[2012] JMCA App 2

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO. 156/2011

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN **WILLIAM CLARKE** **APPLICANT**

AND **GWENETTA CLARKE** **RESPONDENT**

Gordon Steer and Mrs Judith Cooper-Batchelor instructed by Chambers, Bunny and Steer for the applicant

Lord Anthony Gifford, Q.C., Miss Scheree Miller and Miss Tiffany Lofters instructed by Alton E. Morgan and Co for the respondent

10, 11 October; 2 December 2011 and 27 January 2012

HARRIS JA

[1] I have read in draft the reasons for judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing further to add.

PHILLIPS JA

[2] This is an application for permission to appeal from, and a stay of execution of the judgment of Sykes J given on 22 July 2011, where he made the following orders:

> "1. There be standard disclosure of the details of the terms of settlement of the chose in action being the

dispute between the Defendant and his past employer The Bank of Nova Scotia Jamaica Limited, on or before twenty-one (21) days from the date hereof.

2. There be standard disclosure of the details of the Defendant's retirement package and entitlements, on or before twenty-one (21) days from the date hereof.

3. The documents disclosed pursuant to this Order and the contents thereof shall remain confidential and shall not be copied or disclosed by the Claimant or her Attorneys-at-Law to any person, except for the purposes of these proceedings.

4. The Defendant's Application for Leave to Appeal this order is refused.

5. The Defendant's Application for Stay of Execution of this Order is refused.

6. Costs of this Application to be costs in the claim."

[3] On 19 November 2009 Thompson-James J had ordered that there be standard disclosure of all assets owned by the parties, or in which the parties have an interest and specific disclosure of: all assets owned by the parties jointly or in which they have an interest, which should be effected by way of a complete list and production of documents, in respect of all real and personal property acquired over the 15 year period preceding the order; pension documents issued by the Bank of Nova Scotia Jamaica Ltd; all bank records in relation to any accounts held or formerly held, singly or jointly, in named financial institutions; all real property in which the parties have an interest, solely or jointly, whether registered in their names or otherwise; all chattels over the value of $100,000.00 in which the parties have an interest, whether registered in their

names or otherwise; and all monies held on account of the parties in any financial or other institution.

On 2 December 2011, having heard the application in October, we made the following orders:

> "(i) Leave is granted to appeal the decision of Sykes J made on 22 July 2011
>
> (ii) Notice of Appeal is to be filed and served on or before 19 December 2011
>
> (iii) The order of Sykes J made on 22 July 2011 is stayed pending the -hearing of the appeal
>
> (iv) Costs of the application to be costs in the cause."

[4] As the learned judge had refused leave to appeal, the application was made anew before us. The grounds of the application were (i) the appeal has a real chance of success, and (ii) the finding of the learned judge that there was a chose in action was against the weight of the evidence.

[5] The proposed draft notice of appeal attached to the affidavit in support of the application for leave to appeal, contained only one ground of appeal, which was similar to the ground set out above numbered (ii) in the application for leave. The applicant sought the following orders namely, that:

> "(a) The dispute between the appellant and his former employer the Bank of Nova Scotia Jamaica Limited is not a chose in action
>
> (b) The order of Mrs. Justice Sara Thompson-James made on [sic] day of [sic] 2011 does not apply to the

> settlement made between the appellant and the Bank of Nova Scotia."

[6] The applicant was previously employed to the Bank of Nova Scotia Jamaica Limited (the bank), from 16 April 1968 until his early retirement on 1 November 2008, and was its president and chief executive officer for the last 13 years of his employment with that institution. He deposed in an affidavit in support of his application for leave before us, that the respondent, his wife, had filed a fixed date claim form, during the marriage, under the Property (Rights of Spouses) Act (PROSA) and Thompson James J had made an order for disclosure pursuant to that claim. The order was exhibited. He further deposed that the respondent had made a further application for discovery in respect of property which had been acquired by him after their separation. He stated that the respondent was claiming that he had an interest in a chose in action, which he had obtained during the course of the marriage. This alleged chose in action related to a dispute that he had with the bank with regard to a compensation package. The applicant contended that the dispute with the bank was not a chose in action, but the learned judge had ruled that it was. In fact, the learned judge found that he had "possible cause of action against the Bank of Nova Scotia for "constructive dismissal"'. The applicant maintained however that there was insufficient evidence before the learned judge for him to make that determination.

[7] Sykes J, in his judgment, set out in detail the competing contentions of the parties. He referred to the requirements in the Civil Procedure Rules 2002 (CPR) with regard to disclosure and the definition of "property" in PROSA. He noted that the issue

between the parties was whether the settlement/retirement package was a chose in action. After a review of counsel's submissions and their reliance on the Court of Appeal decision in **William Clarke v Bank of Nova Scotia Jamaica Limited** SCCA No. 38/2009 delivered 2 October 2009, and in treating with the central issues as to whether the applicant had been constructively dismissed from the bank and forced into retirement, and therefore had a claim and cause of action against the bank, or whether the compensation made to him was entirely gratuitous and not arising from any cause of action that the applicant may have against the bank, and whether the applicant should make disclosure of the compensation package he had received from the bank, the learned judge had this to say at paragraph [22] of his judgment:

> "The court appreciates the force of Lord Gifford's submission but is concerned that this court is being asked to label the bank's conduct as amounting to constructive dismissal in circumstances where the bank is not a party to this claim and has not made any submissions in this regard. This would be a breach of the audi alteram partem principle which is that one ought not to make any finding or form any conclusion that may reflect adversely on a person without that person having the opportunity to explain his conduct. For this reason, the court is not keen to go along with Lord Gifford on this but nonetheless on the basis of the judgments of the Court of Appeal a reasonable argument could be made that Mr. Clarke was constructively dismissed and so a possible cause of action arose from July 8 2008. This is clearly a chose in action within the meaning of PROSA's definition of property."

[8] Having found that a chose in action existed within the context of PROSA, the learned judge made the following finding in paragraph [24]:

> "Since the duty of disclosure is a continuing one then the full details of the settlement with Mr. Clarke should be disclosed.

> This does not necessarily mean that a court will take the settlement into account when considering the full application under PROSA. Disclosure is merely a step in determining what properties the parties have. The next step is to determine whether the property disclosed can be taken into account in proceedings under the statute. Finally, the court hearing the application will decide what proportion of the property, if any, should be allocated to the claimant."

[9] The learned judge seemed to have been of the view that, in any event, the terms of the order of Thompson-James J may have been wide enough to cover the subject matter under review, and he finally disposed of the matter in this way:

> "The court wishes to point out that this judgment is by no means deciding that the retirement package and settlement must necessarily be [sic] the divided between the parties. All that is being said is that, the definition of property in section 2 of PROSA is wide enough to bring these things within the definition and having regard to all that has been said the details surrounding them ought to be disclosed. It may be that when all the circumstances are examined the trial court may decide that despite falling within the definition they are not to be taken into account in this particular case."

[10] Before dealing with the submissions on the application, as the ruling of Sykes J appears to be based on the decision of this court in **Clarke v BNS Jamaica Limited** and there is no question of the importance of the effect of that ruling on the order of Thompson-James J, it is necessary, at this stage, to set out the facts and the basis of the decision in that case, for comprehension and clarity.

[11] The background facts in **Clarke v BNS Jamaica Limited** may appear at first blush to be complicated but they are not really so. On 8 July 2008, the bank having received reports of misconduct in respect of the applicant, summoned him to a meeting

in Canada and indicated to him that a decision had been made for him to "be separated" from the bank, which would be effective 31 August 2008. This separation was to be done on an amicable basis "to be negotiated". The applicant was told about certain allegations and complaints made against him with regard to his personal and professional conduct that called seriously into question his fitness to continue as chief executive officer of the bank. The applicant denied the allegations and did not accept the compensation package offered to him.

[12] However, it was the view of the court that after the meeting, his separation from the bank was not in issue. Indeed, Cooke JA said that it was a "fait accompli". The sole question to be determined related to the terms of the retirement package.

[13] There were subsequent meetings held, initially on 16 July 2008 when the applicant was present and addressed the Board putting forward his proposals of the terms and conditions of the retirement package that he would accept. On 18 July 2008, the Board met, in the absence of the applicant and, the terms and conditions of the package were discussed. In the opinion of Cooke JA, the discussions in the Board meetings focused on (a) the terms of the retirement package, (b) the protection of the reputation of the applicant in the communication of information, and (c) safeguarding the image of the bank as a stalwart financial institution. He set out the news release issued by the bank in its entirety in his judgment. It read thus:

> "William "Bill" Clarke to Retire"
>
> **Kingston Jamaica, July 18, 2008** - The Board of the Bank of Nova Scotia Jamaica Limited wishes to advise that

> President and CEO William 'Bill' Clarke has decided to retire on October 31, 2008. The Board refutes any allegations that Mr. Clarke has separated from the Bank.
>
> The Board wishes to express its admiration for the exemplary leadership which Mr. Clarke has provided to the Bank over the past fourteen years, and its appreciation for his forty years of service to the Bank.
>
> Scotiabank has been part of the Caribbean and Central America since 1889. It is now the leading bank in the region, with operations in 26 countries, including affiliates. The bank has some 12,081 employees in the region, serving more than two million customers, with 437 branches and about 919 automated banking machines."

[14] The applicant's successor was appointed as president and chief executive officer on 1 August 2008. Correspondence followed thereafter from the applicant's attorneys, and in particular an e-mail dated 12 July 2008 circulated to the Board with a proposal for the parties to submit to arbitration. The Board met on 21 October 2008, and a resolution was passed in the following terms:

> "The Board resolved that:
>
> a. The retirement package be restated with the value of the supplemental pension foreign exchange protection and car along with a total value of CDN $3.7M or
>
> b. The parties proceed to Arbitration
>
> c. The Arbitration panel be constituted by a panel of three arbitrators selected in the following manner:
>
> - Each party to select an arbitrator of his/its own choice.
> - The two arbitrators shall select a Chairman

- In the event that the two elected arbitrators are unable to agree upon the selection of the Chairman, the Chairman shall be selected under the London Court of Arbitration (LCIA) Rules.

- The Chairman will decide the location of the Arbitration and the rules to govern the Arbitration.

- The Agreement to be governed by Jamaican Law.

d. The question to be referred to the Arbitration Panel for determination is:

What is [sic] fair and equitable retirement plan for Mr. Clarke having regard to all circumstances."

[15] On 22 October 2008 Mr Robert Armstrong wrote, on behalf of the bank, to Mr R.N.A. Henriques, QC, attorney for the applicant, allegedly setting out the terms of the resolution of the Board, but which all members of the court held had been inaccurately stated, amended unlawfully without the concurrence of the Board and the court having found the letter to be entirely ineffectual, consequently disregarded it. On 29 October 2008, Mr Henriques, wrote a subsequent letter to Mr Armstrong stating inter alia:

> "With respect to the offer to refer the matter to arbitration the acceptance of which we now confirm, we enclose a draft agreement which we are instructed conform [sic] with the decision of the Board."

[16] The court found that the offer to settle the dispute by arbitration was made in the resolution which was communicated to the applicant and accepted by the above letter of 29 October 2008 from Mr Henriques. The court also found that the applicant

and the bank were bound by the agreement to submit to arbitration the dispute between them as to what was "a fair and equitable retirement plan for [the applicant], having regard to all the circumstances."

[17] In **Clarke v BNS Jamaica Limited**, the fundamental issue was whether there was a binding agreement to arbitrate. Smith JA stated that, "Both parties are at one that the primary issue in this appeal is whether the learned trial judge erred in holding that there was no arbitration agreement between the parties." Cooke JA said that the central issue of debate conducted by this court on the appeal, was whether or not there was an agreement to arbitrate. Harris JA set out the issue in this way in paragraph 88 of the judgment:

> "The critical issue to be determined in this case is whether there is in place, for submission to arbitration, a binding agreement between the parties that the dispute between them 'as to what is a fair and equitable compensation for the appellant, in all the circumstances'."

The Submissions of the Applicant

[18] In counsel for the applicant's written submissions, he stated that the applicant had previously been employed to the bank, but had retired effective 31 October 2008. He referred to the fact that the applicant had a dispute with the bank which had gone to court, the issue being whether there was a binding arbitration agreement between the applicant and the bank, and indicated that the court had held that there was. It was submitted that the respondent was claiming that the dispute was a chose in action on

the basis that the applicant's early retirement was really constructive dismissal. Counsel identified the issues before the court on the application as follows:

> "a. Whether there was evidence before the court on which the judge could have made a finding [sic] the husband had been constructively or wrongfully dismissed.
> b. Whether there was a cause of action between the bank and the husband.
>
> c. Whether there ought to be disclosure of property acquired after the separation of the parties."

Counsel referred to Halsbury's Laws of England, Volume 16, 4th edition, para 451, for the definition of wrongful dismissal and the conditions which must be satisfied for such a claim to succeed. In the instant case counsel indicated that there had been discussions as to what would be a fair and equitable compensation package for the applicant on his retirement. He relied on the case of **Charles Sandhu v Jan De Rijk Transport Limited** [2007] EWCA Civ 430 for the submission that the issue of unfair dismissal did not arise in the instant case as there were discussions with regard to the compensation package to be paid to the applicant who decided to accept the same. He consented to his early retirement, and once the amount to be paid to him was settled, there could be no suit for dismissal.

[19] In his oral submissions counsel maintained that there must be a hearing from which there would be a finding of dismissal before a "chose in action" could arise. In the instant case, there was none. Additionally, the cause "unfair dismissal" is a creature of statute, and the applicant has not at any time prayed in aid any statutory provisions. The learned judges of appeal, he argued, were not addressing that issue, but whether

there was an agreement to arbitrate the amount of compensation to be paid on the early retirement of the applicant, as agreed. In any event, counsel submitted, there was no evidence before the learned judge in respect of either dismissal, or early retirement. There had been no viva voce evidence adduced, and no cross-examination of the applicant had taken place. There certainly was no evidence on which the judge could have made a finding that there was constructive dismissal. Counsel further submitted that the conclusion arrived at in the judgment of the Court of Appeal, which was the only basis which the respondent relied on before the court for that state of the facts, was that the applicant demitted the organization on his own terms. Counsel also submitted that the learned judge had fallen into error, that the appeal has a very good chance of success, and the application should be granted.

The Submissions of the Respondent

[20] Counsel emphasized that the proposed ground of appeal which the applicant sought leave to argue was "all about disclosure". It was the respondent's contention that the applicant could suffer no prejudice if the terms of the settlement were disclosed, as the parties would be bound by confidentiality. Counsel argued that the position taken by the applicant was premature. The learned judge, he said, did not and could not decide whether "the settlement and retirement package" to be made to the applicant was in fact "property" within the meaning of PROSA, although the definition was very wide, without (i) seeing and reviewing the terms of the settlement and (ii) without hearing evidence from the parties. The time, he said, for cross-examination would be at the hearing of the application under PROSA.

[21] Counsel stated that PROSA is a new legislative reform designed to achieve fairness between husband and wife after the marriage has broken down, and the court's mandate under the Act is very broad. The Act does not only deal with division of the matrimonial home, but, he argued, gives spouses the right to apply to the court for the division of other property. Counsel referred to section 14 of PROSA claiming that where a spouse applies for division of property, the court must take into account any "fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account" (section 14(e)), and submitted that the court should therefore know what the parties own. The court, he contended, should order disclosure so that the court can know, "(1) what is the nature of the payment and other benefits which the appellant has received; or (2) whether it is property to which the Act applies; or (3) what the overall justice of the case may require in terms of the proper share in the Appellant's property which should be awarded to the Respondent".

[22] It was counsel's position that whether the property had been acquired during the marriage, or would ultimately be considered to be "property" pursuant to the definition in PROSA, information in respect of such property, including the settlement/retirement package, was relevant to the issues that the court had to decide, with regard to the division of properties which fell within the purview of the Act, in order to ascertain the overall justice of the case, and whether the ultimate order would be fair. All assets were relevant to the disposal of the matter, and disclosure of the same was required to obtain the necessary information.

[23] Counsel also argued that the learned judge was correctly reluctant to hold that the applicant had been constructively dismissed. However, counsel insisted that the applicant was claiming that he had been wronged by the bank. The applicant, he stated, by his own words, was in a "dispute" with the bank. Counsel maintained that the applicant had a claim, and a claim was a chose in action, caught by section 2 of PROSA. He relied on the definition of "things in action" as given in Stroud's Judicial Dictionary 4th edition Vol 1, page 460, as:

> "'Things in action' is when a man hath cause, or may bring an action, for some duty to him;… and because that they are things whereof a man is not possessed but for recovery of them is driven to his action, they are called 'things in action'."

He also relied on the dictum of Lord Denning MR in **Western Excavating v Sharp** [1978] 1 All ER 713 for the test for constructive dismissal:

> " If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

[24] Counsel insisted that the compensation to be paid by the bank could not be a gratuitous payment. The applicant plainly claimed that he was entitled to compensation, thus, it was not "a gift"; there was a dispute, and the appropriate question to be asked was whether the circumstances disclosed a "dismissal" or a "resignation". He referred to and relied on **Charles Sandhu** and **Clarke v BNS Jamaica Limited**, and submitted

that the circumstances of the termination of the applicant's employment amounted to a "dismissal". He argued that the decision to terminate had been made by the bank without any hearing or due process. There were also serious allegations. The bank, he said, had recognized, that having terminated the employment of the applicant, in the manner adopted by the bank, a wrong had been done. The applicant was a senior employee, and there had been no notice to sever his employment which had existed for several years. There was, he submitted, an understanding, that a resolution had to be sought by payment of compensation, the amount of which, initially, the applicant did not agree. Had he accepted the sum originally posited, the respondent could have legitimately claimed an interest in the same. It was therefore necessary to have complete disclosure, as prayed for, so that the respondent could be fully apprised of the basis for the settlement and, what was being settled by the monies being paid.

[25] Counsel submitted that if any monies were being paid in respect of defamation of the applicant's character, which the applicant had deposed in an affidavit, and which was therefore an aspect to be considered, the respondent may have no claim on those funds, but whether the respondent is entitled to part of the compensation package made can only be determined after a full inquiry and full disclosure. Disclosure, he reminded the court, is as the learned judge said, only the first step in the process. Therefore, he asserted, the possible appeal, in all the circumstances of this case, was wholly a waste of the court's time, and the application for permission to appeal, and for a stay of execution of the judgment of Sykes J, should be dismissed accordingly.

Discussion and analysis

[26] Rules 1.8(1) and 1.8(2) of the Court of Appeal Rules (CAR) state that where an appeal requires the permission of the court below or of the Court of Appeal, the application for permission must be made within 14 days of the order against which permission to appeal is sought, and where the application for permission can be made to either court it must first be made to the court below. In the instant case, as indicated, the application for permission was first made orally to Sykes J and was refused and so was renewed before us. Pursuant to Rule 1.8 (9) the general rule is that permission will only be given if the court considers that an appeal will have a real chance of success.

[27] A real chance of success has been decided by the authorities to mean a realistic as opposed to a fanciful prospect of success (see **Swain v Hillman** [2001] 1 ALL ER 91, which was applied by this court in **Paulette Bailey et al v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies** SCCA No 103/2004, delivered 25 May 2005 and many others since).

[28] The application also asked for a stay of execution of the order of Sykes J. The CAR state that except so far as the court below or the court may otherwise direct, an appeal does not operate as a stay of execution of the decision below (rule 2.14(a)). In this instance Sykes J refused a stay of execution. It is now well established and has been accepted, that a stay will not be granted unless the appeal has some prospect of success, and it is therefore incumbent on the applicant to show this, or in keeping with

the two-fold test of Lord Staughton in **Linotype-hell Finance Limited v Baker** [1992] 4 All ER 887, the applicant should also show that without the grant of a stay he would be ruined. More recently, the court, in the unfettered exercise of its discretion in respect of the grant or refusal of the stay, has approached the same on the basis of that which accords with the best interests of justice, and is likely to cause the least irremediable harm. The principles enunciated with clarity in **Hammond Suddard Solicitors v Agrichem International Holdings Limited** [2001] EWCA Civ 2065, and **Combi (Singapore Pte Limited v Ramnath and Sun Limited** FC 297/623; [1997] EWCA Civ 2164, have been followed in this court in several cases since, to name a few: **Watersports Enterprise Ltd v Jamaica Grande Limited & Others** SCCA No 110/2008 Application No 159/2008, delivered 4 February 2009; **Reliant Enterprise Communications Limited & Another v Infochannel Limited** SCCA No 99/2009 Application Nos 144 & 181/2009 delivered 2 December 2009; **Cable and Wireless Jamaica Limited v Digicel Jamaica Limited** SCCA No 148/2009 Application No 169/2009, delivered 16 December 2009; and **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Paul Lowe** SCCA No 78/2010 Application No 103/2010, delivered 18 January 2011.

[29] The real issue in the appeal would be whether the terms of the settlement/ retirement package entitlements payable to the applicant by the bank are "choses in action" within the meaning of "property" in section 2 of PROSA. As indicated previously, the learned judge found that, based on the judgment of the Court of Appeal in **Clarke v BNS Jamaica Limited**, there was a reasonable argument that the applicant had

been constructively dismissed, and so a possible cause of action could have arisen, which, he said, was clearly a chose in action within the meaning of the Act.

[30] I am mindful of the fact that this is an application for permission to appeal and for a stay pending appeal, so I am not required to give any view on the merits of the different positions taken by the parties, on the facts or on the law, as the issues between the parties will have to be decided if and when the appeal is heard (see **Sewing Machines Rentals Limited v Wilson & Another** [1976] 1 WLR 37). However, I will venture to say that the learned judge anchored his findings and conclusions on the **Clarke v BNS Jamaica Limited** judgment when arguably that judgment did not address any question as to the applicant's dismissal.

[31] In section 2 of PROSA, "property" is defined as:

> "any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled."

The Oxford Dictionary of Law, 6th edition, defines "a chose in action" as:

> "a right (e.g. a right to recover a debt) that can be enforced by legal action."

In Halsbury's Laws of England, 4th edition, 2003 re-issue, Vol 6, in paragraph 1, "chose in action" is given this meaning:

> "the expression 'chose in action' or 'thing in action' in the literal sense means a thing recoverable by action, as contrasted with a chose in possession, which is a thing of

> which a person may have not only ownership but also actual physical possession. The meaning of the expression 'chose in action' or 'thing in action' has varied from time to time, but is now used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession. It is used in respect of both corporeal and incorporeal personal property which is not in possession."

In paragraph 8 thereof, the learned authors set out in five groupings the kinds of things and property which have been held to be choses in action, which summarized are: (1) debts, (2) the benefits of contracts, (3) recognized subjects of property, such as stocks in public funds, (4) equitable rights to property, such as beneficial interests in trusts, and finally (5) miscellaneous rights, such as a right of action arising under contract, including a claim for unliquidated damages for breach of contract, or a right of action in tort.

[32] On the basis of the facts in **Clarke v BNS Jamaica Limited**, in my opinion, it is certainly arguable that the applicant's separation from the bank and the compensation to be agreed for the retirement package were independent of each other. The applicant had not placed before the court any "dispute" with regard to his separation. The dispute related to the terms of his compensation. Indeed, in the reasons for judgment, Harris JA indicated that the facts of the case gave rise to the following questions:

> "1. Did the appellant's e-mail of October 12, 2008 and/or Professor Vasciannie's proposals contain an offer for the parties to submit to arbitration which was accepted by the Board in its Resolution of October 21, 2008?
>
> 2. If neither the e-mail nor the proposals is found to be an offer, was the Resolution an offer and the letter of October

> 29, 2008 from the appellant's attorney-at-law to Mr. Armstrong an acceptance, by the appellant, of that offer?"

[33] It would seem therefore that the questions left for the court were limited to the issue of whether there was an agreement to arbitrate, and it is therefore arguable that the amount payable was a matter in the discretion of the bank, which was entirely gratuitous, and to be decided by the arbitrators as to whether it was equitable and fair in all the circumstances. It would also be eminently arguable that the applicant's separation from his employment with the bank was not open for debate and therefore not a "cause of action" by the applicant which could give rise to a right of action arising under contract, and not a chose in action falling under the definition of property in PROSA.

[34] Indeed, in his affidavit before Sykes J, sworn to on 12 July 2008, the applicant had deposed that the contract was one of indefinite duration which could be terminated by notice on either side. He said that he opted to go on early retirement and was entitled to a pension. He could not, he said, sue the bank for "retirement benefits" as they were not due to him. So, anything offered by the bank, he contended, was "gratuitous" and in an effort to save the bank from unfavourable publicity. He maintained that his lawsuit against the bank was "instituted with the aim of having the dispute arbitrated as I had no cause of action against the bank". This statement would have to be considered against all the facts and the law as set out in the judgments of this court but it is powerful evidence which the respondent may be hard put to displace.

[35] The case of **Charles Sandhu** was dealing with facts somewhat dissimilar to those in the instant case, particularly as the issue underlying the appeal was simply stated by Lord Justice Wall, who delivered the judgment of the court, to be whether the appellant Sandhu resigned from his employment or was dismissed. As previously shown, this is an entirely different question from the one posed in the **Clarke v BNS Jamaica Limited** case. So, although Mr Sandhu's employment was terminated at a meeting to which he was summoned, the purpose about which he knew nothing, he had no time to obtain any advice, nor was he given time to reflect. The tribunal found that the situation may have begun as a dismissal but had ended as a voluntary resignation, he, having in its view, negotiated the terms of his separation. This finding however, was made by the tribunal accepting the facts of his case to be "on all fours" with other cases (to name two, **Sheffield v Oxford Controls Ltd** [1979] IRLR 133 and **Crowley v Ashland (UK) Chemicals Ltd** EAT 31/79 decided 20 April 1979) which encouraged that result. The court, having found that to be wrong, overturned the decision of the tribunal, made a finding that Mr Sandhu had been dismissed by his employer, and sent the matter back to be heard by a different tribunal in respect of his claim for unfair dismissal.

[36] In paragraph 27 of his judgment, Lord Justice Wall quoted a passage from the judgment of Arnold J in **Sheffield,** which, in my view, admirably sets out the deliberations on the facts in that case and the principles applicable when considering issues relating to dismissal as against enforced resignation:

> "…It is plain, we think, that there must exist a principle, exemplified by the four cases to which we have referred, that where an employee resigns and that resignation is determined upon by him because he prefers to resign rather than to be dismissed (the alternative having been expressed to him by the employer in the terms of the threat that if he does not resign he will be dismissed), the mechanics of the resignation do not cause that to be other than a dismissal. The cases do not in terms go further than that. We find the principle to be one of causation. In cases such as that which we have just hypothesised, and those reported, the causation is the threat. It is the existence of the threat which causes the employee to be willing to sign, and to sign, a resignation later or to be willing to give, and to give the oral resignation. But where that willingness is brought about by other considerations and the actual causation of the resignation is no longer the threat which has been made but is the state of mind of the resigning employee, that he is willing and content to resign on the terms which he has negotiated and which are satisfactory to him, then we think there is no room for the principle to be derived from the decided cases. In such a case he resigns because he is willing to resign as the result of being offered terms which are to him satisfactory terms on which to resign. He is no longer impelled or compelled by the threat of dismissal to resign, but a new matter has come into the history, namely that he has been brought into a condition of mind in which the threat is no longer the operative factor of his decision; it has been replaced by the emergence of terms which are satisfactory. Therefore we think that the finding that Mr. Sheffield had agreed to terms upon which he was prepared to agree to terminate his employment with the company-terms which were satisfactory to him - means that there is no room for the principle and that it is impossible to upset the conclusion of the Tribunal that he was not dismissed."

[37] In paragraph 37 of **Charles Sandhu** Lord Justice Wall made this observation which was relevant to the discourse on the authorities and the decision in that case and is also useful in distilling the principles which may be applicable to the issue herein:

> "What is striking in the authorities, and is amply demonstrated by the cases I have discussed so far, is that in none of the cases in which the employee has been held to resign has the resignation occurred during the same interview/discussion in which the question of dismissal has been raised, and in no case in which the termination of the employee's employment has occurred in a single interview has a resignation been found to have taken place. The reason for this, I venture to think, is not far to seek. Resignation, as the authorities indicate, implies some form of negotiation and discussion; it predicates a result which is a genuine choice on the part of the employee. Plainly, if the employee has had the opportunity to take independent advice and then offers to resign, that fact would be powerful evidence pointing towards resignation rather than dismissal."

[38] On the basis of the facts of the instant case, it is certainly arguable that the applicant was not dismissed, and that he agreed to be separated from the bank and engaged willingly in discussions to do so, in an effort to arrive at terms satisfactory to him. He obtained independent legal advice and the resignation took place months after the meeting in which the decision of the separation was communicated to him. So arguably, no cause of action, or "chose in action" could arise.

[39] With regard to the duty of disclosure, the parties were in agreement that where they are required by any direction of the court to give standard disclosure, they are required to disclose all documents which are directly relevant to the matters in question in the proceedings (r28.4(1) of the CPR.) The issue therefore in this matter related to whether the documents comprised in the settlement/retirement package would be relevant to the proceedings, if the settlement did not fall under the definition of "property" in the PROSA. Any order for specific disclosure with regard to that

documentation would be met with the same hurdle. The argument by counsel for the respondent that there should be disclosure of documentation whether it falls under PROSA and is relevant or not, but on the basis that the court can consider whether the division of property which does fall under PROSA, is equitable and fair, in my view, is not sustainable and ought not to succeed.

[40] Based on all that has been stated above, it would appear that the applicant has a good chance of success on appeal, which is why I concurred with the order with respect to permission to appeal, made on 2 December 2011 set out in paragraph [3] herein.

[41] I also agreed that if a stay of execution of the order was refused, the appeal if successful would only be a pyrrhic victory for him. In my view, the court ought always to take the approach which the authorities have advocated, namely that which accords with the best interests of justice, and is likely to cause the least irremediable harm.

[42] The applicant should proceed to file his notice and grounds of appeal so that the appeal may be heard as early as possible in the Hilary term.

McINTOSH JA

[43] I have had the opportunity to read in draft the reasons of Phillips JA for the order made on 2 December 2011 with which I agree and have nothing to add.