**IN THE GRAND COURT OF THE CAYMAN ISLANDS**
**CIVIL DIVISION**

**Cause No: G 0069/2017**

**BETWEEN:**

**BRIAN TAYLOR**

**Plaintiff**

**AND:**

**(1) ROYAL BANK OF CANADA TRUST COMPANY (CAYMAN) LTD**
**(2) ROYAL BANK OF CANADA (CHANNEL ISLANDS) LTD**
**(3) ROYAL BANK OF CANADA**

**Defendants**

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| **Appearances:** | **Ms. Sarah Dobbyn of Sinclairs, for the Plaintiff** |
| | **Mr. Kerrie Cox of HSM Chambers, for the Defendants** |
| **Before:** | **Mr. Justice Stephen Hellman (Actg.)** |
| **Heard:** | **19th – 21st March 2018** |

## HEADNOTE

***GCR Order 14A – determination of questions of law and construction*** *– whether employer could terminate employment contract without cause – applicable notice period – whether terms of Employee Handbook and Code of Conduct incorporated into employment contract – measure of damages for wrongful dismissal – scope of Johnson exclusion area – duty of mutual trust and confidence – whether measure of damages recoverable for loss of pension rights limited to measure of damages for wrongful dismissal – whether costs of employee's claim in labour Tribunal recoverable as damages – whether any contractual impediment to employer's right to defend proceedings in Labour Tribunal – pursuit of allegation of criminal conduct in civil proceedings – whether legal basis for contractual claims against other members of the same group of companies as the employer – whether legal basis for claims in misrepresentation and negligent misrepresentation – whether parent company owed tortious duty of care to employee of subsidiary company.*

***GCR order 18, rule 19 – strike out application*** *– whether employer trading unlawfully – whether failure to provide statement of terms and conditions a breach of contract – whether failure to enrol employee in Cayman Islands pension plan a breach of contract.*

## JUDGMENT

### INTRODUCTION

1. The Plaintiff was employed by various companies in the Royal Bank of Canada ("RBC") Group, including the First and Second Defendants, from 4th March 1985 until 8th July 2014.

2. On 4th March 1985 the Plaintiff joined the Second Defendant in Guernsey as an Assistant Trust Officer. In February 1996 he joined RBC (Bermuda) Ltd ("RBC Bermuda") as Executive Director – Trust Services. RBC Bermuda started to wind down its business and eventually ceased to trade. That is why it is not a defendant in these proceedings. Accordingly, in September 2002 the Plaintiff joined the First Defendant as Head of Trust Services – Caribbean and in September 2005 he was promoted to Head of Trust Management – Caribbean. For a time the Plaintiff, although based in Cayman, was employed by RBC Bermuda and the First Defendant simultaneously. Eventually, he was only employed by the First Defendant.

3. When the Plaintiff started his employment with the Second Defendant, he became enrolled into a Guernsey based final salary pension plan ("the Guernsey Pension Plan"). He regarded this as a valuable contractual benefit.

4. In 2009 the First Defendant informed the Plaintiff that it intended to stop contributing to the Guernsey Pension Plan and that it would enrol him in a Cayman Pension Plan instead. The Plaintiff strongly objected to this proposed course. Although the First Defendant continued to contribute to the Guernsey Pension Plan, the prospect that it would cease to do so remained a bone of contention.

5. By letter dated 19th December 2013, the First Defendant informed the Plaintiff that it would stop contributing to the Guernsey Pension Plan from 31st December 2013. This date was extended from time to time, but the First Defendant's contributions ceased from 31st May 2014.

6. On 8th April 2014, after 29 years' unblemished service, the Plaintiff was summoned to a meeting with two senior staff members, who were employed by the First and Third Defendants respectively. At the meeting, he was handed a letter terminating his employment with the First Defendant with effect from 8th July 2014 and put on "garden leave" until then. His employment was terminated without cause, although I draw the reasonable inference that had the question of the First Defendant's contributions to the Guernsey Pension Plan been resolved to the parties' mutual satisfaction it is unlikely that he would have been dismissed. The Plaintiff understandably feels that the First Defendant, and indeed the RBC Group, has treated him very shabbily.

7. The Plaintiff brought a complaint for unfair dismissal before the Labour Tribunal. By a unanimous decision dated 17th June 2016, the Tribunal found that he had been unfairly dismissed and was entitled to 29 weeks' severance pay at CI$3,200.00 per week for a total of CI$92,800.00, as well as 29 weeks' compensation for unfair dismissal at the same rate and in the same amount, for a total award of CI$185,000.00.

8. The Tribunal noted, however, that it had no jurisdiction to make awards in respect of purely contractual entitlements such as accrued vacation leave or to award legal costs.

9. By a specially endorsed writ of summons dated 12th April 2017, which was subsequently amended and re-amended, the Plaintiff claims damages for repudiatory and other breaches of contract (although in this context the word "*repudiatory*" adds nothing to the claim), wrongful dismissal, negligence and misrepresentation, including negligent misrepresentation, against the Defendants. The sum claimed is in the region of CI$1.7 million.

10. By a summons dated 19th January 2018, the Defendants seek an order striking out portions of the Re-Amended Statement of Claim pursuant to Order 18, rule 19 of the Grand Court Rules ("GCR") ("GCR O.18 r.19") and a determination of certain questions of law or construction pursuant to GCR O.14A.

11. By a cross-summons dated 7th March 2018, the Plaintiff also seeks a determination of certain questions of law or construction pursuant to O.14A. His application deals largely with the underlying issues raised by the Defendants, but formulated in slightly different terms.

12. This is a judgment on those applications. The Plaintiff was represented by Sarah Dobbyn and the Defendants by Kerrie Cox. I am grateful to both counsel for their lively and interesting submissions.

13. GCR O.18, r.19 and O.14A are, in all material respects, the same as the equivalent rules under the former Rules of the Supreme Court ("RSC") in England and Wales. Cases from that jurisdiction and the commentary to the 1999 Edition of the *White Book* are therefore of assistance in construing these rules.

14. It is convenient to deal first with the applications under GCR O.14A.

## GCR O.14A: DETERMINATION OF QUESTIONS OF LAW AND CONSTRUCTION

### GENERAL PRINCIPLES

15. O.14A, r.1(1) provides that the Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:

a. Such question is suitable for determination without a full trial of the action; and

b. Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

16. O.14A, r.1(2) provides that on such determination the Court may dismiss the matter or make such order or judgment as it thinks just.

17. The commentary to RSC Order 14A in the 1999 Edition of the *White Book* at 14/A/2/5 considers the relationship of an application under that Order to an application under RSC Order 18, rule 19:

*"Sir Thomas Bingham M.R. considering the inter-relationship of striking out and O.14A, expressed unease at '... deciding questions of legal principle without knowing the full facts'. However he continued 'But applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case ... [If] the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition), or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached.' (E (A Minor) v. Dorset C.C. [1995] 2 A.C. 633; [1994] 4 All E.R. 640). These words were approved on appeal to the House of Lords by Lord Browne-Wilkinson (the other members of the Appellate Committee concurring) reported sub nom. X (Minors) v. Bedfordshire County Council (another appeal heard at the same time) at [1995] 2 A.C. 633; [1995] 3 All E. R. 353, HL (E). It was said that where the law is not settled but is in a state of development it is normally inappropriate to decide novel questions on hypothetical facts; however where construction of statutes is conclusive this is not so. Thus a defendant, in cases arguably falling within O.14A, should also rely thereon when seeking to strike out; the question for the Court on O.14A applications, namely resolving the point of law, will be more easily decided in a defendant's favour. He must otherwise bear the heavier onus ..."*

18. The commentary at 14/A/2/5 goes on to make some more general points:

*"The question of law or construction to be determined by the Court under the Order should be stated or formulated in clear, careful and precise terms, so there should be no difficulty or obscurity, still less any ambiguity, about what is the question that has to be determined (see Allen v Gulf Oil Refining Ltd [1980] Q.B. 156; [1979] 3 All E.R. 1008, C.A, reversed on another point [1981] A.C. 101; [1981] 1 All E.R. 353), and this is all the more important since the determination will be final (see para 1(i)(b))*

*Moreover it should be remembered that among the facts which are to be treated as proven or admitted, there must be no hypothetical or future facts (see Summer v William Henderson & Sons [1963] 1 W.L.R. 823; [1963] 2 All E.R. 712, CA) and still less any fictitious facts, even though they may be admitted in the pleadings (see Royster v. Cavey [1947] K.B. 204; [1946] 2 All E.R. 642, CA). Where the issues of fact are interwoven with the legal issues raised, it will be undesirable for the Court to split the legal and factual determination, for to do so would in effect be to give legal rulings in vacuo or on a hypothetical ruling, which the Court will not do (see per Taylor L.J. in State Bank of India v Murjani Marketing, March 1, 1991, CA Transcript 91/0304)."*

19. I bear these strictures in mind. However the courts have sometimes been prepared to adopt a more flexible approach. For example in ***Mahmud v BCCI***[1], a case to which we shall return later in this judgment, the House of Lords decided a preliminary point as to whether the appellants' evidence disclosed a reasonable cause of action giving rise to a sustainable claim for damages. They did so on the basis of a statement of facts which had been agreed for the purpose of the determination of the preliminary point notwithstanding that for all other purposes those facts were disputed.

20. The parties are agreed as to the broad areas giving rise to issues under O.14A and are keen that the Court uses the O.14A procedure to resolve as many such issues as possible. Where the parties have been unable to agree upon the wording of the questions which the Court should answer, I have gone with the wording which seems to me most suitable, subject, in some cases, to some slight amendment. On one occasion, in relation to what the Plaintiff calls the Terms of International Assignments, I have carved out a separate question. I am, however, satisfied that the questions as worded in this judgment are apt to resolve the issues which were argued before me. The technique employed in this judgment is to take an issue and discuss it generally, then answer the specific questions posed in relation to that issue, before moving on to the next issue.



[1] [1998] AC 20

## NOTICE PROVISIONS IN CONTRACT

21. The core terms and conditions of the Plaintiff's contract of employment were set out in a letter from the First Defendant to the Plaintiff dated 29th October 2009. The letter was a written statement of the Plaintiff's conditions of employment within the meaning of s.6(1) of the Labour Law (2015 Revision) ("the Labour Law"). The Plaintiff signed the letter, signifying his assent to the conditions, on 3rd December 2009.

22. The letter provides in material part:

> "*Except as otherwise stated in this letter, you will be subject to the policies generally applicable to all RBC employees.*
>
> *Termination Notice: The standard notice period for employees is 90 days; however this notice period may be shortened by mutual consent. Royal Bank of Canada Trust Company (Cayman) Limited may terminate your employment at any time without notice in accordance with the terms of RBC's Code of Conduct.*
>
> *Employment Policies. In accepting this offer of employment, you agree to abide by the terms and conditions of all RBC employment policies, including 'Our Code of Conduct'. RBC retains the right to change its employment policies from time to time in its sole discretion, with or without notice.*
>
> *Conditions of Employment. Your employment with RBC Cayman is contingent upon your agreement to abide by and be subject to each of the 'Commitments of Employee' set forth in this letter, including without limitation the agreement to abide by and be subject to the terms and conditions of all RBC policies.*"

23. The Plaintiff was issued with an Employee Handbook ("the Handbook"). I have been referred to the August 2010 edition. It is common ground that this was applicable to the Plaintiff. There was a subsequent edition in 2014, but I have not been referred to that.

24. Para 1.1 of the Handbook, which is the "*Welcome*" section of the Introduction, provides:

> "*This Handbook is produced to familiarize new employees with RBC Wealth Management Cayman and to provide information about key policies, practices and benefits affecting your employment at RBC Trust Company (Cayman) Limited.*
>
> *This handbook, in conjunction with your Letter of Employment contains the terms and conditions of the contract of employment between employees and RBC WM Cayman. All employees are required as a term of their employment to comply with the policies and procedures incorporated in the Handbook. Failure to comply may lead to disciplinary action, which may result in dismissal.*
>
> *If there is a conflict between the provisions of your Letter of Employment and the Handbook, the terms and conditions as detailed in the Letter of Employment will prevail.*"

25. Para 3.5 of the Handbook, which is headed "*Notice Period*", provides:

> "*Employees must give the Company a minimum of 2 weeks' notice in writing during their probationary period. After the probationary period, employees are required to give the Company notice in writing as set out in their contract of employment.*
>
> *If the Company wishes to terminate an employee's employment during their probationary period, 2 weeks' notice in writing will be given. Following the end of the probationary period, if the Company wishes to terminate an employee's employment, the Company will give in writing 4 weeks' notice.*"

26. Part 9 of the Handbook is headed "*Corrective Action Procedure*". It sets out the Company's disciplinary procedure, but states:

> "*Such procedure shall not form part of an employee's terms and conditions of employment.*"

27. Para 9.7 of the Handbook is headed "*Gross Misconduct*". It provides in material part:

> "*RBC Wealth Management Cayman will be entitled to dismiss you without notice (or payment in lieu of notice), and without full reference to the Disciplinary Action Procedures in the event of gross misconduct, or breach of RBC's policies or procedures or of your contract of employment.*"

28. Para 9.7 includes a non-exhaustive list of examples of gross misconduct.

29. I was referred to the 26th February 2014 version of the Code of Conduct ("the Code"). It does not contain any provisions regarding termination of employment.

30. As provided by the 29th October 2009 letter, the First Defendant could determine the Plaintiff's contract of employment at any time without notice. However I am satisfied that the reference in the letter to "*the terms of RBC's Code of Conduct*" is a drafting error for "*the terms of the Employee Handbook*", and that therefore the First Defendant could only do so if the Plaintiff was found to have committed gross misconduct. Although Part 9 of the Handbook states that the disciplinary procedure does not form part of an employee's terms and conditions of employment, that statement is, as we shall see, not necessarily conclusive. It is in any case overridden by the terms of the 29th October 2009 letter, which, once the drafting error is corrected, incorporated *inter alia* the gross misconduct provisions of the Handbook by reference.

31. I have considered whether, as provided by para 3.5 of the Handbook, the First Defendant could also terminate the Plaintiff's contract of employment by giving 4 weeks' written notice.

I have concluded that the First Defendant could not. In my judgment, para 3.5 conflicts with rather than complements the terms of the 29th October 2009 letter. I am reinforced in my opinion by the fact that 4 weeks' notice would be clearly inappropriate for an employee of the Plaintiff's seniority. Insofar as there is any doubt on the point, I rely upon the principle of *contra proferentem* to resolve it in the Plaintiff's favour.

32. However, there was, in my judgment, an implied term of the Plaintiff's contract of employment that the First Defendant could terminate it on giving *reasonable* notice. The law entitles both employer and employee to terminate the employment relationship without good cause, or any cause at all. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination.

33. It has been said that reasonable notice will be the time reasonably required to find similar employment. See the judgment of McLachlin J of the Supreme Court of Canada, dissenting in part but not on this point, in ***Wallace v United Grain Growers Ltd***[2], to which I shall return when considering wrongful dismissal. But that principle is only a guide as to what is reasonable - for example an employee may have little prospect of finding work for the foreseeable future during a recession or may be able to walk straight into another job when the economy is booming. It does not follow that in the former case the employer is unable to give notice or that in the latter case the employer need give no notice. When deciding what is reasonable the court may also take into account such factors as the length of the employee's employment and industry norms for notice periods.

[2] [1997] 152 DLR (4th) 1 at para 115

For example, in ***Hill v CA Parsons Ltd***[3], which concerned a 63 year old engineer who had been employed by his employer for 35 years, Lord Denning MR suggested that for a professional man of his standing and length of service, reasonable notice would be six months and maybe twelve months.

34. I reject Ms. Dobbyn's submission, unsupported by authority, that in an exceptional case the reasonable notice requirement should not apply and that the court should adopt some other approach, more favourable to the employee, instead. It would be more accurate to say that what is reasonable depends upon the particular circumstances of the case.

35. In the present case, it took the Plaintiff six months to find similar employment. This was the time which he reasonably required to do so. That he might need six months was reasonably foreseeable at the time of his dismissal. It is true that the Plaintiff was only required to give his employer three months' notice if he wished to terminate the contract, but the law does not require that the respective notice requirements of employer and employee must be symmetrical. In my judgment, and also taking into account the Plaintiff's long service and seniority, a reasonable notice period would have been six months.

36. In ***Gunton v Richmond-upon-Thames BC***[4], the Court held that the plaintiff had been wrongfully dismissed as the disciplinary procedure incorporated into his employment contract had been carried out. He was entitled to damages covering not only his contractual notice period but also the period of time which it would have taken the employer to carry out the disciplinary procedure before giving notice.

[3] [1972] 1 Ch 305 EWCA
[4] [1981] 1 Ch 448 EWCA

37. One of the Plaintiff's pleaded allegations was that he had been dismissed in retaliation for insisting upon his pension rights. It was a term of his employment contract – a term which I shall address later in this judgment – that the First Defendant would investigate every claim of retaliation. Ms. Dobbyn submitted, by parity of reasoning with ***Gunton***, that as the First Defendant had failed to carry out any such investigation, the Plaintiff was entitled to damages for the time which it would have taken the First Defendant to do so. If that allegation formed part of the Plaintiff's pleaded case, and if he could establish that he had complained to the First Defendant that his dismissal was retaliatory but that the First Defendant had failed to investigate his complaint, then I would agree. Ms. Dobbyn suggested that the investigation would have required a period of from six to twelve months. I should have thought that three months would have been ample, but that would have been for the Court to decide after hearing evidence on the point. However, the fatal flaw in Ms. Dobbyn's submission is that the Re-Amended Statement of Claim does not include allegations that the Plaintiff complained of retaliation to the First Defendant or that the First Defendant failed to investigate any such complaint. He is not entitled to damages in relation to allegations which have not been pleaded.

38. The questions and answers in relation to this issue are as follows:

a. ***Whether on the true construction of the Plaintiff's employment contract the First Defendant had any right to terminate the Plaintiff's employment on notice or alternatively whether the Plaintiff's employment could only be terminated for cause?***


i. The First Defendant could lawfully terminate the contract on giving reasonable notice.

b. ***What was the applicable notice period?***

i. The applicable notice period was six months. This is without prejudice to the Plaintiff's right to argue the investigation point should he amend his pleadings so as to raise the issue.

## EXPRESS TERMS OF CONTRACT

### DOCUMENTS

39. It is common ground that the Plaintiff's contract of employment with the First Defendant included the written statement of terms and conditions contained in the 29th October 2009 letter and parts of the Handbook. The Plaintiff submits: (i) that all of the Handbook other than parts 8 and 9 was incorporated into his employment contract along with the Code; and (ii) that the Handbook and the Code therefore give rise to mutually enforceable rights and obligations between the Plaintiff and the First Defendant. The Defendants submit that most of the Handbook, and all of the Code, consists of non-contractual statements of values, policies, procedures and information.

40. Para 7.1 of the Handbook, which is headed "*Code of Conduct*", deals with the Code. It states:

> "*All employees are urged to become familiar with the Code of Conduct and RBC values, and are expected to follow these rules and standards faithfully in doing their own jobs and conducting the Company's business. The Code of Conduct e-Learning Program is to ensure all employees know and understand the principles and compliance elements in the code. All employees must complete the program at least once every two years. Once the Code of Conduct e-learning Program has been completed, a copy of the pass certificate must be given to the Human Resources Department.*"

41. The Handbook then sets out "*Eight Guiding Principles*" embodied in the Code. These include:

"*Principle 1: Upholding the Law*

*Every RBC company and employee will, at all times, abide by the law and respect its intent in the best interests of our clients, employees and shareholders.*

*Principle 3: Fairness*

*In all our dealings, we strive to treat people fairly, carefully weighing our responsibilities to all stake holders. Business relationships – whether cooperative or competitive – will be pursued freely, fairly and openly.*

*Principle 7: Integrity*

*Our word is our bond. As representatives of RBC companies, we tell the truth in all our communications and do not mislead by commission or omission.*"

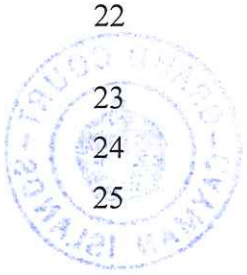
42. Para 7.1 concludes with a hyperlink to the Code.

43. The version of the Code to which I was referred was published on 26th February 2014. The Plaintiff asserts that it has remained in substantially the same form for many years. This was the version in force when he was dismissed.

44. The Code begins with a message from the Chief Executive Officer, which gives a flavour of the contents. For example:

"*Our values and Code of Conduct guide us and set expectations for ethical behaviour and decision-making. They help us decide how we serve our clients and how we interact with each other. Our Code protects employees, clients and RBC by providing a common understanding of what's acceptable and what's not. The Code is a resource that helps us understand what's expected of each of us and why.*

*Each one of us is responsible for protecting and enhancing RBC's reputation by adhering to our Code of Conduct. It's also important that we support one another, and feel empowered to challenge situations we believe are wrong.*"



45. The Code's Table of Contents is headed "*Our Vision and Values*" and sets out seven sections: (i) Introduction; (ii) Speaking Up, Raising Concerns and Reporting Misconduct; (iii) Integrity in Dealing with RBC Clients, Communities and Others; (iv) Integrity in Working Together at RBC; (v) Integrity in How We Do Business; (vi) Integrity in Safeguarding Entrusted Assets; and (vii) Conclusion. These are divided into sub-sections. The concept of integrity is key.

46. The "*Conclusion*" states:

> "*Our Code of Conduct is integral to the way we do business at RBC. It helps define our culture of doing what's right and provides all of us with the same frame of reference for dealing with issues that can be both sensitive and complex.*"

## AUTHORITIES

47. There are a number of authorities dealing with the incorporation of documents such as the Handbook and the Code into an employee's contract of employment. I need only cite a few.

48. ***Keeley v Fosroc International Limited***[5] gives a useful overview of the relevant principles. See the judgment of the Court, given by Auld LJ, at paras 31 – 32 and 34 – 35:

> "*31. On the question of construction ... where a contract of employment expressly incorporates an instrument such as a collective agreement or staff handbook, it does not necessarily follow that all the provisions in that instrument or document are apt to be terms of the contract. For example, some provisions, read in their context, may be declarations of an aspiration or policy falling short of a contractual undertaking; see e.g. Alexander & Ors v Standard Telephones and Cables Ltd (No 2) [1991] IRLR 286, per Hobhouse J, as he then was, at para 31; and Kaur v MG Rover Group Ltd [2005] IRLR 40, CA, per Keene LJ, with whom Brooke and Jonathan Parker LJJ agreed, at paras 9, 31 and 32. It is necessary to consider in their respective contexts the incorporating words and the provision in question incorporated by them.*
>
> *32. In Alexander, the issue was whether the primary contract, in expressly incorporating the provisions of a collective agreement, included a provision in that agreement as to the procedure for selection for redundancy, breach of which entitled the claimants to damages for wrongful dismissal by reason of redundancy. Hobhouse J, in the passage at paragraph 31 of his judgment, (applied by this Court in Kaur at paragraphs 31 and 32), summarised the appropriate principles:*

[5] [2006] EWCA Civ 1277

*'... The relevant contract is that between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained. In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from the other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employees. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn.'*



34. *Highly relevant, in any consideration, contextual or otherwise, of an 'incorporated' provision in an employment contract, is the importance of the provision to the over-all bargain, here, the employee's remuneration package — what he undertook to work for. A provision of that sort, even if couched in terms of information or explanation, or expressed in discretionary terms, may be still be apt for construction as a term of his contract (providing it is not in conflict with other contractual provisions); see e.g. Horkulak; and cf. Briscoe v Lubrizol [2002] IRLR 607, per Potter LJ at para 14, as he then was, and with whom on this point Ward LJ and Bodey J agreed. ....*

35. *Equally, if not more important, is the wording of a provision under question in an incorporated document containing contractual terms. If put in clear terms of entitlement, it may have a life of its own, not to be snubbed out by context immediate or distant in the document of which it forms part. Where the wording of the provision, read on its own, is clearly of a contractual nature and not contradicted by any other provision in the documentary material constituting the contract, context is not all."*

49. Applying these principles, the Court held that an enhanced redundancy provision in the appellant's employee handbook formed part of his contract of employment.

50. In ***Martland v Co-operative Insurance Society Ltd***[6] the Employment Appeal Tribunal reached a similar conclusion in relation to an enhanced redundancy provision in a collective agreement. Elias J (President), giving the judgment of the Tribunal, stated at paras 57 – 58:

> "*57. Not all terms typically found in a collective agreement will be incorporated. That is so, even where the contract of employment ostensibly incorporates all relevant terms from the collective agreement. In order to be apt for incorporation the terms must, by their nature and character, be suitable to take effect as contractual terms. Some collective terms will not do so because, for example, they are too vague or aspirational, or because their purpose is solely to regulate the relationship between the collective parties.*
>
> *58. It is not disputed that in principle a term fixing redundancy payment is manifestly apt to be incorporated. Its very purpose is to define what the individual employee will be paid in the event of redundancy. The term in issue in this case is precise, unambiguous and intended to regulate the relationship between the employer and the individual employees rather than the employer and the trade union.*"

51. The parties to the collective agreement had not agreed that the enhanced redundancy provision should have any contractual effect. But that was not determinative of the issue. The Court, which found that the provision was part of the contract, agreed with the claimants' submission that it should look at the nature of what had been agreed and ask whether that could properly take effect as a term in the individual contract of employment. As Elias J stated at para 63:

> "*The question is whether what is agreed is a term as defined by the contract and not as defined by the collective agreement.*"


[6] 2008 WL 833695

52. In ***Wandsworth LBC v D'Silva***[7], the Court found that the appellant Council could make changes to their Code of Practice on Staff Sickness without the agreement of their employees. Lord Woolf, giving the judgment of the Court stated at page 7:

> *"... the Code is doing no more than providing guidance for both the supervisors and the employees as to what is expected to happen. The Code does not set out what is contractually required to happen. The whole process in the initial stages is sensibly designed to be flexible and informal in a way which is inconsistent with contractual rights being created."*

53. In ***Dr Hussain v Surrey and Sussex Healthcare NHS Trust***[8], the Court held that the parts of the employer's Practical Disciplinary Procedure on which the complainant's claims were based were not part of her contract of employment. Andrew Smith J stated at paras 168 – 169:

> *"168. There is no single test as to whether an employer and employee intended to agree that provisions of an agreement such as the Practitioners Disciplinary Procedure should be contractual between them (rather than advisory or hortatory or an expression of aspiration), and if so which provisions. The indicia that a provision is to be taken to have contractual status which are, I think, of some relevance to this case include these:*
>
> *i) The importance of the provision to the contractual working relationship between the employer and the employee and its relationship to the contractual arrangements between them: as I understand it, it is common ground in this case that, because parts of the Practitioners Disciplinary Procedure are contractual, in some circumstances the Trust might exclude Dr Hussain or bring disciplinary proceedings for misconduct against her. The implication of this, as it seems to me, is that provisions important to implementing the agreement about exclusion and about conduct hearings are also apt to be contractual: the more important the provision to the structure of the procedures, the more likely it is that the parties intended it to be contractual. ...*


[7] 1997 WL 1104347 EWCA
[8] [2011] EWHC 1670

ii) *The level of detail prescribed by the provision: as Penry-Davey J said in Kulkarni v Milton Keynes Hospital NHS Trust, [2008] IRLR 949 at para 25, the courts should not 'become involved in the micro-management of conduct hearings', and the parties to the contract of employment are not to be taken to have intended that they should be. (In the Court of Appeal in Kulkarni, (loc cit) at para 22, Smith LJ endorsed this observation of Penry-Davis J.)*

iii) *The certainty of what the provision requires: as Swift J observed (in Hameed (loc cit) at para 68), if a provision is vague or discursive, it is the less apt to have contractual status.*

iv). *The context of the provision: a provision included amongst other provisions that are contractual is itself more likely to have been intended to have contractual status than one included among other provisions which provide guidance or are otherwise not apt to be contractual.*

v) *Whether the provision is workable, or would be if it were taken to have contractual status; the parties are not to be taken to have intended to introduce into their contract of employment terms which, if enforced, [would] not be workable or make business sense: see Malone v British Airways, [2010] EWCA Civ 1225 at para 62.*

*169. This is not, of course, an exhaustive list of considerations which might bear upon whether a provision in a collective agreement is apt to have contractual status. In particular, the wording of the provision is also of significance. ..."*

54. The question of incorporation falls to be considered in the context of the principles governing the interpretation of contracts in general, as considered in a number of recent cases in the UK Supreme Court. As stated by Lord Neuberger JSC in ***Arnold v Britton***[9]:

[9] [2015] AC 1619 at para 15

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context."*

55. The test, then, is whether the provision in question is apt for incorporation into the contract of employment. The provision may be something less than that: e.g. a statement of aspiration, guidance, information, policy or procedure, or some such. Whether the handbook, code or other document containing the provision describes it as forming part of the employment contract is not conclusive of the issue. The authorities set out a number of indicators which may assist the Court in resolving this question but these are not exhaustive. The principles regarding the interpretation of contracts generally are also applicable.

56. I am invited to rule on whether a number of terms in the Handbook and the Code formed part of the Plaintiff's contract of employment. They are pleaded at paras 75 (Handbook) and 79 (Code) of the Re-Amended Statement of Claim. In ruling on these questions I have considered in relation to each term all the principles and factors set out above.

57. I am satisfied that the following terms of the Handbook, pleaded at para 75 of the Re-Amended Statement of Claim, were incorporated into the contract of employment. They impose precise, concrete obligations on the employer or employee; are workable terms of a kind which might reasonably be expected to be found in a contract of employment; and make commercial sense. In each case I have not set out the whole term, but merely its heading.

a. (iii) Para 5.1 "*Anniversary Date*". This imposed an obligation on the employer to use a particular date to calculate various important employee benefits.

b. (v) Para 5.3 "*Silver Thatch Pension Plan*". This imposed specific, concrete obligations on the employer and employee regarding pension contributions.

c. (viii) Para 7.4 "*Harassment Policy*". This was a policy dealing with a specified area of conduct which imposed specific, concrete obligations on the employer and its managers and made harassment subject to disciplinary action.

d. (x) Part 8: "*Grievance Procedure*". Notwithstanding the statement in the Handbook that such procedure shall not form part of any employee's terms and conditions of employment, I have looked at the substance of the procedure not the label attached to it, and concluded that it was apt for incorporation into the contract of employment.

e. (xii) Para 9.7 "*Gross Misconduct*". The incorporation of this term is dealt with above. The reasoning for the incorporation of the grievance procedure is also applicable to this term.

58. I am satisfied that the following terms of the Handbook pleaded at para 75 of the Re-Amended Statement of Claim were not incorporated into the contract of employment. They are vague and abstract, or merely provide information about a programme or opportunity available to the employee. I have merely set out the heading of each term.

a. (i) Para 1.3 "*Our Values ... Integrity – Trust through integrity in everything we do*".

b. (ii) Para 3.12 "*Opportunities for Advancement*".

c. (iv) Para 5.2 "*Registered Employee's Share Options Savings Plan (RESSOP)*".

d. (vi) Para 5.14 "*Employee Assistance Program*".

e. (vii) Para 7.1 "*Code of Conduct*".

f. (ix) Para 7.7 "*Ethical Standards*".


59. I am satisfied that the following term of the Code pleaded at para 79 of the Re-Amended Statement of Claim was partially incorporated into the contract of employment.

a. (iv) (f) Para 2.4 "*RBC's Commitment to Non-Retaliation*". The following wording was incorporated. It conferred a specific contractual right on the employee to freedom from retaliation.

> "*There will be no retaliation for speaking up and making a truthful report of real or potential misconduct, for participating in an investigation, or for exercising our legal rights*".

60. Although not pleaded at para 79 of the Re-Amended Statement of Claim, the Code contained a commitment to investigate every claim of retaliation and to take disciplinary action against individuals found to have retaliated in breach of the Code. I am satisfied that these, too, were contractual terms. They give teeth to the right to freedom from retaliation.

61. I am satisfied that none of the other terms of the Code pleaded at para 79 of the Re-Amended Statement of Claim were incorporated into the contract of employment. I need not set them out. They were expressed in vague and general terms which are so broad that they would be unworkable if incorporated into an employment contract, and their incorporation would make no commercial sense.

62. The Plaintiff relies upon the fact that all the First Defendant's employees, including the Plaintiff, were required to take online courses to familiarise themselves with the Code. But the fact that the Code was, or was supposed to be, part of the corporate culture of the First Defendant does not mean that it was apt for inclusion in the Plaintiff's contract of employment.

63. The questions and answers in relation to this issue are as follows:

a. ***Which terms of the Handbook pleaded at para 75 of the Re-Amended Statement of Claim formed part of the Plaintiff's employment contract?***

i. Handbook paras 5.1; 5.3; 7.4; Part 8; para 9.7.

b. ***Which terms of the Code pleaded at para 79 of the Re-Amended Statement of Claim formed part of the Plaintiff's employment contract?***

i. The following statement in para 2.4 of the Code:

> *"There will be no retaliation for speaking up and making a truthful report of real or potential misconduct, for participating in an investigation, or for exercising our legal rights".*

## WRONGFUL DISMISSAL, IMPLIED DUTY OF TRUST AND CONFIDENCE, AND *JOHNSON* EXCLUSION AREA

### WRONGFUL DISMISSAL

64. The Plaintiff has pleaded various causes of action against the Defendants. Amongst them is a claim against the First Defendant for wrongful dismissal. It is common ground that the measure of damages for wrongful dismissal is the amount which the employee would have earned from the date of the dismissal to the earliest date when the contract could have lawfully been terminated. This principle was established by the House of Lords in ***Addis v Gramophone Co Ltd***[10]. Thus the court proceeds on the assumption that the employer would have brought the contract to an end in the way most beneficial to itself. See the judgment of Buckley LJ in ***Gunton*** at 469C.

65. McLachlin J of the Supreme Court of Canada gave pithy expression to the measure of damages in ***Wallace v United Grain Growers Ltd***[11]:

> *"The remedy for this breach of contract is an award of damages based on the period of notice which should have been given. The length of the notice period is based on the time reasonably required to find similar employment. The damages represent what the employee would have earned in this period. These damages place the employee in the position that he or she would have been in had the contract been performed – the proper measure of damages for breach of contract."*

[10] [1909] AC 488
[11] at para 115

66. Damages for wrongful dismissal include the loss of pension benefits that would have accrued had the employee worked to the end of the notice period. See the judgment of the Ontario Court of Appeal given by Sharpe JA in ***Taggart v Canada Life Assurance Co***[12].

67. The question and answer in relation to this issue are as follows:

a. ***What is the measure of damages to which the Plaintiff would be entitled if he was wrongfully dismissed?***

i. If the Plaintiff can establish that he was wrongfully dismissed, he would be entitled to the financial recompense which he would have received had he been given the 6 months' notice required by his employment contract. However, he would have to give credit for the 3 months' recompense which he has already received.

b. ***Does this financial recompense include the pension contributions which his employer would have made during that 6 month period?***

i. Yes, it does.


[12] [2006] OJ No 310 at paras 13 – 15

## IMPLIED DUTY OF TRUST AND CONFIDENCE

68. One of the terms of the Plaintiff's successive contracts of employment with the First and Second Defendants was an implied duty of trust and confidence which they owed to him as his employers. This duty is common to all contracts of employment, unless, perhaps, it is expressly excluded. It was developed by the Employment Appeal Tribunal ("EAT") in England and Wales as a mechanism to allow an employee who had been driven to resign by the bad behaviour of his employer to bring a claim for unfair dismissal in the Industrial Tribunal: the English equivalent to the Labour Board. The statutory remedy of unfair dismissal was only available to an employee who had been dismissed: an employee who resigned because of a breach by his employer of the duty of trust and confidence was taken to have been *constructively* dismissed and was therefore able to claim for unfair dismissal in the Industrial Tribunal. See ***Eastwood v Magnox Electric***[13] *per* Lord Nicholls at paras 4 – 6 (implied duty of trust and confidence); ***Mahmud v BCCI*** (*supra*) *per* Lord Steyn at 45D (possible exclusion of implied duty).

69. Breach of the implied duty of trust and confidence does not necessarily arise from circumstances connected with the employee's dismissal. ***Mahmud v BCCI*** was concerned with loss said to have arisen from breach of the employer's duty not to run a dishonest or corrupt business.

70. Lord Nicholls, with whose judgment a majority of the House agreed, drew a distinction between two types of losses arising from an employer's breach of the implied duty of trust and confidence, both of which could be compensated by damages.

[13] [2005] 1 AC 503 HL

71. First, losses caused by the premature termination of the contract, e.g. salary, commission and pension rights. The measure of damages was what the employee would have received had the contract run its course until the earliest date at which it could have been duly terminated, i.e. the same as for wrongful dismissal. See 36 E – F.

72. Second, financial losses continuing beyond the earliest date at which the contract could have been duly terminated, e.g. conduct which prejudicially affects an employee's future employment prospects. In such cases, the employee could recover for losses of a type which was reasonably foreseeable. See 37 C and H.

73. Thus, if the appellant employees in ***Mahmud*** could show that, as a reasonably foreseeable consequence of BCCI's corruption, they were handicapped in the labour market, they could claim damages for their continuing financial loss.

74. By parity of reasoning, damages for dismissal in breach of an express term of the employment contract would be calculated in the same way - for example, if the Plaintiff were dismissed in breach of his contractual right to freedom from retaliation. I am not in a position to make any findings as to whether his dismissal was in fact retaliatory.

## *JOHNSON* EXCLUSION AREA

75. In ***Johnson v Unisys***[14] the House of Lords declined to extend the implied term of trust and confidence to cover a claim for the manner in which an employee was dismissed; i.e. to found a common law claim for unfair dismissal. This was so as to avoid an overlap with the statutory scheme for unfair dismissal. In ***Eastwood v Magnox Electric*** at paras 27 – 29, Lord Nicholls analysed with great clarity the boundary between common law claims which are permissible under the rule in ***Johnson*** and claims which are not:

> *"27. Identifying the boundary of the 'Johnson exclusion area', as it has been called, is comparatively straightforward. The statutory code provides remedies for infringement of the statutory right not to be dismissed unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal.*
>
> *28. In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss. The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the Johnson exclusion area.*
>
> *29. Exceptionally this is not so. Exceptionally, financial loss may flow directly from the employer's failure to act fairly when taking steps leading to dismissal. Financial loss flowing from suspension is an instance. Another instance is cases such as those now before the House, when an employee suffers financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment. In such cases the employee has a common law cause of action which precedes, and is independent of, his subsequent dismissal. In respect of his subsequent dismissal he may of course present a claim to an employment tribunal. If he brings proceedings both in court and before a tribunal he cannot recover any overlapping heads of loss twice over."*



[14] [2003] 1 AC 518

76. Lord Nicholls noted at para 31 that in some cases this legalistic distinction might give rise to difficult questions of causation. He made that observation in the context of financial loss claimed as a result of psychiatric illness, but that is not the only situation in which difficult questions of causation might arise.

77. In ***Edwards v Chesterfield Royal Hospital NHS Trust***[15], Lord Dyson JSC summarised the position thus:

> *"The question in each case is, therefore, whether or not the loss founding the cause of action flows directly from the employer's "failure to act fairly when taking steps leading to dismissal" and "precedes and is independent of" the dismissal process (Lord Nicholls, at para 29). In other words, the court must decide whether "earlier events do or do not form part of the dismissal process" (Lord Steyn, at para 39). This is a fact-specific question."*

78. In ***Edwards*** a majority of the UK Supreme Court held that damages were irrecoverable for breach of contract in relation to the manner of dismissal even where the breach was an express term of the contract of employment regulating the disciplinary procedures leading to dismissal[16]. As Williams J stated in ***Hemmings v Tomlinson Hospital***[17], the majority decision in ***Edwards*** makes it clear that the ***Johnson*** exclusion area applies irrespective of whether the claim is based on the breach of an implied or an express term.

79. The question and answer in relation to this issue are as follows:


[15] [2012] 2 AC 22 UKSC at 51
[16] See the Headnote at (1)
[17] [2013] (1) CILR 254 GC at para 46

a. ***What is the scope of the Johnson exclusion area? What claims for breach of the employment contract as set out in the Re-Amended Statement of Claim fall within its ambit?***

i. The scope of the Johnson exclusion area is as stated by Lord Nicholls in Eastwood v Magnox Electric at paras 27 – 29. I shall consider its applicability to the specific breaches of contract which were argued before me when I come to consider those breaches elsewhere in this judgment.

## PRESENT CASE

80. The Plaintiff alleges that there are two aspects of the duty of trust and confidence which have been breached by the First Defendant:

a. Duty to continue making employer's contributions to the Guernsey Pension Plan for the duration of the Plaintiff's contract of employment. I shall consider this duty in a moment.

b. Duty to act lawfully.

81. I shall consider each of these aspects in turn.

## DUTY TO PAY CONTRIBUTIONS TO THE GUERNSEY PENSION PLAN

82. I am satisfied that the First Defendant had a contractual duty to continue making employer's contributions to the Guernsey Pension Plan for the duration of the Plaintiff's contract of employment. I do not understand the First Defendant to contend otherwise. It matters not whether the duty is categorised as an aspect of the First Defendant's duty of trust and confidence or alternatively as an independent contractual term in its own right.

83. The duty arises as an implied term of the employment contract. In the leading case of ***Attorney General of Belize v Belize Telecom Ltd***[18], Lord Hoffmann stated at para 21:

> *"There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"*

[18] [2009] 1 WLR 1988

84. That was in the context of a written contract. The Plaintiff, as noted above, did not receive a written statement of his terms and conditions of employment until 29th October 2009. Absent a written contract, the question posed by Lord Hoffmann can be restated thus: is that what the agreement made by the parties, understood as a whole against the relevant background, would reasonably be understood to mean? The relevant background included the fact that the Plaintiff's various employers within the RBC Group prior to his employment by the First Defendant had paid employer's contributions to the Guernsey Pension Plan.

85. The First Defendant made regular contributions to the Guernsey Pension Plan for the duration of the Plaintiff's contract of employment contract until shortly before his contract came to an end. It thereby communicated to the Plaintiff that it was under a contractual duty to do so. As Underhill LJ stated in ***Park Cakes Ltd v Shumba & Ors***[19], on an appeal from the Employment Appeal Tribunal but construing the terms of an employment contract:

> "*34. But what Leveson LJ makes clear in Garratt [[2011] ICR 880] is that the essential object is to ascertain what the parties must have, or must be taken to have, understood from each other's conduct and words, applying ordinary contractual principles: ...*
>
> *35. Taking that approach, the essential question in a case of the present kind must be whether, by his conduct in making available a particular benefit to employees over a period, in the context of all the surrounding circumstances, the employer has evinced to the relevant employees an intention that they should enjoy that benefit as of right. If so, the benefit forms part of the remuneration which is offered to the employee for his work (or, perhaps more accurately in most cases, his willingness to work), and the employee works on that basis. ... It follows that the focus must be on what the employer has communicated to the employees. What he may have personally understood or intended is irrelevant except to the extent that the employees are, or should reasonably have been, aware of it.*"



[19] [2013] EWCA Civ 974 at paras 34 – 35

86. The point of contention between the parties is the measure of damages should the First Defendant be found to have breached its duty to make employer's contributions to the Guernsey Pension Plan. The Plaintiff alleges that the First Defendant's 19th December 2013 letter constituted such a breach as it gave him notice that with effect from 31st December 2013 the First Defendant no longer intended to be bound by its contractual obligation to make payments into the Guernsey Pension Plan. The Defendants, accurately in my judgment, characterise this as an allegation of anticipatory breach.[20] Whether there was in fact such a breach is not a question which I have been asked to determine.

87. The Plaintiff further submits that, if there was a breach, the appropriate measure of damages would be a lump sum payment to reflect the value of the pension which he would have received had he remained employed by the First Defendant until retirement.

88. I reject that submission. As stated in *Chitty on Contracts*[21], Volume 1, at para 24-022, in a case of anticipatory breach the injured part may take one of two courses:

> *"He may 'accept' the renunciation, treat it as discharging him from further performance, and sue for damages forthwith, or he may wait till the time for performance arrives and then sue."*

[20] For the avoidance of doubt, the Defendants' case is that there was no breach. What they say is that the allegation made by the Plaintiff, correctly analysed, is one of anticipatory breach. I understand that the Plaintiff does not accept this analysis. That is a matter of legal argument. The Defendants, contrary to the submission of the Plaintiff upon receipt of this draft judgment, do not have to amend their pleadings in order to take the point.

[21] All references in this judgment to Chitty are to the Thirty Second Edition, published in 2015.

89. The Plaintiff did not accept the breach and the contract remained in force. The First Defendant continued to make payments to the Guernsey Pension Plan until 31st May 2014. The following day was the earliest date from which damages could be claimed. By that time, the First Defendant had already given notice of dismissal to the Plaintiff. His dismissal superseded the alleged anticipatory breach as the effective cause of his loss. Thus the Plaintiff's claim for loss of pension rights was subsumed within the ***Johnson*** exclusion area.

90. Had the Plaintiff's employment with the First Defendant not come to an end, the appropriate measure of damages would have been the arrears of pension contributions to the date of judgment, coupled with a declaration, if sought, that the First Defendant had acted unlawfully in ceasing to make the contributions. See the judgment of Kenneth Jones J in ***Burdett-Coutts v Hertfordshire CC***[22]. This was approved by May LJ, giving the judgment of the Court of Appeal of England and Wales, in ***Rigby v Ferodo Ltd***[23]. The employer's appeal to the House of Lords was dismissed. If there was any doubt as to whether the First Defendant would honour its future pension obligations, the Court could have ensured compliance through an order for specific performance for the duration of the contract.

91. The questions and answers in relation to this issue are as follows:

a. ***Can the Plaintiff claim damages for breach of mutual trust and confidence in relation to his loss of pension rights or does such claim fall within the <u>Johnson</u> exclusion area?***

i. The claim falls within the ***Johnson*** exclusion area.

[22] [1984] IRLR 91 QB
[23] [1987] ICR 457 at 463 G

b. ***What are the relevant dates for assessing any damages alleged to be suffered by the Plaintiff in relation to breach of contract in connection with termination of his enrolment in the Guernsey Pension Plan?***

i. The start date for the assessment of damages is 1st June 2014, ie the day after the First Defendant ceased making payments to the Guernsey Pension Plan. The end date is the last day of the six months' notice period which the Plaintiff should have been given.

## DUTY TO ACT LAWFULLY

92. The averment that the First Defendant owed the Plaintiff a general contractual duty to act lawfully is too broad. It goes considerably further than the employer's duty established by ***Mahmud*** not to run a dishonest or corrupt business. It would include, for example, a duty not to commit a regulatory breach even where such breach had no impact on the lawfulness of the employment relationship and caused the employee no reputational damage. I accept, however, that as an incident of the duty of trust and confidence which is so obvious as to "go without saying", an employer has a contractual duty not to cause or require an employee to act unlawfully.

93. The Plaintiff alleges that the First Defendant has acted unlawfully in three specific ways: (i) trading unlawfully; (ii) failing to provide him with a statement of the terms and conditions of his employment within the timeframe required by statute; and (iii) failing to enrol him in a Cayman Islands pension plan within the timeframe required by statute. The Defendants have applied to strike out these allegations. Rather than deal with them under O.14A I shall deal with them later in this judgment under O.18, r.19.

## CLAIMS DERIVED FROM PROCEEDINGS IN LABOUR TRIBUNAL

### TRIBUNAL COSTS

94. The Plaintiff claims the costs of the proceedings in the Labour Tribunal as damages for breach of contract or misrepresentation. This is because the powers of the Tribunal are limited by the Labour Law, under which it was established, and do not include the power to award costs.

95. I am satisfied that the Plaintiff has pleaded no properly arguable breach of contract capable of supporting such a claim. As stated below, I am not in a position to determine the validity of the Plaintiff's claims for misrepresentation.

96. I shall, however, address whether the costs of the proceedings in the Labour Tribunal are in principle recoverable as damages. The general rule in civil proceedings is that costs are recoverable as damages unless there is a policy reason why they not recoverable – for example, a party to civil litigation cannot recover as damages the costs of an earlier action. To permit him to do so would offend against the principle that there must be finality in litigation. See ***Carroll v Kynaston***[24] per Ward LJ, giving the judgment of the Court, at paras 30 – 31.

97. On the other hand, in ***Berry v British Transport Commission***[25], which involved a claim for malicious prosecution, the plaintiff was permitted to recover the costs of her defence in the criminal courts, credit being given for the small award of costs made in her favour on her acquittal on the criminal appeal.

[24] [2011] QB 959 EWCA
[25] [1962] 1 QB 206 EWCA

In ***Union Discount Co Ltd v Zoller***[26] and ***National Westminster Bank plc v Rabobank Nederlands***[27] the claimants were awarded the costs of foreign proceedings in which there was no possibility of costs being awarded in the claimants' favour.

98. As the Tribunal had no power to award costs, the occasion for a court or tribunal to determine the Plaintiff's Tribunal costs has not yet arisen. Thus the need for finality in litigation does not provide a policy reason to bar the Plaintiff's claim. But there is another policy justification for doing so. This was stated by Lord Dyson JSC, with whom Lord Walker JSC and Lord Mance JSC agreed, in ***Edwards v Chesterfield Royal Hospital NHS Trust*** at para 67:

> "*Every unfair dismissal claim involves at the very least an alleged breach of the implied term of trust and confidence, and probably involves an alleged breach of express contractual terms as well. If the court were to award damages for legal representation in dismissal proceedings, such claims would arise following all unfair dismissal claims. This would defeat Parliament's statutory regime which was intended to provide a fast, cost-free resolution to dismissals which are alleged to be unfair by a specialist tribunal. All such claims would result in satellite litigation to recover litigation costs. Nor would there be any reason to confine such satellite litigation to successful claims for unfair dismissal.*"

99. The Labour Law does not empower the Tribunal to award costs because the Legislature intended such costs to be irrecoverable. This is in keeping with the policy underpinning the Labour Law that Labour Tribunals should be affordable and therefore readily accessible. To allow Tribunal costs to be recoverable as damages would undermine this policy. For that reason the Plaintiff's Tribunal costs are in principle irrecoverable from the First Defendant. By parity of reasoning, they are also in principle irrecoverable from any of the other Defendants.

100. The questions and answers in relation to this issue are as follows:

[26] [2002] 1 WLR 1517 EWCA
[27] [2008] 1 All ER (Comm) 266 QB

a. ***Is the Plaintiff entitled to recover the costs of his claim in the Labour Tribunal as damages in tort or contract from any of the Defendants?***

i. No, he is not.

b. ***Why not?***

i. The legislative intent was that costs incurred in the Labour Tribunal should be irrecoverable. Allowing their recovery "*by the back door*" as damages, whether from a party to the Tribunal proceedings or from a non-party, would undermine the policy of the statute.

## FIRST DEFENDANT'S RIGHT TO CONTEST TRIBUNAL PROCEEDINGS

101. I am satisfied that there was no contractual term prohibiting the First Defendant from contesting the Plaintiff's claim in the Tribunal. The provisions of the Handbook and the Code upon which the Plaintiff relies as to integrity etc. were not terms of the employment contract, and even if they were, they would not have given rise to such prohibition.

102. At the Tribunal hearing the Plaintiff alleged that for purposes of unfair dismissal his employment began on March 1985, i.e. the start date for his employment with the Second Defendant. The First Defendant alleged that it began on 30th September 2002, i.e. the start date for his employment with the First Defendant. The Tribunal determined this issue in favour of the Plaintiff.

103. That determination led the Plaintiff to plead, at para 102(vii) of the Re-Amended Statement of Claim, the following alleged breach of contract:

> *"RBC-Cayman unlawfully made a false statutory declaration pursuant to section 12(2) of the Labour Law knowing the same to be untrue and thereby also committing a criminal offence under section 120 of the Penal Code (2013 Revision), by informing the Cayman Labour Tribunal that the Plaintiff's employment had commenced only on 30 September 2002."*

104. I have been invited to determine whether, as a matter of law, the First Defendant's position before the Labour Tribunal as to the start date of the Plaintiff's employment would, as the Plaintiff alleges, constitute the commission of a criminal offence. The answer is obviously not.

The Plaintiff's employment with the First Defendant did commence on 30th September 2002. Whether that was also the commencement date of his employment for purposes of unfair dismissal was a question of legal interpretation. It was reasonably open to the First Defendant, no doubt on legal advice, to take the position that it did. It is in any event doubtful whether it would be constitutionally appropriate for a civil court to make a finding that a named person or entity had committed a criminal offence.

105. Allegations of criminality should not be pleaded lightly. I draw the attention of counsel to Rule 8.04 of the Code of Conduct for Cayman Islands Attorneys-at Law, and in particular to the commentary at para 2:

> *"An attorney should not be a party to the filing of a pleading or other court document containing an allegation of fraud, dishonesty ... unless the attorney has first satisfied himself or herself that it is necessary relevant and material and that there is reasonably credible material to support the allegation. For an attorney to allow such an allegation to be made, without the fullest investigation, could be an abuse of the protection which the law affords to the attorney in the drawing and filing of pleadings and other court documents."*

106. Breach of this rule might constitute a serious case of professional misconduct. As Sir Igor Judge stated in ***R v Ulcay***[28]– a case concerned with the duties of counsel in a criminal trial, but which is in my judgment equally applicable to counsel acting in civil proceedings:

> *"The advocate is not a tinkling echo, or mouthpiece, spouting whatever his client 'instructs' him to say."*


[28] [2007] EWCA Crim 2379 at para 27

107. The question and answer in relation to this issue are as follows:

a. ***Was there any contractual impediment to the First Defendant's right to defend proceedings in the Labour Tribunal?***

i. No, there was not. The allegation that in the course of so doing the First Defendant committed a criminal offence is manifestly ill founded and should not have been pleaded.

## CLAIMS FOR BREACH OF CONTRACT ARISING UNDER THE TERMS OF INTERNATIONAL ASSIGNMENTS

108. The Plaintiff alleges that, while he was employed by the Second Defendant, the Second and Third Defendants expressly agreed that his contractual rights and benefits would be preserved and enhanced if he relocated internationally to work for other companies within the RBC Group. The Plaintiff alleges that this was one of a number of terms agreed between the Plaintiff and the Second and Third Defendants which the Plaintiff describes compendiously as the Terms of International Assignments.

109. The Plaintiff further alleges that the Second and Third Defendants breached this term by consenting to the First Defendant's decision to cease making contributions to the Guernsey Pension Plan.

110. These claims are fact sensitive. They are not suitable for determination on an application brought pursuant to O.14A. Although it is not clear to me that, assuming the existence of the contractual term alleged, the conduct alleged against the Second and Third Defendants would necessarily amount to a breach of that term.

111. The question and answer in relation to this issue are as follows:

a. ***Has the Plaintiff established a legal basis for claims against the Second and Third Defendants for breach of contract arising under the Terms of International Assignments in relation to loss of pension rights?***

i. The question is not suitable for determination on an Order 14A application.

## CLAIMS FOR MISREPRESENTATION AND NEGLIGENT MISSTATEMENT

112. These claims, which are brought against all three Defendants, are fact sensitive – for example, they include claims in relation to representations allegedly made in relation to the Terms of International Assignments. They are not suitable for determination on an application brought pursuant to Order 14A.

113. The question and answer in relation to this issue are as follows:

a. ***Has the Plaintiff established a legal basis for claims in misrepresentation and negligent misrepresentation in law, subject to proving the required elements of the same?***

i. The question is not suitable for determination on an Order 14A application.

## TORTIOUS LIABILITY OF THIRD DEFENDANT FOR ACTS OF FIRST AND SECOND DEFENDANTS

114. I am not in a position to determine whether the Third Defendant assumed tortious liability for the acts of the First and Second Defendants. However the relevant test, as stated by Arden LJ, giving the judgment of the Court, in ***Chandler v Cape plc***[29], is whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees or, in the present case, employee, i.e. the Plaintiff. This is sometimes referred to as an "*assumption of responsibility*", although whether the parent has assumed responsibility falls to be determined objectively: the real question is not whether the parent has subjectively assumed responsibility but whether in the circumstances it is fair, just and reasonable for the court to impose it. See the discussion in ***Chandler*** at paras 62 – 64.

115. ***Chandler*** was concerned with whether, in appropriate circumstances, the law would impose on a parent company responsibility for the health and safety of its subsidiary's employees. The Court held that it would. At para 80, Arden LJ outlined one such set of circumstances. Applied *mutatis mutandis* to the facts of the present case, they included a situation where: (i) the businesses of the parent and subsidiary are in a relevant respect the same; (ii) the parent has, or ought to have, superior knowledge of some relevant aspect of the particular industry; and (iii) the parent knew or ought to have foreseen that the subsidiary or its employee would rely on its using that superior knowledge for the employee's protection.

[29] [2012] 1 WLR 3111 EWCA at para 70

116. Arden LJ stated that for the purposes of (iii) it is not necessary to show that the parent is in the practice of intervening in the relevant policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (iii) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary as opposed to the relevant policy areas.

117. The presence or absence of these circumstances would be highly relevant when determining whether the Third Defendant had assumed responsibility in tort for the acts of the First and Second Defendants towards the Plaintiff.

118. The question and answer in relation to this issue are as follows:

a. ***Did the Third Defendant owe any duty of care to the Plaintiff as the employee of a subsidiary company? If so, what was the scope of that duty?***

i. The question is not suitable for determination on an Order 14A application.

## "GARDEN LEAVE"

119. I was initially invited to determine whether the First Defendant was contractually entitled to place the Plaintiff on "garden leave". However the Defendants concede at the hearing that the First Defendant was not. Damages were not discussed. I therefore adjourn the assessment of damages to trial, or to such earlier date as the parties may agree with the Listings Office.

## GCR ORDER 18, RULE 19: STRIKE OUT APPLICATION

### GENERAL PRINCIPLES

120. GCR O.18, r.19(1) provides in material part that 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, on the ground that:

a. It discloses no reasonable cause of action; 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.

121. GCR O.18, r.19(2) provides that no evidence shall be admissible on an application under sub-paragraph (1)(a). Evidence is admissible under sub-paragraphs (1)(b) – (d).

122. The principles applicable to the present application were summarised by Auld JA in an oft-quoted passage from ***Electra v KPMG***[30]:

> *"It is trite law that the power to strike-out a claim under Order RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known..... There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation. See eg Lawrence and Lord Norreys (1890) 15 Appeal Cases 210 per Lord Herschell at pages 219–220."*

[30] [2001] 1 BCLC 589 EWCA at 613 e – h

123. The Defendants seek to strike out, in relation to the Re-Amended Statement of Claim:

i. The allegation contained in para 2 that the First Defendant has traded unlawfully by conducting business and employing staff in the Cayman Islands, and thereafter repeated in paras 3 and 102(i), as scandalous, frivolous or vexatious.

ii. The allegation of breach of statutory duty by the First Defendant in failing to provide the Plaintiff with a statement of his terms and conditions of employment pursuant to section 6(1) of the Labour Law, contained in para 10 and thereafter repeated in paras 63 and 102(ii), as disclosing no reasonable cause of action.

iii. The allegation of breach of statutory duty by the First Defendant in failing to enrol the Plaintiff in a Cayman Islands pension plan pursuant to the National Pensions Law, contained in para 11 and thereafter repeated in paras 67, 94 and 102(iii), as scandalous, frivolous or vexatious, or is otherwise an abuse of process.

## UNLAWFUL TRADING

124. The Plaintiff submits that as the First Defendant is a non-resident company within the meaning of the Local Companies (Control) Law (2015 Revision) ("the LCCL") it has been trading unlawfully by conducting business in Cayman. Section 2(1) of the LCCL provides that "*non-resident company*" means a company in respect of which a currently valid certificate designating it as such has, or is deemed to have, been issued under s.2(3).

125. Section 2(3) of the LCCL provides in material part:

> "*If the Financial Secretary is of the opinion that a company is not a company which does, or intends to, carry on business within the Islands he may, on application by or on behalf of such a company, issue a certificate designating it to be a non-resident company. Such a certificate shall be prima facie proof of the fact that the company to which it relates is not a company which carries on business in the Islands.*"

126. The First Defendant was designated a non-resident company by a declaration made under s.3(3) of the Exchange Control Law (Revised), which Law was repealed with effect from 20th May 1980. However, s.2(4) of the LCCL provides that such declaration shall have effect as if it were a certificate under s.2(3) of that Law.

127. Section 4(1) of the LCCL sets out the circumstances in which a company may carry on business in the Cayman Islands. The Plaintiff alleges that the First Defendant was trading unlawfully in that it did not satisfy the requirements of this section. It is not alleged that the First Defendant was trading unlawfully in any other way. The First Defendant submits that it did comply with the subsection.

128. Section 4(1) of the LCCL provides that no company shall carry on business in the Islands unless it is so empowered by its Memorandum of Association and satisfies any one of four conditions. For present purposes, the relevant condition is that the company is licensed under the Banks and Trust Companies Law (2013 Revision) ("the BTCL").

129. The First Defendant satisfies both limbs of this requirement. It is empowered to carry on business in the Islands by its Memorandum of Association and it holds a Category "A" banking licence under the BTCL. The licence was given on 21st November 1990 with effect from 1st November 1990.

130. The Plaintiff objects that as a non-resident company the First Defendant ought not to have been licensed to carry on banking business within the Cayman Islands, even though it is common ground that the First Defendant's non-resident status is a historical anomaly which could easily be rectified. But unless and until the licence is revoked by the licensing authority, i.e. the Cayman Islands Monetary Authority, the First Defendant is entitled to rely upon it. If a bank could not rely upon the validity of its banking licence, provided, of course, that the licence had not been obtained by fraud or corruption, then that would undermine the certainty which the licensing regime is intended to guarantee. No bank could ever be sure that it was trading lawfully.

131. There is in any event no conflict with s.2(3) of the LCCL as the certificate issued under that section is only *prima facie* proof that the First Defendant does not carry on business in the Islands.

132. I am therefore satisfied that the First Defendant was not trading unlawfully during the time that it employed the Plaintiff and that consequently it neither caused nor required him to act unlawfully during the course of his employment. Had it caused or required him to do so, that would have been a breach of contract. In the premises, I order that the allegations of unlawful trading should be struck out as scandalous, frivolous and vexatious.

133. Neither party suggested that, if the Plaintiff's contract of employment had been illegal, it should be unenforceable. The test would have been whether its enforcement would have been harmful to the integrity of the legal system. See the judgment of Lord Toulson JSC, giving judgment for a plurality of five justices, and with whom a sixth agreed, in ***Patel v Mirza***[31]. I am satisfied that it would not.

134. The Plaintiff does not claim to have suffered any damage as a result of the alleged breach. He invited the Court, if it found that there was a breach (and I have found that there was none), nonetheless to award him nominal damages so as to vindicate his contractual right and as a peg on which to hang costs. This was on the authority of ***Beaumont v Greathead***[32], as cited in Chitty[33]. Had I found a breach, I should have been minded to do so, although the damages would have been very nominal indeed, and without prejudice to whatever order the Court might have made as to costs. There is much force in the Defendants' submission that the real purpose of including this allegation in the Re-Amended Statement of Claim was to embarrass the Defendants.

135. The questions and answers in relation to this issue are as follows:



[31] [2017] AC 467 UKSC at para 120
[32] (1846) 2 CB 494 at 499
[33] at para 26-009

a. ***As a matter of law, was the First Defendant entitled to carry on business and employ staff in the Cayman Islands, as a non-resident Company?***

i. ***if 'Yes', should any references to the contrary in the Amended Statement of Claim be struck out?***

ii. ***if 'No', does this constitute a breach of contract for which the Plaintiff may receive nominal damages?***

1. Yes, the Plaintiff was entitled to carry on business and employ staff in the Cayman Islands.

a. Yes, as scandalous, frivolous and vexatious.

b. The question does not arise.

## FAILURE TO PROVIDE STATEMENT OF TERMS AND CONDITIONS

136. It is common ground that the First Defendant failed to provide the Plaintiff with a statement of the terms and conditions of his employment within 10 working days of entering into a contract of employment with him as required by s.6(1) of the Labour Law. He commenced employment with the First Defendant in September 2002 but no such statement was provided until October 2009.

137. However, the requirements of the Labour Law do not give rise to contractual rights and obligations, nor (though such has not been pleaded) to a common law action for breach of statutory duty. As Lord Hoffmann said of the analogous legislation in Great Britain at para 54 of ***Johnson,*** the legislature:

> "*... set up an entirely new system outside of the ordinary courts, with tribunals ... applying new statutory concepts and offering statutory remedies.*"

138. To the extent that the legislature intended there to be a remedy for breach of a statutory duty imposed by the Labour Law, that remedy is to be found within the statute. The Labour Law does not provide a civil remedy for a breach of s.6(1). However s.6(2) of the Labour Law provides that an employer who fails to furnish a statement pursuant to s.6(1) within seven days of being requested in writing by the employee to whom it relates to do so commits an offence. Under s.81 of the Labour Law the penalty is a fine or imprisonment.

139. To treat s.6(1) of the Labour Law as an implied term of the Plaintiff's employment contract, one which would give rise to a contractual remedy in excess of that provided by the statute, would, as Lord Millett put it at para 80 of ***Johnson***, "*be inconsistent with the declared policy of [the legislature]*". This would be so even if the First Defendant had a general contractual duty to act lawfully, although I have found that it did not.


140. As the failure to provide the Plaintiff with a written statement of the terms and conditions of his employment within the statutory time limit was a breach of a statutory obligation imposed by the Labour Law and not a term of the Plaintiff's contract of employment, it cannot amount to an actionable breach of contract.

141. The Plaintiff submits that the statutory breach is contextually relevant as it lulled him into a false sense of security: had the First Defendant supplied a written statement of terms and conditions promptly then the Plaintiff would have likely been alerted earlier to the First Defendant's position as to his contractual rights in relation to the Guernsey Pension Plan and would have governed himself accordingly.

142. Pleading styles vary. There is a fine line between: (i) pleading contextually relevant facts in order to clarify the material facts which give rise to a cause of action; and (ii) simply pleading evidence. I will allow the averment that the First Defendant did not provide the Plaintiff with a written statement of terms and conditions until October 2009 to remain in the Re-Amended Statement of Claim. I order that the allegations that the First Defendant failed to do so within the statutory time limit and that such failure was in breach of contract should be struck out as disclosing no reasonable cause of action.

143. The questions and answers in relation to this issue are as follows:

a. ***As a matter of law, does the First Defendant's failure to provide the Plaintiff with written terms of employment in breach of its statutory duty under the Labour Law give rise to a private law action for breach of contract?***

i. ***If "yes", what is the measure of damages?***

ii. ***If "no", should the material allegations of breach of contract in the Re-Amended Statement of Claim be struck out?***

1. No, it does not.

a. The question does not arise.

b. Yes, to the extent indicated above, as disclosing no reasonable cause of action.

## FAILURE TO ENROL PLAINTIFF IN CAYMAN ISLANDS PENSION PLAN

144. Under s.25(2) of what is now the National Pensions Law (2012 Revision) ("the Pensions Law"), the First Defendant was required to provide and contribute to a Cayman Islands pension plan for the Plaintiff once he had been working in Cayman for a continuous period of nine months. It is common ground that the First Defendant did not in fact do so until around five weeks before his dismissal.

145. On 3rd June 2014 the First Defendant made a lump sum payment of CI$70,160.00 to the Plaintiff's Cayman pension plan. The First Defendant avers that this put the Plaintiff in the position which he would have been in had the First Defendant enrolled him in an approved pension plan within the statutory timeframe. The Plaintiff seeks to put the First Defendant to proof on this point, but it is for the Plaintiff to establish loss, not for the First Defendant to establish that there has been none.

146. The Pensions Law does not expressly confer a right of action for breach of s.25, although that is not dispositive of whether one exists, and the Plaintiff has not pleaded a claim for breach of statutory duty. Rather, the Plaintiff alleges that the First Defendant breached a contractual term that the First Defendant would act lawfully. Earlier in this judgment, I have found that there was no such term. That is sufficient to dispose of the Plaintiff's claim that failing to enrol the Plaintiff in a Cayman Islands pension plan in a timely manner was a breach of contract.

147. The Plaintiff submits that the allegation is contextually relevant as the First Defendant relied upon its obligation to enrol the Plaintiff in a Cayman Islands pension plan as justifying its stated intent, allegedly in breach of contract, to stop paying contributions towards the Guernsey Pension Plan.

148. I will allow the allegation that the First Defendant failed to enrol Plaintiff in a Cayman Islands pension plan within the statutory time frame to remain in the Re-Amended Statement of Claim insofar as it is relied upon as forming part of a background sequence of events. I order that the allegation that the First Defendant's failure was in breach of contract should be struck out as frivolous, vexatious, or otherwise an abuse of process.

149. The questions and answers in relation to this issue are as follows:

a. ***As a matter of law, does the First Defendant's failure to enrol the Plaintiff in an approved pension plan in the Cayman Islands within the timeframe prescribed by statute give rise to a private law action for breach of contract?***

i. ***If "yes", what is the measure of damages?***

ii. ***If "no", should the material allegations of breach of contract in the Re-Amended Statement of Claim be struck out?***

1. No, it does not.

a. The question does not arise.

b. Yes, to the extent indicated above, as frivolous, vexatious, or otherwise an abuse of process.

## CONSEQUENTIAL ISSUES AND COSTS

150. I have been invited to deal with several consequential issues.

151. The Plaintiff seeks leave pursuant to GCR O.20, r.5 to amend and update the Re-Amended Statement of Claim to reflect the findings in this judgment. In relation to this application, I draw a distinction between amendment by removing passages from the pleadings and amendment by adding fresh material. The Defendants do not object to either category of amendment, but submit that the Plaintiff should bear the cost both of any amendments to the Re-Amended Statement of Claim and any consequential amendments to the Defence.

152. As to amendment by removal, I give the parties leave to amend their pleadings so that the pleadings deal only with outstanding issues. My provisional view is that the costs of such amendments should be costs in the cause, but the parties may, if they wish, make written submissions on the point as part of their submissions as to costs generally. As to which, see the final paragraph of this judgment.

153. As to amendment by adding fresh material, the Plaintiff, having seen this judgment in draft, seeks leave to amend the Re-Amended Statement of Claim to plead that the First Defendant's conduct was retaliatory and that the Plaintiff complained of this to the First Defendant, but that the First Defendant failed to investigate his complaint. I shall allow the amendment so that the Court may better determine the real issues in contention between the parties. But the amendment will be on the usual terms that the costs of and consequential upon it are borne by the Plaintiff.

154. The amendments should be shown both in a "red-lined" and a "clean" version of the pleadings. Both versions should be filed and served, but the clean version will be the working copy for the Court.

155. The Plaintiff seeks leave to appeal against the judgment. If leave is required, then both parties may have it.

156. I shall hear the parties as to costs. I propose to deal with them on the papers. The parties may, if they so wish, file and serve written submissions within seven days after the date of this judgment (i.e. the date of the final judgment, not the date on which the draft judgment was circulated to the parties), and written replies seven days later. My provisional view is that the costs of the O.14A applications should be reserved to the trial judge, to be determined together with the costs of the trial, and that the Defendants, as the successful parties, should be awarded the costs of the O.18, r.19 application on the basis that costs should follow the event. However, it is open to the parties to seek to persuade me otherwise. If I receive no representations as to costs, the orders for costs shall be as per my provisional views.

**Dated this the 7th day of May 2018**

S. C. Hellman

**Mr. Justice Stephen Hellman**
**Acting Judge of the Grand Court**

GRAND COURT - CAYMAN ISLANDS