel for the Plaintiff, Mr. Simeon Brown submits in part that the draft exhibited at J.P.2 of the Plaintiff's Affidavit shows the extent of the amendments being sought by the Plaintiff and as they are so numerous he submits that it would be a whole new statement of claim. He refers the Court to Order 20, Rule 5 of the RSC and relies on the guidance from the 1976 White Book at 20/5/8/6 on page 340 on the issue of amendments. In particular he submits that it is a guiding principle of cardinal importance of the question of amendment in that all amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or correcting any defect or error in any proceeding. **See LJ Jenkins in G.L. Baker v Medway Building & Supplies [1958]** 1 W.L.R. 1216 at 1231; **[1958]** 3 All E.R. 540 at 546. It is also his submission that the Defendant has not suffered any real prejudice and will not suffer any real prejudice if the amendments are allowed. Mr. Brown submits that the Plaintiff's action is still within the limitation period even if the matter is struck out but the Plaintiff may be

unable to do so if the Court makes it a condition that the Plaintiff pay the Defendant's cost if the matter is brought afresh. He submits that if the amendments are allowed and the matter proceeds, the issue of costs will be dealt with at the end.

13. Counsel for the Defendant, Ms. Karen Brown in opposition to the Plaintiff's application to amend submits that the Plaintiff's evidence at paragraphs 4 and 7 of his Affidavit with regard to the misstatement of the name of the Chief Justice is an error that does not amount to irregularity but affects the validity of the Writ issued and the Court should not permit the amendment. She further submits that the commentary referred to by Mr. Brown in support of the application is that the guiding principle of amendments is for the purpose of determining the real question in controversy between the parties to any proceedings and as such that rule presumes that there are valid proceedings. It is her submission that the Writ filed does not constitute a valid proceeding before the Court. Ms. Brown also submits that the evidence of the Plaintiff at paragraph 7 of his Affidavit seeks the Court's leave to withdraw and abandon the Second Statement of Claim however the application before the Court is pursuant to Order 20, Rule 5 of the RSC which deals with amendments not abandonment or withdrawal.
14. Ms. Brown further submits that even if the Court was to grant the relief sought it still does not put the parties in a position to determine the real questions in controversy between the parties and subsequently still left with two statement of claims on file. She refers the Court to paragraph 5 of the draft document exhibited as J.P.2 to the Plaintiff's Affidavit and submits that even if the draft document is accepted and amended the Defendant is still unable to respond to the claim and the issue between the parties still remain unclear. It is also her submission that the Defendant would be prejudiced by the granting of the amendment as the Defendant has been put through the expense of two statements of claim and the knowledge of the Plaintiff's impecuniosity in that he would be unable to meet an order for costs.
15. Mr. Brown in response to Ms. Brown's submission that the Writ is not valid submits that the Defendant did not file a conditional appearance to the objection of its validity and instead filed an appearance and as such the Defendant accepted the documents as they were. He also submits that the draft as exhibited is a draft and as such it is not finalized and can be cured by further amendments.

Analysis, Conclusion and Disposition

16. Counsel for both parties accept that the guiding principle on the question of amendment is that all amendments made should be for the purpose of determining the real question of controversy between the parties to any proceedings.
17. However, I do not accept that the error of the naming of the then Chief Justice Sir Hartman Longley on the Writ of Summons invalidates these proceedings. Ms. Brown has produced no authority to support this submission. Further, as submitted by Mr. Brown, the Defendant filed an appearance in these proceedings as opposed to entering a conditional appearance and an application to set aside the Writ. To my mind, by entering an unconditional appearance the Defendant made a fresh step and in so doing has accepted

such irregularity as it relates to the Writ of Summons and I refer the parties to Order 2, Rule 1 of the RSC.

18. In considering the Summons and Affidavit in support of the Plaintiff's application it is noted that the evidence of the Plaintiff is that the Writ of Summons and Statement of Claim to which he wishes to amend is exhibited as "J.P.1" which was filed on March 29, 2018 and that he wishes to withdraw and abandon the Second Statement of Claim.
19. As there is no application before the Court by the Plaintiff to withdraw the Second Statement of Claim, I accept Mrs. Brown submission that the only application on behalf of the Plaintiff is to amend his Writ of Summons and Statement of Claim.
20. In **Tildesley v Harper (1878)** 10 Ch. D. 393 at 396 and 397, Bramwell L.J. said "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated by costs or otherwise."
21. Additionally, the practice of the Court has been to allow the amendment if it can be made without any injustice to the other side however negligent or careless may have been the first omission or how late the proposed amendment, there is no injustice if the other side can be compensated by costs. See Commentary at 20/8/6 on page 379 of The Supreme Court Practice 1999, Volume 1).
22. Counsel for both parties have indicated the impecuniosity of the Plaintiff and Ms. Brown has submitted that as a result of such, the Plaintiff would be unable to meet any costs order and thus the Defendant would be prejudiced by the granting of an amendment.
23. While Mr. Brown has conceded that the Plaintiff is a man of limited means, the only injustice that the Defendant has submitted to the Court is that the Plaintiff would be unable to meet any costs order. To my mind, I do not find that the Plaintiff's inability at this juncture to meet any potential costs order gives rise to a level of prejudice to not grant the amendment. Additionally, it would not be in the interest of justice to run a potential or current litigant from the judgment seat because they are impecunious. In weighing the potential prejudice faced by the Plaintiff and the Defendant, I find that to not grant the amendment would be more prejudicial to the Plaintiff who may have a legitimate case against the Defendant.
24. Moreover, as opined by Bramwell L.J. in **Tildesley v Harper (supra)** above I am satisfied on the evidence and submissions that the Plaintiff has not acted mala fide in these proceedings and that his blunder has not injured the Defendant in such a way that an order of costs could not compensate it.
25. Therefore, in the exercise of the Court's discretion the Plaintiff's is granted leave to amend his Writ of Summons as prayed in his Summons and in accordance with the said amendments provided in the draft exhibited to the Plaintiff's Affidavit in support. The Plaintiff is to file and serve the same on the Defendant within seven days hereof failing which the Plaintiff's action shall stand/be dismissed.

Defendant's Applications to Strike Out

The Law

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

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

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

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

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

27. Order 31A, Rule 18(2)(d) and (s) of the RSC states:-

"18.

(2) Except where these Rules provide otherwise, the Court may —

(d) stay the whole or part of any proceedings generally or until a specified date or event

(s) take any other step, give any other direction or make any other order for the purpose of managing the case and ensuring the just resolution of the case."

28. The power to strike out is a Draconian remedy which should be employed only in clear and obvious cases where it is possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof (per Allen, J in **Bettas Limited v Hong Kong and Shanghai Banking Corporation Limited and HSBC Bank Plc SCCiv App No. 312 of 2013**).

29. Guidance on how this rule should be applied is set out by **Osadabey, JA** in **Hamby v Hermitage Estates Ltd SCCiv App No. 21 of 2008** and also by **Auld, LJ** in **Electra Private Equity Partners v KPMG Peat Marwick (a firm) & Ors [2001] 1 BCLC 589**. Osadabey, JA states in Hamby:

"It is well settled that the jurisdiction to strike out is to be used sparingly and limited to plain and obvious cases where there is no need for a trial. There is no doubt that the exercise of that jurisdiction may deprive a party of the examination and cross examination of witnesses which can change the result of a case." At page 613 of **Electra Private Equity Partners**, Auld LJ stated: "It is trite law that the power to strike out a claim under RSC Ord.18, r.19 or in the inherent jurisdiction of the Court should only be exercised in "plain and obvious" cases. That is particularly so where there are issues as to material primary facts and the inferences to be drawn from them, and when there has been no discovery or oral evidence. In such cases, as Mr. Aldous submitted, to succeed in an application to strike out, a defendant must show that there is no realistic possibility of the

plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits. See **Goodson v Grierson [1908] 1 KB 761, CA**, per Fletcher Moulton LJ at 764-5 and Buckley LJ at 766; **Wenlock v Moloney**, per Sellers LJ at 1242G-1243D and Danckwerts LJ at 1244B ([1965] 1 WLR 1238); and **Torras v Al Sabah & others(unreported) 21 March 1997 CA**, per Saville LJ. There may be more scope for early summary judicial dismissal of a claim where the evidence relied on by the plaintiff can properly be characterised as "shadowy" or where "the story told in the pleadings is a myth . . . and has no substantial foundation"; see eg **Lawrance v Lord Norreys (1890) 15 App Cas 210**, per Lord Herschell at 219-220. However, the court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in a state of development. It should only strike out a claim in a clear and obvious case. Thus, in **McDonald's Corporation v Steel [1995] 3 All ER 615, [1995] EMLR 527, CA**, Neill LJ, with whom Steyn and Peter Gibson LJ agreed, said, at 623e-f of the former report, that the power to strike out was a Draconian remedy which should be employed only in clear and obvious cases where it was possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof."

Submissions

30. While the Defendant has filed two strike out applications, Mrs. Brown submits that the second strike out application should be dealt with as a preliminary point.

Second Strike Out Application

31. Ms. Brown submits that the Second Statement of Claim to which she alleges was purportedly amended by the Plaintiff fails to disclose a reasonable cause of action. She submits that that Statement of Claim consists of two paragraphs and a prayer which sets out an introduction of the parties, a recital of the purported terms of an agreement between the parties, without offering any particulars relating to the nature of the agreement (oral or written), the date, or the party who executed the same on behalf of the Defendant and a claim for damages, interest, costs and further or other relief. It is her submission that the Court ought to exercise its discretion to strike out the Second Statement of Claim pursuant to Order 18, Rule 19(1)(a) and relies on two authorities in support. She refers the Court to the judgment of **Danckwerts L.J.** in **Nagle v Feilden [1966] 2 QB 633** whereby he opined that the summary remedy of strikeout should only be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court. She also refers the Court to the judgement of Lord Pearson in **Drummond-Jackson v British Medical Association [1970] 1 W.L.R.688** at page 696 whereby he provided further clarification on how the

likelihood of success of an action should be assessed and stated that to his mind a reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered.

32. Ms. Brown therefore submits that the Second Statement of Claim is bound to fail when looking at the pleadings as drafted and further submits that the Plaintiff's cause of action against the Defendant is not set out in the pleadings.
33. In addition to her submissions relating to the Second Statement of Claim failing to disclose a reasonable cause of action, Ms. Brown submits that the Plaintiff's conduct in filing the Second Statement of Claim following the service of the Defendant's Summons to strike out the First Statement of Claim amounts to an abuse of process on the Plaintiff's part. Ms. Brown relies on the commentary at 18/19/9 on page 314 of the Supreme Court Practice 1976, Volume 1 in support of this submission. It is her submission that the commentary found above sets out what amounts to an abuse of the process of the Court and frivolous or vexatious pleadings establishes that the Court is obliged to prevent any abuse of its litigants. She submits that litigants should be prevented from taking actions which would prejudice other parties similar to the actions of the Plaintiff by filing the purported "Amended" Statement of Claim to which she also submits prejudiced the grant of relief claimed in and/or sought by the Defendant in the first strike out Summons. She further submits that the Plaintiff's conduct in filing the Second Statement of Claim being aware of the first strike out summons demonstrates contempt for and/or a disregard of the Court's role and its process. Therefore, she states that the Plaintiff's conduct falls within the definition of conduct that is frivolous, vexatious, and/or abuse of the Court's process.

First Strike Out Application

34. Ms. Brown submits that the First Statement of Claim is wholly inadequate for the purpose of framing the Plaintiff's claims with any clarity or coherence and that the said Statement of Claim fails to provide the necessary and specific particulars which ought to be set out by the Plaintiff with respect to his claims. She refers the Court to the Affidavit evidence of Ms. Strachan and submits that the Plaintiff was obliged to provide all of the necessary details of his claims pursuant to Order 18, Rule 12 of the RSC. It is her submission that the allegation found at paragraph 8 of the First Statement of Claim fails to comply with the mandatory obligations under Order 18, Rule 12 of the RSC to provide requisite particulars and draws the Court's attention to the commentary at 18/12/51 on page 336 of the Supreme Court Practice, 1999, Volume 1 in support. Additionally, she submits that in the absence of any rebuttal to the evidence of the Defendant or any explanation by the Plaintiff for his failure to comply with the mandatory provisions of Order 18, Rule 12 of the RSC, there is nothing before the Court that would justify the refusal or the relief sought by the Defendant.
35. Mr. Brown in opposition of both of the Defendant's applications for strike out submits that the Court ought not to penalize the Plaintiff for any incompetency or slackness of his

former Counsel in this action. He further submits that the submission relating to abuse of process imports something intentional or reckless and that the poor manner in which the documents were drafted is not the fault of the Plaintiff. It is his submission that the defects of the documents are procedural and falls squarely within Order 2, Rule 1 of the RSC in that they can be cured. He submits that the Plaintiff has been as much a victim in these proceedings as his former counsel put him in his current position and abandoned him previously and that the Plaintiff is not a student of the law and would not understand drafting and the deficiencies in those documents. Mr. Brown submits that the Plaintiff would like to proceed with his action against the Defendant without being prevented from doing so by virtue of any billing of costs.

36. Ms. Brown submits in response that the tactic employed by the Plaintiff whereby he concedes the applications made by the Defendant in order to avoid the potential or possible award of costs and by making an application for leave to amend is a further abuse of the Court's process.
37. Mr. Brown in response to Mrs. Brown's submission above is that the Plaintiff conceding the defects in the Statements of Claim before the Court lead him to make the application for amendment. He also submits that the allegation on the pleadings before the Court is that the dismissal was unfair and wrongful and that is prima facie acceptable. It is his submission that in the circumstances there may be an obligation to provide further or fuller particulars to the Defendant.

Analysis

38. The law guiding the Court on strikeout applications is clear. As stated above the power to strike out is a Draconian remedy which should be employed only in clear and obvious cases where it is possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof.
39. In the instant case, there are two Statements of Claim that were filed by the Plaintiff after the filing of his Writ of Summons. It is not lost on the Court that the Defendant's applications for strike out related to the Statements of Claim filed and not the Writ of Summons. Although the Writ of Summons at page 3 is entitled "General Endorsement" upon review of the indorsement itself I find that it is drafted as a Statement of Claim. The commentary at 6/2/3 and 6/2/4 on page 39 of the Supreme Court Practice, 1999, Volume 1 is helpful in that it identifies the difference between a general indorsement and an indorsement with a statement of claim. In particular a general indorsement should be a concise statement of the nature of the claim made or the relief or remedy required. A specially indorsed writ must have a full and proper statement of claim, with proper particulars to be given which provided it properly pleads a cause of action is usually in attenuated form. Therefore, to my mind, I find that the statements and/or particulars as found in the Writ of Summons goes beyond a concise statement of the nature of the claim and amounts to a full and proper Statement of Claim contained in a Specially Indorsed Writ of Summons.

40. Further, while Ms. Brown submits that the Second Statement of Claim purported to amend the First Statement of Claim and that it failed to be indorsed with a statement that it had been amended, I do not accept that the Second Statement of Claim purported to amend the First Statement of Claim. To my mind in the absence of any identifying features indicating the same i.e. that it was amended pursuant to any Order of the Court or the insertion of red lines under each amendment, it is difficult to determine if the purpose of the Second Statement of Claim was to amend the First Statement of Claim or the Plaintiff simply filed another Statement of Claim in the action.
41. Considering the principles guiding the Court when determining strike out applications and reviewing the Statements of Claim that are before the Court, I find that the Second Statement of Claim discloses a reasonable cause of action. The Court at this juncture is not concerned with how successful the Plaintiff will be in his action or how successful the Defendant will be in defending but whether on the pleadings it discloses a cause of action with "some chance" of success. In the circumstances, although deficient, the Court is satisfied that the Second Statement of Claim discloses a reasonable cause of action. As it relates to the First Statement of Claim, the grounds upon which the Defendant sought to strike the First Statement of Claim was that it is vexatious, frivolous and/or an abuse of the process as it fails to set out clear, coherent, full and/or proper particulars of the Plaintiff's claims against the Defendant and fails to offer any particulars what constituted reasonable notice contrary to Order 18, Rule 12 of the RSC.
42. The commentary at 18/19/16 on page 350 of the Supreme Court Practice, Volume 1, 1999 highlights what is deemed as frivolous or vexatious and states that these words are meant for cases which are obviously frivolous or vexatious or obviously unsustainable. Further, the pleading must be so clearly frivolous that to put it forward would be an abuse of the process of the court. While Ms. Brown has submitted that the First Statement of Claim is wholly inadequate in framing the Plaintiff's claim with any clarity or coherence and that it failed to provide the necessary and specific particulars which ought to be set out, I do not accept that the First Statement of Claim failed to frame the Plaintiff's claim with clarity or coherence. Although the First Statement of Claim may be deficient in some aspects, to my mind it can be cured with an amendment and a request for Further and Better Particulars by the Defendant.
43. In the instant case there are three Statements of Claim before the Court. In granting the Plaintiff leave to amend the Writ of Summons in accordance with the draft exhibited to his Affidavit in Support, I find that it would be an abuse of the process of the Court to allow the subsequent filed Statements of Claim to remain. I am guided by the submission of Ms. Brown whereby she refers the Court to the commentary at 18/19/9 on page 314 of the Supreme Court Practice, Volume 1, 1974 that the process of the Court must be used bona fide and properly and that the Court will prevent the improper use of its machinery and will in a proper case summarily prevent it from being used as a means of vexation and oppression in the process of litigation.

Disposition

44. In the circumstances, I believe that it would be unjust to penalize the Plaintiff for the conduct of his former Counsel in that the Plaintiff demonstrated contempt or disregard for the Court's role and its processes as submitted by Ms. Brown. Further, two Statements of Claim cannot subsist in one action as between the same parties. Therefore, the Court in the exercise of its inherent jurisdiction hereby strikes out the First Statement of Claim filed May 3, 2018 and the Second Statement of Claim filed July 26, 2018.
45. Ms. Brown's applications were also made pursuant to Order 31A, Rule 18(2)(d) and (s) of the RSC. Although no arguments were led by both Counsel for or against these provisions, it is important to note that these provisions fall under the Court's case management powers. However, I find that these provisions pursuant to Order 31A, Rule 18(2) of the RSC are only invoked when there are no other rules or provisions in the RSC to which a party can seek the relief to which they claim. In the instant case the Defendant's applications are made pursuant to Order 18, Rule 19 of the RSC as those provisions deal with strike out applications. Therefore, I do not find that the Court's discretion should be invoked under these provisions in relation to the Defendant's applications. Additionally, the relief sought in both of the Defendant's applications pursuant to Order 31A, Rule 18(2)(d) is for an order to stay these proceedings until the determination of the instant applications. As the Court has made such determination, the relief sought pursuant to that provision ultimately falls away. Therefore, items 3 and 4 of the Defendant's Summonses filed May 16 and November 8, 2018 are refused.

Costs

46. On the issue of costs, I award costs of and occasioned by both the striking out applications and the amendment application to the Defendant to be paid by the Plaintiff to be taxed if not agreed at the conclusion this trial.

Dated the 3rd day of March, 2021


Petra M. Hanna-Adderley
Justice