

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2019/CLE/gen/FP/00086**



BETWEEN

GEORGE KINGSLEY RUSSELL

Plaintiff

AND

SCOTIABANK (BAHAMAS) LIMITED

Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Edmond Russell for the Plaintiff
Mrs. Zia Lewis-Adams for the Defendant

HEARING DATE: March 30, 2022

RULING

Introduction:

1. There is one Summons filed in this Action by the Defendant on December 6, 2021, which formed the subject matter of the hearing. The Defendant's Summons seeks an Order that the Plaintiff's Writ of Summons and Statement of Claim filed herein on April 12, 2019 be struck out and the action dismissed pursuant to Order 18, Rule 19 (1) (a) and (d) of the Rules of The Supreme Court ("RSC") and that the Defendant be awarded its costs to be taxed if not agreed.
2. The Defendant's Summons is supported by the Affidavit of Christina Davis-Justin filed on December 6, 2021. The Defendant laid over Written Submissions and the Plaintiff made oral Submissions at the hearing this application. The Plaintiff meets the Defendant's Summons with an Affidavit in Support filed December 9, 2021 and by the Affidavit of Ms. Enda Gibson also filed on December 9, 2021. The issues are (1) whether the Statement of Claim discloses any triable issue, and (2) whether to permit the trial to proceed would be an abuse of the Court's process. The Court finds that the Statement of Claim

discloses no reasonable cause of action and to permit the trial to continue would amount to an abuse of the Court's process. The reasons for the Court's decision are as follows.

Statement of Facts

3. The Plaintiff's Statement of Claim states as follows:

"1. That Mr. George Kingsley Russell hereinafter called the plaintiff is a Bahamian citizen and resident of Fire Road, Coppers Town, Abaco in The Bahamas and was at all material times a customer of Scotiabank Bahamas Ltd.

2. That Scotiabank Bahamas Ltd. hereinafter called the Defendant is a company duly incorporated under the Statute Laws of the Commonwealth of the Bahamas and operates as a banking institution in the said Commonwealth.

3. That sometimes around 4th October 2018 the Plaintiff wrote a hand-written letter to the Defendant requesting that an investigation be done on his fixed account #550156371 (as it showed an incorrect balance). The letter was delivered to its Freeport Branch in Grand Bahama.

4. That on the 14th November 2018 the Plaintiff instructed his Attorneys Russell & Russell Law Chambers, to write a letter to the Defendant (see attached letter that is self explanatory) requesting information as the Plaintiff states that the account is in error and he would be most grateful if the matter could be investigated so that the matter could be finally resolved. The letter was addressed to the manager of the Freeport Branch.

5. On 12th December 2018 the Defendant emailed a history of the account from the time period of 1st September 1993 to 7th November 2018 and informed that the account was domiciled at the Marsh harbor, Abaco and that we should expect a response from them in the near future.

6. That the Plaintiff's account showed large sums of withdrawals, however, the Plaintiff states he absolutely did not make any withdrawals from that account nor did he instruct anyone to withdraw funds from his account, he further states that the account in question is his saving account and that he has other accounts that he use as his operating accounts.

7. That on the 16th January 2019 after waiting more than four weeks without a formal response from the Marsh Harbour, Abaco branch, we again wrote a letter to Scotiabank Bahamas Ltd. Freeport Branch requesting information on the matter and informing them

that we had not received a response from Marsh Harbour, Abaco branch.

8. That again, on February 18, 2019 Russell & Russell Law Chamber wrote a third letter to Scotiabank Bahamas informing that the Plaintiff nor his attorneys received a response from the Defendant and that the Plaintiff is now demanding that all funds be placed back on his account, failing which the Plaintiff had instructed that legal action be taken against the Defendant. That the manager of the Freeport branch informed that our missive was received and forwarded to the Marsh Harbour branch in Abaco.

9. That by various letter, notices and phone calls the Defendant was notified of the Plaintiff's intention to take further steps to resolve the matter however, the Defendant did not respond.

PARTICULARS OF LOSS

10. That by reason of the matters aforesaid, the Plaintiff is asking this honorable court to find the Defendant liable for the missing funds on the Plaintiff's account and that the court make an order that the Defendant replaced the missing funds along with interest and any other related charges.

AND THE PLAINTIFF CLAIMS:

- (1) Special Damages in the sum of \$;
- (2) Damages
- (3) Interests as aforesaid;
- (4) Costs
- (5) Such further and other relief as the court deems just"

Evidence

4. Ms. Christina Davis-Justin, an Associate with GrahamThompson states in her Affidavit that the Plaintiff claims that funds are missing from his account #550156371, a term deposit, at the Defendant Bank. That in 2018 the Plaintiff requested an investigation into his account which he claims showed an incorrect balance. That an investigation was conducted by the Defendant further to a request by the Plaintiff and it was determined that the balance was in fact correct as there were withdrawals made from the account by the plaintiff or authorized by the plaintiff from as early as 1994. That the Defendant provided the Plaintiff with a history of his account evidencing the withdrawals and

also advised the Plaintiff's attorney of a cash secured loan that the Plaintiff applied for in 2016, using the balance of his term deposit account as security for that loan. Exhibited to the Affidavit was a copy of a letter dated May 29, 2019, from Robinson Scavella, in house Counsel, for the Defendant to Russell and Russell Law Chambers which outlined the hereinbefore-mentioned findings of the Defendant. That there were partial withdrawals being made by the Plaintiff over a period of time commencing from 1994 and that in 2016. That the Plaintiff applied for a loan with the Defendant and used the balance of that account as security for that loan.

5. Mrs. Davis-Justin stated that the Plaintiff discovered a discrepancy on his account in 2018, however, based on the Defendant's records, the Plaintiff applied for a cash secured loan in 2016, at which time the balance on his term deposit account, being \$9,000.00 was used as security for the said loan. That the Defendant firmly believes that the Plaintiff having been aware of the balance on his term deposit account did not raise issue with it at the time of applying for the loan in 2016. That the Plaintiff thereafter remained a customer of the Defendant and did not raise an inquiry or bring a claim until 2 years later in 2018, at which time he closed his term deposit account and the balance of that account was credited to his remaining account with the Defendant.
6. That at Exhibit 2 of Mrs. Justin affidavit is a true copy of an application for Credit and Authority to Hold Funds on Deposit dated 28th April, 2016 and signed by the Plaintiff. The Application for Credit on page 2, shows the amount of \$9,004.31., which was the balance on the term deposit account that was used as security for the cash secured loan. That Mr. Russell signed the application and also gave the bank authority to hold the sum of \$9,000.00.
7. Mrs. Davis-Justin further stated that the Plaintiff's claim is in the vaguest of term with no specification of a liquidated amount as to the loss claimed to have been suffered. That the Plaintiff has also failed to set out a cause of action as against the Defendant or particularize or adduce proper particulars to support his claim and she urges the Court to strike out the action.
8. The Plaintiff states in his Affidavit that sometime in 2016 he visited the Defendant and he was informed by a servant or agent of the Defendant that they were holding card #5443358055024679. That without thinking he signed it and put it in his wallet but he never used the card. That around October 4, 2018 he and his daughter Edna Gibson

attended the Defendant. On entering the Defendant he was approached by a servant or agent of the Defendant a Mrs. Swain. He explained to her that he was returning the card because he never used it. He denied that he took money from his fixed account nor did he give anyone permission to remove monies from his account. That he asked the Court to rule in his favour because the monies were placed in the care of the Defendant to assist with his retirement years.

9. Ms. Edna Gibson, the Plaintiff's daughter, states in her Affidavit that sometime on October 4, 2018 she assisted her father in turning in the card that was given to him by Scotiabank and never used. That the card was returned to an employee of the bank named Mrs. Swain and that her father made a request to have it cancelled. That the Plaintiff also provided the bank with a letter to have the card cancelled. That in addition to requesting that the card be cancelled, the Plaintiff presented the bank with a letter, hand written by her and signed by him, requesting an investigation into his fixed account, that the monies was missing and that he did not know about that. That they left the Bank looking forward to a response soon.

Submissions

Defendant

10. Mrs. Zia Louis-Adams, of Counsel for the Defendant submitted, in part, that the words "reasonable cause of action or defence" stipulated in Order 18, Rule 19(1)(a) of the Rules of the Supreme Court, 1978 have been expounded by Lord Pearson in the Court of Appeal decision of **Drummond –Jackson v. British Medical Association** [1970] 1 All E.R. 1094 expressing that the words "reasonable cause of action", means a cause of action with some chance of success when only the allegation in the pleading are considered.
11. That further, Mr. Justice Marcus Smith in the recent case of **Allsop v Banner Jones Ltd** [2021] EWCA Civ 7 at paragraph 7 asserted that the court should be concerned about the merits of the claim and whether it meets the threshold of "reasonable arguability". That this provision addresses 2 situations: (1) where the content of a statement of case is defective in that, even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or (2) where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.

12. Mrs. Lewis-Adams submits that at paragraph 716 in Halsbury's Laws of England (Volume 32 2019.) it notes that "*A pleading may be struck out under the Civil Procedure Rules, where, for example it does not amount to a legally recognizable claims or defence, is defective in material respect, or relies on an unwinnable issue*".
13. That Order 18 Rule 19 clearly gives the court has the discretionary power to strike out pleadings and can do so at any stage of the proceedings especially if to refuse the application would result in costs being wasted in a trial of a hopeless action.
14. Mrs. Lewis-Adams submitted that it is axiomatic that the function of pleadings is to define the issues between the parties so that both the Plaintiff and the Defendant know what the other side's case is. Upon reading the Plaintiff's Writ of Summons and Statement of Claim, it is unclear what claims the Plaintiff is making against the Defendant and further what relief is being sought.
15. That essentially the Plaintiff's allegation is that his account had an incorrect balance and he made a request of the Defendant for an investigation into his account and the Defendant failed to respond in a reasonable or appropriate manner. That this allegation is not a cause of action but a complaint. A cause of action must comprise of all those things necessary to give a right of action. The Plaintiff has not alleged that there has been a breach of any kind, committed by the Defendant. Additionally, the Plaintiff does not allege that he has suffered any loss or specify what that loss is that he alleges he has suffered.
16. Mrs. Lewis-Adams submits that the Plaintiff's statement of claim falls short in particularizing exactly what his cause of action is. The Defendant does not know what case it has to answer. The Defendant is unable to properly defend itself as a result of the uncertainty with which the Plaintiff has posed his claims. In fact, the Defendant attempted to resolve the case by providing the Defendant and/or his attorneys with the results of his investigation, as this is what it understood the Plaintiff's complaint to be. The Plaintiff and/or his attorneys remain dissatisfied with the results of the investigation and as such, is using the court's resources as a "fishing exercise".
17. It is therefore submitted that not only is the Plaintiff's case not "reasonably arguable", his pleading does not amount to a legally recognizable claim and is defective in every respect. Further, the defect in the Statement of Claim cannot be remedied as the defect lies in the foundation of the Plaintiff's cause of action, or lack thereof. That when

applying the principle in *Drummond*, the Plaintiff has little to no chance of success when considering the pleading alone. That further, the Plaintiff's Writ of Summons is defective and lacks any reasonable grounds for bringing this Action. That in any event, the crux of his complaint has now been addressed by the Defendant.

Plaintiff

18. Mr. Edmond Russell, of Counsel for the Plaintiff, submitted, in part, that what the Defendant did in fact do was provide his Chambers with a copy of the history of the account showing where the monies were withdrawn, but it never sent any proof of who took the monies. That Mr. Russell is saying that he never took the monies and they are alleging in a letter from Mrs. Scavella that the monies were moved either by him or by him giving permission to another person to remove monies from the account.
19. That instead the Defendant just said well this is the history of the account. That the Plaintiff the Defendants to provide proof of how or who took the \$9,000.00.
20. That the Defendant is the keeper of the accounts and as such it should be able to provide the Plaintiff with how the monies was removed from his account, because the Defendant is saying that the monies was moved by the Plaintiff without proof or by it was moved by his giving someone else authority to withdraw from that account which the Plaintiff is saying he never did. That he had a second account that he was operating from. That he had no need to touch that the account simply because that money was put on a fixed account for his retirement age, for his retirement.
21. That the Statement of Claim refers to the whole \$26,000.00 because he is saying that he never moved the money. He put the money on the fixed account, but he never removed the money nor did he apply for a loan. That the Plaintiff is of the opinion that the loan that they are referring to is the credit card which he never used. He never really applied for it, but he did sign for it. The Defendants never showed any proof of where there was any use of the card, any charges to the card and he returned it unused. The Defendant who holds itself out as bankers, professionals, they should provide proof of how and who took the entire funds. That the allegation is that they are responsible for the missing funds because he did not move it and the money is now missing. That the Plaintiff expects the Defendant to produce withdrawals slips or authorizations which would show who withdrew the funds.

Issues

22. The issues for determination by the Court are:

- (1) whether the Writ of Summons and Statement of Claim discloses a cause of action;
and
- (2) whether to permit the trial to proceed would be an abuse of the process of the Court.

Analysis

The Law

23. Order 18 rule 19 (1) (a) and (d) of the RSC provides:

“(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).” (emphasis mine)

Abuse of the Process of the Court

24. Order 18, rule 19 (1) (d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appears to be “an abuse of the process of the Court.” This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (**Commentary at 18/19/18 on page 352 of the Supreme Court Practice 1, 1999 Castro v Murrary (1875) 10 Ex. 213**).

Discussion and Conclusion

25. In the Statement of Claim the Plaintiff essentially claims that the Defendant mishandled the Plaintiff's account and is responsible for that and should be ordered to pay the missing or removed money back. The relationship between bank and customer is contractual in nature and the Statement of Claim fails to state which contractual obligation the Bank has breached. The Statement of Claim does not plead any specific breach on behalf of the Bank in tort either. Breach of fiduciary duty does not arise as this is not a situation where the Bank or its Attorneys have failed to give advice or gave advice to the customer to his detriment. In short the Plaintiff has not pleaded any breach of legal obligation by the Defendant. The Statement of Claim does not even state what sum of money and upon which date the sum or sums of money is missing or was removed from the Plaintiff's account, or by whom it was removed. The Statement of Claim is defective in a material respect. I must conclude that a trial of this action is bound to fail and that it would be an abuse of the process of the Court to allow the action to proceed to trial.

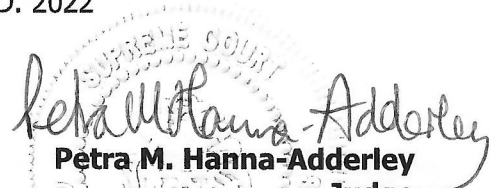
Disposition

26. In conclusion, having read the pleadings filed to date, the written submissions of both counsel, having heard Counsel for both parties, having considered the authorities relied upon by the Defendant and all the circumstances of the case, I find that the Plaintiff's Statement of Claim discloses no triable issue and that to permit the action to continue on the pleading filed would amount to an abuse of the Court's process. The Writ of Summons and Statement of Claim and therefore the action is dismissed.

Costs

27. Costs usually follow the event. I see no reason to depart from this principle. The Defendant having been successful in this application, the costs of this application and of the action are awarded to the Defendant to be taxed of not agreed.

Dated the 16th day of June A. D. 2022


Petra M. Hanna-Adderley
Judge

