IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Blinn v Harlow, 2008 NSSC 42

Date: 20080220
Docket: S.T. 278914
Registry: Halifax

Between:

Carmen Blinn and 3088106 Nova Scotia Limited

Plaintiffs

and

Joyce Case Harlow and Timothy Gillespie

Defendants

Judge:	Justice John M. Davison
Heard:	January 31, 2008, in Chambers, Halifax, Nova Scotia
Written Decision:	February 20, 2008
Counsel:	Stephanie Atkinson, for the plaintiffs
	Joyce Case Harlow, self-represented
	Timothy Gillespie, self-represented

Davison, J.:

[1] This is an application advanced by the plaintiffs to strike the defence and counter claim of each defendant and, in the alternative for an order for Summary Judgment against the defendants. Carmen Blinn and 3088106 Nova Scotia Limited throughout these reasons including references to the counterclaim are referred to as the "plaintiffs" and Joyce Case Harlow and Timothy Gillespie as the "defendants".

[2] There are three sets of documents relevant to the plaintiffs' claim to strike pleadings. On April 17, 2007 there were defences filed on behalf of both defendants. I will refer to those two documents as defences. Also, on April 17, 2007 there were documents filed called Statement of Claim (Counterclaim). I will refer to those two documents as counterclaims. In January, 2008 there was filed an amended defence on behalf of the defendant Gillespie but not on behalf of defendant Harlow.

APPLICATION TO STRIKE

(A) THE DEFENCES.

[3] The application to strike pleadings or parts of them is advanced pursuant to *Civil Procedure Rule* 14.25:

> **14.25.** (1) The court may at any stage of a proceeding order any pleading, affidavit or statement or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> (a) it discloses no reasonable cause of action or defence;
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> (b) it is false, scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
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> (d) it is otherwise an abuse of the process of the court;
>
> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a).

[4] It should be noted by way of general comment that courts are reluctant to preclude a litigant's right to trial by a summary proceeding except in the clearest of cases. In **American Home Assurance Co. et al. v. Brett Pontiac Buick GMC Ltd. et al.** (1992), 116 N.S.R. (2d) 319, the Court of Appeal was faced with an

appeal from an order which did not strike the statement of claim pursuant to *Rule* 14.25(1)(a) and Freeman, J.A. said at p. 322:

> The appellant faces an onerous double burden in appealing from the dismissal of an application to strike out the statement of claim, a serious matter that would result in the action being decided against the respondent plaintiffs without trial. A claim will be struck out only if, on its face, it is "absolutely unsustainable" (See **Curry v. Dargie** (1984), 62 N.S.R. (2d) 416; 136 A.P.R. 416 (A.D.), at p. 429) or "is certain to fail because it contains a radical defect". (See **Hunt v. T & N. pic et al.,** [1990] 2 S.C.R. 959;

[5] In recent years there have been an increase in the number of applications for summary judgments under *Civil Procedure Rule* 13 and an increase in applications to strike portions of pleadings under *Rule* 14.25. These motions arise because counsel who act for plaintiffs or defendants and who consider their client's case has strength seek to conclude matters in a summary way to avoid further costs and to effect timely decisions. That is understandable, but the court, in dealing with these motions, must not lose sight of the basic rule to exercise caution before disposing of matters where a party is precluded from trial.

[6] The Supreme Court of Canada had cause to comment on applications to strike pleadings in **Operation Dismantle v. the Queen**, [1985] 1 S.C.R. 441 where Wilson, J. commented at p. 486-87:

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, i.e. a cause of action "with some chance of success" ... or ... is it "plain and obvious that the action cannot succeed?" Is it plain and obvious that the plaintiffs' claim for declaratory or consequential relief cannot succeed?

The court does not try the issues in these applications but decides whether there are issues to be tried as stated by Justice Angus MacDonald in **Vladi Private Islands Ltd. v. Haase** (1990), 96 N.S.R. (2d) 323 at 325.

[7] A definitive decision is **Hunt v. Casey Canada Inc.,** [1990] 2 S.C.R. 959 where the Supreme Court of Canada emphasized pleadings should be struck only when it is "plain and obvious" they disclose no reasonable claim.

[8] The test on an application to strike was summarized by the Nova Scotia Court of appeal in **Nova Scotia (Attorney General) et al. v. MacQueen et al.** 281 D.L.R. (4th) 287 and I refer to paragraphs 7 and 8:

> [7] The applications to strike were made after the statement of claim was filed and before any defences were filed. No party took issue with the test to be applied by the judge on an application to strike. The judge stated:

> [12] The parties are not in dispute as to the burden resting on the defendants with respect to their respective applications to strike portions of the plaintiffs' statement of claim. Each of the defendants acknowledges the onus on them is to establish it is "plain and obvious" the plaintiffs' statement of claim discloses no reasonable cause of action, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; 117 N.R. 321. Also acknowledged by the defendants is that a court, in considering an application to strike, is to assume the facts contained in the statement of claim are true and then to assess whether, assuming those facts to be true, a claim may be made out. The applications will only succeed if, on the facts as pleaded, the action is "obviously unsustainable". ...

[8] All parties agree that a pleading should only be struck if it is "plain and obvious" that the claim does not disclose a cause of action; that the action is "obviously unsustainable." This test was recently approved by this Court in *Mabey v. Mabey* (2005), 230 N.S.R. (2d) 272:

> [13] It is well settled that the test pursuant to Rule 14.25(1)(a) is that the application will not be granted unless the action is "obviously unsustainable". In considering an application to strike out a pleading it is not the court's function to try the issues but rather to decide if there are issues to be tried. The power to strike out pleadings is to be used sparingly and where the action raises substantial issues it should not be struck out: *Vladi Private Islands Ltd. v. Haase et al.* (1990), 96 N.S.R. (2d) 323; 253 A.P.R. 323 (C.A.). An application for variation should not be struck out unless it is certain to fail, or it is plain and obvious that it will not succeed. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the respondent to present a strong defence should prevent the applicant from proceeding with his or her case: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; 117 N.R. 321.

[9] In **Keating v. Southam Inc.** (2000), 189 N.S.R. (2d) 153, Associate Chief Justice MacDonald (as he then was) considered the application and meaning of Rule 14:25(1) and stated at paragraphs 8 and 9:

8 This provision places a heavy onus on the Defendants. Strong language has been used by our Courts to limit its application. I refer to the following passage from MacQuaid, J.A. in *Wakelin v. Superior Sanitation Services Ltd.* (1990), 85 Nfld. & P.E.I.R.151, 266 A.P.R. 151 (P.E.I.. T.D.) as recently approved by Hart, J.A. of the Nova Scotia Court of Appeal in *Fraser v. Westminer Canada Ltd.* (1996), 155 N.S.R. (2d) 347 (N.S. C.A.) where at page 352 it states:

> This is a rule whose limitations are, unfortunately, largely misunderstood. It does not open the door to what is, in effect, a pretrail application, nor to an argument on a preliminary point of law. It has been said that it is not the practice in the civil administration of the courts to engage in a preliminary hearing on the merits; and further, if there is a point of law which requires serious discussion, there is provision elsewhere to set that matter down for preliminary argument.
>
> What, then, is meant by the expression 'no reasonable cause of action (or defence)'?
>
> The authorities indicate that in point of law, every cause of action is a reasonable one, that is to say, one which has some chance of success when only the allegations in the impugned pleadings are considered. The fact that the case may, on the fact of it, appear to be weak, and not likely to succeed, is no ground for striking it out.
>
> To warrant the striking out thereof, the pleading must be, on the face of it, obviously unsustainable, in which case, however, the remedy will be available only in plain and obvious cases. It will be exercised only where it is clear, beyond reasonable doubt, that there exists no reasonable cause of action in the sense above referred to.
>
> It has been further held by the authorities that the court will not permit a plaintiff to be 'driven from the judgment seat' except where the cause of action is obviously bad and almost incontestably bad.

> 9 This demanding test, although still intact, has been recently modified to allow a court to strike an action if, as a matter of clear law, it is not sustainable. I refer to the recent decision of the late Pugsley, J.A. of the Nova Scotia Court of Appeal in *Nova Scotia (Labour Relations Board) v. Future Inns Canada Inc.* (1999), 179 N.S.R. (2d) 213 (N.S. C.A.) where Justice Pugsley notes:
>
> > I am of the view that questions of law are appropriate for determination under rule **14.25**, in cases where the law is clear, and provided no further extrinsic evidence is required to resolve the issues raised.

[10] It is to be noted that MacDonald A.C.J. stated the principles set out by Hart J.A. in **Fraser v. Westminister Canada Ltd.** (supra) are "still intact" but "modified" by the words of Pugsley J.A. in **Future Inns Canada Inc. v. Labour Relations Board** (179) N.S.R. (2d) 213. In my view the modification was confined to cases where "questions of law are appropriate for determination under Rule 14.25 where the law is clear, and provided no further extrinsic evidence is required to resolve the issues raised." The issues in this case do not bring the matter before the court under the narrow "modification" referred to by Justice Pugsley.

[11] I must assume the facts in the pleadings are true and consider the allegations that pleadings or parts of pleadings should be struck. In her written brief counsel for the plaintiffs sets out the question that is before the court in these terms:

> ...the question before the court on issues of defamation is not for a determination of whether or not the relevant excerpts are defamatory or whether or not they support the suggested innuendo, but rather whether or not they are capable of being defamatory or capable of supporting the suggested innuendos: Elliott v. Canadian Broadcasting Corp. (1993), 108 D.L.R. (4th) 385; Keating v. Southam Inc. (2000), 189 N.S.R. (2d) 153 ...

[12] The statement of counsel is accurate if you accept "the court" is the judge who, as a question of law, must determine whether the excerpts are capable of being defamatory but that is not the end of the matter. After the judge finds there exists the capability of defamation and it relates to the plaintiff, the trier of fact must consider and find whether the excerpts are actually defamatory. In the absence of an agreement by the parties section 34(a)(i) of the *Judicature Act* provides that in actions for libel or slander, the trier of fact shall be a jury. I refer to The Law of Libel and Slander in Canada 2nd edit. by Jeremy S. Williams at page 16:

> The court has the duty to determine whether the words or statements were capable of being defamatory and, if so, the trier of fact has the further obligation of determining whether they were in fact defamatory.

[13] On April 17, 2007 both defendants filed defences which contained the same terms. This first defence of Timothy Gillespie reads:

DEFENCE

1. The Defendant, Timothy Gillespie denies each and every allegation against him set out in the plaintiff's Statement of Claim.

2. The Defendant specifically denies that he engaged in any defamatory or malicious act or campaign to attack Plaintiff's honesty and business ethics. The Defendant specifically denies that he encouraged others to make defamatory or malicious comments against the Plaintiffs or that she engaged in any activity with the intention of destroying the Plaintiff's business.

STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION

3. The Defendant further says that the instant complaint brought upon him by Plaintiffs is designed as a Strategic Lawsuit Against Public participation (SLAPP), i.e., a merit less action filed by the Plaintiffs, whose primary goal is not to win the case but rather to slience or intimidate citizens who have participated in proceedings which may affect public policy or perception about a proposal or project whose public or private benefit is questionable.

Further, the Defendant's communications and conduct was and continues to be genuinely aimed at promoting or furthering lawful action by the public, government officials and bodies and the general media. No communication or action occurred which resulted in damage or destruction of property or physical injury nor was unlawful nor was an unwarranted interference with the rights or property of any person.

The intent of this action against Defendant is to create financial risk and psychological stress in the mind and eye of the Defendant and to distract his time, resources and energy away from issues of concern to the public. Plaintiff knows that legal defense is expensive and time-consuming and that there is a chance that Defendant, who is a well-known citizen, will be burdened and distracted by the expense, uncertainty and hardship involved in defending his right to voice legitimate concerns.

> 4. The Defendant repeats and relies on the foregoing and request that the Plaintiffs' claim against him be dismissed with costs and such other relief as this honourable court deems appropriate.

[14] The defence of Joyce Case Harlow contained the same terms substituting her name for that of Timothy Gillespie.

[15] Both defendants are self-represented. It is clear from the defences filed on April 17, 2007 that the documents were drafted without the aid of legal advice. The defendant Gillespie impressed me as an educated and intelligent man but I am unaware of the reason he chose to represent himself.

[16] In **Lieb v. Smith** (1994), 120 Nfld. & P.E.I. 201 a self-represented plaintiff was suing for defamation and harassment. Counsel for the defendants moved to strike the pleadings as disclosing no cause of action and being scandalous and embarrassing in law. The plaintiff argued that the court should be lenient in judging the materials because the rules of court permit parties to represent themselves. The trial judge rejected the argument of the plaintiff and held that the court must take into account the lack of experience and training of the litigant but the self-represented litigant must also realize that implicit in the decision to act as his own counsel is the willingness to accept the consequences that may flow from

such lack of experience or training. It was determined the court should advise litigants who represent themselves of the correct procedures to be followed in the course of litigation but it was also determined the issue is finding the appropriate balance that enables the personal litigant to proceed without prejudicing any other parties rights to require the rules of court be properly followed.

[17] In the case of **Baziuk v. Dunwoody**, [1998] O.J. No. 2374 (Gen. Div.). Justice Plantana stated at para. 18:

> A sense of fairness and understanding granted to unrepresented parties ought never to extend to the degree where courts do not give effect to the existing law, or where the issue of fairness to an unrepresented litigant is permitted to override the rights of a defendant party.

[18] Counsel for the plaintiff seeks to have struck the words "...or that she engaged in any activity with the intention of destroying the Plaintiff's business". They are in paragraph 2 of the defences. In view of the general terms of paragraph 6 of the Statement of Claim, I will not strike this portion of paragraph 2 of the defences. Paragraph 6 reads:

> Starting in mid March of 2006 the defendants began a campaign against the Plaintiffs that was characterized primarily by attacks on the plaintiffs' honesty and business ethics. These attacks were defamatory to the Plaintiffs and were intended to be so.

[19] The defendant's belief of the purpose of the proceeding or his belief of why it was started has no relevance to the issues before the court. Also, the extreme irregularity of the pleading dictates paragraph 3 should be struck.

[20] There is set out in the Rules of court a general provision with respect to pleading under the heading, "Facts, not Evidence to be pleaded." Rule 14.04 states:

> **14.04.** Every pleading shall contain a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which the facts are to be proved, and the statement shall be brief as the nature of the case admits.

[21] I had occasion to consider pleadings in **Fairbanks v. Nova Scotia** 190 N.S.R. (2d) 120. I referred to Williston and Rolls, *The Law of Civil Procedure* (1970) at page 647. The authors state:

> "It is an elementary rule in pleading that when a state of fact is relied on, it is enough to allege it simply without setting forth the subordinate facts which are the means of proving it or the evidence to sustain the allegation. While generally

> any fact which may be given in evidence may be pleaded, the pleading of a fact which is only relevant insofar as it tends to prove a material allegation is in the nature of pleading evidence and will be struck out."

[22] In that case I stated it was often difficult to distinguish between fact and evidence but it is clear that paragraph number 3 (which actually consists of four paragraphs) in the defences of both defendants are extremely irregular having radical defects. They should be struck for a number of reasons including they do not disclose a reasonable cause of defence.

[23] The defendant, Timothy Gillespie, advanced an amended defence in January 2008. I ordered that he could file an amended defence. The defendant Joyce Case Harlow, did not attempt to amend her defence. She was in attendance in court during this application and made brief comments.

[24] The amended defence of Mr. Gillespie struck out all the pleading in the defence he filed on April 17, 2007. He admitted matters in paragraphs 1, 2 and 3 of the Statement of Claim and denied matters raised in paragraphs 5, 6, 7, 8 and 9. The document goes on to plead truth, fair comment and provisions of the *Defamation Act* with reference to limitation periods. There is also a plea of justification and qualified privilege.

[25] There is no indication that it is “plain and obvious” the amended defence should be struck. Nor could it be said the amended defence is certain to fail. I dismiss any application to strike this amended defence document or parts of it.

[26] In argument counsel for the plaintiffs stated she did not receive a copy of the amended defence until January 24, 2008 which was one week before the date set for this application. Her comments and the documents in the file indicate the defendant Gillespie was aware of this application to strike the original defence about two months before the date of the hearing. I accept her submission that additional costs were incurred because of the untimely manner by which the defendant Gillespie brought the application to file an amended defence. The plaintiffs are entitled to costs against the defendant Gillespie and reference will be made to this issue later in my reasons.

[27] With respect to the defence of the defendant Harlow, there remains the denial of matters raised in the statement of claim and the denial set out in paragraph 2. She is entitled to rely on these denials with the burden of proof at trial on the plaintiffs.

(B) COUNTERCLAIMS

[28] Counsel for the plaintiffs submit that a large part of the counterclaims disclose no cause of action nor any arguable issue against the plaintiffs. It is argued that the allegations advanced by Mr. Gillespie make reference to "copyright violation" and "unwarranted hijacking of his copyrighted materials" but he bases his claim on defamation. I agree with the position advanced by Ms. Atkinson that allegations in the counterclaim, to which I have referred, are not relevant to a claim of defamation and the documents do not comply with the rules of pleading.

[29] Civil Procedure Rule 14:04 establishes in a clear fashion pleadings should contain material facts and not evidence by which the facts are to be proved and should be set out in a summary form to enhance clarity.

[30] It has been recognized that there could exist in some situations difficulty in distinguishing between facts and evidence. That difficulty does not exist in this case. The counterclaim filed by Mr. Gillespie does not achieve any of the three objects set out in Rule 14.04. It is not concise and is set out in eight pages of

single spaced type. It is not confined to material facts and is expansive in setting out evidence.

[31] From the last five paragraphs in the counterclaim it wuld appear the relief sought by Mr. Gillespie is damages for alleged defamatory comments. I agree with the position taken by Ms. Atkinson. I am unable to determine the relevance of some of the contents in the documents to the claim of defamation.

[32] What is the relevance of the marital status of the plaintiff, Carmen Blinn, to which reference is made in paragraph 5?

[33] There are numerous references to alleged statements contained in newspapers, letters and e-mail. The alleged contents are set out in the counterclaim. The contents may or may not be relevant but they consist of evidence and the many references to it constitute irregular pleading.

[34] There is a reference, in paragraph 22, to contents of newspaper reports with the allegation by Mr. Gillespie that a counsel for the plaintiffs was “an agent” of

the plaintiffs with respect to defamation. I consider that comment to be scandalous. There are other contents I consider to be scandalous.

[35] Most important, the counterclaim filed on behalf of Mr. Gillespie and the counterclaim filed on behalf of Ms. Harlow are unsustainable. I have read the documents each of which occupy eight pages of single spaced type but I do not intend to review them in further detail. In this respect I take the same position as Justice Cromwell did in **Wall v. 679927 Ontario Limited** (1999), 176 N.S.R. (2d) 96 with respect to affidavits. At page 110 he said:

> **[41]** Having reviewed the affidavit and the submissions of the parties, I conclude, with respect, that the Chambers judge erred in failing to make a clear ruling on the admissibility of the Carter affidavit. It was central to his conclusions and its admissibility, in its entirety, was objected to and the objection was fully argued. Moreover, significant portions of the affidavit are clearly irrelevant, scandalous or consist of innuendo and conjecture. The affidavit is so fundamentally defective that the court should not be required to take it apart in pieces to preserve some possibly admissible material. It should have been struck.

[36] Pursuant to Rule 14.25 I find most of the counterclaim documents do not disclose a reasonable cause of action. I also find many facts to be scandalous and the documents with the material therein would certainly “delay the fair trial of the proceeding”. The document is “fundamentally defective” and I need not set out further examples of that which could be termed radical defects.

[37] I strike the whole of the counterclaims . I direct that they be placed in a sealed envelope to be opened only by a judge of the Supreme Court of Nova Scotia or a judge of the Court of Appeal of Nova Scotia. Pursuant to Section 37 of the *Judicature Act* I deem the sealing to be in the interest of the proper administration of justice. The sealed envelopes can remain in the court file.

[38] Because the parties represent themselves I will permit the defendants to file another counterclaim within thirty days of the date of this decision. I suggest that they seek legal advice on the preparation of these documents.

(C) SUMMARY JUDGMENT

[39] The application includes a submission that pursuant to Rule 13 summary judgement should be entered against the defendants. Reference was made in the brief filed by counsel for the plaintiffs of **Carl B. Potter Limited v. Antil Canada Limited et al.** (1976) 15 N.S.R. (2d) 408; **Bank of Nova Scotia et al. v. Dombowski** (1977) 23 N.S.R. (2d) 532 A.D. and **Oceanus Marine Inc. v. Sanders** (1996) 153 N.S.R. (2d) 267 N.S.C.A.

[40] In **Oceanus Marine Inc. v. Saunders** (supra) Justice Pugsley commented that all that was required for a defendant to defeat the application was to raise an arguable issue to be tried and that burden is not a heavy one. Justice Pugsley referred to **Lienaux v. Toronto Dominion Bank** (1995) 140 N.S.R. (2d) 156 at 158. During the course of his judgment, Pugsley J.A. made various comments which indicate the difficulty which exists for an application for summary judgment to prevail. He said:

> The case illustrates the problems that may arise when parties attempt to resolve disputes involving conflicting evidence before a chambers judge rather than setting down the matters for trial where the issues may be fully aired before a trial judge.

[41] Again Pugsley J.A. stated:

> Notwithstanding the necessity of making assessments of credibility to resolve the issues, the chambers judge proceeded with the encouragement of Mr. Saunders and counsel for Oceanus to determine all the issues raised by the parties including the s. 347 issue. The exercise required the chambers judge to make findings of fact and determinations of credibility.

[42] Pugsley J.A. further said:

> Once the affidavits, and the letter next to Mr. Saunder's defence, raised an arguable issue to be tried Oceanus' application should have been dismissed.
>
> It was, with respect, not the function of the chambers judge on an application for summary judgment, to determine matters of fact or law which were in dispute. Matters of controversy should be left for resolution at trial.

[43] There is no doubt that controversy prevails with respect to the action advanced by the plaintiffs and the defences filed by the defendants. The plaintiffs put forward a number of incidents alleging the defendants were guilty of defamation knowing them to be false or reckless thereby causing alleged damage to the plaintiff, Carmen Blinn. The amended defence filed by the defendant Gillsepie sets out by way of defence truth in respect to the sources of the facts, justification and qualified privilege.

[44] The defendant Ms. Harlow was left with the denial of the allegations set forth in the statement of claim and she is entitled to rely on the burden of proof which rests with the plaintiffs.

[45] There are matters of controversy which should be left to resolution at trial as stated by Justice Pugsley in the **Saunders** case. It is clear that there are credibility

differences and arguable issues among the parties. The application for summary judgment is dismissed.

(D) COSTS

[46] The plaintiffs incurred additional costs because of the untimely manner of delivery of the amended defence. In addition, considerable time would be incurred by counsel for the plaintiff on the application to strike the counterclaims by reason of the length of the documents and the irregular nature of the contents with particular reference to the counterclaims. I award seven hundred dollars ($700.00) in costs to the plaintiff to be paid by the defendant Mr. Gillespie who I believe drafted the documents in any event of the cause and not forthwith. By way of explanation “in any event of the cause” means the plaintiffs will recover the $700.00 from the defendant Mr. Gillespie no matter how the costs of the action are disposed of following trial. The words “not forthwith” means not immediately but at the end of the litigation. Reference is made to The Law of Costs by Orkin at p. 62:

> Unlike the costs of the action, interlocutory costs should not be made payable forthwith, although there is said to be no fixed rule that in all cases the costs of

> interlocutory proceedings should only be paid at the end of the litigation. It is, however, desirable to have only one taxation in an action, and also that a person not be prevented from maintaining a just action because he is unable to pay interlocutory costs; so that only in exceptional cases should interlocutory costs be made payable forthwith, or their payment made a condition of a party's right to proceed.

[47] The cost in the amount of seven hundred ($700.00) was directed to specific events. There may be a claim for additional costs of this application and they shall be cost in the cause. For the benefit of those parties not represented by counsel "cost in the cause" means the costs of the application are to abide the result of trial and go to the party who, following trial, is successful as to costs.

(E) **SUMMARY**

This is a summary of the determinations I have made in these reasons:

1) With respect to the defences filed in April 2007 I did not delete the words "...or that she engaged in any activity with the intention of destroying the plaintiff's business" which appear in paragraph 2 of the defence documents.

2) I struck paragraph 3 of the two defences.

3) I did not strike any part of the amended defence.

4) The defendant Joyce Case Harlow is entitled to rely on the denial she made in her defence and to require the plaintiffs to advance proof of the allegations in the Statement of Claim.

5) I struck the whole of the documents relating to counterclaims of the defendants and directed they be placed in a sealed envelope to be opened only by a judge of the Supreme Court or a judge of the Court of Appeal.

6) I determined the defendants, within 30 days of the date of this decision, could file counterclaims and suggested they seek legal advise on the preparation of these documents.

7) I dismissed the application for summary judgment.

8) I found the plaintiffs were entitled to costs of $700.00 against the defendant Mr. Gillespie. There may be additional costs with respect to this application and they will be costs in the cause.

J.