[2014] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 145/2011

BEFORE: **THE HON MRS JUSTICE HARRIS JA**
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA

BETWEEN	**WILLIAM CLARKE**	**APPELLANT**
AND	**GWENETTA CLARKE**	**RESPONDENT**

Gordon Steer and Mrs Judith Cooper-Bachelor instructed by Chambers, Bunny & Steer for the appellant

Lord Anthony Gifford QC and Miss Tiffany Lofters instructed by Alton E. Morgan & Co for the respondent

4, 5 December 2012 and 11 April 2014

HARRIS JA

[1] I have read the judgment prepared by Morrison JA in draft and I am fully in agreement with his reasoning and conclusion.

MORRISON JA

Background

[2] On 18 July 2011, Sykes J made an order for further disclosure in proceedings commenced by the respondent ('Mrs Clarke') against the appellant ('Mr Clarke') on 14 April 2009 under the Property (Rights of Spouses) Act 2004 ('the Act'). In this appeal, which is brought pursuant to the grant of leave to appeal by this court on 2 December 2011, Mr Clarke challenges the learned judge's order for further disclosure.

[3] The parties were married to each other on 21 July 1973 and their marriage was dissolved, after the commencement of these proceedings, on 16 November 2010. On Mrs Clarke's account, she had in fact moved out of the matrimonial bedroom from 19 November 2008.

[4] By her amended fixed date claim filed on 27 July 2010, Mrs Clarke sought orders under the Act in relation to several items of property, in respect of which she claims to be a joint legal and beneficial owner with Mr Clarke. This aspect of the proceedings is specifically concerned with Mrs Clarke's claim for a declaration that she is entitled to a half interest -

> "…in all…the investments, savings, monetary instruments, pension entitlements and other perquisites or benefits attached to [Mr Clarke's] current or former employment and monies, whether held in the name of the parties, in the name of [Mr Clarke] only or on his behalf or for his benefit."

[5] The "current or former employment" referred to in the fixed date claim form was Mr Clarke's 40-year employment to the Bank of Nova Scotia Jamaica Ltd ('the bank'). During his last 13 years with the bank, Mr Clarke served as its president and chief executive officer. His employment with the bank formally ended upon his early retirement from its service, with effect from 1 November 2008.

[6] A dispute arose between Mr Clarke and the bank as to what would constitute a fair and equitable retirement plan for him. As a result, Mr Clarke commenced litigation against the bank on 24 December 2008, to determine whether, as he maintained, there was a binding agreement between the parties to submit their differences to arbitration. The background to this dispute – and, indeed, to Mr Clarke's retirement - is that it is common ground that Mr Clarke did not initiate the steps which ultimately led to his separation from the service of the bank. This is how Cooke JA described it in his judgment in ***William Clarke v Bank of Nova Scotia Jamaica Ltd*** (SCCA No 38/2009, judgment delivered 2 October 2009, at para. [57]):

> "[Mr Clarke] was summoned to a meeting in Toronto, Canada by Robert Pitfield, the Chairman of the Board of [the bank]. This meeting was on July 8, 2008. Also present at this meeting was the Deputy Chairman of the [bank's] Board. At this meeting [Mr Clarke] was informed that a decision had been made. He would 'be separated' from [the bank] and would retire on August 31, 2008. This separation would be done on 'an amicable basis to be negotiated'...[Mr Clarke] 'was apprised of 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 CEO of [the bank]'... At the meeting of July 8th in Canada, [Mr Clarke] was given a letter which proposed the terms on which he should retire. This was not

> accepted. Subsequent negotiations between the parties as to the terms of [Mr Clarke's] retirement package have proved fruitless and it would not be unfair to say that both parties, despite any outgoing show, understood that there would be no amicable resolution to this issue. Thus, after this meeting, [Mr Clarke's] separation from [the bank] was not an issue; it was a *fait accompli*. The sole question pertained to the terms of the retirement package. Of course...[the bank] was faced with the factor of dealing with [Mr Clarke's] retirement in such a manner that, as regards public consumption, there would be no fallout in any way to [the bank's] operation. This was a sensitive task."

[7] In the result, in ***Clarke v Bank of Nova Scotia Limited***, this court granted a declaration that [Mr Clarke] and the bank were "bound by agreement to submit to Arbitration the existing dispute between them as to what is a fair and equitable retirement plan for [Mr Clarke] having regard to all the circumstances". The principal issue that arises in the instant appeal is whether this dispute between Mr Clarke and the bank falls within the definition of 'property' set out in section 2(1) of the Act:

> "'property' means 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 right or interest whether in possession or not to which the spouses or either of them is entitled;"

The proceedings in the court below

[8] On 19 November 2009, pursuant to Mrs Clarke's application, Thompson-James J made an order for standard disclosure "of all assets owned by the parties or in which the parties have an interest in [sic]". The learned judge also made an order for specific

disclosure, to include "(b) original and subsequent pension documents issues [sic] by the Bank of Nova Scotia".

[9] In a further affidavit filed on 20 May 2011, Mrs Clarke referred to Mr Clarke's retirement from the bank and to discussions between them on the question of his "retirement package":

> "14. That I am advised by my Attorneys-at-law and do verily believe that the dispute between the Defendant and the Bank is a chose in action and is therefore marital property subject to distribution under the Property (Rights of Spouses) Act 2004.
>
> 15. That I am further advised by my Attorneys-at-Law and do verily believe that under the said Act, the Defendant's pension and retirement benefits are matrimonial property, to the extent that they are rights and interests to which the Defendant became entitled to during the marriage.
>
> 16. That in further reference to the judgment of the Court of Appeal I confirm that there is no dispute that the Defendant is to receive from the Bank, financial compensation relating to his retirement in 2008. I therefore know that the Defendant will, as a matter of certainty, receive financial compensation in relation to his employment with, and retirement from, the Bank during the course of our marriage.
>
> 17. That I fear that the Defendant may be delaying arbitration proceedings in the hope that the property distribution dispute herein will be finalized before he accepts and/or receives his retirement entitlements, and so enable him [sic] take the full benefit of same.
>
> 18. That I fear that if this honourable court should proceed to make an award in relation to matrimonial property without considering my matrimonial property rights to an equal share of the Defendant's retirement entitlement

> earned during the marriage, then I would suffer great prejudice.
>
> 19. That in the circumstances I humbly pray that this honourable Court will grant orders herein contemplating an equal or equitable share of all remaining family property including the monetary value of the Defendant's retirement entitlements."

[10] In his affidavit filed in response to this affidavit on 13 June 2011, Mr Clarke denied (at para. 10) discussing with her "any matter pertaining to my dispute with my former employers". In response to Mrs Clarke's comment on the status of the arbitration proceedings, Mr Clarke stated (at para. 14) that "the dispute between my former employers and myself has been referred to arbitration". Finally, Mr Clarke denied (at para 17) that Mrs Clarke "has an equal right to any settlement to which I may be entitled to [sic] by virtue of my early retirement or otherwise".

[11] On 7 July 2011, prompted by an item of news, Mrs Clarke made an application to the court for a further order for standard disclosure of the details of (a) the terms of the settlement between Mr Clarke and the bank, and (b) Mr Clarke's retirement package and entitlement. The basis of her application was set out in her affidavit sworn to on 5 July 2011. After restating the advice which she had received that the dispute between Mr Clarke and the bank as to his retirement benefits was a "chose in action", Mrs Clarke said this:

> "6. That I have recently read a news article published in the Jamaica Observer dated June 17, 2011, wherein it was reported that [Mr Clarke] and the Bank have arrived at a settlement having regard to the said chose in action and

retirement package entitlements. That to date I have not seen any statement made by [Mr Clarke] denying the truth of the said article...

7. That I am advised by my Attorneys-at-Law and do verily believe that [Mr Clarke] has a duty of continuous disclosure regarding documents and information relevant to the matters in question in the proceedings until the proceedigns are concluded.

8. That [Mr Clarke] has not provided me with any information or documentary records of the said settlement and his retirement package.

9. That I am advised by my Attorney-at-Law and do verily believe that there is no record of the recent events involving the chose in action settlement, retirement package, and related property and monetary awards, before the court for consideration.

10. That I fear that if this honourable court should proceed to make an award in relation to matrimonial property without considering my matrimonial property rights to an equal share of [Mr Clarke's] chose in action and retirement entitlement earned during the marriage, then I would suffer great prejudice.

11. That in the circumstances I humbly pray that this honourable Court will grant orders sought herein so as to detremine [sic] the full extend [sic] of all remaining family property including the monetary value of [Mr Clarke's] retirement entitlements."

[12] Mr Clarke responded to this affidavit in a short affidavit of his own, sworn to on 12 July 2011. The material paragraphs read as follows:

"3. There was an oral contract of employment between the Bank of Nova Scotia Jamaica Limited and myself. It was a contract of indefinite duration. This contract could have been terminated either by me or the Bank by written notice on either side.

> 4. I opted to go on early retirement. I was not entitled to retirement benefits save and except my pension, which I duly received.
>
> 5. I could not sue the bank for 'retirement benefits' as they were not due to me. Anything offered to me by the Bank was gratuitous and in an effort to save the Bank from unfavourable publicity.
>
> 6. My lawsuit against the bank was instituted with the aim of having the dispute arbitrated, as I had no cause of action against the bank.
>
> 7. Therefore in the circumstances, my lawsuit against the Bank cannot be deemed a chose in action and I pray that this Honourable Court will deny the application sought by the claimant in her Notice of Application for Court Orders."

[13] It is on the basis of this material that Sykes J made the following order for further disclosure by Mr Clarke:

> "1. There be standard disclosure of the details of the terms of settlement of the chose in action being the dispute between [Mr Clarke] and [the bank]...
>
> 2. There be standard disclosure of the details of [Mr Clarke's] retirement package and entitlements...
>
> 3. The documents disclosed pursuant to this Order and the contents thereof shall remain confidential and shall not be copied or disclosed by [Mrs Clarke] or her Attorneys-at-Law to any person, except for the purposes of these proceedings.
>
> ..."

[14] Among other things, the learned judge considered the submission of counsel for Mrs Clarke that Mr Clarke was, in effect, constructively dismissed and that, on that

basis, he had a cause of action against the bank, which had arisen as early as July 2008. However, the judge declined (at para. [22]) "to label the bank's conduct as amounting to constructive dismissal in circumstances where the bank is not party to this claim". But the judge nonetheless expressed the view that a "reasonable argument could be made that Mr Clarke was constructively dismissed and so a cause of action arose from 8 July 2008". The order was therefore made on two bases, firstly, that Mr Clarke's dispute with the bank over the terms of his compensation upon his early retirement was capable of being a "chose in action" within the meaning of section 2 of the Act; and secondly, that in any event, the terms of Thompson-James J's order for disclosure were sufficiently wide to encompass Mr Clarke's settlement with the bank, disclosure being an ongoing process.

The grounds of appeal

[15] The two grounds of appeal filed on Mr Clarke's behalf are as follows:

> "(a) The learned trial Judge's finding that there was a chose in action is against the weight of the evidence.
>
> (b) The finding of constructive desertion [sic] was against the weight of the evidence."

[16] Mr Gordon Steer for Mr Clarke referred us to the decisions of the English Employment Appeal Tribunal ('the EAT') in ***Sheffield v Oxford Controls Co Ltd*** [1979] ICR 396 and ***Optare Group Ltd v Transport and General Workers Union*** [2007] UKEAT 0143_07_1007, to make the point that, Mr Clarke having opted to resign,

it could not be said that he had been dismissed by the bank. In these circumstances, Mr Steer submitted, the only dispute which Mr Clarke had with the bank related to the question whether or not the parties were bound by agreement to arbitrate their differences as regards the terms of Mr Clarke's retirement package. It was accordingly submitted that there was no chose in action between Mr Clarke and the bank, so as to bring it within the ambit of the definition of property in section 2 of the Act.

[17] Lord Gifford QC for Mrs Clarke emphasised at the outset that, at this stage of the proceedings, the case is simply about disclosure: it will be for the judge at trial to determine whether any funds received by Mr Clarke by way of settlement with the bank are property within the Act and, if so, to what share, if any, is Mrs Clarke entitled. It was submitted that there was evidence before the judge to support a conclusion that Mr Clarke may have been constructively dismissed by the bank, within the meaning of the test for constructive dismissal set out in ***Western Excavating (ECC) Ltd v Sharp*** [1978] 1 All ER 713 and ***Saint Aubin Limitee v Alain Jean Francois Doger de Spéville*** [2011] UKPC 42. In these circumstances, it was accordingly submitted, Mr Clarke's rights against the bank were clearly a chose in action, which arises when there is a credible right to bring an action. Further, even if Mr Clarke's employment was in fact terminated by mutual consent, rights would have accrued to him under the settlement agreement; and, further still, there was an agreement between the parties to arbitrate their differences and this agreement also gave rights to Mr Clarke which the bank would be obliged to honour by paying over to him whatever the arbitrator might

award. Thus, any settlement which was arrived at by the bank with Mr Clarke was to be regarded not as a gift, but as compensation for the termination of his employment.

[18] Finally, Lord Gifford mounted an argument, based on the well-known decision of the House of Lords in ***White v White*** [2000] 3 WLR 1571, to the effect that, even if Mr Clarke's settlement with the bank did not give rise to a chose in action, it was a factor to be taken into account by the judge trying Mrs Clarke's claim under the Act: on that basis, it was submitted, as well as on the basis of Thompson-James J's order, the terms of the settlement ought to be disclosed.

[19] In a brief reply to this last submission, Mr Steer reminded us that the decision in ***White v White*** was based on statutory provisions in the United Kingdom which have no counterpart in the Act. Apart from the entitlement of each spouse to a share in the family home, there is no concept of equal sharing in the Act and, in a claim to any other item of matrimonial property, the applicant is required to show some level of contribution.

The duty of disclosure

[20] Rules governing disclosure of documents are contained in Part 28 of the Civil Procedure Rules 2002 ('the CPR'). An order for disclosure may either be an order for standard disclosure or an order for specific disclosure. Rule 28.4(1) provides that, where a party is required by any direction of the court to give standard disclosure, "that party must disclose all documents which are directly relevant to the matters in question

in the proceedings". Rule 28.6(1) provides that an order for specific disclosure is an order that a party must "(a) disclose documents or classes of documents specified in the order; or (b) carry out a search for documents to the extent stated in the order and disclose any documents located as a result of that search".

[21] Rule 28.7 lists the criteria for orders for specific disclosure as follows:

> "(1) When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.
>
> (2) It must have regard to-
> (a) the likely benefits of specific disclosure;
> (b) the likely cost of specific disclosure; and
> (c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.
>
> (3) Where, having regard to paragraph (2) (c), the court would otherwise refuse to make an order for specific disclosure, it may however make such an order on terms that the party seeking that order must pay the other party's costs of such disclosure in any event."

[22] The duty of disclosure in accordance with any order for standard or specific disclosure "continues until the proceedings are concluded" (rule 28.13(1)); and, if documents to which the duty extends comes to a party's notice at any time during the proceedings, "he must immediately notify every other party and serve a supplemental list of documents" (rule 28.13(2)).

[23] In ***Davies v Eli Lilly and Co*** [1987] 1 All ER 801, 804, Lord Donaldson MR said that discovery, as the process was then known, "is designed to do real justice between opposing parties and, if the court does not have *all* the relevant information, it cannot achieve this object". Thus, Professor Adrian Zuckerman has observed (Zuckerman on Civil Procedure Principles of Practice, 3rd edn, para. 15.3):

> "…disclosure is but one component of what has come to be known as the 'cards on the table approach'. This approach seeks to ensure that parties to a dispute are able to find out as much as possible about each other's case as early as possible, so that no party is taken by surprise and so that the court is appraised [sic] well before the trial of the nature and extent of the evidence."

Constructive dismissal

[24] In ***Western Excavating (ECC) Ltd v Sharp***, the court was concerned with the meaning of paragraph 5(2)(c) of Schedule 1 to the Trade Union and Labour Relations Act 1974, which provided, so far as is material, as follows:

> "...an employee shall be treated for the purposes of this Act as dismissed by his employer if, but only if...(c) the employee terminates that contract, with or without notice in, circumstances such that he is entitled to terminate without notice by reason of the employer's conduct."

[25] Lord Denning MR considered that this paragraph encapsulated the common law test for constructive dismissal, which he stated as follows (at page 716):

> "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. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

[26] And in ***Saint Aubin Limitee v Alain Jean Francois Doger de Spéville***, upon which Lord Gifford also relied, Lord Mance stated (at para. 19) that '[a] constructive dismissal occurs if an employer imposes on an employee unilaterally, that is without the employee's consent, a substantial modification of the original contract conditions...[t]he employee is entitled, though not bound, to treat such a change so imposed as a constructive dismissal".

[27] But, as the cases cited by Mr Steer reveal, it may in a particular case nevertheless be necessary to determine whether, as a matter of fact, it can truly be said that an employee, offered the option of a voluntary resignation by the employer, has been dismissed. In ***Sheffield v Oxford Controls Co Ltd***, the employee was both a director and an employee of a company, to which his wife was also employed. Although the families of the employee and his co-director had originally held an equal shareholding in the company, this position changed when the co-director's family were able to increase their shareholding. Following a disagreement in which the employee's wife was

threatened with dismissal, the employee threatened to leave if his wife was dismissed. He was then told that, if he did not resign voluntarily, he too would be dismissed. After some negotiation, the employee then agreed to resign in return for certain financial benefits. In these circumstances, an industrial tribunal dismissed his complaint of unfair dismissal, on the ground that he had not been dismissed, but had in fact agreed to resign upon the terms negotiated between the parties.

[28] The decision of the tribunal was upheld by the EAT. Delivering the judgment of the EAT, Arnold J identified the question for decision (at pages 398-399) as being whether the employee's resignation "...is really something which terminated the contract of employment on the employee's initiative or whether, because it was made as a result of a threat that he would be dismissed if he did not resign, the result is that there was a dismissal by the employers notwithstanding the intermediate negotiation". After a review of some previous decisions, Arnold J summarised the principles applicable to such cases in this way (at page 402):

> "...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...We find the principle to be one of causation...the causation is the threat. It is the existence of the threat which causes the employee to be willing to [resign]...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."

[29] In the later decision of the EAT in ***Optare Group Ltd v Transport and General Workers Union***, to which Mr Steer also referred us, Wilkie J confirmed (at paras 25-27) that the important question for determination in such cases is one of causation. In addition to quoting in full the passage from Arnold J's judgment in ***Sheffield v Oxford Controls Co Ltd***, which I have set out above, the learned judge also made reference to the decision of the Court of Appeal in ***Sandhu v Jan de Rijk Transport Ltd*** [2007] EWCA Civ 430. That was a case in which the employee was invited to a meeting, during the course of which he was confronted with certain facts by the employer's representatives and made aware that the employer no longer had any trust in him and wished to terminate his contract. It appears that thereafter, the employee spent the majority of the meeting negotiating – ultimately with a measure of success - a financially beneficial way for him to leave the company. The Employment Tribunal concluded that, although the situation started off as a dismissal, the employee in fact left because of the favourable terms that he was able to negotiate.

[30] The Court of Appeal disagreed. Wall LJ considered (at para. 51) that the employee was being dismissed and that "it simply cannot be argued that he was negotiating freely":

> "He had had no warning that the purpose of the...meeting was to dismiss him; he had had no advice, and no time to reflect. In my judgment, he was doing his best on his own to salvage what he could from the inevitable fact that he was going to be dismissed. This, in my judgment, is the very antithesis of free, unpressurised negotiation."

[31] The Court of Appeal therefore concluded (at para. 60) that the tribunal's factual conclusion that the employee was not dismissed, but had resigned, was "perverse":

> "The evidence before the Tribunal was that the [employee's] contract was being terminated...that was the purpose of the meeting: those were the words spoken at its inception. I therefore take the view that it was simply not open to the Tribunal in these circumstances to hold on the facts that he had resigned."

[32] Before leaving this case, I should note that (at para. 37) Wall LJ considered it to be of some significance that the termination of the employee's employment and his resignation had occurred in the same interview: "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".

[33] In summary, this limited review of the authorities to which we were referred by counsel suggests that:

1. A constructive dismissal may occur where an employer imposes on an employee unilaterally, that is without the employee's consent, a substantial modification of the original contract conditions, thus entitling the employee, at his option, to treat the employer's conduct as having brought the contract of employment to an end.
2. Where an employee resigns after having been offered by the employer the option of resignation as an alternative to dismissal, the employee will nevertheless be treated as having been dismissed, provided that the effective cause of the resignation remains the threat of dismissal.
3. However, where, at the time of his resignation, the employee's conduct is no longer impelled by the threat of dismissal, but rather is based on terms satisfactory to him offered by the employer or negotiated by him, the contract of employment will have been terminated by the employee's voluntary act of resignation, and not by dismissal.
4. It is essentially a question of fact on which side of the line a particular case falls, though a relevant consideration may be whether the employee, before resigning, had an opportunity for reflection and the taking of advice as to his position.

Choses in action

[34] For a definition of "chose in action", we were referred by Lord Gifford to Stroud's Judicial Dictionary of Words and Phrases (4th edn, Vol 1, page 460):

> "(1) 'chose' in action is the antithesis of 'chose in possession'…
>
> (2) 'Things in action' is when a man hath cause, or may bring in action, for some duty due to him;…and because 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'."

[35] Lord Gifford also referred us to the decision of the Court of Appeal of England and Wales in ***Jennifer Simpson v Norfolk & Norwich University Hospital NHS Trust*** [2011] EWCA 1149, in which the first issue for consideration was whether a claim for damages for personal injury arriving out of the alleged negligence of a hospital was capable of assignment. The answer to this question turned on whether a claim of this nature could properly be regarded as a "legal thing in action", within the meaning of section 136(1) of the Law of Property Act 1925 (which is to the same effect as section 49(f) of the Judicature (Supreme Court) Act). Moore-Bick LJ (with whom Kay LJ and Dame Janet Smith DBE agreed) held that it could:

> "Whether a right to recover compensation for personal injury caused by negligence can properly be regarded as a form of property might at one time have been open to argument, but in my view the expression 'legal thing in action' is wide enough to encompass such a claim and support for that conclusion can be found in the decision in *Ord v Upton* [2000] Ch. 352, to which I shall return in a moment. It is difficult to see why a claim for damage to property caused by negligence should not be regarded as a chose in action and capable of assignment and if that is so, I can see no reason in principle why a claim for damages for personal injury should not be regarded in the same way. Indeed, the reasons given in the authorities for not permitting the assignment of a bare cause of action, namely, that to do so

> would undermine the law on maintenance and champerty, tends to support the conclusion that a claim of that kind is to be regarded as a chose in action and inherently capable of assignment."

[36] In not dissimilar vein, the learned editors of Crossley Vaines' Personal Property (5th edn, page 263) make the point that the expression "chose in action", "when used in its widest sense, covers a multitude of things of which no really accurate classification seems possible". It accordingly appears that, in the modern law, the term 'chose in action' is apt to carry the widest possible connotation and in Halsbury's Laws of England (4th edn Reissue, Vol 4, para. 1) it is said that "[t]he meaning of the expression 'chose in action' or 'thing in action' has varied from time to time, but it 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". In a list of things which have been held to be choses in action, Halsbury's includes (at para. 8) "miscellaneous rights, such as a right of action arising under a contract, including a claim for unliquidated damages for breach of contract, or a right of action arising out of tort..."

Resolving the appeal

[37] I start, as I must, from the position that this is an appeal from the exercise of the discretion given to a judge to make an order for disclosure pursuant to Part 28 of the CPR. As such, this court will, as has oft been said, ordinarily defer to the judge's exercise of his discretion and will not interfere with it on the ground only that members of this court might or would have exercised the discretion differently had the decision been theirs to make. Accordingly, this court "will only set aside the exercise of a

discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference – that particular facts existed or did not exist – which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'" (***Attorney General of Jamaica v John MacKay*** [2012] JMCA App 1, para. [20], applying the well-known dictum of Lord Diplock in ***Hadmor Productions Ltd v Hamilton*** [1982] 1 All ER 1042, 1046).

[38] Dealing first with the question of constructive dismissal, after recounting the fateful events of 8 July 2008 at the bank's offices in Toronto (see para. [6] above), Sykes J observed (at para. [20]) that –

> "...there was no written notice from either the bank or Mr. Clarke terminating the indefinite duration contract. It is clear that the meeting on July 8 in Canada was not about whether Mr. Clarke would remain with the bank but rather it was to inform him that he would leave and with that settled, the only remaining question was compensation."

[39] Although, as has been seen, the learned judge sensibly declined to conclude that the bank's conduct did in fact amount to constructive dismissal (since, as the judge said, he had not had the benefit of any argument from the bank and in any event that was not an issue before him), he nonetheless took the view that a reasonable argument could be made that Mr Clarke had been constructively dismissed and that a possible cause of action arose in his favour against the bank from 8 July 2008. In my view, this

was a conclusion that was plainly open to the judge on the material before him, there being no question that, after this meeting, Mr Clarke's separation from the bank was, as Cooke JA put it, "a *fait accompli*".

[40] There was no evidence that, before 8 July 2008, the question of Mr Clarke's retirement from the bank had been in the offing. It is therefore strongly arguable, it seems to me, that his decision "to go on early retirement" (as he put it at paragraph 4 of his affidavit sworn to on 12 July 2011) was no more than the mechanism by which it was agreed that his separation from the bank should be achieved. In these circumstances, as Arnold J put it in ***Sheffield v Oxford Controls Co Ltd*** (see para. [28] above), "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".

[41] After the 8 July meeting, as Sykes J observed in the passage quoted above, the only remaining question was compensation. It is indeed the case that the litigation which resulted in the decision of this court in ***Clarke v Bank of Nova Scotia Limited*** was solely concerned with the issue whether there was an agreement between the parties to submit their differences as to what would be "a fair and equitable retirement plan" for Mr Clarke to arbitration. But this of course masks the more fundamental question of what should be the actual content of such a retirement plan. Mr Clarke's assertion in these proceedings that "I was not entitled to retirement benefits save and

except my pension, which I duly received" (see para. 4 of his affidavit sworn to on 12 July 2011), naturally begs the further question: what then was the "dispute" with the bank which he was so bent on having arbitrated? It again seems to me to be strongly arguable that the only answer to this question is that the parties remained in dispute over the issue of what compensation should be paid to Mr Clarke in consequence of his involuntary separation from the bank.

[42] In these circumstances, it appears to me that no basis has been shown to suggest that Sykes J's conclusion that "a reasonable argument could be made that Mr. Clarke was constructively dismissed and so a possible cause of action [against the bank] arose from July 8, 2008", was not one that was open to him on the material before him.

[43] The learned judge next stated (at para. [22]) that "[t]his is clearly a chose in action within the meaning of [the Act's] definition of property". He went on to say this (at paras [23]–[24]):

> "[23] If what has just been said is correct, then the cause of action would have arisen before the parties separated whether one uses the November 2008 date suggested by Mrs. Clarke (see paragraph 21 of affidavit dated April 14, 2009) or August 12, 2008 hinted at by Mr. Clarke (see paragraph 26 of affidavit dated October 30, 2009).
>
> [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 [the Act]. 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."

[44] In the penultimate paragraph of his judgment (para. [26]), the learned judge added this for emphasis:

> "The court wishes to point out that this judgment is by no means deciding that the retirement package and settlement must necessarily be the [sic] divided between the parties. All that is being said is that, the definition of property in section 2 of [the Act] 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."

[45] In my view, the judge's approach on this aspect of the matter cannot be faulted. Firstly, Mrs Clarke specifically claims a half interest in all "pension entitlements and other perquisites or benefits attached to [Mr Clarke's]...former employment…" Secondly, it is obvious that the legislature, in crafting the definition of "property" in section 2 of the Act, was intent on making it as broad and inclusive as possible. Thirdly, it is plainly arguable that Mr Clarke's claim against the bank (whatever may have been his view of its merits or potential for success at the time he launched it) is capable of falling within the words "debt or other chose in action, or any right or interest whether in possession or not", particularly given the breadth of the various definitions of "chose in action", some of which I have discussed (at paras [34]-[36] above). And fourthly, the

court is at this stage concerned solely with the duty of disclosure, which is a continuing one, and not with the ultimate rights of the parties: that will be a matter for the trial judge, armed with all the necessary information, to decide upon a consideration of all the evidence and the provisions of the Act.

[46] In these circumstances, I accordingly consider that no basis has been shown to disturb Sykes J's exercise of his undoubted discretion to order full disclosure of the details of the settlement of what Mr Clarke himself characterised several times as his "dispute" with the bank over his pension benefits.

[47] The learned judge also found it possible to arrive at the same conclusion by an alternative route (para [25]):

> "Thompson-James J has made an order asking the parties to disclose all their property and related documents. The terms of the order are quite wide and made no distinction between property acquired before separation and property acquired after separation. Since disclosure is ongoing, then Mr. Clarke ought to make the disclosure of his settlement with the bank and should Mrs. Clarke make any claim in respect of that property at the hearing of the substantive matter, then the trial judge can determine whether the property falls within [the Act] and can properly be taken into account when considering whether Mrs. Clarke has any interest in it. As stated above, disclosure per se does not mean that all property disclosed will be subject to the legislation. There is no injustice to Mr. Clarke in this regard. If he has concerns about confidentiality, then appropriate orders can be made dealing with that aspect of the matter."

[48] Again, the learned judge's approach appears to me to be unexceptionable. It is true, as Mr Steer pointed out, that section 12(2) of the Act makes it clear that a

spouse's share in property is to be determined "as at the date on which the spouses ceased to live together as man and wife". But it is clear that the judge specifically recognised that an order for disclosure of the terms of Mr Clarke's settlement with the bank at this stage does not necessarily mean that Mrs Clarke thereby becomes entitled to a share of it. As has been seen, Sykes J was at pains to state and reiterate that what was before him was an application for disclosure, and not the trial of the substantive issues in the case. In my respectful view, he was correct to do so. Disclosure is about ensuring that all relevant information is before the court of trial which will ultimately discharge the onerous duty of doing justice between the parties.

[49] I have therefore come to the clear conclusion that this appeal ought not to succeed, for the reasons which I have attempted to state. In arriving at this view, I have not found it necessary to consider Lord Gifford's interesting argument based on ***White v White***. It suffices to say, I think, that, as Mr Steer pointed out, the extensive powers given to the court to make financial provision and property adjustment orders under sections 23 and 24 of the English Matrimonial Causes Act 1973, to which effect was given in ***White v White***, do not form part of our law.

Disposal of the appeal

[50] I would therefore dismiss the appeal and affirm the orders made by Sykes J. Mrs Clarke should have the costs of the appeal, to be taxed if not sooner agreed.

[51] But I cannot leave the matter without proffering profuse apologies to the parties on behalf of the court for the delay in producing this judgment. While there are reasons

for it, I do not offer any of them as an excuse for what has been an inordinate delay by any measure in dealing with an interlocutory appeal.

DUKHARAN JA

[52] I too have read Morrison JA's judgment in draft and I entirely agree with his conclusion.

HARRIS JA

ORDER:

Appeal dismissed. Order of Sykes J affirmed. Costs to the respondent to be taxed if not agreed.