

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law and Equity Side  
2016/CLE/gen/FP/00071**



**BETWEEN**

**LAZARO SEARA MARIN  
Plaintiff**

**AND**

**THE HON. ALLYSON MAYNARD-GIBSON (in her capacity as the Attorney  
General of the Commonwealth of The Bahamas)  
1<sup>st</sup> Defendant**

**AND**

**THE HON. FREDERICK A. MITCHELL (in his personal capacity and in his  
capacity as the Minister of Foreign Affairs & Immigration of the  
Commonwealth of The Bahamas)  
2<sup>nd</sup> Defendant**

**AND**

**PATRICK WRIGHT  
(in his capacity as the Commissioner of Bahamas Department of Corrections)  
3<sup>rd</sup> Defendant**

**BEFORE:** The Honourable Justice Petra M. Hanna-Adderley

**APPEARANCES:** Mr. Fred Smith, Q.C., Mr. Martin Lundy, Ms. Raven Rolle and  
Ms. Kandice Maycock for the Plaintiff

Mr. Franklyn Williams, Mr. Kirkland Mackey, Ms. Kenria Smith and  
Mr. Kingsley Smith for the Defendants

**HEARING DATES:** November 2 and 12, 2020

**RULING**

**Hanna-Adderley, J**

This is an application by the Plaintiff to strike out the Defendants' Defence and enter Judgment on Liability

## **Introduction**

1. This is an application by the Plaintiff by way of a Summons ("**the Strike Out Summons**") filed October 28, 2020 pursuant to Order 24, Rule 16(1) and/or Order 31A, Rule 18(2)(i) and 20(1)(a) of The Rules of the Supreme Court ("RSC") and the inherent jurisdiction of the Court for an Order (1) striking out the Defendants' Defence filed on September 26, 2017 and entering Judgment on liability for the Plaintiff following the admission of the Plaintiff's evidence by his Witness Statement filed on October 29, 2018 as supplemented and; (2) costs of this application be paid by the Defendants to the Plaintiff on a full indemnity basis.
2. In support of his application the Plaintiff relies on the following documents:- (i) Affidavit of Raven Rolle filed October 28, 2020; (ii) the Second Affidavit of Raven Rolle filed November 9, 2020; (iii) the Plaintiff's Skeleton Arguments [Strikeout of Defence] filed November 10, 2020 and; (iv) the Plaintiff's Reply Submissions [Strikeout of Defence] filed November 12, 2020.
3. The Defendants oppose the Plaintiff's application and rely on the following documents:- (i) the Affidavit of Kingsley Smith filed on November 4, 2020 and; (ii) the Defendants' Submissions on Plaintiff's Summons to Strike Out Defence and Enter Judgment on Liability dated November 2, 2020.

## **Background Facts**

4. The Plaintiff in this action makes the following claims against all of the Defendants and against the 2<sup>nd</sup> Defendant in his personal capacity.
  - a. The Plaintiff claims against all of the Defendants for damages which he alleges resulted from the assault, battery, false imprisonment, misfeasance and malfeasance of public officers and alleged breaches of his Constitutional Rights (Articles 17, 19, 20, 23, 25 and 26) under Articles 28 of the Constitution of The Bahamas while during his alleged unlawful and illegal

detention at the Carmichael Detention Centre between March 2013 to February 2016.

- b. The Plaintiff also claims against the 2<sup>nd</sup> Defendant in his personal capacity for misfeasance and malfeasance in public office and seeks damages for defamation of character, libel and slander of published information by the 2<sup>nd</sup> Defendant on numerous occasions following the Plaintiff's release.
5. The Plaintiff in his prayer for relief seeks the following:- (i) general damages including aggravated, punitive and exemplary in the sum of \$5,000,000.00 against all of the Defendants in their official capacities; (ii) general damages including aggravated, punitive and exemplary in the sum of \$1,000,000.00; (iii) interest; (iv) costs; and (v) further or other relief as the court may deem just.
6. The Plaintiff subsequently filed his Statement of Claim on August 23, 2017. The Defendants entered an appearance by way of their Notice and Memorandum of Appearances filed August 31, 2017 and they subsequently filed their Defence on September 26, 2017.

### **Chronology**

7. In an effort to fully appreciate the conduct of this matter, I believe it is important to set out a chronology of events and filed documents.
8. I set out below a table of the documents filed in this action relevant to the application before me.

	Document	Filing Date
1.	Writ of Summons	March 4, 2016
2.	Statement of Claim	August 23, 2017
3.	Memorandum & Notice of Appearance	August 31, 2017
4.	Defence	September 26, 2017
5.	Notice of Referral to Case Management	October 23, 2017 (dated)
6.	Plaintiff's List of Documents	October 23, 2018

7.	Directions Order	November 2, 2018
8.	Directions Order-Pre-Trial Review	November 2, 2018
9.	Plaintiff's Supplemental List of Documents	November 2, 2018
10.	Defendants' List of Documents	November 5, 2018
11.	Defendants' Bundle of Documents	November 5, 2018
12.	Order [Further Directions for the Hearing of P's Discovery Application]	September 30, 2020

9. The following is a chronology of events:-

- a. The parties attended before the Court pursuant to the Notice for Referral for Case Management on November 30, 2017. The Court gave the parties directions inclusive of timelines in which to file and serve their respective documents, set a Pre-Trial Review for October 18, 2018 and subsequently set the matter down for trial on November 5 and 6, 2018.
- b. The parties appeared before the Court on October 18, 2018 for the Pre-Trial Review and by its Order recorded that at that time the parties had not complied with any of the pre-trial directions set out in the Directions Order as there were attempted settlement negotiations; that the parties agreed to comply with the Directions Order in the weeks prior to trial; that notwithstanding their collective failure to comply with the Directions Order the trial would proceed as ordered and the Court ordered that the parties comply with the Directions Order by the week prior to the commencement of the trial; that the trial would proceed on the previously scheduled dates of November 5 and 6, 2018 and that costs of the appearance on that day was in the cause.
- c. The parties subsequently filed their respective documents in anticipation of trial which included numerous Witness Statements on behalf of both parties, the Praecipe for Writ of Subpoena Ad Testificandum for Allyson Maynard

Gibson, Fredrick Mitchell, Brent Symonette, Carl Bethel, Charles Murphy, Patrick Wright Immigration Officer, Alfred Gray and Mark King Prison Officer, the Writ of Subpoena Ad Testificandum for the same persons; their respective Statement of Facts and Issues; the Plaintiff's Trial Skeleton Arguments; and the Defendants' Skeleton Submissions.

- d. The Plaintiff filed on November 5, 2018 a Summons ("Discovery Summons") pursuant to Order 24, Rule 3 of the RSC and/or under the inherent jurisdiction of the Court for an order that the Defendants make and serve on any other party a list of the documents which are or have been in their possession, custody or power relating to any matter in question in the cause or matter including but not limited to the items included in the Schedule (which is attached to the Summons) and that the Defendants make and file an affidavit verifying the List of Documents and for costs. The Defendants also filed on November 5, 2018 a Summons to strike and/or dismiss the Plaintiff's Subpoenas and costs.
- e. The trial dates for November 5 and 6, 2018 were vacated on what was to be the first day of the trial and the matter was adjourned. The Court on October 21, 2019 set the action down for trial for September 14 and 15, 2020. As there were two extant applications i.e. the Defendants application to strike/set aside the Plaintiff's Subpoenas and the Plaintiff's application for Discovery the Court set down subsequent hearing dates for the applications. However, on June 19, 2020 both parties withdrew their respective applications, the Plaintiff's Writs of Subpoenas were withdrawn and the Defendants' application to strike out the same was also withdrawn. The Court also set down the Plaintiff's application for Discovery.
- f. The parties appeared before the Court on August 20, 2020 and it was ordered by the Court that the trial dates of September 14 and 15, 2020 were vacated, the Plaintiff's Discovery Summons was listed for hearing on November 2, 2020 at 2:30p.m. and that the costs of that hearing would be costs in the cause.

- g. The parties then appeared before the Court on November 2 and 12, 2020 for the hearing of the Plaintiff's application pursuant to Order 24, Rule 16(1) and/or Order 31A, Rule 18(2)(i) and 20(1)(a) of the RSC.

## **The Law**

10. The provisions that govern how parties to an action conduct discovery and inspection of documents is found in Order 24 of the RSC.

11. Halsbury's Laws of England, 13<sup>th</sup> Edition, Volume 13, paragraph 37 titled "Nature and extent of disclosure" states:-

***"Whether discovery is to be made without an order of the court in an action begun by writ, or by order of the court in such an action or in other proceedings, the party concerned must make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter.***

***The list of documents, whether made without or pursuant to an order of the court must be in the prescribed form and a party may be required by the other party or ordered by the court to make and file an affidavit which must be in the prescribed form, verifying the list, and serve a copy on the opposite party."***

12. The Plaintiff filed his application pursuant to Order 24, Rule 16(1) of the RSC. This provision states:-

***"If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case***

***may be, order that the defence be struck out and judgment entered accordingly.”***

### **Issues**

13. The Court on such an application must consider whether there has been non-compliance by the Defendants of any Order made pursuant to the provisions of Order 24 of the RSC and if so, whether it is just to strike out the Defendants Defence.

### **Discussion**

14. It is not disputed by the parties that a Summons on behalf of the Plaintiff was filed on November 5, 2018 pursuant to Order 24, Rule 3 of the RSC for an order that the Defendants make and serve on any other party their List of Documents and make and file an affidavit verifying the List of Documents. Additionally, during the hearing on November 2, 2020 Counsel for the Plaintiff Mr. Fred Smith, QC stated at page 11, lines 24 to 29 “MR. SMITH: I haven’t moved my summons for discovery before the Court. I’ve moved my summons to strike out the defendant to enter judgment. If I’m unsuccessful when the Court rules, then the discovery summons resumes to be heard presumably but that’s not a live issue. I have not move my summons, my lady.”

15. As I understand the Plaintiff’s position, the Plaintiff by virtue of this application is not seeking an order for the Defendants to file and serve their list of documents and the affidavit verifying the same but is seeking an order to strike the Defendants Defence for what the Plaintiff alleges is their non-compliance with the Rules.

16. Paragraphs 8 and 9 above sets out the chronology of events and the filing of documents that are relevant to the application. The Court made an Order on October 18, 2018 after it was acknowledged and accepted by the parties that there was non-compliance with the Court’s previous Directions Order made on November 30, 2017 and that the parties would attempt to comply with the new Directions Order in an effort to maintain the previously agreed trial dates. Additionally, as stated above, the parties complied with that Directions Order in anticipation of the trial of the matter commencing.

17. Subsequent to the intervening events outlined in the paragraphs above, the parties appeared by video link on August 20, 2020 and the Court made an order. I am of the view that for the purposes of this application it is important to set out that Order in its entirety below.

**“BEFORE THE HONOURABLE MADAM JUSTICE PETRA HANNA-ADDERLEY this 20<sup>th</sup> day of August, 2020 by video link pursuant to the Court Corona Virus Mitigation Protocols:**

**UPON the parties appearing before this Honourable Court for the hearing of the Plaintiff’s Summons for Discovery filed herein on 5<sup>th</sup> November, 2018 (“the Discovery Summons”);**

**UPON HEARING Mr. Frederick R.M. Smith, QC of counsel for the Plaintiff appearing along with Mr. Martin A. Lundy, II;**

**AND UPON HEARING Mr. Franklyn Williams of Counsel on behalf of the Defendants herein;**

**WHEREAS trial of these proceedings has been set down for Monday and Tuesday, 14<sup>th</sup> and 15<sup>th</sup> September, 2020 respectively by Order dated 21<sup>st</sup> October, 2019;**

**AND UPON the undertaking by Counsel for the Defendants to file and serve an Amended List of Documents as necessary and specifically to make discovery by the Defendants of any and all documentary or other evidence, to the extent that such may exist, set out in the Schedule to the Discovery Summons or otherwise;**

**IT IS HEREBY ORDERED AS FOLLOWS, that the:**

- 1. Trial dates of Monday and Tuesday, 14<sup>th</sup> and 15<sup>th</sup> September, 2020 respectively be and are hereby vacated.**
- 2. Discovery Summons is hereby listed for hearing by video link at 2:30pm on Monday, 2<sup>nd</sup> November, 2020; and**
- 3. Costs of and occasioned by today’s hearing be costs in the cause.”**

18. This Order was filed on September 30, 2020.



## **Whether There Has Been Non-Compliance?**

19. The evidence of the Plaintiff is found in the Affidavits of Ms. Raven Rolle filed October 28, 2020 and November 9, 2020 respectively. Ms. Rolle's evidence between the two Affidavits is sworn in support of the Plaintiff's application for discovery and strikeout. However, as the Plaintiff's application before the Court is whether there has been non-compliance by the Defendants thus justifying striking out their Defence, I will only summarize the evidence that is relevant to this issue.
20. Ms. Rolle's evidence in part is that the Plaintiff complied with the case management directions in the weeks between the pre-trial review and the date originally set down for trial but the Defendants did not comply with the said Order. She deposes that the Defendants attorneys instead appeared for trial on November 5, 2018 and "ambushed" Counsel for the Plaintiff with documents that had only been filed that morning. These documents were the Witness Statements of Claudia Frazer, Sheralean Stubbs, Dr. Hasting Johnson, Frederick Clarke; the Defendants' Bundle of Documents; the Defendants' List of Documents; Summons to strike out the Writs of Subpoenas; the Affidavit of Mr. Ryan Sands in support of the Strike out application; Submissions in support of the strike out application; Statement of Facts and Issues and Trial Submissions. Further, she states that she was advised by Mr. Smith QC that on December 11, 2018 that attempts were made via email to Counsel for the Defendants following a recent conversation between the two in which Counsel for the Defendants agreed to email a list identifying all of the items the Government was willing to disclose. She also states that Counsel for the Plaintiff has attempted to correspond via email and telephone with Counsel for the Defendants requesting discovery and that to date the Defendant have not responded to the Plaintiff's request for discovery or adequately complied with their discovery obligations required by the Rules of the Court.
21. Ms. Rolle deposes that the Defendants' List of Documents contains five items available for inspection, namely; the Deportation Order; copies of the Plaintiff's Permanent Resident Card, Driver's License and Social Security Card; the Letter-Ministry of Foreign Affairs to United States of America; the Bahamas Prison Form

and pictures of the Plaintiff. She further states that the Defendants could have only prepared their Defence by documents to which they have in their possession and that the Defendants have yet to comply with the request for discovery. Additionally, she states that the Defendants' undertaking "to file and serve an Amended List of Documents as necessary and specifically to make discovery by the Defendants of any and all documentary or other evidence, to the extent that such may exist, set out in the Schedule to the Discovery Summons or otherwise" is set out in the Order made on August 20, 2020. She continues that at the date of swearing the Affidavit the Defendants had yet to provide the Plaintiff with further discovery and by their deficient discovery the Defendants have deliberately failed to comply with not only Orders of the Court and the rules but their own undertaking.

22. The Defendants evidence in response is found in the Affidavit of Mr. Kingsley Smith filed November 4, 2020. His evidence in part is that as stated in the Affidavit of Ms. Rolle, the discovery application is still before the Court and as such no Order for discovery has been made by the Court in respect of which the Defendants have not complied and any assertion of the same is incorrect and inaccurate. He continues that Counsel for the Plaintiff during the hearing on November 2, 2020 conceded that he has not moved the Court on any discovery application. Mr. Smith states that he was advised by Mr. Franklyn Williams that no date was set for the compliance of the undertaking given and that the Order made on August 20, 2020 mentioned that there was a Discovery Hearing set for November 2, 2020. He deposes that the Affidavit of Ms. Rolle confirms and evidences the compliance by the Defendants with the Pre-Trial and Case Management Orders but provides no evidence of compliance by the Plaintiff to such orders.

23. In response to Mr. Smith's Affidavit, Ms. Rolle in her Second Affidavit deposes in part that the Plaintiff has been in compliance with the Orders of this Court. She continues that the Respondents' [Defendants] List of Documents and Bundle of Documents is sparse and does not include documents which the Plaintiff knows to be in the possession of the Defendants. Ms. Rolle also states that the Plaintiff is

now more than four years out from the commencement of these proceedings; that during those four years these proceedings have been set down for trial twice and that the Plaintiff can only conclude that if the Defendants intended to advance these proceedings in a meaningful way they would have adequately and meaningfully participated in discovery within a reasonable time prior to any of the previous trial dates.

### **Submissions**

24. Counsel for the Plaintiff, Mr. Frederick Smith, QC has referred the Court to the provisions of Order 24 of the RSC, in particular Order 24, Rule 2 and Rule 16(1) in support of his submissions. He also refers the Court to the case of **Matthew Sewell v The Attorney General of The Bahamas et al 2017/CLE/gen/1181**. Mr. Smith, QC submits that according to the rules of court, a party's obligation to make discovery begins even before case management directions have been given and that Order 24, Rule 2 of the RSC requires each party to exchange their list of documents within 14 days after the pleadings in the action are deemed closed. Therefore, he submits that each party in this action was to file their respective List of Documents within 14 days after September 26, 2017 which would have been by October 10, 2017. Further, he submits that notwithstanding the rules of the Court, the Case Management Order, Pre-Trial Review Order and the Defendants' undertaking, the Defendants have failed to provide discovery in any meaningful way.

25. Mr. Smith, QC contends that the Defendants must have had more than the four documents and photographs of the Plaintiff in their possession when they filed their Defence and that the Defendants can only plead a Defence from instructions obtained from various governmental bodies or functionaries. He submits that the Defendants' failure to provide discovery is either willful or negligent in the circumstances; willful in the view of the series of correspondence (written or otherwise) with Defendants' Counsel on the issue of discovery and Counsel would indicate his intention to review the items sought by way of discovery and revert. He further submits that absent sensible discovery by the Respondents

[Defendants] the Plaintiff will not have a fair trial and that given the number of opportunities the Defendants have had to make adequate discovery and having failed to do so demonstrates their intention not to do so thereby denying the Plaintiff a fair trial.

26. Counsel for the Defendants, Mr. Franklyn Williams also referred the Court to Order 24, Rule 16(1) of the RSC and submits that no order should be made under that provision unless there is a failure to comply with any such provision to both rules 3(2) and 11(1) and set out both rules. He further submits that for the Plaintiff to avail himself of the provisions of Order 24, Rule 16(1) of the RSC he must satisfy the Court that there has been a complete failure of the Defendants to comply with the provisions of both Rules 3(2) and 11(1). Mr. Williams contends that Order 24, Rule 3(2) requires that if the Plaintiff considered that there was a failure of the Defendants to provide their list of documents for discovery then he must make an application to request the same but to date no such application has been made to the Court by the Plaintiff. He further asserts that the Defendants filed and served their list of documents and bundle of documents containing copies of the documents.
27. Mr. Williams also submits that the Plaintiff has failed to demonstrate that the Defendants failed to comply with Rule 11(1) and such rule is contingent on the failure of a party to comply with Rule 9 (inspection of documents). He further submits that the Plaintiff has not pointed to the Court of a failure of that provision (Rule 9) considering that the Plaintiff at the date of trial was in possession of the Defendants List of Documents and Bundle of Documents. It is also his submission that the Plaintiff cannot now rely on Order 24, Rule 17 of the RSC (revocation and variation of orders) as any previous orders and directions given by the Court had been varied by the Court by further directions given by the Court.
28. Mr. Williams submits that the Plaintiff's reliance on Order 31A of the RSC cannot be maintained and that the Court should rarely exercise its discretion to strike out a defence on the basis of failure of discovery and referred the Court to the case of **Ryanair Limited v The Revenue Commissioners [2016] IEHC 48** in support.

He further submits that the Plaintiff has not provided the Court with any evidence that would move the Court to take such drastic measures such as striking out the defence and such application is the Plaintiff seeking to have the Court exercise its discretion to punish the Defendants.

29. Lastly, Mr. Williams submits that there has not been full and frank disclosure of the Plaintiff as the Plaintiff did not disclose or detail whether he had complied with all of the pre-trial requirements and served on the Defendants.

30. While by his reply Mr. Smith, QC made note of what he submits as factual inconsistencies of the Defendants submissions in response to the Defendants submission on the provisions of Order 24, Rule 16(1) of the RSC, he submits that there need not be a failure to comply with rules 3(2) and 11(1) (as submitted by Mr. Williams) in order for an application to be brought pursuant to Rule 16. He once again referred the Court to the case of **Sewell (supra)** and referred to the case of **Ballard and another v Sun International Bahamas Limited and another [2010] 3 BHS J No. 50** in support. Further he submits that based on the terms of the Defence and the documents disclosed in the Defendants Bundle of Documents and List of Documents, the Defendants have blatantly not complied with discovery as required firstly by the Rules of Court, secondly the various Court orders and thirdly their own undertaking.

31. Mr. Smith, QC submits that the Defendants submission regarding the undertaking not having a time specified to comply is insulting and referred the Court to Rule VIII, Note 11 of The Bahamas Bar (Code of Professional Conduct) Regulations and an article entitled "Undertakings in and out of Court" written by Igor Ellyn, Q.C. and Nadine J.L. Barmania of Toronto, Canada. Mr. Smith, QC also referred the Court to **Ryanair Limited v The Revenue Commissioners (supra)** at paragraphs 26 and 29 in support.

32. Lastly, Mr. Smith, QC submits in part that the instant application is not an application to dismiss for want of prosecution but was an application that was brought following the Defendants' wanton and deliberate failure to make discovery.

## **Discussion/Analysis**

33. It is important to fully identify the factual matrix of the instant action. The application to strike-out and enter judgment was filed on October 28, 2020. Prior to the filing of this application, the trial dates set for September 14 and 15, 2020 were vacated notwithstanding that the parties had complied and filed their requisite documents in anticipation for the commencement of this trial on November 5 and 6, 2018. Additionally, prior to the filing of this application the parties appeared before the Court via video link on August 20, 2020 whereby the Court set down the hearing of the Plaintiff's application for discovery filed November 5, 2018 to be heard on November 2, 2020; vacated the trial dates and accepted the undertaking given by Counsel for the Defendants to file and serve an Amended List of Documents as necessary and specifically make discovery by the Defendants of any and all documentary or other evidence, to the extent that such may exist as set out in the Discovery Summons Schedule.
34. It has not been and it cannot now be disputed by the parties that the Defendants filed a List of Documents on November 5, 2018. As I understand the bulk of the submissions on behalf of the Plaintiff, Mr. Smith, QC alleges that considering the averments made by the Defendants in the Defence the List of Documents and by extension the Bundle of Documents is woefully deficient and sparse and as such the Defendants have not complied with the Orders of the Court and the provisions of Order 24 of the RSC.
35. While Mr. Smith, QC has conceded that he has not moved his Discovery Summons, the Defendants undertook to make discovery of any documents in the attached Schedule to the extent that such may exist. Consequently, the Schedule ought to be considered only in light of the undertaking.
36. On close inspection of Order 24, Rule 16(1) of the RSC, the provision itself is clear. A party must first be required by any of the foregoing rules or by any order made thereunder to make discovery of documents or produce the same. The foregoing rules in this instance would be Order 24, Rule 2 and Rule 3. As submitted by Mr. Smith, QC the parties were obligated to provide their List of Documents following

the close of pleadings, however, the parties (and it is not disputed) failed to comply with this provision and subsequently filed their List of Documents in compliance with the Further Pre-Trial Directions Order in anticipation of Trial. Moreover, it is Rule 2 that empowers a party to make an application for an Order for discovery and it is Rule 3 of the RSC that gives the Court the discretion to order that the parties are to file and serve their respective List of Documents and their Affidavits verifying the same, and not Order 24, Rule 16(1) of the RSC.

37. The Plaintiff has yet to have his Discovery Summons heard. To my mind, had that Summons been heard before the one now before the Court and had the Defendants failed to comply with the Order of the Court (i.e. to file and serve their List of Documents and file their affidavit verifying the list) then the provisions of Order 24, Rule 16(1) would be invoked.

38. The Plaintiff has relied on the case of **Matthew Sewell v The Attorney General of The Bahamas et. al (supra)** in support of this application. In that case, then Justice Ruth Bowe Darville struck out the Defendants Defence on the Plaintiff's application pursuant to Order 24 and 31A of the RSC. The Learned Judge in her decision set out a chronology of events in the progress of that matter. In considering the Plaintiff's application, the Learned Judge referred to Order 24, Rule 16(1) of the RSC and Order 31A, Rule 20(a) of the RSC and noted that there was blatant failures by the Defendants in progressing the matter (the trial was set for August 4 and 5, 2020 however at the trial start date the Defendants had not participated in discovery nor had they produced witness statements) and struck the Defendants Defence on the basis that they were negligent in their conduct of the matter and guilty of contumelious delay in the prosecution of their Defence.

39. However, the instant case I find is distinguishable on the facts. In the **Sewell** case, the Defendants failed to enter an Appearance or Defence within the required time; made an application for leave to file out of time and then filed their Defence; then failed to comply with several Orders of the Court and failed to respond to letters and emails sent by Plaintiff Counsel. It is evident on the facts alone that the

Defendants in that case completely failed to comply with any and all Orders of the Court and failed to progress their defence in the action.

40. Conversely, in the instant action, the parties have readily acknowledged and accepted when they failed to comply with the initial Directions Order and attempted to comply with the Further Pre-Trial Directions Order in anticipation of the trial. It cannot also be disputed at this juncture that the parties, in particular the Defendants, had filed their List of Documents and Bundle of Documents on November 5, 2018 the original start date of the trial.
41. While the Plaintiff in his submissions identifies the case **of Ballard and another v Sun International Bahamas Limited and another (supra)** as another case where Order 24, Rule 16(1) of the RSC was invoked, the Court did not strike out the plaintiffs' writ of summons as by the time the matter came on for hearing the plaintiffs had filed the list of documents and bundle of pleadings in compliance with the directions order as is similar to the instant action.
42. As stated above, to my mind, it appears that the Plaintiff's main contention is that the Defendants have not provided "full" discovery and attempted to outline (as found in the Schedule to the Discovery Summons) the documents he believes are in the Defendants possession and/or custody or once were in the Defendants possession and/or custody. However, as I understand the provisions of Order 24, Rule 16(1) there has to be non-compliance with any provision of any of the foregoing rules or order made subsequent to those rules. In this case however, I find that the Defendants have complied by the filing and serving of their List of Documents and further have filed and served their Bundle of Documents. Additionally, the Plaintiff's application pursuant to Order 24, Rule 3 of the RSC merely requires a party to file and serve their List of Documents and file their affidavit verifying the same. That application has yet to be heard by this Court. It should also be noted that Order 24, Rule 3 does not deal with obtaining an order for discovery of particular documents.



### **The Defendants Undertaking**

43. It is also not disputed that the Defendants on August 20, 2020 and encapsulated in the Order filed September 30, 2020 made an undertaking to this Court to file and serve an Amended List of Documents as necessary and specifically to make discovery of any and all documentary or other evidence to the extent that such may exist, as set out in the Schedule to the Discovery Summons.

44. However, I am of the view that the language of the Order indicates that the Defendants would file and serve an Amended List **as necessary** and make discovery of any and all documentary or other evidence to the extent that such **may exist**. The Plaintiff has alleged that he knows that certain documents are in the possession of the Defendants and attempted to provide examples (at paragraph 19 of First Affidavit of Raven Rolle) of documents which he believes should be in their possession. I find that the Defendants undertaking was contingent on determining whether the filing of an Amended List was necessary based on the existence of the documentary evidence which the Plaintiff alleges the Defendants to have or have been in possession of.

45. Therefore, I find that the Defendants have complied with the Order made on August 20, 2020. I also find that there is no evidence before me that would suggest that the Defendants have been avoiding discovery. Moreover, while I accept that there has been some delay as to the progression of this matter on behalf of the parties to my mind I find that such cannot amount to negligence or an unwillingness to comply by the Defendants.

### **Whether It Is Just To Strike Out Defence**

46. However, if I am incorrect in my findings above, in considering whether to strike out the defence and enter judgement on behalf of the Plaintiff such discretionary power should only be used if it is just to do so. The Plaintiff has submitted that he cannot have a fair trial without discovery. The Plaintiff's evidence (as found in the First Affidavit of Raven Rolle) or should I say the Plaintiff's submission is that discovery aids in the fair determination of the issues between the parties. I accept that this is the case, but as it has been reiterated by the Plaintiff, he has not moved

his application for discovery. Therefore, I am of the view that it would not be just at this juncture to strike out the Defence and to enter judgment for the Plaintiff.

**Order 31A, Rule 18(2)(i) and (20)(1)(a) of the RSC**

47. The Plaintiff's application is also pursuant to Order 31A, Rule 18(2)(i) and 20(1)(a) of the RSC.

48. Order 31A, Rule 18(2)(i) states:-

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

***...***

***—(i) dismiss or give judgment on a claim after a decision on a preliminary issue;"***

49. Order 31A, Rule 20(1)(a) states:-

***"(1) In addition to any other powers under these Rules, the Court may strike out a pleading or part of a pleading if it appears to the Court — (a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the Court in the proceedings;"***

50. Mr. Smith, Q.C. did not offer any specific submissions under this provision, however, Mr. Williams submitted that the Plaintiff could not rely on these provisions and referred the Court to **Ryanair Limited v The Revenue Commissioner (supra)** also referred to by Mr. Smith, Q.C.

51. The Plaintiff's reliance on Order 31A, Rule 18(2)(i) I find fails, as the Plaintiff has not identified nor asked of the Court in its Summons to strike to determine a preliminary issue (if any) whereby the Court would subsequently dismiss the action or give judgment on the claim.

52. Additionally, I find that Order 31A, Rule 20(1) of the RSC acts as a catch-all in the event that there is not a specific rule or power under which a party may be able to apply for relief sought under the subsections found within Order 31A, Rule 20(1) of the RSC. Moreover, as I have made a finding above that the Defendants have

complied with the Case Management Orders, I find that Order 31A, Rule 20(1)(a) of the RSC does not apply.

53. Additionally, the parties helpfully referred the Court to the case of **Ryanair (supra)**. In *Ryanair (supra)* the issue before the court was whether Ryanair should be awarded costs for a discovery related application that it brought which was rendered moot by circumstance. In its chronology the court noted that Ryanair had obtained an order for discovery against the State in *Minister for Finance and Ireland v Ryanair Limited (2013/3286P)* and was made on November 5, 2013. There was a series of correspondence between Ryanair and the State regarding discovery between 2014 and 2016 with intervention by the court by setting a hearing for December 8, 2015. However, that hearing was adjourned to January 12, 2016 and on January 11, 2016 discovery was finally made by the State. The court at paragraphs 23 to 28 considered the applicable case law that identified the nature and extent of the powers enjoyed by the court under Order 31, Rule 21 of the Rules of the Superior Courts (1986). Order 31, Rule 21 of the Rules of the Superior Courts (1986) states:- *"If any party fails to comply with any order...for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not been defended..."*

54. It is at paragraphs 26 to 28 whereby the court set out three cases (*Mercantile Credit Co. of Ireland v Heelan [1998] 1 I.R. 81; Murphy v J. Donohoe Ltd. [1996] 1 I.R. 123; and Radiac Abrasives Inc v. Prendergast (Unreported, High Court, Barron J., 13<sup>th</sup> March, 1996)*) that the court in those instances made observations as to the proper application of Order 31, Rule 21 of the Rules of the Superior Courts (1986). These observations set out between paragraphs 26 to 28 are:-

[1] Striking out a defence is a very serious matter because it deprives a defendant of such defences as would be open to him (at 87).

[2] Despite delay and prolongation of proceedings, the interests of justice may require that the defendant be afforded an opportunity of raising such defences as are available to him (at 87).

[3] Court utilisation of O.31, r.21 is discretionary, not obligatory (at 85).

[4] Court utilisation of O.31, r.21 should not occur unless the court is satisfied the defendant is endeavouring to avoid giving discovery (at 85).

[5] Court utilisation of O.31, r.21 should only occur where there is wilful default or negligence on the part of the defendant, and then only upon application to the court for such order (at 85).

[6] Court utilisation of O.31, r.21 should not be effected where an omission or neglect to comply is not culpable, e.g. if due to memory loss or illness (at 85).

[7] The powers of the court to secure compliance with court rules and orders regarding discovery should not be exercised to punish a party for failure to comply with an order for discovery in the time limited by same (at 85).

[8] Cases may exist where one party may not be able to get a fair trial because of the other party's wilful refusal to comply with an order for discovery. In such cases it may be necessary to dismiss a plaintiff's claim or strike out a defendant's defence. "*But such cases will be extreme cases*" (at 142).

[9] Acting on the legal advice of independent legal advisors is a mitigating factor that counts against strike-out, even if the trial judge considers the said advice wrong (at 143).

[10] An offer of further and better discovery is a mitigating factor that counts against strike-out (at 143).

[11] If there were deliberate concealment in the course of discovery, the proper remedy would be to order a strike-out. "*A party to proceedings who has deliberately concealed documents in its discovery cannot, when it has been found out, be allowed merely to amend its discovery.*"

55. The Court in its conclusion stated that while the rules makes it seem as if the High Court has drastic powers open to it they can only be applied in circumstances that are so extreme that they seem likely to occur only very rarely. The Court determined that there was nothing in the facts before it Ryanair would have been successful in obtaining the orders sought. They also determined that the State had not been endeavouring to avoid discovery; there was no willful default on the part of the state and the fact that there was delay is not suggestive of any negligence. The Court continued that even if it was minded to 'punish' the State for its action, Order 31, Rule 21 of the Rules of the Superior Courts (1986) does not fall to be exercised as a means of punishment for untimely compliance with a discovery order. The Court ultimately reserved the issue of costs for the now moot application to be dealt with by the trial judge upon the trial of the substantive dispute between the parties.

56. I find the above authority helpful in that the principles gleaned on such an application before the Court is clear. Therefore, I accept the submissions of Counsel for the Defendants that the Plaintiff has not provided the Court with any evidence that there was deliberate and willful refusal to make discovery which would move the Court to take such drastic measures to strike out the Defendants defence and enter judgment. Further, I am not minded to 'punish' the Defendants for its actions as I have made a finding above that while there was some delay it cannot be suggestive of negligence or unwillingness.

### **Disposition**

57. Therefore, having read the submissions of Counsel, having read and considered the Affidavit evidence, having read the relevant authorities and statutes I find that this application to strike and enter Judgment was **premature** as the Plaintiff has yet to move his Discovery Summons before the Court and as such I hereby dismiss the Plaintiff's Summons for the reasons stated above.


58. I will now set the matter down for the hearing of any extant Summonses, an order for the filing of any outstanding documents if necessary and set the matter down for trial.

59. On one final matter that of the delay in delivering this Ruling the Court reserved the delivery of its Judgment to a date to be fixed regrettably, the disruption caused by the Covid 19 pandemic was an event which greatly interfered with the Court's writing schedule. I apologize profusely for the delay in this matter.

60. The costs of this application are costs in the cause.

61. The Plaintiff is granted leave to appeal this Ruling.

Dated the 23<sup>rd</sup> August, 2022

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

