THE EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. NEVHCV2017/0117

BETWEEN:

Fletcher St. Jean

Claimant

and

[1] Regulator of International Banking
[2] Financial Services Regulation and Supervision Department
[3] Minister of Finance
[4] Nevis Island Administration

Defendants

Appearances:-
Ms. Midge Morton with Ms. Maurisha Robinson for the Claimant
Ms. Rhonda Nisbett-Browne for the Defendants

2018: May 16,
October 8,

JUDGMENT

CHARLES-CLARKE J:

Introduction

[1] This is my decision in an application by the Claimant to strike out certain paragraphs and parts of paragraphs of the affidavits of the Defendants in a claim for judicial review.

[2] The Claimant filed a fixed date claim for judicial review supported by affidavit on 22nd December 2017. In his application for judicial review the Claimant is seeking inter alia:

i) an order of certiorari to quash the purported decision of the Defendants to revoke the Claimant's status as a fit and proper person under section 80 of the **Nevis International Banking Ordinance, 2014,** the **(NIBO)** rendered on or about December 2016 or January 2017;

ii) a declaration that the Claimant is a fit and proper person under the NIBO to hold a managerial position as a registered licensee thereunder;

iii) an order that the Defendants acted irrationally, and in bad faith and as public authorities, acted unlawfully and unfairly when they summarily revoked the Claimant's status as a fit and proper person under the NIBO;

iv) damages against the Defendants, including aggravated and exemplary damages.

[3] The Claimant averred that as a result of the action of the First and Second Defendants deeming him to no longer be a fit and proper person to hold a managerial position with Bank of Nevis International (BONI) as designated under the NIBO his employment with BONI as business development Manager was terminated.

[4] On 13th February 2018 the First and Second Defendant (who also represented the third and fourth defendants) filed affidavits in reply to the fixed date claim as the regulator of international banking and regulator of the financial services department respectively. The Defendants averred that the Claimant's termination with BONI was a result of his own action and misconduct as business development manager of BONI and not as a result of him being deemed no longer a fit and proper person.

The Application to Strike Out

[5] On 15th March 2018 the Claimant filed an application to strike out some parts of the affidavits of the First and Second Defendants. The application was supported by the affidavit of the Claimant.

[6] In his application to strike out, the Claimant applied for inter alia:

i) an order pursuant to CPR 26.3.(1) that paragraphs 10, 12-14, 16-19, 23-25, 27-29, 34, 40, 42, 45, 48, 66, 67 and 76 of the affidavit of Heidi Lyn-Sutton (the Second Defendant) and paragraphs 12 and 33 of the affidavit of James Simpson (the First Defendant) be struck out;

ii) cost and any other order that this court deems appropriate.

[7] The grounds for the application were that the impugned paragraphs were in breach of CPR 26.3 (1) and were an abuse of process and likely to obstruct the just disposal of the case. In her oral arguments learned counsel for the Claimant Ms Midge Morton submitted that the impugned paragraphs were in breach of CPR. 30.3 and were either statements of opinion, legal arguments and conclusions and or were scandalous, irrelevant or otherwise oppressive matter. She relied on the principles for striking out parts of the affidavit as laid down by Hariprashad-Charles J. in the cases of **JIPFA Investments Limited v The Minister of Physical Planning and Alred Frett and Natalie Brewley**[1] (**JIPFA**) and the dicta of Blenman J (as she then was) in **Delcine Thomas v Victor Williams.**[2]

[8] The first and second Defendants filed affidavits in opposition to the application on 4th of May 2018. The Defendants contended that the impugned paragraphs were neither irrelevant, legal arguments, scandalous or offensive, but rather relate to material facts required to be proven in the proceedings, therefore the application is frivolous and without merit and falls short of the required threshold for striking out.

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[1] BVIHCV2011/0040

[2] ANUHCV2007/0530

[9] Learned counsel for the Defendants Ms Rhonda Nisbett-Brown submitted that the impugned paragraphs are important and in accordance with the applicable legal rules and principles. She argued that these paragraphs must be read collectively to present the entire case for the Defendants to allow for the just disposal of the matter. She referred to the case of **Ian Peters v Robert George Spencer** [3] where George- Creque J.A (as she then was) following the dicta of Edwards J.A in **Citco Global Custody NV v Y2K Finance Inc.**[4] noted the harsh jurisdiction of striking out and the need to exercise it sparingly.

The Issues

[10] The issues which the court has to determine are:

i) Whether the impugned paragraphs offend CPR Part 30. 3 (1) and (3) and CPR Part 26.3;

ii) Whether the impugned paragraphs should be struck out.

The Law Relating To Striking Out Applications

[11] CPR Part 30 deals with the contents of an affidavit.

Sub-rule 30.3(1) provides:

> 'It is the general rule that an affidavit may only contain such facts as the deponent is able to prove from his or her own knowledge.'

Sub-rule 30.3 (3) provides:

> "The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit."

[12] CPR Part 26.3 (1) allows the court to exercise its power to strike out statements of case or part thereof where:

a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;

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[3] ABAHCVAP2009/0016

[4] Civil Appeal No. 22 of 2009 (BVI)

b) the statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending the claim;

c) the statement of case or part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings or;

d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of part 8 or 10.

[13] It is necessary to indicate at this early stage that CPR 26.3 deals with striking out statement of case and strictly speaking does not apply to affidavits[5].

[14] Statement of case is defined in CPR Part 2.4 as:

a) a claim form, statement of claim, defence, counterclaim, ancillary relief form or defence and reply

[15] However CPR Part 26.2 provides:-

> 'Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative'.

[16] Accordingly the application to strike out will be considered under CPR 30.3 which was relied upon by counsel for the Claimant in her oral submissions. The court will also invoke its inherent jurisdiction taking into consideration the overriding objectives of the rules in dealing with matters justly.

[17] The principles of law relating to striking out were applied to witness statements in **Joseph W Horsford v Geoffrey Croft**[6] by Blenman JA who stated at paragraph 36:

> 'The witness statement should contain the evidence which that person would be allowed to give orally. A witness statement should not contain inadmissible evidence. Legal arguments or opinion evidence (except from someone who is qualified to provide that evidence), or irrelevant evidence, (i.e evidence which

[5] Delcine Thomas v Victor Wilkins (Supra)
[6] ANUHCVAP2014/0006

has no bearing on the facts in issue) should not be included in the witness statement. The purpose of the witness statement is to replace oral testimony[7]. A witness statement must therefore address all factual issues in the case upon which the witness is in a position to comment. It is unimpressive when a witness mentions something of importance in oral evidence that does not appear in the witness statement'.

[18] At paragraph 43 the learned Justice of Appeal stated:

> 'Allegations or evidence are held to be scandalous if they state matters which are indecent offensive or are made for the mere purpose of abusing or prejudicing the other party. Moreover any unnecessary or immaterial allegations will be struck out as being scandalous if they contain any imputation on the opposite party or make any charge or misconduct. However an allegation which is scandalous, as for example, by making charges of dishonesty, immorality or outrageous conduct, cannot be struck out if it is necessary or relevant to any issue in the action'[8].

[19] It has been held that these rules and principles of law are equally applicable to affidavits in judicial review cases[9].

[20] In **Deldridge Flavius v Ernest Hilaire**[10] Periera CJ stated at paragraph 3:

> 'Rule 26.3 permits the striking out of a statement of case (or part thereof) where it appears it discloses no reasonable ground for bringing or defending a claim. It may now be taken as trite law that the power to strike out in the plenitude of case management powers contained under part 26 may only be ordinarily utilized as a last resort given its draconian nature[11]. It is normally reserved for the plainest of cases'.

[22] In the same vein the exercise of the discretion to strike out whole or parts of an affidavit should be used as a last resort. I will now deal with the objections raised seriatim by counsel for the Claimant.

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[7] See rule 29.5(1) (e) of CPR 2000.

[8] Christie and Christie [1873] LR 8 CH.499

[9] See reference to the case of Sierra Club of Canada v The Minister of Canada and Others Federal Court T-85-97 (Hagrave John A-Pothonatory) by Hariprashad J. in JIPFA

[10] SLUHCVAP2015/0003

[11] See Real Time systems Limited v Renraw Investments Limited [2014] UKPC

Irrelevance

[23] The Claimant contended that paragraphs 10, 13, 27-29 and 34 or parts thereof of the affidavit of the Second Defendant, Heidi-Lyn Sutton should be struck out in part or entirely on the ground that they contain statements which are wholly irrelevant to the claim for judicial review.

[24] The impugned paragraphs are as follows:

i) Paragraph 10 - "*.... There is no decision to be reviewed by the court...*"

ii) Paragraph 13 - "*Save as the second Defendant does not refute as stated at paragraphs 8 and 9 that the third Defendant is designated as the Minister responsible for Finance in the Nevis Island administration, I am advised by my counsel and verily believe that the 3rd Defendant is not a proper party to these judicial review proceedings. I have no objection with the authority of the 4th Defendant*".

iii) Paragraph 27- "*my action was correct and proper*".

iv) Paragraph 28 - " *On 25th November 2016, I wrote to Mr Everette Martin, general manager of the Bank of Nevis Limited and the Bank of Nevis International Limited, compelling the production of certain documents, records or information in the bank's custody or control as well as the presence of the Claimant and other individuals to facilitate an investigation that was launched pursuant to the provisions of* ***the Financial Services Regulatory Commission Act (FSRC Act)***[12] *and* ***the Nevis International Banking Ordinance***[13]".

v) Paragraph 29 - '*I had jurisdiction to conduct this meeting based on the provisions of the quoted legislations. Specifically it was my duty under Section 4(2); 4 (3) and 39 of the FRSC. The noted legislation is now produced to me and exhibited and marked "HLS2*"'.

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[12] *Chap 21.10*

[13] Act *No. 1 of 2014*

vi) Paragraph 34 - '*the claimant who has claimed in paragraph 7 to be familiar with the provisions of NIBO ought to have known at that time the ramifications of his actions and the implications his disclosure would have for his status as a manager of BONI. It is unconscionable for the claimant to now blame me, the other Defendants and a Dover Letter for his termination instead of his misconduct*'.

[25] Learned counsel for the Claimant Ms Morton contended that the impugned parts of paragraphs 10 and 27 should be struck out on the basis of being irrelevant or inappropriate as stated in **R v Poole Borough Council, ex p.Ross**[14] and cited in the text **Judicial Review Handbook, Sixth Edition, Michael Fordham QC** at page 176 that 'it is entirely inappropriate to put in evidence asserting confidence that the decision was fair and untainted'.

[26 With respect to paragraph 13 the Claimant submitted that this issue had been dealt with by an order of Williams J dated December 12, 2017 on an application to remove the Third Defendant as a party to the judicial proceedings. This was conceded by counsel for the Defendants Ms Rhonda Nisbett- Browne. In light of this concession and in keeping with the principle of *res judicata* which prevents a party from re- litigating issues already decided by a court of competent jurisdiction, paragraph 13 is struck out as being an abuse of process.

[27] The Claimant contended that parts of paragraphs 28, 29, and 34 should be struck out because they are not relevant to resolving the issue before the court namely whether section 80 of the NIBO specifically authorizes any of the Defendants to revoke someone's status.

[28] The Second Defendant denies being the maker of the decision that the Claimant was not a fit and proper person to hold a managerial position at the BONI Limited. She denies signing a letter as Regulator of International banking but admits she signed the letter dated 25th November 2016 as regulator of financial services by virtue of her authority derived under the Financial Services Regulatory

[14] [1996] 28 HLR 351

Commission. Counsel for the Second Defendant argued that reference to that piece of legislation is relevant to dispute the allegations by the Claimant that the Second Defendant made an unlawful decision and without proper authority. Therefore paragraphs 27 – 29 are relevant to refute the allegations made by the Claimant at paragraphs 17, 29 and 32 of his affidavit in support of his fixed date claim. She argued that these are issues to be determined at the full trial and therefore these paragraphs should not be struck out.

[29] At paragraph 17 of his affidavit filed on 22nd December 2017 in support of his fixed date claim, the Claimant deposed: *'On or about December 2016, I met with Ms Sutton, who at all material times, represented herself as "the regulator of international banking". The meeting took place at the invitation / instigation of Ms Sutton (solely) who described it "as fact finding exercise". Ms Sutton assured me that I would be given an opportunity to correct any statements made at that meeting "at a later time" '.*

[30] At paragraph 25 of the Claimant's affidavit he stated ' *In any event, the letter from Sutton (which I have not seen to date, though I have requested a copy of same on several occasions) purporting to revoke my status under the NIBO was not in compliance with the NIBO, since Ms Sutton was not the person designated thereunder as the Regulator of international Banking vested with the statutory duties that she purported to exercise. Moreover, none of the Defendants possessed the requisite authority under NIBO, without more, to revoke my status as a fit and proper person. In this respect, the purported decision was unlawful, irrational and in bad faith'.*

[31] At paragraph 27 of the Claimant's affidavit he deposed *'I have not nor have I ever been afforded an opportunity to be heard in respect of the purported acts the defendants complained were committed by me in furtherance of any investigation that the regulator under the NIBO is required to conduct in accordance with Section 30(3)(c). In any event, the purported launching of an investigation pursuant to Section 30 of NIBO, instigated by Ms Sutton was unlawful, as she had no jurisdiction thereunder to so act'.*

[32] At paragraph 32 the Claimant deposed *'It was discussed at the meeting that for the purpose of accuracy and to properly document the facts, I would be given an opportunity to submit and engage the three personnel from the office of the 2nd Defendant thereafter, if after that point in time our recollection of facts would render useful statements, and render a more accurate reflection of the truth. The initial meeting was supposed to be one in a series of meetings, however no other meetings ensued. Thereafter it appears that Ms Sutton purported to make the decision to revoke my status under the NIBO without affording me any or a proper avenue to address my side of the story, to wit allegations allegedly levied against me by Mr Nunoo. Mr Nunoo has never confronted me on the allegations. Moreover at no point in time during this meeting did Ms Sutton or any of the defendants express to me that my status as a fit and proper person under NIBO was being questioned. Further neither Ms Sutton nor the defendants informed me that they would arrive at a determination on the issue of the alleged extortion and conclude their investigation and advise BONI accordingly. Instead in an affidavit sworn to by Ms Sutton at the leave stage and filed on October 17, 2017, Ms Sutton deposed that:*

> *"The Applicant ought to have known at that time the ramifications of his actions".*

[32] Ms Nisbett-Browne also contended that paragraph 34 is relevant in support of the defendants' assertion that the Claimant's status was revoked because of his own actions. She also relies on Section 63 of the **Evidence Act**.

Discussion and Analysis

[33] In **JIPFA** Hariprashad J stated at paragraph 30:

> 'It is the law that where the charge is one of irrelevance the question for the court is whether the impugned paragraphs are material to resolving the question in dispute before the court'.

Therefore if the impugned paragraph is 'central to the substantive matter'[15] the judge may refuse to strike the paragraph.

[35] In **Horsford** at paragraph 43 Blenman JA recognized that even if an allegation is scandalous if it contained any imputation on the opposite party or made any charge of misconduct it cannot be struck out if it is necessary or relevant to any issue in the action.

[36] At paragraph 49 the Learned Justice of Appeal found that if the impugned paragraphs are

> 'not only relevant but crucial to the party being able to successfully deploy the claim against him they are neither unnecessary nor superfluous but provide vital evidence'.

[37] At paragraph 50 Blenman JA stated:

> 'It is the law that (it) (sic) is open to the court to strike out matters that are irrelevant and scandalous or which may tend to prejudice, embarrass or delay the fair trial of the action. But such orders are not to be lightly made. One party cannot dictate how the other should provide the relevant evidence. The primary test whether material is scandalous, is whether the matter is relevant to an issue raised by the pleading. It should be stated that even if a paragraph of a witness statement is not elegantly stated, without more, this is no ground for striking it out. (My emphasis)

[38] Section 63 of the **Evidence Act No.30 of 2011 of Saint Christopher and Nevis (The Evidence Act)** provides:

> (1) The evidence that is relevant in proceedings is evidence that, if it were accepted could rationally affect, whether directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings.
> (2) In particular evidence is considered relevant even if it only relates to

[15] Maudlyn Elaine Bascus v Errol James ANUHCV 2006/0383

a) The availability of the party or witness
b) The admissibility of other evidence; or
c) A failure to adduce evidence

[39] Applying the principle in **R v Poole Borough Council, ex p.Ross** I agree with Ms Morton that the statement at para 10 is inappropriate as it is a statement of opinion on a matter which is entirely within the purview of the trial judge and should therefore be struck out.

[40] I do not agree that the impugned part of paragraph 27 should be struck out because I am of the view that it is in direct response to the Claimant's allegation at paragraph 25 of his affidavit that the Defendants decision was unlawful, irrational and in bad faith. The Second Defendant in response is indicating under which legislation she derived her authority to convene the meeting referred to by the claimant. Therefore her statement that what she did was correct and proper is relevant to her defence.

[41] Further upon review of paragraphs 17, 29 and 32 of the Claimant's affidavit, I am of the view that the impugned parts of paragraphs 28 and 29 are made to refute the allegations of the Claimant that the Second Defendant did not have the authority to convene a meeting under NIBO. Therefore in accordance with dicta of Blenman JA in Horsford I find that these statements are not only relevant to the Defendants' case but 'crucial to being able to successfully deploy' the claim against the Second Defendant and should not be struck out. The issue whether the Second Defendant acted under the NIBO and therefore ultra vires is in my view a crucial matter to be determined at the trial.

[42] Further applying Section 63 of the Evidence Act I find that these paragraphs are relevant in that if accepted they could rationally affect either directly or indirectly the assessment of the probability of the existence of a fact in issue in the judicial review proceedings i.e whether the second defendant acted unlawfully and therefore ultra vires in revoking the Claimant's status as a fit and proper person.

[43] At paragraph 34 the Second Defendant is alleging that the Claimant's misconduct is responsible for the revocation of his status as a fit and proper person and seeks to refute the suggestion by the Claimant that there was no justification for his revocation as a fit and proper person. Accordingly consistent with Blenman JA at paragraph 50 in **Horsford** I find that although 'the language used may be considered inelegant and scandalous' it is admissible because it is relevant to the Defendant's case.

Opinion and Legal Arguments

[44] The claimant contends that paragraphs 12, 14-19, 20, 23 – 25, 40, 45, 48, 66, 67, and 76 or parts thereof amount to legal argument or opinion and conjecture, and should be struck out. He further submits that the fact that the Second Defendant is a lawyer does not qualify her to give legal opinion or to give evidence as an expert until she is deemed an expert by the court. The Claimant relied on the authority of **JIPFA**[16].

[45] The impugned paragraphs are as follows:

> [12] *'It is noteworthy that the claimant has mentioned those sections which are useful to the case of the defendants as they outline how an application is made by the licensee, in this case BONI. Section 9 is instructive as it highlights in particular the proper person to issue the license based on findings from an investigation, that person being the Regulator of International Banking, Mr James Simpson. As the Regulator has authority to approve the claimant as a fit and proper person based on a reading of Section 9(6), so too has the regulator the power to revoke the fit and proper status which he did and not me.*
>
> ***Judicial Review Proceedings***.
>
> [14] *'I am advised by my Counsel and verily believe that Judicial Review proceedings is governed by Rules 56.2 to 56.5 of the Eastern Caribbean*

[16] Op. cit.

Supreme Court Civil Procedure Rules 2000 ("CPR") as amended. I am further advised that these rules amongst other things provide the:-

(i) *This Honorable Court may refuse leave or to grant relief if it is considered that there has been unreasonable delay before making this application; and*

(ii) *In considering whether to refuse or grant relief because of delay, this Honourable Court must consider whether the granting of leave or relief would be likely to:-*

a. *Be detrimental to good administration;*

b. *Cause substantial hardship to or substantially prejudice the rights of any person.*

As such, I respectfully crave the leave of this Honourable Court to address these factors before addressing the evidence filed by the Claimant'.

Unreasonable Delay as a bar to Judicial Review Proceedings.

[15] 'The claimant was terminated by BONI in 17th January 2017. He has taken almost nine (9) months in which to bring an application to have this Court review:-

(i) *The alleged purported decision of the Regulator of Financial Services, acting as Regulator of International Banking rendered on or about December 2016 that the Claimant failed to satisfy the fit and proper criteria under section 21 and 80 of the Nevis International Banking Act No.1 of 2014 which caused the BONI to terminate his contract of employment'.*

[16] 'Those explanations ought to be rejected by the court since the termination letter clearly stated that it was a decision of the Bank in terminating the Claimant. It was therefore unnecessary to further engage the Regulator on seeking reasons especially when the Claimant had admitted that he had emailed confidential information by way of emails such a fact expressly stated in the Termination Letter. By so doing the Claimant being fully seized of the reasons for the termination constructively delayed Judicial Review'.

[17] '*The reference made that the ECCB regulates the parent company that is, the Bank of Nevis Limited is irrelevant. The two Companies are distinct. The Claimant seems to be deliberately attempting to confuse the Court with his reference to the Bank being regulated by the ECCB'.*

[18] 'As the Eastern Caribbean Central Bank had no authority over BONI, with no power to reverse its decision to terminate the Claimant, he ought to have known that dialogue with them on the matter was unnecessary and futile. The Claimant's act in writing another letter to the ECCB in July when the first correspondence of May was not responded to according to him was not prudent conduct of bringing prompt Judicial Review action as set out by Rules'.

[19] 'From this it can be safely deduced that he understood from the outset all the ramifications of the Defendants purported decision which he claimed was unlawful and the need to swiftly bring the matter to the Court's attention'.

[20] 'Additionally I find it absurd that the Claimant was waiting on information from the board of BONI who was seeking guidance from the ECCB when the board of BONI had already terminated the Claimant many months prior without either a phone call or correspondence retracting their decision. The Claimant is put to strict proof of such assertions'.

Alternative Remedy

[23] 'I am advised by my Counsel and verily believe that Judicial Review Proceedings are not the appropriate remedy for the claimant but one in private law for the breach of contract or otherwise against BONI based on the contents of the Termination Letter which clearly stated that the decision to terminate him with immediate effect was pursuant to a decision of Bank's Board of Directors'.

[24]' I would go further to add that the decision that the claimant was no longer a fit and proper person rendered by Mr James Simpson was proper fair and reasonable based on the action of the claimant in disseminating confidential emails'.

[25] 'I will also hasten to add though, that the claimant's indiscriminate release of such confidential information to bolster his case when the details are not necessary to the issue at bar is the very sort of act that caused the Board of BONI to terminate his contract of employment. I have had sight of the claimant's first affidavit where he deposed to such confidential information without care from the reputational harm to clients of BONI and the bank itself providing information that requires an order of the court'.

[40] ' I am advised by my counsel and verily believe that in order for the claimant to properly prove his case and succeed in these Judicial Review proceedings , he would need to show that as a matter of fact, the bank based its decision solely or mainly on the Defendant's decision. It is pellucid however that a final determination on the Claimant's employment with BONI rested with the board of directors which was communicated in the said letter'.

[42] 'The reference to the findings of fact by the regulator was therefore merely explanatory; and not the decision itself. By bringing an action for judicial review the applicant has grossly misconstrued his termination letter'.

[45]' I am baffled that in paragraph 21 the claimant's claims that the decision to revoke his status was not made in accordance with the NIBO yet goes on to claim awareness of the decision being made pursuant to section 80 of the said Ordinance. The claimant is confusing his own position since section 80 is one of the provisions of NIBO that he claims the decision was not made thereunder'.

[48] ' In respect to paragraphs 21 and 23 of the affidavit I am advised by my counsel and verily believe the claimant has taken into account immaterial points and misquoted provisions of the Nevis International Banking Ordinance to bolster his claim for judicial review'.

[66] 'Even if I am to accept knowledge of the claimant only at the leave stage based on the affidavit of James Simpson, it is an unreasonable waste of the court's time that he has continued this matter against the defendants but even more so against me without withdrawing the claim at the end of the leave stage. The court ought to take judicial notice of this and dismiss the case against the defendants forthwith'.

[67] ' Based on what is now said in paragraph 40 of the claimant's affidavit, it is clear that he accepts the truth of what is said by Mr Simpson on his entitlement to revoke the status and not me. There is only one logical conclusion as a result of all this which is the continuation of the claim against the Regulator of International Banking without the defendants'.

[76] Having regard to the statements therein, I am advised that this frivolous action brought by the claimant serves only two purposes:- 1) to mislead this Honourable Court and 2) to impugn and malign my character.

[46] The Claimant also objected to paragraphs 12 and 33 of the First Defendant's affidavit on the ground that they offend the rules of court and can be considered opinion and legal arguments. Paragraph 12 and 33 are as follows:

[12] 'I am advised by my counsel and verily believe that in these matters " he who asserts must prove" and in such judicial review proceeding it is for the aggrieved person to prove that the process by which a public body reached its decision was unlawful, illegal, unreasonable or irrational on the basis of irrelevant considerations. I therefore fully endorse the defendant's case as set out in the affidavit of Ms Sutton on those issues'.

[33] 'The evidence therefore that the decision was in fact made by the deponent herein renders the claimant's argument baseless..... The reason for bringing judicial review against me is then unclear when it is the action of the second defendant that is consistently referenced and challenged throughout the pleadings'.

[47] Counsel for the Defendants, Ms Nisbett Browne conceded the objections to paragraphs 40, 66, from line 4, and paragraph 67 of the Second Defendant's affidavit, and paragraph 12 of the First Defendant's affidavit.

[48] With regards to the objections on grounds of legal argument and opinion Ms Nisbett-Browne referred to Sections 76 – 78 of the Evidence Act which allows for a person to give opinion evidence which provides that while opinion evidence is not generally admissible, evidence based on specialized knowledge is admissible.

[49] Section 78 of the Evidence Act provides:

> 'Where a person has specialized knowledge based on a person's training, study or experience, the opinion rule shall not prevent the admission or use of evidence of any opinion of that person that is wholly or substantially based on that knowledge'.

[50] Ms Nisbett-Browne referred the court to the case of **Public Service Union v Public Service Commission** [17] where parts of the affidavit was struck out on the ground that he was not a lawyer and had no legal training and was therefore not qualified to make these assertions.

[17] SVGHCV2016/0219

[51] She submitted that the court should not strike out the affidavit if evidence of a legal nature is made from one who is trained in that area. She argued that the Second Defendant has deposed at paragraph 7 of her affidavit filed on February 13, 2018 that she is an attorney-at-law with knowledge of the various pieces of legislation highlighted in the fixed date claim form, and as such can give her opinion based on her specialized knowledge, training and experience. Further the evidence given by the Second Defendant is no different to what is deposed at paragraph 6 of the affidavit of the Claimant of his familiarity with the provisions of NIBO as a result of his position at BONI. She also asserted that the impugned paragraphs provide evidence which is material to the proceedings.

[51] Ms Nisbett-Browne argued that paragraph 12 is in response to paragraph 7 of the Claimant's affidavit and does not amount to legal argument but is relevant to the issues to be determined in judicial review proceedings. She further stated that paragraphs 14 – 19 are in response to paragraphs 50 – 58 of the Claimant's affidavit.

[52] Paragraphs 50 – 58 of the Claimant's affidavit state:

> *[50] To date, notwithstanding the multiple requests that I have made of the Defendants and more importantly, Ms. Sutton, to be provided with a copy of "the decision" which was meted out against me, revoking my status as a fit and proper person under NIBO, I have been ignored and or refused access thereto.*
>
> *[51] Nevertheless, I feel it incumbent upon me to inform the court of my efforts to clear my name as a consequence of Ms. Sutton's findings against me from the singular meeting with Ms. Sutton, Ms. Olugbala and Mr. Simpson on December 5, 2016 to the filing of my application for leave to bring judicial review proceedings filed on 11 September 2017. During this meeting, I should note that at no time did Mr. Simpson have any questions, comments and or otherwise for me and remained quiet for its duration.*
>
> *[52] On 12 April 2017, I wrote Ms. Sutton in an effort to solicit an audience with her and the relevant personnel at the 2nd Defendant, so that I could understand the reason for the decision to revoke my status under the NIBO. I have received no response to date. A copy of my letter to Ms. Sutton dated 12 April 2017 is annexed hereto and marked "**FSJ-11**".*

*[53] On or about 19 May 2017, having not had any response from Ms. Sutton or the Defendants, I sent an e-mail to the Deputy Governor of the Eastern Caribbean Central Bank ("ECCB") seeking that institution's assistance in the matter. I am aware that the ECCB is not the regulatory authority over BONI; rather they regulate the parent company, Bank of Nevis Limited. I wrote them to inform them of my efforts and the prejudice that has befallen me since Ms. Sutton's decision as I was advised that they were informed of the "decision" and in fact, they had sought to interview me on the matter. This would have been the reason why I sought to make contact with them in the first instance. I also received no response from the ECCB. A copy of the letter sent to the ECCB dated 19 May 2017 is annexed hereto and marked "**FSJ-12**". I also sent another letter to the ECCB on 8 July 2017. A copy of that email dated 8 July 2017 is annexed hereto and marked "**FSJ-13**" for identification.*

[54] During this time, I should also add that I initiated a phone call with the then Premier, Vance Amory (the 3rd Defendant as at the date of filing of the application for leave) and during that telephone call, he indicated to me that the 2nd Defendant was in the process of seeking guidance from the ECCB and as such, he would not be able to offer any assistance on the matter. I was also advised and duly believed that the board of directors of BONI were seeking guidance from the ECCB on the matter and as such, I believe it was entirely reasonable for me to seek an audience with the ECCB.

[55] When Ms. Sutton wrote the letter to BONI's Mr. Martin on November 25, 2016. She purported to exercise powers under the Financial Services Regulatory Commission Act. I am advised by Counsel and verily believe that under the Act, there is a commission which is comprised of several members, including one person nominated by the Governor of ECCB to acts as a commissioner pursuant to the approval of the 3rd Defendant herein.

[56] I have seen an affidavit sworn to by Ms. Sutton at the leave stage, wherein she deposed at paragraph 3 thereof that,

> *"I act as a member of the Financial Services Regulatory Commission's (FSRC) Board of Commissioners.* ***A significant part of my post involves liaising with*** *FSCR St. Kitts Branch,* ***the Eastern Caribbean Central Bank (ECCB)****, and the Ministry of Finance in St. Kitts and Nevis with respect to all matters concerning the financial services industry." (Emphasis added)*

*A copy of Ms. Sutton's Affidavit sworn to on the 17th day of October 2017 is annexed hereto and marked "**FSJ-14**".*

[57] At all material times, I continued to initiate contact (both in writing and by telephone) with Ms. Sutton, the 3rd Defendant and ECCB in an effort to be heard and to have my status reinstated. Every effort on my part has been thwarted and or ignored and to date I still do not have a copy of the "decision" made adverse to me by the Defendants. At no time did I make contact with the 1st Defendant, nor did the 1st Defendant seek to make contact with me- it has always been Ms. Sutton. The request for meetings were always made by Ms. Sutton and all communication in this matter to me had been at the hand of Ms. Sutton.

[58] I rely on the evidence of Ms. Sutton wherein she boldly intimates that the Defendants did not owe me any duty to be heard and that that duty at all times fell at the feet of BONI- not the Defendants. At paragraph 55 of Ms. Sutton's affidavit, she deposes,

> *".... any opportunity to be heard ought to have been given to the Applicant by BONI as the Employer and the entity whose Board made a decision terminating the Applicant."*

[53] With respect to paragraph 45 Ms Nisbett-Browne argued that it is in response to paragraph 21 of the Claimant's affidavit filed 22nd December 2017. Paragraph 21 states:

> *[21] 'The purported decision was not made in accordance with NIBO. Specifically, I learned at the application for leave for judicial review that the purported decision was made pursuant to section 80. I have reviewed section 80 and note that it gives no mandate whatsoever to the Defendants to revoke my standing as a fit and proper person. Any purported decision was therefore made in contravention of NIBO, in particular, sections 21 and 35 thereof – the latter being a section quoted by Ms Sutton, when she assumed the role of the 1st Defendants in her letter dated 25 November 2016'.*

[54] With respect to paragraph 48 Ms Nisbett -Browne submitted that this evidence is acceptable in an affidavit and she also submitted that paragraph 76 does not amount to legal opinion or argument.

[55] Ms Nisbett-Browne conceded to the objection to paragraph 13 of the First Defendant's affidavit but argued that paragraph 33 of the said affidavit does not constitute legal argument.

[56] In support of her submissions that the impugned paragraphs are in response to the assertions of the Claimant Ms Nisbett-Browne referred to the case of **Josephine Huggins v SKN Choice Times Limited et al**[18] which established that where the Defendant denied any allegations in the Claimant's statement of case he or she must also state the reason for doing so and if he/she intends to prove a different version of events that different version must be set out in the defence.

[57] Ms Nisbett-Browne further argued that the impugned paragraphs are important pieces of evidence to be determined at the full trial and should not be struck out as irrelevant, scandalous or legal argument. She referred the court to **Horsford** at paragraph 23 where the court cited the case of **William and Humbert Limited v W.H Trade Marks (Jersey) Ltd**[19] and the dicta of Lord Templeman which indicated the need to exercise restraint in the exercise of the discretion to strike out.

Analysis and Discussion

[58] In **JIPFA** Hariprashad J. at para 43 stated with regards to legal arguments:

> 'Our court has made similar pronouncements that legal submissions are impermissible in an affidavit: *See* **National Insurance Corporation v Rochamel Develpoment Company Limited** *at paras 11, 14, 21* and also **Anthony Eugene v Joseph Jn Pierre** *at para 41* where the court stated:
>
> > 'The rules do not permit a law clerk or anyone else to make legal submissions in their affidavit. Affidavits are to address questions of fact and are not supposed to raise questions of law.....'

[59] The learned judge referred to the general approach of the courts to exercise the discretion to strike out proceedings in judicial review very sparingly with some

[18] SKBHCV2016/0146
[19] 1986 AC 368

exceptions. Reference was made to the dicta of Mr Justice Richards (as he then was) in **Unitel Communications Company et al v MCI Communications Corp. et al**[20] who stated inter alia at pp 143 and 145 'Of course pure conjecture, speculation and legal opinion, which have no place in an affidavit and ought to be struck out at an early date so that the hearing of the application may proceed in a reasonable way'.

[60] In **Sierra Club and Canada v Minister of Finance of Canada and others**[21] the court noted that the applicant had legal background with personal experience relevant to environmental legislation and nuclear reactors and as such had the relevant experience, therefore the judge hearing the judicial review application should be able to assess that weight and admissibility of the material in her affidavit. The court noted at paragraph 29:

> 'Some of the May affidavit may border on interpretation of statutes. Some of the material is in the nature of submissions which might better be made in argument. However with some clear exception, the May affidavit is not, for the most part pure opinion or pure interpretation of law. Indeed given Ms May's background the affidavit provides a useful and informative framework which the judge hearing this application might find helpful in putting a fairly complex application into perspective, without having to give some portions of the affidavit much weight'.

[61] At paragraph 30 the court noted that:

> 'However a number of paragraphs cross over the boundary of unacceptable opinion, legal conclusion conjecture and speculation. These paragraphs are struck out, in part or entirely, as I have indicated'

[62] I find these pronouncements of the law in **JIPFA** and **Sierra Club and Canada** instructive and applicable to the instant case. The Second Defendant stated at paragraph 2 of her affidavit, that she has held the position of Regulator in the Financial Services (Regulation and Supervision) department for the last four years. At paragraph 3 she outlines her duties as Regulator which includes general supervision over the Nevis branch of the Financial Services Regulatory

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[20] (1997) 199 F.T.R 142

[21] Op. cit.

Commission to regulate and monitor for prudential and AML/CFT compliance of all regulated entities in Nevis including service providers/registered agents, and international banks etc. She is also an ex-officio member of the Financial Services Regulatory Commission's Board of Commissioners. At paragraph 7 she deposes that she is an attorney- at- law and based on her legal training and from her tenure as Regulator of financial services she is familiar with the several pieces of legislation referred to in the fixed date claim and also quoted in the Claimant's affidavit; namely the **Nevis International Banking Ordinance**[22], (NIBO) **The Financial Services Regulatory Commission Act**[23],(FSRC) and **the Confidential Relationship Act**[24]**.**

[63] While I accept the Second Defendant is an attorney - at - law who has worked as the regulator of financial services for many years and is thereby familiar with the legislative framework which governs that sector this does not qualify her as an expert in that field. In the impugned paragraphs of her affidavit she not only indicates her knowledge and familiarity with the legislation but goes on to provide her interpretation of the various provisions and her opinion of whether it was applied correctly. In my view these paragraphs cross over the boundary of unacceptable opinion, legal conclusion, conjecture and speculation and do not belong in an affidavit. This contravenes CPR 30. 3 (1) and 30. 3 (3).

[64] The argument that these impugned paragraphs are made in response to the Claimant's affidavit is rejected as neither the Claimant nor the Defendant is permitted to use legal argument, opinion or conjecture in their affidavits. I have read paragraphs 50 to 58 of the Claimant's affidavit and although titled *'Discretionary Bar – Delay and Alternative Remedy'* I do not find they amount to legal argument and opinion. Instead they provide a chronology of events detailing the actions which followed the Defendants' revocation of his status as a fit and proper person and his dismissal from Bank of Nevis International. Paragraphs 7 and 21 of the Claimant's affidavit lay out the basis of the claim for judicial review

[22] No.1 of 2014
[23] Chap.21.10
[24] Chap.21.02

that his revocation as a fit and proper person was not done in accordance with the law and not by the proper authorities. It is open to him to make that assertion because that is what his case is about. It will be for the trial judge to determine whether the Claimant has gone beyond what is necessary or relevant in presenting his case.

[65] Accordingly, bearing in mind the principles relating to striking out statements of case and the draconian nature of the exercise of such discretion and mindful not to deprive the Defendants of the ability to properly present their case I find that paragraphs 13, 14, 18, 40, 45, 48, 67, 76 and the impugned parts of paragraphs 16, 24, 42 and 66 of the Second Defendant's affidavit constitute legal argument or conclusion and should be struck out. I also find that the impugned parts of paragraphs 12, 17, 19, 20, and 25 of the Second Defendant's affidavit constitute unacceptable opinion, conjecture or speculation and are otherwise irrelevant and scandalous and are therefore struck out.

[66] With regards to the First Defendant's affidavit, counsel for the Claimant conceded that paragraph 12 constitutes legal argument. I agree and it is therefore struck out. I also find that paragraph 33 constitutes legal opinion and is therefore struck out.

[67] I therefore order:

1. That the impugned paragraphs or parts thereof be struck out as follows:

The First Defendant's affidavit

i) Paragraph 12 and paragraph 33 in their entirety, on the ground of legal argument.

The Second Defendant's affidavit

i) Paragraphs 13, 14, 18, 40, 45, 48, 67 and 76 in their entirety on the ground of legal argument or conclusion.

ii) Paragraph 10 which reads '*There is no decision to be reviewed by the court...*" on the ground of legal argument.

iii) Paragraph 12 from lines 5-13 which reads: '*It is noteworthy that the claimant has mentioned those sections which are useful to the case of the defendants as they outline how an application is made by the licensee, in this case BONI. Section 9 is instructive as it highlights in particular the proper person to issue the license based on findings from an investigation, that person being the Regulator of International Banking, Mr James Simpson. As the Regulator has authority to approve the claimant as a fit and proper person based on a reading of Section 9(6), so too has the regulator the power to revoke the fit and proper status which he did and not me'* on the ground that it constitutes legal argument.

iv) Paragraph 16 lines 2-8 which reads '*Those explanations ought to be rejected by the court since the termination letter clearly stated that it was a decision of the Bank in terminating the Claimant. It was therefore unnecessary to further engage the Regulator on seeking reasons especially when the Claimant had admitted that he had emailed confidential information by way of emails such a fact expressly stated in the Termination Letter. By so doing the Claimant being fully seized of the reasons for the termination constructively delayed Judicial Review'* on the ground of opinion and legal conclusion.

v) Paragraph 17 lines 3-6 which reads '*The reference made that the ECCB regulates the parent company that is, the Bank of Nevis Limited is irrelevant. The two Companies are distinct. The Claimant seems to be deliberately attempting to confuse the Court with his reference to the Bank being regulated by the ECCB'* on the grounds of opinion and conjecture.

vi) Paragraph 19 lines 3-5 which reads '*From this it can be safely deduced that he understood from the outset all the*

ramifications of the Defendants purported decision which he claimed was unlawful and the need to swiftly bring the matter to the Court's attention.' on the grounds of opinion and conjecture.

vii) Paragraph 20 lines 12-16 which reads *'Additionally I find it absurd that the Claimant was waiting on information from the board of BONI who was seeking guidance from the ECCB when the board of BONI had already terminated the Claimant many months prior without either a phone call or correspondence retracting their decision. The Claimant is put to strict proof of such assertions.'* on the grounds of opinion and conjecture.

viii) Paragraph 24 lines 7-9 which reads *'I would go further to add that the decision that the claimant was no longer a fit and proper person rendered by Mr James Simpson was proper fair and reasonable based on the action of the claimant in disseminating confidential emails'* on the grounds of opinion and legal conclusion.

ix) Paragraph 25 lines 5-11 which reads *'I will also hasten to add though, that the claimant's indiscriminate release of such confidential information to bolster his case when the details are not necessary to the issue at bar is the very sort of act that caused the Board of BONI to terminate his contract of employment. I have had sight of the claimant's first affidavit where he deposed to such confidential information without care from the reputational harm to clients of BONI and the bank itself providing information that requires an order of the court.'* on the ground of opinion.

x) Paragraph 42 lines 6-9 which reads *'The reference to the findings of fact by the regulator was therefore merely explanatory; and not the decision itself. By bringing an action*

for judicial review the applicant has grossly misconstrued his termination letter.' on the grounds of opinion and legal conclusion.

xi) Paragraph 66 lines 4-8 which reads *'Even if I am to accept knowledge of the claimant only at the leave stage based on the affidavit of James Simpson, it is an unreasonable waste of the court's time that he has continued this matter against the defendants but even more so against me without withdrawing the claim at the end of the leave stage. The court ought to take judicial notice of this and dismiss the case against the defendants forthwith'* on the grounds of opinion and legal conclusion.

2. The Costs of this application shall be to the Claimant in the sum of EC$1000.00 to be paid within 21 days.

3. The matter is adjourned to a date to be fixed by the Registrar for pre-trial review.

Victoria Charles-Clarke
High Court Judge

By the Court

Registrar