[2015] JMSC Civ 113

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO 2014 HCV 02872

BETWEEN	**GEORGE NOOKS**	**CLAIMANT**
AND	**FIRST CARIBBEAN INTERNATIONAL BANK (JAMAICA) LIMITED**	**DEFENDANT**

IN CHAMBERS

Carlton Williams instructed by Williams, McKoy and Palmer for the claimant

Gavin Goffe and Jermaine Case instructed by Myers Fletcher and Gordon for the defendant

May 28, June 4 and 12, 2015

CIVIL PROCEDURE – APPLICATION TO STRIKE OUT DEFENCE – VICARIOUS LIABILITY

SYKES J

[1] Mr George Nooks is a famous singer and entertainer in Jamaica. In November 2013 he deposited J$15m in to his account held at First Caribbean International Bank (Jamaica) Limited ('the bank'). At some point he found out that money was he thought was invested in what he thought were investment denominated in United States of America dollar was now missing. He contacted the bank. The bank conducted enquiries and eventually it was discovered that an employee of the bank may be responsible for the loss. Mr Nooks has sued the bank. The bank has filed a defence. Mr Nooks does not want to go trial. He believes that the bank's defence is anaemic. He has sought to have the defence struck out on any of three grounds. These are:

a. no reasonable grounds for defending the claim;

b. the defence is an abuse of the process of the court;

c. mere denial that an employee of the defendant was not acting as servant and/or agent of the defendant does not amount to a defence.

[2] He relies on rule 26.3 (3) (c) of the Civil Procedure Rules ('CPR') which states that the statement of case or parts of it may be struck out if there are no reasonable grounds for bringing or defending the claim.

[3] In this case Mr Goffe sought to say that there were important points of law to be decided. This court does not agree. As will be shown below the law is very clear on vicarious liability. The application is denied because there are important factual issues that are essential to liability that need to be resolved.

The claim and the defence

[4] In this case Mr Nooks alleged in his claim form that the bank wrongfully refused to comply with his demand for the return of his money which was either in his account or invested on his behalf. He claimed, in the alternative, that the bank

breached its duty of care to him by wrongfully allowing its employee to convert his funds or operate the account fraudulently or negligently. He also alleged that there was a breach of contract. There was no mention of any breach of fiduciary duty in the claim form.

[5] In the particulars of claim paragraphs 4 – 6 spoke to the employee offering advice to Mr Nooks who took the advice and acted upon it. Paragraphs 7 – 11 indicated how the discrepancy was found out. Paragraphs 13 – 15 made reference to breach of statutory duty, negligence and breach of fiduciary duty.

[6] The bank in an amended defence alleged that the employee in question and Mr Nooks had an intimate relationship. It also pleaded that the employee was not private banker; acted in breach of its procedures and policies. The main defence seems to be that Mr Nooks was negligent in the way he handled his account by making it possible for the employee to withdraw sums of money from his account by handing to her signed blank withdrawal slips. The bank is saying that if the employee took the money then she took it as Mr Nooks' girlfriend and therefore the bank is not liable. To put it bluntly, Mr Nooks and his girlfriend were operating the account and it was in that context the money was withdrawn by her and therefore this is really a dispute between lovers, one of whom happens to be employed to the bank. The fact of being employed to the bank cannot and should not the basis of a claim against the bank.

[7] Mr Nooks refutes the suggestion that the employee was or is his girlfriend.

The cases cited

[8] Both counsel cited cases. The court will briefly refer to them. The court will begin with those cited by the defendant. The case of **RBTT Securities Jamaica Limited v Yvonne Powell** [2015] JMCA Civ 10 was referred to in the skeleton submissions. That was case dealing with negligent advice. The court need not consider this case any further because Mr Williams informed the court that he

was not suing in the basis of negligent advice but on the straight principle of the bank being vicariously liable for the negligence of its employee. Similarly, the case of **Sylvia Steens v National Commercial Bank** [2013] JMSC Civ 104 was also a case negligent advice and need not be examined any further having regard to Mr Williams' submissions.

[9] In light of Mr Williams' submissions focus was directed at the following cases: **Lister v Hesley Hall Limited** [2002] AC 215, **Dubai Aluminium Co Ltd v Salaam** [2003] 2 AC 366, **Bernard v Attorney General of Jamaica** (2004) 65 WIR 245 and **Kooragang Investments Pty v Richardson & Wrench Ltd** [1982] AC 462.

[10] The **Kooragang** case is a Privy Council appeal from Australia. In that case the employee had conducted valuations on behalf of the claimant. The claimant failed to pay and the defendant declined to do further work for the claimant. Unknown to the defendant, the employee did more valuations and it turned out that two were negligently done which led to losses to the claimant. The claimant sued the employer. The Privy Council held that he acted outside the scope of his employment and therefore the employer was not liable.

[11] As can be seen, the language used in **Kooragang** reflects the vocabulary in the era before **Lister** and **Dubai**. In the new dispensation, the language is now whether the conduct in question is so closely connected with what the employee was authorised to do so that it's fair and just to impose liability on the employer. **Kooragang** was explained by Lord Millett, with his customary precision, as a case of a moonlighting employee. According to his Lordship, the employee was not acting as an employee of the defendant but rather that of the claimant and therefore the employer was not liable.

[12] At one point the bank was suggesting that because the employee acted in breach of the bank's policies and procedures that was evidence that the bank ought not to be liable. The court indicated that was not quite an accurate view of the law because no employer, not even criminal enterprises, takes on a person to

act with the objective of having that person breach its policies and procedures. It cannot be very common for an employee to act in full compliance with the employer's policies and procedures but is found to have acted negligently unless of course the situation is one in which the very practices and procedures themselves are wanting. Usually, it is the failure of the employee to follow the policies and procedures that has precipitated the claim.

[13] We are past the days when we say that if the employee acted in accordance with the procedures and policies then all is well but if he or she did not then he or she was acting outside the scope of his or her duties. We are one hundred years past the proposition that intentional torts or torts involving dishonesty present challenges that the law struggles with (**Lloyd v Grace, Smith & Co** [192] AC 716. The law no longer tussles with the distinction between intentional and non-intentional torts. As Lord Millett pointed out in **Dubai**, to say that someone acted negligently is merely to describe the way in which he acted; to say that he acted dishonestly is to describe the purpose for which he acted (para. 123). These differences are no longer important. The crucial thing now, according to his Lordship is to have regard '*to the closeness of the connection between the employee's wrongdoing and the class of acts which he was employed to perform, or to the underlying rationale of vicarious liability, [and therefore] there is no relevant distinction to be made between performing an act in an improper manner and performing it for an improper purpose or by an improper means*' (para 124).

[14] Crucially, Lord Millett observed that '*vicarious liability of an employer does not depend upon the employee's authority to do the particular act which constitutes the wrong. It is sufficient if the employee is authorised to do acts of the kind in question*' (para 122).

[15] On the question of whether there is a question of fact or law, Lord Millett said at paragraph 112:

If the actions of the party primarily liable are legally capable of being performed within the course of his employment or the ordinary course of his firm's business, the question whether they were so performed is a question of fact, not of law. Such a question was formerly left to the jury. It is not, of course, a question of primary fact, but a factual conclusion based on an assessment of the primary facts. This may involve questions of fact and degree, and in borderline cases the decision may properly go either way. Unless, however, the conclusion of the tribunal of fact is not legally capable of being derived from the primary facts or is contradicted by them, then its determination must be respected.

[16] Lord Nicholls, who delivered the other leading judgment in the **Dubai** case stated at paragraphs 22 and 23 that vicarious liability should not be confined strictly to acts done with the employer's authority but also extends to acts which the employee is authorised to do and therefore in any given case the question is whether the wrongful conduct was so closely connected with the acts the employee was authorised to do that it can be said that the acts were fairly and properly done in the ordinary course of the employee's job. His Lordship noted that the close connection test does not answer the question of how close is close and how connected must the connection be for liability to attach to the employer (para. 25). The answers to these considerations are largely evaluative ones to be made in each case having regard to all the circumstances of the case while taking into account previous decisions.

[17] What is also important is that neither Lord Nicholls nor Lord Millett regarded the fact that employee acted dishonestly or for his or her own benefit as an insurmountable hurdle on the road to vicarious liability. The other important point to note is that both Law Lords were united on the point that the question is not what the employer authorised the employee to do but rather what the employee

was in fact authorised to do. This opens the possibility that an employee may by the terms of the contract be employed to do one thing but over time he or she was authorised to do a number of other things. If the employee in doing those other things commits a tort and the tortious act is indeed closely connected to what he or she was now authorised to do vicarious liability will attach regardless of what the contract actually says. In other words, the focus is on the reality of the situation and not any theoretical construct. The decision in **Grace, Smith** which held that the proposition that a principal was not liable for the fraud of his agent unless committed for the benefit of the principal was confirmed by the House of Lords.

[18] These passages from Lord Nicholls and Lord Millett were referred to show that this court does not accept that there is any point of law that has arisen on the pleaded cases. Much of what the bank has pleaded regarding policies and procedures are really irrelevant to the question of vicarious liability.

[19] The affidavit of Mrs Allison Rattray, attorney at law for the bank, filed in opposition to Mr Nooks' application had the following:

a. the employee in question was a customer care officer had no authority to offer personal banking services (para 4);

b. the internal investigations of the bank showed that Mr Nooks would normally sign blank withdrawal slips and leave them at the bank for the employee to process and the bank was not aware of this arrangement (para 5);

c. all withdrawal transactions on Mr Nooks' account are supported by withdrawal slips signed by him which indicates that on the face of it he received the money he is now claiming (para 5).

[20] For the bank to say by sworn testimony that all the sums being claimed by Mr Nooks were withdrawn by him must mean that the bank is saying that it held money which Mr Nooks was entitled to withdraw. Mr Nooks is saying that he

deposited money in the bank. He is also saying that he withdrew money. The bank has not asserted in its defence that Mr Nooks did not have money that he was entitled to withdraw. It is almost inconceivable that a bank faced with a vicarious liability claim by a customer alleging money was taken by its employee would not check to see (a) whether money was in fact deposited in the account; (b) whether the customer was indeed entitled to withdraw money from the account and (c) what became of the money if money was in fact withdrawn from the account. Neither the affidavit of Mrs Rattray nor the pleaded defence has said that Mr Nooks never had the JA$15m in the account.

[21] In light of the pleaded case and the sworn testimony of an attorney at law, the court is puzzled by the proposition that Mr Nooks' case that he deposited JA$15m in the bank and over a period of time funds were withdrawn is one of a mere allegation and needs to be proved. During the hearing the bank had the withdrawal slips and Mr Nooks' examined them and stated quite clearly that the signatures were his. It was he who supplied the additional information that sometimes the slips were signed in blank and at other times they were fully completed.

[22] Mr Nooks says that he was led to believe that those sums were invested in instruments denominated United States of America currency. The bank says that it has no knowledge of what Mr Nooks is speaking about and added that the employee did not have the authority to do anything like giving investment advice. Mr Nooks said that he received documents from the employee which contained (the bank admits this) a genuine stamp from the bank. Mr Nooks thought that these documents were genuine and that they represented what had become of the money withdrawn from his account. The bank says that those documents are false despite them having its genuine stamp. The bank does not know how its stamp got on the documents. Mr Nooks has now accepted that the documents are false.

[23] In light of the submissions, the affidavit evidence from both sides, the pleaded cases, a number of facts are not now in dispute from this court's perspective. Mr

Goffe was reluctant to agree with the court but inspite of his misgiving the following is clear:

a. Mr Nooks had an account into which he deposited at least J$15m;

b. Mr Nooks signed withdrawal slips, at times in blank and at other times, fully written up;

c. Mr Nooks gave these withdrawal slips to the employee in question;

d. in every single case money was in fact withdrawn from the account;

e. the employee in question in fact processed the withdrawal slips (see paragraph 5 of bank's amended defence which reads in part 'the bank denies that [the employee] was acting as its servant or agent **when she processed transactions for the claimant that was not in keeping with the Bank's contract with the claimant or its policies and procedures**' (my emphasis);

f. Mr Nooks did not receive the money now in dispute that was withdrawn from his account.

[24] At paragraph 3 of the particulars of claim, Mr Nooks pleaded that he sold his house and arising from that sale, his account was boosted by JA$15m. He pleads that he received advice from the bank and gave instructions that repo accounts be established at the Bank of Jamaica. In response to this the bank pleaded that it can neither admit nor deny paragraph 3 of the particulars of claim. The actual amended defence says paragraph 2 but this seems to be an error. The upshot of this according to Mr Goffe is that Mr Nooks should prove all of this. The court accepts that the bank may not know of the sale of the house and the advice allegedly given but surely the bank must know whether JA$15m was deposited in Mr Nooks account on or around the time of the alleged sale of the house. Mr Nooks gave the approximate date of the sale.

[25] Under rule 1.3 of the CPR litigants are under a duty to help the court advance the overriding objectives which include dealing with cases expeditiously and saving expense. In the opinion of this court, in a case such as the present, this must mean that the bank should say definitively whether or not it has evidence of Mr Nooks depositing the JA$15m. This would save time and expense on the part of Mr Nooks of having to prove that he deposited the money. Furthering the overriding objective means accepting allegations which the party against whom they are made knows that they are true. Indeed the precedent of particulars of claim and defence that accompanies the CPR has this sentence, 'I certify that all the facts set out in my defence are true to the best of my knowledge information and belief.' Is the bank really saying that it cannot say whether or not JA$15m were deposited into an account operated by Mr Nooks?

[26] In this case, the court cannot appreciate any difficulty on the part of the bank checking to see whether the JA$15m were deposited or not and saying what its findings are. In the modern world, this is simply a matter of checking the record (electronically?) since the bank must be taken to have an accurate record of all deposits taken and withdrawals of these transactions unless it states otherwise. This litigation has been going on for one year and as stated earlier, the court finds it puzzling that even at this stage, early as it is, no definitive answer on the issue of the quantum of the deposit can be obtained from the bank. Likewise, the court cannot see any value in Mr Nooks asking the bank to prove, at trial, that he signed the withdrawal slips when he made that admission during the hearing.

[27] The bank's pleaded case and the affidavit of Mrs Rattray have narrowed down the employee in question and named her. So too has Mr Nooks. Both have named the same person.

[28] Based on Mr Nooks' and the bank's pleaded case the most likely person to have received the money from the withdrawal slips would be the employee in question. He is in fact alleging that she did not hand over the money to him but purported to invest it in some kind investment instrument. Indeed since all parties are now agreed that the documents produced by Mr Nooks which

purported to be evidence of his investments are fraudulent, the inevitable conclusion from Mr Nooks' stand point is that money was stolen by the employee and the documents were fraudulent were produced to cover her tracks. The bank is saying that it has no record of any such investment and in any event, the employee was not authorised to advise on investments or make any investment on behalf of anyone. However, in light of Mr Williams' submission that his case, despite the pleadings, is not based on negligent advice, this response by the bank does not advance its defence.

[29] The only remaining question on the issue of liability, from this court's point of view, is whether what is being played out is a 'lovers' quarrel' where the female party might have withdrawn the money with full knowledge and agreement of her boyfriend but she has not accounted for it to him and that the boyfriend is now seeking to recover from the bank. This is the factual question that cannot be resolved at this stage in the proceedings.

[30] From all that was said during the application it is clear that the employee in question had the authority to 'interview customers and assist them in the completion of application forms, checking for accuracy in order to facilitate quick turnaround' among others. It could hardly be said that handling a withdrawal slip or completing a withdrawal slip for a customer could not or did not fall within what the employee was authorised to do.

[31] In **Lister** Lord Clyde said at paragraph 45:

> *Thirdly, while the employment enables the employee to be present at a particular time at a particular place, the opportunity of being present at particular premises whereby the employee has been able to perform the act in question does not mean that the act is necessarily within the scope of the employment. In order to establish a vicarious liability there must be some greater connection between the tortious act of the employee and the circumstances of his*

employment than the mere opportunity to commit the act which has been provided by the access to the premises which the employment has afforded:

[32] Also in **Lister** Lord Millett held at paragraph 65:

Thirdly, while the employment enables the employee to be present at a particular time at a particular place, the opportunity of being present at particular premises whereby the employee has been able to perform the act in question does not mean that the act is necessarily within the scope of the employment. In order to establish a vicarious liability there must be some greater connection between the tortious act of the employee and the circumstances of his employment than the mere opportunity to commit the act which has been provided by the access to the premises which the employment has afforded:

[33] And paragraph 77:

Just as an employer may be vicariously liable for deliberate and criminal conduct on the part of his employee, so he may be vicariously liable for acts of the employee which he has expressly forbidden him to do. In Ilkiw v Samuels [1963] 1 WLR 991 a lorry driver was under strict instructions from his employers not to allow anyone else to drive the lorry. He allowed a third party, who was incompetent, to drive it without making any inquiry into his competence to do so. The employers were held vicariously liable for the resulting accident. Diplock LJ explained, at p 1004, that some prohibitions limited the sphere of employment and others only dealt with conduct within the sphere of employment. In order to determine into which category a particular

prohibition fell it was necessary to determine what would have been the sphere, scope, or course (nouns which he considered to amount to the same thing) if the prohibition had not been imposed. In a passage which is of some importance in the present case, he added:

"As each of these nouns implies, the matter must be looked at broadly, not dissecting the servant's task into its component activities—such as driving, loading, sheeting and the like—by asking: what was the job on which he was engaged for his employer? and answering that question as a jury would."

He reasoned that the job which the driver was engaged to perform was to collect a load of sugar and transport it to its destination, using for that purpose his employers' lorry, of which he was put in charge. He was expressly forbidden to permit anyone else to drive the lorry in the course of performing this job. That was not a prohibition which limited the scope of his employment, but one which dealt with his conduct within the sphere of his employment.

[34] Finally at paragraph 79:

So it is no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty. The cases show that where an employer undertakes the care of a client's property and entrusts the

> *task to an employee who steals the property, the employer is vicariously liable. This is in accordance not only with principle but with the underlying rationale if Atiyah has correctly identified it. Experience shows that the risk of theft by an employee is inherent in a business which involves entrusting the custody of a customer's property to employees. But the theft must be committed by the very employee to whom the custody of the property is entrusted. He does more than make the most of an opportunity presented by the fact of his employment. He takes advantage of the position in which the employer has placed him to enable the purposes of the employer's business to be achieved.*

[35] There can be no question that banking carries the risk of an employee stealing money or misappropriating money. The owners and managers of the bank if for no other reason other than volume of work cannot conduct personally all banking services required by customers. Of necessity they have to entrust direct dealing with customers to others. In those circumstances the risk of theft is increased by reason of the simple fact that more persons are dealing with the customer one may have dishonest persons among that number. When the bank authorised its employees to assist with the completion of forms and the processing of those forms a great deal of imagination is not required to see that there is the risk that the employee may take advantage of that circumstance to enrich himself or herself.

[36] If one follows the reasoning of Lord Millett at paragraphs 82 – 84 in **Lister**, one will see that his Lordship was at pains to point out that vicarious liability goes beyond simply opportunity to commit the tort. His Lordship looked at the context that the school was responsible for the boy and the employee was entrusted to look after the boys and in so doing he abused his position. Similarly, the employee here, on one view, went beyond mere opportunity and took advantage

of the confidence Mr Nooks had in her to steal the money and she did this while carrying out her duties of assisting customers to navigate the bank's services. On another view, she was opportunistic and since she was or is the girlfriend of Mr Nooks it was that relationship that gave her the opportunity to take the money. It is for these reasons and these reasons only why this court took the view that the matter should go to trial.

[37] The conveyancing clerk in **Grace Smith ‘**had authority to arrange and negotiate sales of real property and carry them out and also to receive deeds for safe custody.' Clearly, unless the firm of solicitors were part of a crime syndicate, the conveyancing clerk could not have had authority to commit the crime that he did. The claimant thought he was a member of the firm of solicitors and dealt with him as such. The report that the claim was brought against the firm and the fraudulent conveyancing clerk was never sued by the claimant. The firm was held liable even though the conveyancing clerk was not sued. This point is being made because one of the submissions made by Mr Goffe was that the employee has not been sued and neither has she been found guilty of fraud in any forum. The theme of this submission was that the employee has not been presented with an opportunity to defend herself. It was also said that that there is no allegation of dishonesty on the part of the bank. **Grace Smith** shows that suing the fraudulent employee is not a legal requirement or practical necessity. Also, vicarious liability on the part of the employer is strict liability and does not depend on any wrong doing in the part of the employer.

[38] From the job description of the employee there is no doubt that she was in fact authorised to assist customers by completing the relevant forms. Her role as a customer service representative was to assist customers in navigating the various pathways of the banking services. Thus her act of processing the filled in forms or completing and processing the forms or seeing to it that both types of forms were processed were acts she was authorised to do. She was not employed to steal but the fact that she stole cannot lead to the ineluctable conclusion that what she did was not closely connected with what she was in fact

authorised to do. The fact that she is being accused of not accounting for the money cannot in and of itself lead to the inevitable conclusion that her employer cannot be liable. In the same way that in **Lister** the fact that the employees who were employed to look after the children took advantage of the opportunity to sexually abuse the children did not mean, as the Court of Appeal thought, that vicarious liability could not attach to the employer. The firm of solicitors in **Grace Smith** were found to be of impeccable character but that did not immunise them from liability for the fraud of their conveyancing clerk. In **Lister** no one contended that the employees were employed to molest children. In both **Lister** and **Grace Smith** liability attached. By parity of reasoning, the fact that the employee in this case may have breached all policies and procedures and may have stolen the money cannot, without more, immunise the bank from being vicariously liable.

[39] Mr Goffe made the submission that in the vicarious liability cases he cited all of them were decided after a trial and that in and of itself suggested that striking out was inappropriate. The court emphatically rejects that proposition. There does not accept the existence of any principle of 'other cases went to trial therefore this one should also because it is a case of vicarious liability.' Vicarious liability cases do not form any exceptional group that exclude them from striking out applications. The test is the same across all types of cases without exception.

[40] It was Lord Woolf who pointed out in **Kent v Griffith** [2001] 1 QB 36 that it is not accurate to say that a court should be reticent about striking out a statement case that has no real prospect of success when the legal position is clear and the investigation of the facts would not be of any assistance. Indeed his Lordship said that the courts are now being encouraged to take issues that have been or can be identified at an early stage and deal with them so that time and expense can be saved. Active case management is an ongoing process. It does not stop because this or that application is being. It may be that during the application the issues become more sharply defined. The applicable law becomes evident. If that is the case, it makes no sense to say that because there is this particular application then that application alone is an end in itself and the court should not

take all opportunity to resolve other issues. Once the parties have the opportunity to make their case then there cannot be anything wrong with using case management powers to deal with the case justly and save expense regardless of the application being made.

[41] Mr Goffe cited the judgment of Batts J in **City Properties Limited v New Era Finance** [2013] JMSC Civ 23 where his Lordship said at paragraph 9 that it must be rare that a court can find that a case is properly pleaded but then find that it is unreasonable to bring the claim or mount a defence. Batts J and this court are not in disagreement. Batts J never said that if such a case exists then it should not be struck out.

[42] The point being made by this court is that the CPR is a new procedural code (it is not an updated version of the old) with expanded powers to manage cases in such a manner that cases that should not go to trial are identified and disposed of early. Striking out is not the only way of stopping cases from going forward. The power of active case management exists at all times the case is within the court system. It is time we left behind the notion of trying to fit the old Civil Procedure Code with all its defects into CPR. New means new.

[43] Rule 25 of the CPR pushes the court to identify issues at an early stage. Resolve those that can be resolved at the time the case is before the court. The issues can be identified through pleadings; they can be identified with greater precision during various applications. This court has had experience where during applications the parties see both their case and other side's with greater clarity and that has led to settlements and in some cases discontinuance of the claim. If this happens then the objectives of the new rules are being met. The trial-at-all-cost mentality is behind us. It cannot be that because a particular application is being made the court must sit like a zombie or like Aladdin's genie popping up to do the bidding of he or she who rubbed the lamp, ignore the possibility of clarifying the matters so that a settlement on some or even all issues can be arrived at. Why this can happen is that the litigants are under the specific obligation of assisting the court to further the overriding objective. One

way of doing this is admitting facts when the party so doing knows that what is being said is true. We are long past the days of mechanical judicial responses to applications and blinkered vision. The new rules empower the courts to seek to resolve as many issues as possible on each occasion the case comes before the court. This is what active case management looks like.

[44] Lord Woolf indicated in **Kent** that there may be cases where the critical facts need examination in detail but this is not because it arises in any particular corner of the law but because the pleaded cases show that there are important facts to be determined which cannot be decided on the pleadings.

[45] The court wishes to say that it has taken account of Mr Williams' submission that the 'lover's defence' is preposterous even on the bank's case. Mr Williams was making the point that if the employee was his girlfriend why would he be 'paying' her or 'tipping her' with various sums of money. These are matters of fact to be resolved by a trial. The defence is not an abuse of the court. The defence is not a bare denial and there are reasonable grounds for defending the claim.

Disposition

[46] Application to strike out defence is refused. Costs to the defendant to be agreed or taxed.