



[2021] JMSC Civ 4

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV 03431

BETWEEN	JANETTE BROWN (As Executor of Estate of Clayton Roy Turner and in her Personal Capacity)	CLAIMANT/RESPONDENT
AND	JOSCELYN CAMPBELL	1ST DEFENDANT/APPLICANT
AND	DAZIEL DUNCAN	2ND DEFENDANT
AND	ALRICK JOHNSON	3RD DEFENDANT
AND	JAMAICA NATIONAL BUILDING SOCIETY JAMAICA LIMITED (NOW JN BANK)	4TH DEFENDANT/APPLICANT

IN CHAMBERS

Mr. Garth McBean QC instructed by Garth McBean & Co., Attorneys-at-Law for the 1st and 4th Defendants/Applicants.

Mr. Chukwuemeka Cameron instructed by Carolyn C. Reid & Co., Attorneys-at-Law for the Claimant/Respondent.

Heard: December 2, 2020 and January 15, 2021

Civil Procedure - CPR 26.3 - Application to strike out statement of case - Discloses no reasonable ground for bringing claim - Constitutional right to privacy of information - Building society and employees' duty of confidentiality - Disclosure exceptions - Own interest and required by other law.

Application for indemnity costs on abandonment of the application for summary judgment at the hearing of application.

C. BARNABY, J

INTRODUCTION

- [1] On the 2nd December 2020 the 1st and 4th Defendants' Notice of Application for Court Orders to Strike Out Statement of Case or for Summary Judgement came on for hearing. It was filed on the 21st March 2019. Only the first of the two titular applications proceeded following the indication from Mr. McBean QC that the summary judgment relief was no longer being pursued. This belated indication prompted an oral application by Mr. Cameron, Counsel for the Claimant, for an indemnity costs order against the 1st and 4th Defendants (the Applicants). A decision on both applications was reserved to today's date with permission given to the Court by Counsel, to determine the indemnity costs application on the basis of the parties' written submissions. I thank both Counsel for that facility.
- [2] The substantive claim commenced by way of Fixed Date Claim Form filed on 12th September 2018 but was ordered by Batts J, on the 28th November 2018, to continue as if begun by claim. Particulars of Claim and a Defence by the 1st and 4th Defendants were filed on the 31st January 2019 and 21st March 2019 respectively.
- [3] The Claimant sues in her own capacity as an account holder at the Jamaica National Building Society, now JN Bank, the 4th Defendant (hereinafter called "JN"). She opened an account there on the 6th June 2012. She also brings a claim in her capacity as the Executor of the Estate of Clayton Roy Turner (hereinafter called the Estate), her deceased common law husband. The spousal relationship was declared by order of the court on 26th July 2010; and a Grant of Administration in respect of Mr. Turner's estate was obtained by the Claimant on the 8th May 2012. Up to the time of Mr. Turner's death on the 28th August 2006, he held two accounts

at JN. One of those accounts (hereinafter called “the Joint Account”), was held jointly with his daughter who is not a party to these proceedings.

- [4] During the course of an investigation into allegations of fraud at JN, the 1st Defendant, a Senior Manager in charge of fraud investigations there, gave a statement to the police on the 17th April 2015. It was stated that the 2nd and 3rd Defendants along with external members known to them illegally withdrew funds from a number of accounts, including the Joint Account. The numbers to the Joint Account as well as the Claimant’s account with JN were included in the statement. It was stated that on the 21st March 2015 the Claimant acted in concert with the 2nd Defendant to fraudulently close the Joint Account; transfer the funds therein to the Claimant’s account; and that the Claimant later withdrew some of the funds by way of ATM and POS transactions. The Claimant’s biographical data, Mr. Turner’s original and forged Account Signature Card, withdrawal forms in the Claimant’s name, photocopy of Elector ID and TRN, and Extract of Accounts in both their names were disclosed in the statement. The 2nd Defendant is also said to have disclosed the Claimant’s banking information to the police. The 1st, 2nd and 3rd Defendants were all employed to JN at the material time.
- [5] Arising from the fraud investigations, the Claimant, the 2nd and 3rd Defendants were criminally charged. Informations were laid on the 16th September 2015 charging the Claimant with obtaining money by means of false pretence and conspiracy to defraud.
- [6] It is the Claimant’s contention that the Defendants unlawfully and without her consent, disclosed her banking account information and that of the Estate of Mr. Clayton Roy Turner to the police, causing her to suffer irreversible damage. Damage is particularised to include the Claimant’s criminal prosecution and inability to access monies in her account. In consequence, the Claimant in her Particulars of Claim claims declaratory relief that the disclosure by the Defendants contravened her constitutional right to protection of privacy of property as guaranteed by section 13(3)(j)(iii) of the **Charter of Fundamental Rights and**

Freedoms (hereinafter called “the Constitution”); that the Defendants have breached section 44 of the **Financial Institutions Act** and the common law duty of secrecy owed to her by making the disclosures to the police; that in the absence of lawful authority or the Claimant’s consent, the Defendants were not entitled to disclose banking information to a third person; that the “*3rd Defendant (sic)*” as trustee of the monies held on the Claimant’s behalf breached its duty to her to employ only honest persons; and that the Defendants defrauded the account of the deceased Clayton Roy Turner.

[7] An injunction restraining any further disclosure to third parties was also sought but is no longer being pursued by the Claimant following the conclusion of the criminal proceedings in her favour.

[8] Whereas there is a judgment on admission by the 2nd and 3rd Defendants in respect of the instant claim, the 1st and 4th Defendants persist in defending the claim which subsists against them. It is their defence that the consent of the account holders was not required for the disclosure of banking information to the police in the course of fraud investigations; that the disclosures were lawfully made pursuant to section 85(2) and paragraphs (a), (d), (i), (j) and (k) of the Eighth Schedule of the **Building Societies Act**, and the **Proceeds of Crime Act** (hereinafter called “**POCA**”); the disclosure was justified in a free and democratic society and did not amount to a breach of any right the Claimant has under the Constitution. The 1st and 4th Defendants do not admit that JN had a duty to employ honest employees, a matter to which they have put the Claimant to strict proof; and it is denied that JN knowingly or recklessly employed or had dishonest persons in their employ. It is further contended that JN, by virtue of its registration as a building society under the **Building Societies Act** at the material time, was exempt from the provisions of the **Financial Institutions Act**.

[9] The Applicants’ application was made on these several grounds:

- (a) *The Claimant by her claim is seeking to prohibit the disclosure of information concerning fraudulent actions of the Claimant in concert with the 2nd and 3rd Defendants, which is currently the subject of criminal proceedings in the Parish Court at Half Way Tree, which is set for trial on the 15th and 16th May, 2019. As such the claim herein is an abuse of the process of the court and is likely to obstruct the just disposal of the criminal proceedings.*
- (b) *With reference to the relevant provisions of the Building Societies Act, the Proceeds of Crime Act and the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, the Claimant's statement of case filed herein discloses no reasonable grounds for bringing the claim herein against the 1st and 4th Defendants.*
- (c) *The Claimant does not have the requisite locus standi to prosecute a claim on behalf of the Estate of Clayton Turner, in so far such a claim concerns the account which is the subject of the pending criminal proceedings against the Claimant in her personal capacity.*
- (d) *The Claimant has no real prospect of succeeding in the claim herein against the 1st and 4th Defendants.*
- (e) *The Claimant's statement of case discloses no reasonable grounds for bringing a claim.*
- (f) *The said orders will further the overriding objective by ensuring that the case is dealt with expeditiously and fairly.*

[10] In light of the determination of the criminal prosecution in the Claimant's favour after the filing of the application, it was conceded Mr. McBean QC at the hearing

that the ground lettered (a) is no longer relevant. Having abandoned the claim for summary judgment, a like observation arises in respect of ground (d).

CONCLUSION

- [11] Having considered the application to strike out, I find that it is to be granted in part. All the claims in the Statement of Case said to be brought on behalf of the Estate of Clayton Roy Turner are to be struck out; as well as the claims brought by the Claimant in her own capacity for breaches of common law and statutory duties of confidentiality, and of the constitutional right to privacy of information. This is on the basis that no reasonable ground for bringing those claims is disclosed on the Claimant's Statement of Case.
- [12] Under the **Building Societies Act**, JN had an interest in disclosing account information to the police where its customers' accounts were being defrauded and sums converted to the use of the conspirators. Additionally, both JN as an entity within the Regulated Sector under the **POCA**, and the 1st Defendant who came to know of the money laundering concerns in the course of her employment with JN, were compelled by law to make the disclosures to the police. There being no allegation that the legislations which permitted disclosure were unconstitutional, the Claimant's Statement of Case does not disclose any breach of the constitutional right to privacy of information.
- [13] On the other hand, it was not so plain and obvious that the Claimant does not have any reasonable grounds for bringing a claim against JN for an alleged breach of a duty it may have owed to her in knowingly or recklessly employing dishonest persons, who caused the Claimant to become embroiled in criminal prosecution and suffering damage. The Claimant is therefore permitted to pursue that claim against the 4th Defendant.
- [14] On the application for indemnity costs, while the withdrawal of the summary judgment application was belated, the 1st and 4th Defendants in making it or in

pursuing the criminal charge against the Claimant had not acted in a manner which warrants such an award.

[15] The reasons for these conclusions appear below.

REASONS

THE STRIKING OUT APPLICATION

[16] Pursuant to CPR 26.3 (1) (c) a court may strike out a statement of case in whole or in part, if it appears to it *“that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;”*. This has been recognised as part of the wider duty to further the overriding objective of dealing justly with cases, which includes the appropriate allocation of the court resources such as time.

[17] As stated by Harris J.A. in **S & T Distributors Limited and S & T Limited v. CIBC Jamaica Limited and Royal & Sun Alliance** SCCA 112/04 delivered 31st July 2007, 29

The striking out of a claim is a severe measure. The discretionary power to strike out must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implication of striking out and balance them carefully against the principles as prescribed by the particular cause of action which sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases.

[18] It is my view, notwithstanding the submission of Mr. Cameron that the court should be loathed to entertain summary judgment applications where constitutional relief is being sought, that the above quoted principle is equally applicable to claims for constitutional relief in appropriate cases, as it is for other claims. To find otherwise would result in plain and obviously unmeritorious claims for constitutional relief

being permitted to exhaust the litigation process, including trial of those claims. The overriding objective of dealing with cases justly could hardly be said to be advanced in permitting such claims to go unchecked, their striking out having already been excluded by the CPR.

Locus Standi to bring claim on behalf of the Estate and defrauding the Joint Account

- [19] It is the position of the 1st and 4th Defendants that “[t]he Claimant does not have the requisite locus standi to prosecute a claim on behalf of the Estate of Clayton Turner, in so far such a claim concerns the account which is the subject of the pending criminal proceedings against the Claimant in her personal capacity.”
- [20] In paragraph 29 of their written submissions, the 1st and 4th Defendants contend, consistent with the language of the previously stated ground, that the Claimant did not have the locus standi to bring a claim on behalf of the Estate “... *having regard to the pending claim and her apparent conflict of interest when one considers the fact that she was both conspirator and/or facilitator in the said fraudulent transactions and also intended beneficiary from the illicit an [sic] fraudulent transaction.*” While this was a meritorious argument when the 1st and 4th Defendant’s filed their application, the Criminal proceedings have since been determined in the Claimant’s favour therefore rendering this argument nugatory. In consequence, Mr. McBean QC made an adjustment in oral submissions before me, without objection from the Claimant’s Counsel.
- [21] It was argued by Mr. McBean that the Claimant did not have locus standi to initiate the claim in respect of the Joint Account because she was only declared to have the beneficial interest in the funds therein on 3rd March 2020, which order did not operate retroactively. He went further to state that the claim should be struck out on this basis alone as disclosing no grounds for bringing the claim on behalf of the Estate.

[22] It was Mr. Cameron's response that the Claimant, as the Administrator of the Estate of the deceased Joint Account holder, had a real interest in the funds in the account and in their preservation for the benefit of the Estate. This, he contended, gave her the necessary standing to initiate a claim on behalf of the said Estate, notwithstanding that her own beneficial interest in the funds on credit in the account was only declared on the 3rd March 2020. I do not agree entirely with these submissions.

[23] In **Paget's Law of Banking** 15th ed (LexisNexis 2018), [5.21], the following is stated in respect of the chose in action against a bank relative to a joint account,

[e]ach holder of a joint account co-owns the entirety of the chose in action against the bank. Where an account is a joint account and one party dies, the survivor is in ordinary cases entitled to the whole amount, either under the law of devolution between joint owners or by custom of bankers or by express (and such a clause is common) or implied agreement. The banker obtains a good discharge by paying the survivor.

However, although the joint holders will in law be joint tenants, the beneficial interest remains a matter of debate in any particular case. With some assistance from the presumptions of resulting trust and advancement, depending upon the relationship between the joint holders... [T]rusts law must determine whether the beneficial interest was also jointly held or whether it was held by only one of the account holders. If one account holder dies, and the beneficial interest was jointly held, then the survivor will be the sole legal and beneficial owner and nothing will pass into the estate. If the account holders were holding the account on trust for only one of them, then if that beneficially owning holder dies the survivor will hold on trust for the deceased's estate, although if the non-beneficially owning trustee dies then the survivor will be sole legal and beneficial owner.

- [24] I agree with Mr. Cameron that an administrator of the estate of a joint account holder may have an interest in the funds in a joint account which is in the name of the deceased and a surviving joint account holder. As is evident from the preceding extract from **Paget's**, funds may in fact be held by the surviving joint account holder on trust for the deceased account holder's estate. The interest would undoubtedly involve taking steps to determine whether the beneficial interest in the account was jointly held by the account holders or whether it was held on trust by one for the other, as the Claimant here did in separate proceedings. It would also include identifying those who may be beneficially entitled to the funds on credit in the account, if not the surviving joint account holder; and ensuring that the funds are preserved for those who are entitled to benefit and appropriately distributed. Beyond this, I cannot agree with Mr. Cameron's submission.
- [25] I am mindful that a joint bank account is a debt owed to the holders of the account jointly and is only enforceable by them against the account holding institution. The Claimant refers to the accounts as bank accounts and there is no reason to doubt that they are of that character. There is no dispute that the legal title to the Joint Account passed to the surviving Joint Account holder on Mr. Turner's death by operation of survivorship. The beneficial entitlement to the credit on the account was the subject of dispute between the Claimant and the surviving account holder however, and was only determined in the Claimant's favour on the 3rd March 2020.
- [26] The instant claim, which has been brought on behalf of the Estate is not for a determination as to whether the surviving joint account holder held the sums on credit in trust for the Estate. The claim, so far as it relates to the Joint Account, is aimed at enforcing a right to confidentiality of account information and for a declaration that the Joint Account held at JN was defrauded by the society's employees. In my view a claim must subsist for the benefit of a claimant at the time that the claim is being filed and cannot be filed in anticipation of the right sought to be enforced by it, arising at some future date.

[27] Until the 3rd March 2020, there was no determination that the credit in the Joint Account was being held on trust by the surviving joint account for the benefit of the Estate to give locus standi to the Claimant *qua* Executor in respect of the Joint Account prior to that date. Further, it was only on being declared entitled to the credit on the account that the Claimant could call upon JN pay out to her. There is no claim that JN has refused to pay out the funds on credit in the account to the Claimant consequent on her interest being determined and declared to sustain a claim that JN defrauded the account. Accordingly, the claims to enforce any rights which existed for the benefit of the Joint Account should be struck out on the basis that the Claimant did not have the locus standi to commence such a claim. In any event, the breach of confidentiality claims brought in respect of the Estate are to be struck out for reasons which are addressed subsequently.

Breach of Duty of Confidentiality or the Constitutional Right to privacy of information

[28] On a reading of the Claimant's Statement of Case, which was issued on her own behalf and on behalf of the Estate, the constitutional and statutory claims, as well as the claim for breach of the common law duty are concerned with the disclosure of confidential information. In particular, the claims center on whether JN and its employees were permitted to disclose banking information of account holders to the police in the course of a fraud investigation, in the absence of consent of the account holders. I therefore find it convenient to deal with these claims together.

[29] At common law, there is an implied contractual duty of confidentiality owed by a bank to its customers, with certain well established exceptions as formulated in the oft cited *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461. These exceptions include disclosure under compulsion by law, public duty, in the bank's interest or with the express or implied consent of the customer. In respect of banks, this duty and the limits to it are codified in section 45 of the *Banking Act*. For financial institutions to which the *Financial Institutions Act* apply, the duty and like exceptions are codified in section 44 of that legislation.

[30] It is the Claimant's pleaded case that the Defendants, in breach of section 44 of the **Financial Institutions Act** disclosed her banking information and that relating to the Joint Account to the police. As pointed out by Counsel for the 1st and 4th Defendants, the provision is inapplicable. Pursuant to the section 1(2)(e) of the said Act, it does not apply to building societies or to commercial banks. JN was registered as a building society at the material time. There is therefore no reasonable ground for bringing that particular claim and accordingly, I would order that aspect of the Claimant's statement of case struck out.

[31] The duty of confidentiality by a building society to its customers is also codified at section 85 of the **Building Societies Act**, which, so far as is relevant states,

(1) Subject to subsection (2), no official of any society and no person who by reason of his capacity or office has by any means access to the records of the society, or any registers, correspondence or material with regard to any customer's accounts shall, while his employment in or, as the case may be, his professional relationship with the society continues or after the termination thereof, give, divulge or reveal any information regarding the money or other relevant particulars of that customer's.

(2) Subsection (1) shall not apply in any of the circumstances specified in the Eighth Schedule.

(3) ...

[32] The Eight Schedule provides thus,

Section 85 (1) shall not apply in any case where –

- (a) the information is disclosed by an officer of a society to another officer of that society;*
- (b) the customer or his personal representative gives written permission for disclosure of the information;*

- (c) *the customer is an undischarged bankrupt or, if the customer is a company, it is being wound up;*
- (d) *the information is disclosed in connection with civil proceedings*
 -
 - (i) *arising between the society and the customer relating to transactions carried out by the customer; or*
 - (ii) *brought by the society by way of interpleader in connection with competing claims by two or more parties to money in the customer's account;*
- (e) *the information is disclosed to an authorized officer;*
- (f) *the disclosure is made on the written direction of the Minister to the police or to a public officer who is duly authorized under the provisions of any law for the time being in force which requires such disclosure for the purpose of the investigation or prosecution of a criminal offence;*
- (g) *the society has been served with a court order attaching money in the account of the customer;*
- (h) *the Minister in writing directs such disclosure to a foreign government or agency of such government where there exists between Jamaica and such foreign government an agreement for the mutual exchange of information of such kind and the Minister considers it in the public interest that such disclosure be made;*
- (i) *the Minister in writing directs such disclosure in the public interest;*
- (j) *the circumstances are such that it is in the interests of the society that the information be disclosed;*
- (k) *disclosure is required under another enactment;*
- (l) *disclosure is required by virtue of an order of the court, other than an order under paragraph (g).*

[33] The circumstances prescribed in the Eight Schedule are not conjunctive and the permission or consent of the customer of a building society is but one of several circumstances under which disclosure of account information may be made to a third party without breaching the duty of confidentiality. Two others which appear clearly relevant to the facts of this case are disclosure in the interest of the building society and where required under another enactment.

- [34] It was during the course of JN's own fraud investigations that the discovery was made of funds being removed from the accounts of deceased persons by two of its employees, the 2nd and 3rd Defendants, into accounts held by others, which were converted to their use. The 2nd and 3rd Defendants have admitted the Claimant's claims against them, including that of defrauding the Joint Account.
- [35] At the time the Claimant entered into transactions in respect of the Joint Account and deposited the proceeds therefrom into her own account at JN, there remained one legal owner of the former named account, Mr. Clayton's daughter, the surviving account holder. The transactions would objectively appear to be unusual. Further, where the funds in the account are in the nature of deposits by the customer, giving rise to a creditor and debtor relationship between the society and the account holder, the society also has an interest in the funds in the account. The accounts were in the nature of bank accounts, as they are referred to by the Claimant in her pleadings, that relationship existed between JN and the account holders. In those circumstances, it was in JN's own interest to report the findings of its enquiry to the police for investigation into suspected criminal conduct at the building society involving any of its customers' accounts.
- [36] Disclosure was also necessary by compulsion of law, specifically **POCA**. Under that legislation, entities in the Regulated Sector, including building societies and persons employed in them, have an obligation to report money laundering concerns to authorised officer when suspicions of money laundering come to their attention during the course of their work. Constables are authorised officers. There is also a duty under the Act not to engage in conduct which would prejudice any investigations into money laundering. Breach in either regard is at pain of criminal penalty. Where disclosures are protected within the meaning of **POCA**, they do not constitute a breach of any restriction on the disclosure of information, however those restrictions came to be imposed per section 100(2).
- [37] It is no part of the Claimant's case that the provisions of the **Building Societies Act** or **POCA**, which permit disclosure of account information by a building society

or persons who come to information by virtue of their employment therein, are unconstitutional. In the absence of such an allegation, disclosure which was authorised by these legislations could not reasonably be said to have given rise to any *prima facie* breach of the right to privacy of information guaranteed by the Charter of Fundamental Rights and Freedoms.

[38] In all these circumstances, I find that there is merit in the submission of Counsel for the 1st and 4th Defendants that the Claimant's Statement of Claim discloses no reasonable grounds for bringing any of the claims for breaches of the duty of confidentiality or the constitutional right to privacy of information in respect of her account or the Joint Account, against either or both Defendants who have made the application to the court.

JN Knowingly and recklessly having dishonest persons in its employ

[39] It is a part of the Claimant's pleaded case that JN owed her a duty to employ only honest employees who would provide the best services and that she would never have been exposed to criminal charges were it not for the 4th Defendant knowingly and recklessly having dishonest persons in its employ. There were no submissions by either Counsel as to whether this part of the claim should be struck out as disclosing no reasonable grounds for bringing the claim.

[40] Annexed to the Claimant's Particulars of Claim is a copy of the statement of the 1st Defendant to the police where she disclosed that the 2nd and 3rd Defendants, who were then employed to the 4th Defendant, had orchestrated the fraudulent withdrawal of funds from accounts of deceased account holders as early as the 22nd October 2014. This is almost five (5) months before the Claimant and the 3rd Defendant were alleged to have colluded in defrauding JN relative to the Joint Account, for which she was prosecuted and eventually acquitted.

[41] A claim should only be struck out on the basis that it discloses no reasonable ground for being brought and then only in plain and obvious cases. The 4th Defendant admittedly offered financial services to the Claimant which would no

doubt require the exercise of some care and skill, the scope of which I would not hazard to determine in the absence of argument on the point. This, together with the disclosure by the 1st Defendant is her statement to the police as to the commencement date of fraudulent activities by the 2nd and 3rd Defendants; and the fact that months passed between that event and the date of the incident involving the Claimant and her JN account, I decline to strike out the Claimant's Statement of Case in respect of this specific claim, especially in circumstances where the parties made no specific submissions in respect of it.

THE APPLICATION FOR INDEMNITY COSTS

[42] Following the indication of Mr. McBean QC that the 1st and 4th Defendants would not proceed with the application for summary judgment, which is one of two substantive reliefs sought on the Application, Mr. Cameron made an oral application for indemnity costs. It is the latter's submission that it was so out of the norm and unreasonable for the application to be filed claiming the relief, which is not permitted by the CPR, and then withdraw it at the time of the hearing. It was contended that this should be marked by an award of indemnity costs against the Applicants in any event.

[43] Between both Counsel a number of authorities were cited on the principles which are applicable to an application for indemnity costs. For present purposes I need not go further than the dicta of Brooks J (as he then was) in **Michael Distant and anor. v Nicroja Ltd. and ors.** Claim No. 2010 HCV 1276 delivered on 8th March 2011 which appears in the submissions of the parties. At pp. 10 -11 of the judgement, the following statement by Coulson J in **Noorani v Calver** [2009] EWHC 592 (QB) was approvingly cited and emphasised, "*[i]f indemnity costs are sought, the court must decide whether there is something in the conduct of the action, or the circumstances of the case in question, which takes it out of the norm in a way which justifies an order for indemnity costs.*"

- [44] That that should be the approach of the court on an application for indemnity costs is unsurprising given that the practical effect of such an order, as aptly stated by Brooks J at p. 4 “... is to avoid the taxed costs being assessed at a figure, less than the total of the relevant costs that a party has actually incurred.”
- [45] It was Mr. Cameron’s submission that Counsel for the 1st and 4th Defendants ought to have known that summary judgment was not available where constitutional relief is being pursued and at the very least, should have been so aware on receipt of the Claimant’s written submissions filed 17th November 2020 and therefore withdraw the application altogether. It was his further submission that instead of withdrawing the application, Mr. McBean QC made submissions on striking out in circumstances where his written submissions were based “solely” on the application for summary judgment.
- [46] Counsel also submitted in aid the fact that the 4th Defendant was the complainant in criminal proceedings against the Claimant which were determined in her favour, and otherwise determined against the 2nd and 3rd Defendants who had engaged in the criminal conduct whilst employed by the 4th Defendant.
- [47] As I understand Mr. Cameron’s main complaint in these regards, the conduct of the 1st and 4th Defendants is demonstrative of their proclivity to approach the court with baseless claims, in circumstances where the parties are not on equal footing financially.
- [48] At the time of the filing of the Application, the criminal proceedings against the Claimant as well as the claim for determining the beneficial ownership of the Joint Account still subsisted. The claim, although commenced by Fixed Date Claim Form was ordered to proceed as a claim. It was submitted therefore, on behalf of the 1st and 4th Defendants, that it was open to the court to enter summary judgment in respect of those claims being pursued for redress other than under the Constitution, in exercise of the court’s power to dispose of parts of a claim. I accept this submission on the basis that summary judgment is available on a particular

issue in a claim pursuant to CPR 15.2. In my view, the summary judgment application was therefore not bound to fail in its entirety. As it transpired however, the Court was not invited to grant summary judgment on particular issues in the claim, the application was simply withdrawn at the start of the hearing.

[49] I agree with Mr. Cameron that when one looks at the various subheadings in the 1st and 4th Defendants' written submissions, they appear to be geared towards the summary judgment application. This notwithstanding, I find that the arguments which were in fact advanced were capable of supporting either or both applications. Further, Mr. Cameron was in no doubt that an application for striking out was being made as it was one of the reliefs sought on the Application and was supported by several grounds. In fact, a substantial portion of the Claimant's written submissions were in response to the application for striking out whereas the response to the application for summary judgment was very briefly stated.

[50] The withdrawal of the application for summary judgment was ill-timed, particularly in light of the constitutional claim, for which the particular process is not available. Although it should not be the norm that a particular relief on an application is abandoned only at the point of hearing of the application, I do not believe that it is conduct which warrants an award of indemnity costs especially in context of the conclusions arrived at on the striking out application.

[51] Having found that the Claimant's Statement of Case discloses no reasonable grounds for bringing all but one of her claims, it cannot be said that the application for summary judgment on issues, other than for constitutional relief, was baseless. As it relates to the 4th Defendant's pursuit of criminal prosecutions against the Claimant, I would not, without more, regard such conduct as out of the norm, especially where funds were moved from the Joint Account to the Claimant's account when no determination had been as to her beneficial entitlement to the sums on credit in the said Joint Account.

[52] In these circumstances I do not agree that there is anything in the conduct of the 1st and 4th Defendants outside the norm which would in any way justify an order for indemnity costs. The Claimant's application for indemnity costs is accordingly refused.

ORDER

1. The 1st and 4th Defendants' Notice of Application for Court Orders to Strike Out Statement of Case or for Summary Judgement filed on the 21st March 2019 is granted in part as follows:
 - i. All claims in the Statement of Case against the 1st and 4th Defendants brought on behalf of the Estate of Clayton Roy Turner are struck out;
 - ii. The Claimant's claim in the Statement of Case against the 1st and 4th Defendants in her personal capacity for breaches of common law or statutory duties of confidentiality and the constitutional right to privacy of information are struck.
2. The Claimant is to file and serve an Amended Particulars of Claim on the 4th Defendant on or before the 29th January 2021 to pursue her claim against it for breach of duty in knowingly and recklessly having dishonest persons in its employ.
3. The 4th Defendant is to file and serve its Amended Defence on the Claimant on or before the 15th February 2021.
4. By the court, the claim which subsists between the Claimant and the 4th Defendant is referred to mediation following the filing and service of the 4th Defendant's Amended Defence on the 15th February 2021, which mediation must be concluded within ninety (90) days of the said date.
5. The Claimant's application for indemnity costs is refused.
6. 75% of the costs of the Application to the 1st and 4th Defendants, to be taxed if not sooner agreed.

7. The Attorneys-at-Law for the 1st and 4th Defendants are to prepare file and serve this order.