

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

COMMONWEALTH OF DOMINICA

DOMHCVAP2023/0002

BETWEEN:

**[1] THE COMMISSIONER OF POLICE
[2] THE MINISTER OF JUSTICE, IMMIGRATION AND
NATIONAL SECURITY
[3] THE ATTORNEY GENERAL**

Appellants

and

**[1] ARCHIPELAGO TRADING LTD
[2] GREENS WHOLESALE & CO. LTD
[3] H.H. WILSON & CO. LTD
[4] JOSEPHINE GABRIEL & CO. LTD.
[5] L.A. DUPIGNY & CO. LTD
[6] PIRATES LTD**

Respondents

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mde. Margaret Price Findlay	Justice of Appeal

Appearances:

Mr. Anthony Astaphan SC, with him Dr. David Dorsett and Ms. Vanica Sobers Joseph, for the Appellants
Mr. Leslie Thomas KC, with him Ms. Noelize Knight-Didier, Ms. Joelle Harris and Ms. Indira St. Jean, for the Respondents

2023: December 5;
2024: April 18.

Interlocutory appeal – Strike out application – Civil Procedure Rules 2000 26.3(1)(b) and (c) – Appeal against dismissal of strike out application – Jurisdiction of an appellate court to interfere with judicial discretion – Duty of care of police officers to the public – Assumption of responsibility – Special circumstances in which the police may owe a duty of care and be liable for breach of such duty – Whether the police owed a duty of care to the respondents to protect their business places in Roseau from damage and looting by members of the public following the passage of Hurricane Maria on 18th to 19th September 2017 - If duty of care was owed was it breached when the respondents’

business places in Roseau were damaged and looted between the 19th and 30th of September 2017

On 18th September 2017, Hurricane Maria struck the island of Dominica, generating strong winds and heavy rains until the following day and causing major damage to buildings and other infrastructure on the island. After the wind and rain from the hurricane subsided, there was widespread looting of business places in Roseau and its environs which continued until about 30th September 2017.

The respondents (who were the claimants in the court below) owned and operated several businesses in Roseau and claimed to have suffered significant loss and damage as a result of the looting of their business places. By claim form and statement of claim filed on 20th March 2018, the respondents alleged breach of statutory duty and negligence by the appellants for failing to prevent damage and looting of their business places, resulting in loss and damage to the respondents. It is noted that in the court below, the respondents conceded that the claim for breach of statutory duty could not be maintained.

On 15th March 2022, the appellants filed an application to strike out the respondents' statement of claim pursuant to Rules 26.3(1)(b) and (c) of the Civil Procedure Rules 2000. The learned master heard the strike out application on 10th November 2022 and delivered his decision on 31st January 2023, wherein he dismissed the application to strike out the statement of claim and awarded costs to the respondents. The learned master concluded that there were important issues raised in the case and it was prudent to allow a trial in the public interest.

Dissatisfied with the decision, the appellants appealed. The main issue for determination in this appeal is whether the police owed a duty of care to the respondents to protect their business places in Roseau from damage and looting by members of the public following the passage of Hurricane Maria on 18th to 19th September 2017, which was breached when the respondents' business places in Roseau were damaged and looted between the 19th and 30th of September 2017.

Held: allowing the appeal, setting aside the decision of the learned master and striking out the claim with costs awarded to the appellants to be assessed if not agreed within 21 days, that:

1. An appellate court will only interfere with the exercise of a discretion by a judicial officer if it can be shown that in the exercise of his discretion he exceeded the ambit of reasonable disagreement among similarly-placed judicial officers and arrived at a decision which was clearly or blatantly wrong. The question of whether the master erred in his refusal to strike out the respondents' statement of claim invites this Court to review the exercise of a judicial discretion.

Ratnam v Kumarasamy [1965] 1 WLR 8 applied.

2. In the absence of any special circumstances, the police owe no common law duty of care to protect individuals against harm caused by criminals even though it was reasonably foreseeable that harm was likely to be caused to a member of the public. Furthermore, even if such a duty did exist, public policy requires

that the police should not be liable in such circumstances. The question then is whether an exception should be made in the ordinary application of the common law principle in this case. The party seeking to establish that special circumstances exist, must specifically plead and prove the relationship which gives rise to these special circumstances. In so far as there are special circumstances in this case, they all point in the direction of applying rather than excepting the rule. It is important to remember that the factual genesis of this case lies in the catastrophic category 5 hurricane that struck Dominica in September 2017. Accordingly, in this case, public policy reasons for refusing to impose a duty of care outweigh the public policy of providing compensation for tortiously caused damage or injury.

Hill v Chief Constable of West Yorkshire [1989] AC 53 applied; **Van Colle v Chief Constable of Hertfordshire Police (Secretary of State for the Home Department and others intervening)**; **Smith v Chief Constable of Sussex Police (Secretary of State for the Home Department and others intervening)** [2008] UKHL 50 applied; **Michael v Chief Constable of South Wales Police** [2015] UKSC 2 followed; **Tindall and another v Chief Constable of Thames Valley Police and another** [2022] EWCA Civ 25 followed.

3. The respondents' suggestion is that the agreements between the third and fourth respondents and the government to supply goods for national relief in exchange for police protection gave rise to an assumption of duty by the police. But when a claim is based on an oral agreement, the particulars of claim should set out the contractual words used and state; by whom, to whom, where and when they were spoken. The submissions by the respondents, by which they seek to extract an assumption of responsibility from public statements made by government officials, cannot avail them. There is no essential feature differentiating the relationship of the police with the respondents and their relationship with other members of the public, several of whom also suffered damage from the hurricane.

Woodcock v Chief Constable of Northamptonshire Police [2023] EWHC 1062 (KB) followed; **Sherratt (for and on behalf of the members of the family of the late Beevers) v Chief Constable of Greater Manchester Police** [2018] EWHC 1746 (QB) followed; **Poole Borough Council v GN and another** [2019] UKSC 25 followed.

4. The police, in particular, and the appellants in general, did not owe a duty of care to the respondents to protect their business places in Roseau following the passage of Hurricane Maria over Dominica in September 2017. They did not owe this duty whether arising from any alleged agreement between the police and the third and fourth respondents, or all the respondents. They did not owe a duty of care to any or all of the respondents arising from negligence in tort; and they did not owe a statutory duty to the respondents or to any other individual members of the public to stop the looting and destruction in the aftermath of the hurricane. The master therefore erred in dismissing the strike out application and sending a matter to trial which can only properly lead to one outcome, which would be unfavourable to the respondents, resulting in a waste of the litigants' resources and the court's time.

5. When deciding whether to strike out a case, the court will concentrate on the justice of a particular case in light of the overriding objective, taking into account all the relevant circumstances of the case. The court should exercise its power to strike out only in clear cases and only where lesser sanctions are inappropriate. Thus, it is unlikely to be appropriate to strike out a statement of claim that raises an issue on which serious argument and evidence are required or when the applicable law is unclear or in a state of flux. In this case, the master erred in principle in dismissing the strike out application as the authorities clarify that the law is not in a state of flux. His decision exceeded the generous ambit of reasonable judicial disagreement and was clearly or blatantly wrong and should therefore be set aside.

Royal Caribbean Cruises Ltd. v Medical Associates Ltd et al SLUHCVP2014/0024 consolidated with SLUHCVP2015/0004 (delivered 6th June 2016, unreported) followed; **Royal Bank of Scotland International Ltd v JP SPC 4 and another** [2022] UKPC 18 applied; **Tindall and another v Chief Constable of Thames Valley Police and another** [2022] EWCA Civ 25 followed.

JUDGMENT

- [1] **MICHEL JA:** This is an interlocutory appeal against the decision of a master dated 31st January 2023, wherein the master dismissed the appellants' application to strike out the respondents' statements of case. The application was made pursuant to Rule 26.3 (1) (b) and (c) of the **Civil Procedure Rules 2000** ("CPR").

Background

- [2] On Monday 18th September 2017 at about 7.30 pm, Hurricane Maria struck the island of Dominica. The category 5 hurricane generated strong winds and heavy rains until about 4 am on the following day, causing major damage to buildings and other infrastructure on the island. After the wind and rain from the hurricane had subsided, there was widespread looting of business places in Roseau and its environs, which continued until about 30th September 2017.
- [3] The respondents (who were the claimants in the court below) owned and operated several businesses in Roseau and claimed to have suffered significant loss and damage as a result of the looting of their business places. By claim form and statement of claim filed by the respondents on 20th March 2018, they alleged breach of statutory duty and negligence by the appellants (who were the

defendants in the court below) for failing to prevent damage to and looting of their business places, resulting in significant loss and damage to the respondents.

- [4] On 19th April 2018, the appellants filed their defence and, almost 4 years later, the matter not having proceeded to trial, on 15th March 2022, the appellants filed an application to strike out the respondents' statement of case pursuant to CPR 26.3(1)(b) and (c). Submissions in support of the application were filed on 24th May 2022, submissions in opposition were filed on 8th July 2022 and reply submissions were filed on 23rd September 2022. The learned master heard the strike out application on 10th November 2022 and delivered his decision on 31st January 2023, wherein he dismissed the application to strike out the statement of claim and awarded costs to the respondents.

The Master's Decision

- [5] Before getting to the reasons for the appeal against the master's decision, it may be useful to highlight some of the salient parts of the decision being appealed. At paragraphs 34 and 35 of the judgment, the master stated:

“[34] The central issue for determination on this application is simply whether the Claimants' statement of case discloses grounds for bringing the claim or if the statement of claim is an abuse of the process of the Court or is likely to obstruct the just disposal of the claim.

[35] The test to be applied to this type of application was stated by the Court of Appeal in **Baldwin Spencer v the Attorney General of Antigua and Barbuda et al.**¹ The remedy of striking out should [not] be granted except in a clear and obvious case where it is certain that the claim is unsustainable, cannot succeed or in some other way is an abuse of process. As stated in **Operation Dismantle v the Queen**² “...the claim should not be struck out if there is even a scintilla of a cause of action.”

- [6] At paragraph 39 of the judgment, the master said that he agreed that “as a general proposition no duty is owed” by the police but that “this however is subject to exceptions”. At paragraph 46 the master waters this down a bit when he says that in his view “the authorities ... state as a general rule that no

¹ ANUHCVP1997/0020A (delivered 8th April 1998, unreported).

² (1986) LRC (Const) 421.

common law duty exists unless exceptional circumstances are shown". At paragraph 47 the master went further to say that he "accepts and agrees with counsel for the claimants that the issues of the duty existing is not settled" and that "there are exceptions to the rule". He went on to say in paragraph 47 that "this very involved argument on the state of the law alone in my view is sufficient not to grant this application ...". The master then concluded, at paragraph 49, that "there are important issues raised in the case at bar and it is prudent to allow a trial in the public interest."

The Appeal

- [7] By notice of interlocutory appeal filed on 18th April 2023, the appellants appealed against the decision of the master on several grounds. The numbering of the grounds of appeal is somewhat confusing, so it is uncertain whether there are 5, 9 or 15 grounds of appeal. Be that as it may, the central issue in this appeal is whether the police owed a duty of care to the respondents to protect their business places in Roseau from damage and looting by members of the public following the passage of Hurricane Maria on the night of Monday 18th September through to the morning of Tuesday 19th September 2017, which duty was breached when the respondents' business places in Roseau were damaged and looted between Tuesday 19th and Saturday 30th September 2017. If this Court is satisfied on the pleaded case that a duty of care was owed and breached, then the master was right not to strike out the claim and this Court cannot interfere with his decision. If it is uncertain on the pleaded case whether or not a duty of care was owed to the respondents and breached by the appellants, then the decision of the master to dismiss the strike out application and allow the matter to proceed to trial cannot be interfered with by this Court. If, however, it is clear on the pleaded facts and the applicable law that there was no duty of care owed to the respondents and/or breached by the police, then the master was wrong not to have struck out the claim as disclosing no reasonable ground for bringing it.

Appellants' Submissions

- [8] In their written submissions, the appellants recognised and accepted that striking out a statement of case is the exercise of judicial discretion. They cited

the case of **Ratnam v Cumarasamy**³ where the Privy Council affirmed the principles that a reviewing court will presume that a judge has rightly exercised his discretion and the Court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle. The appellants submitted that the master exercised his discretion on wrong principles in refusing to strike out the claim. They further submitted that although the respondents rightly conceded that the claim for breach of statutory duty could not be maintained, the master did not strike out the portion of the claim dealing with breach of statutory duty. Moreover, the master did not even consider the concession made by the respondents when he awarded costs to the respondents following the general rule that costs follow the event.

[9] Learned counsel for the appellants, Mr. Anthony Astaphan SC, in his oral submissions at the hearing of the appeal, submitted that the main issue to be decided was whether a duty of care of any kind arose in the circumstances of this case, where a category 5 hurricane completely devastated the country followed by massive looting without any actual destruction of property, by the police and persons under their control. Learned senior counsel submitted that the master erred in his decision in this regard, because the circumstances were not ordinary circumstances, and what occurred in this case was absolute devastation and massive looting.

[10] Mr. Astaphan SC argued that, in principle, exceptional circumstances for establishing a duty fall into two categories: firstly, where the police or persons under their control caused the damage⁴ and, secondly, where the police had given specific assurances and assumed a specific responsibility to protect a particular person or a particular property. He submitted that the master erred in failing to specify the limb which he relied on in making a finding of exceptional circumstances in this case. Senior counsel further contended that, notwithstanding the crime and violence, there is no duty of care imposed by the

³ [1965] 1 WLR 8.

⁴ See *The Home Office v The Dorset Yacht Company Limited* [1970] UKHL 2.

common law on the police to take action in relation to crimes that they may have observed in these circumstances.

- [11] Mr. Astaphan SC further argued that the laws of the Commonwealth of Dominica do not impose a duty of care on the police to protect individuals or property in the circumstances which prevailed in this case. Learned senior counsel contended that, as a matter of law and policy, the court ought not to accept these vague generalised allegations of an agreement to provide security to private businesses in the midst of major destruction and massive looting. He argued that, in a commercial context, the allegations are wholly insufficient to give rise to any obligation on or of the police to specially protect the business places of the third and fourth respondents, or the respondents generally.
- [12] The appellants relied on the decision of the Privy Council in **Royal Bank of Scotland International Ltd v JP SPC 4 and another**⁵ as an authority on the issue of whether to strike out a statement of case on pleaded facts involving the existence of a duty of care. The appellants submitted that, in the instant case, the strike out application was based on the pleaded facts, and it is assumed that the pleaded facts are true and not contested. Thus, the strike out application was based on facts as pleaded by the respondents in the statement of claim and consequently the question to be decided was one of pure law, not on disputed facts but on assumed facts. The appellants submitted that, by way of the strike out application, they were contending that the respondents' case was bad in law and that the master was duty bound to determine whether the case was in fact bad in law, and that he erred in failing to do so.
- [13] In their written submissions, the appellants submitted that the law is not in a state of flux and that the law on the duty of care owed to victims of crime and other wrongdoing was laid down by **Van Colle v Chief Constable of Hertfordshire Police (Secretary of State for the Home Department and others intervening); Smith v Chief Constable of Sussex Police (Secretary of State for the Home Department and others intervening)**⁶ and applied in

⁵ [2022] UKPC 18.

⁶ [2008] UKHL 50, [2009] 1 AC 225.

Michael v Chief Constable of South Wales Police⁷ and **Tindall and another v Chief Constable of Thames Valley Police and another**,⁸ amongst other cases. The appellants submitted that although the master made reference to **Tindall** in his judgment, he failed to cite the important pronouncement of Stuart-Smith LJ in that case that “the law is not in a state of flux.” The appellants further submitted that there is no reason why the point of law in issue in this case could only be decided at trial, since the law is not in a state of uncertainty and that the master erred in principle in his determination that the statement of claim should not be struck out and that the matter should go to trial.

[14] The appellants further relied on **Spencer v Attorney General of Antigua and Barbuda** to submit that as a matter of principle, because a case is one with very involved argument is not a sound reason not to strike out a case that is bad in law; the operative issue for determination must be whether there is even a scintilla of a cause of action and, if there is no cause of action, the court should strike out the case.

[15] It was also the appellants’ submission that the master’s decision not to strike out the respondents’ statement of case because of the length of time since the matter was pending, the fact that the proceedings were well advanced, and that witness statements having already been filed, was erroneous. The case of **Dr. Ralph E. Gonsalves et al v Edwardo Lynch et al**⁹ was advanced in support of the submission that a party should not be forced to prematurely advance a strike out application based on some unwritten rule that it must or ought to be done prior to the parties filing their evidence.

[16] In relation to the issue of the agreement between the police and the third and fourth respondents, Mr. Astaphan SC contended in oral submissions at the appeal hearing that these purported agreements seek to convert a public duty owed to the public at large into a private contractual arrangement between these appellants and the police. This, learned senior counsel contended, would

⁷ [2015] UKSC 2, [2015] AC 1732.

⁸ [2022] EWCA Civ 25.

⁹ SVGHCVAP2003/0009 and SVGHCVAP2003/0011 (delivered 2nd July 2003, unreported).

impose additional burdens on the police in already drastic circumstances and ought not to be upheld. Senior Counsel further argued that what the law requires for the imposition of an assumed responsibility to protect are not generalised statements, but specific assurances followed by action taken in furtherance of these specific assurances. Senior Counsel referred the court to the cases of **Sherratt (for and on behalf of the members of the family of the late Beevers) v Chief Constable of Greater Manchester Police**¹⁰ and **Van Colle** in support of this submission.

- [17] Senior counsel also argued that faced with the catastrophic destruction following a category 5 hurricane, with the massive looting that occurred thereafter, the imposition of a duty of care based on those types of allegations would open the floodgates against the police and the governmental authorities in respect of any and every national disaster that may strike the country and hamper, if not disrupt and suffocate, the operational activities of the police in matters such as this.
- [18] Senior counsel further contended that even if the court finds that there were specific assurances, there was however no specific assumption of responsibility as dealt with by Lord Browne in **Van Colle**, and both must exist.¹¹ Mr. Astaphan SC contended that there is nothing in the pleadings to suggest that the police assumed responsibility in these circumstances; there was only a bare allegation of an agreement which does not meet the basic requirements suggested by the law. It was not therefore open to the master to find that there was a cause of action against the appellants in relation to the respondents based on exceptional circumstances.
- [19] In response to the respondents' oral arguments that there was willful neglect by the police, Mr. Astaphan SC argued that willful neglect was not pleaded, which was fundamentally different to duty of care. He argued that public policy decisions and decisions based on the **Hill** principle¹² will mean that some

¹⁰ [2018] EWHC 1746 (QB).

¹¹ See *Van Colle v Chief Constable of Hertfordshire Police (Secretary of State for the Home Department and others intervening)*; *Smith v Chief Constable of Sussex Police (Secretary of State for the Home Department and others intervening)* [2008] UKHL 50.

¹² See *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

persons may be denied a right to redress if they don't have the avenue to pursue an alternative criminal case or a human rights case. Mr. Astaphan SC argued too that an alternative remedy may only arise in circumstances where there has been an assumption of specific responsibility, and an alternative remedy would not apply if there is no legal basis for the cause of action.

Respondents' Submissions

[20] The respondents submitted that, according to the national disaster plan for the Commonwealth of Dominica, the police are an integral part of the response team in emergencies and/or disasters. The basis of the alleged duty of care owed by the police is set out in paragraphs 15 to 22 of the Statement of Claim filed on 20th March 2018. It may be useful to set out in full paragraphs 15, 16, 19, 20, 21 and 22 of the statement of claim:

“15. Further, at all material times the Claimants were owed a general duty of care by the defendants to enforce the criminal law both during the passage of the Hurricane and for a reasonable time period thereafter. The Defendants represented to the Claimants that the said duty of care would be enforced and the Claimants placed reliance upon that assurance, however the Defendants negligently breached the duty of care owed to the Claimants with the result that the Claimants were caused to suffer significant damages and loss as a result of looting and general destruction in the aftermath of the passage of the Hurricane.”

“16. Further, by failing to fulfill their assurances to protect the Claimants' and other business places in Roseau and island wide, the Defendants failed to discharge their duty to the public.”

“19. On Monday 18th September 2017, during a press briefing at the office of the Prime Minister at 11:15 am, the Prime Minister said that the State shall not allow any lawless action in the Country....”

“20. At that same press briefing, the 1st Defendant and his superintendent with responsibility for operations in the Commonwealth of Dominica Police Force, Superintendent Richmond Valentine, gave assurances to the public that the Police are now better prepared to respond to any incident or accident. The 1st Defendant and/or Mr. Valentine stated that the police had made all necessary arrangements, and put in place all mechanisms, and would be ready to respond in full force to any emergency or incident and to ensure that persons with criminal intent would not be given the opportunity to commit any acts of lawlessness in the city and/or island wide.”

“21. Further, the 1st Defendant in particular assured that the public would see a heavy police patrol in the City of Roseau, and that there

would be no looting and that if the storm passes the police would be in control of the situation before, during and after the passage of Hurricane Maria. He specifically assured that police would be deployed in the City of Roseau and Portsmouth to protect business places.”

“22. The Claimants were entitled to and did rely on these assurances by not taking any additional measures to secure their respective places of business other than those taken in the normal course to secure their premises against damage from a storm, and further by not rushing to said business places immediately upon the passage of Hurricane Maria.”

[21] In the particulars of negligence pleaded in the statement of claim, the respondents alleged that the police failed to:

- (i) exercise a general duty of care to enforce the criminal law;
- (ii) reasonably foresee the danger of looting occurring at the Claimants' business places;
- (iii) take reasonable steps to prevent the occurrence of looting at the Claimants' business;
- (iv) protect the Claimants from loss and damage after assuming responsibility by issuing assurances upon which the Claimants relied; and
- (v) have an operational plan and/or adequate operational plan to execute the said assurances to the Claimants.

[22] At the hearing in the court below, the respondents conceded that the claim for breach of statutory duty cannot be maintained. This was also confirmed at the appeal hearing. Thus, the matter continued as a claim in negligence.¹³

[23] The respondents contended that the appeal was misconceived for several reasons, in that the master did not decline to strike out the claim on the basis that the law was in a state of flux as implied by the appellants. Rather, the master declined to strike out the claim on the basis that whilst the police owe no general duty at common law to prevent crime, there are exceptional circumstances where they may owe such a duty. It was against this background that the master

¹³ See paragraphs 4 and 5 of the master's decision.

accepted that the specific matters pleaded by the respondents at paragraphs 25 and 26 C-H of their statement claim were capable of giving rise to a duty.

[24] Counsel for the respondents, Professor Leslie Thomas KC, argued before this Court that the crux of the master's decision was that the claimants had arguably pleaded facts sufficient to constitute exceptional circumstances on the basis of which a duty was arguably owed. Thus, Professor Thomas KC argued that the master's assessment was rightly based on a close assessment of the respondents' pleadings.

[25] Further, with respect to the issue of exceptional circumstances, the respondents submitted that they had pleaded that the police officers had ignored looting that took place in front of them, and that one looter was released because he was a police cadet and this was capable of giving rise to the exceptional circumstances as found in **R v Dytham**¹⁴ and **Costello v Chief Constable of Northumbria**.¹⁵ Professor Thomas KC asserted that these authorities show that there are exceptional circumstances in which police officers who willfully neglect to intervene where a serious crime is taking place in their presence may be held liable. Still further, the statement of claim does disclose grounds to bring a claim on the basis of a duty of care existing as an exception to the general rule.

[26] In relation to the appellants' submissions on the master's reference to "very involved argument", the respondents submitted that the master made reference to the legal arguments to illustrate the fact that the case did not meet the test for striking out. Further, at paragraph 51 of his judgment, the master stated that the claim was not bad in law and, therefore, the appellants' contention at paragraphs 27-35 of their submissions alleging that the master refused to strike out the claim because of the lateness of the application despite the claim being bad in law misrepresents the master's decision.

[27] The respondents submitted that they had pleaded that the third and fourth respondents had made specific agreements with the Government to supply

¹⁴ [1979] QB 722.

¹⁵ [1999] ICR 752.

goods for the national relief effort in exchange for police protection, and that those agreements had not been honoured. Thus, they argued, these agreements were arguably capable of constituting an assumption of responsibility by the appellants towards the third and fourth respondents. The respondents also argued that the authorities show that where there is an assumption of responsibility by the police, a duty of care may arise. The respondents referred to the case of **An Informer v A Chief Constable**¹⁶ to base their submission that a duty of care may arise 'where there is a special relationship between the parties or more specifically an assumption of responsibility by the police to the claimant' and that such 'an assumption of responsibility may be by express words'.

[28] Additionally, the respondents submitted that they pleaded in their statement of claim their reliance on the assurance given by the first appellant prior to the hurricane that the police would not allow looting in Roseau, although this was not specifically cited by the master in his decision and that this pleading was "an exceptional case on the margin of the **Hill** Principle" involving the giving of an assurance or the assumption of responsibility. Consequently, the respondents submitted that the master did not err when he held that a duty may arise in these exceptional circumstances and, taken at the highest, the facts in this case could disclose a duty of care.

[29] Professor Thomas KC, in his oral submissions on behalf of the respondents, argued that whilst there is a distinction between the claim of the third and fourth respondents and that of the first, second, fifth and sixth respondents, this is of no consequence in this appeal because, whereas the third and fourth respondents rely on the specific assurances, all the other respondents benefit from the exceptionality which arises from willful neglect by police officers in these circumstances. Learned King's Counsel argued that, alternatively, if the court found that the willful neglect claim was not made out, the court should not strike out the claim of the third and fourth respondents based on the specific assurance claim, which assurance was both contractual (because of the supply

¹⁶ [2013] QB 579.

of goods to the Government) and tortious (based on the exception to the **Hill** principle).

- [30] Finally, on the issue of costs, the respondents submitted that the appellants had not shown a sufficient basis for interfering with the master's decision as to costs, since the respondents were the clear winners of the application to strike out, and that the claim for negligence would go forward to trial. Further, in terms of damages, the claim for breach of statutory duty, even if made out, would have added little or nothing to the claim in negligence and most of the hearing was spent on the application to strike out the claim in negligence. Accordingly, the master was entitled to find that the appellants should pay the respondents' costs.

Discussion

Appeal against the exercise of judicial discretion

- [31] The question of whether the master erred in his refusal to strike out the respondents' statement of claim invites this Court to review the exercise of a judicial discretion by the master. It is by now trite that an appellate court will only interfere with the exercise of a discretion by a judicial officer if it can be shown that in the exercise of his discretion he exceeded the ambit of reasonable disagreement among similarly-placed judicial officers and arrived at a decision which was clearly or blatantly wrong. Accordingly, before this Court can interfere with the decision of the court below it must reach a clear conclusion that there had been a wrongful exercise of discretion by the master and that the high threshold to justify appellate interference with the master's decision had been reached.

The Court's Power to Strike Out

- [32] Rule 26.3 (1)(b) and (c) of the CPR provides the legal test for striking out a party's statement of claim. It states:

"26.3 (1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings.”

[33] When deciding whether to strike out a case, the court will concentrate on the justice of a particular case in light of the overriding objective, taking into account all the relevant circumstances of the case. The court should exercise its power to strike out only in clear cases and only where other lesser sanctions are inappropriate. Thus, it is unlikely to be appropriate to strike out a statement of case which raises an issue on which serious argument and evidence is required or where the applicable law is unclear or in a state of development.

[34] In **Royal Caribbean Cruises Ltd. v Medical Associates Ltd et al**¹⁷ this Court stated (at paragraph 24) that:

“... an application for a party's statement of case to be struck out pursuant to CPR 26.3(1)(b) is decided by the court solely on the parties' pleaded cases before it. No additional evidence is adduced. All facts pleaded in the statement of case are assumed to be true for this purpose... Therefore, essentially, a strike out application under CPR 26.3(1)(b) would be the appropriate procedure if a party to an action is faced with a statement of case which is plainly just bad in law.”

[35] It was the appellants' case, relying on **Royal Bank of Scotland International Ltd.** that the strike out application based on the pleaded facts (which are assumed to be true) was a question to be decided on pure law. The Privy Council in that case determined that the case could not proceed to trial where the respondent had moved to strike out or summarily dismiss the claim on the ground that there was no basis on the pleaded facts on which the appellants could establish that the respondent owed it the alleged duty of care. At paragraphs 31 and 32 of the judgment, the Privy Council stated:

“31. There are many precedents for decisions being reached as to whether a duty of care can be established on the basis of assumed or pleaded facts rather than following a full trial....

¹⁷ SLUHCVP2014/0024 consolidated with SLUHCVP2015/0004 (delivered 6th June 2016, unreported).

32. ...It follows that the lower courts were correct to “grasp the nettle” and to decide the question of law, as to whether there was the alleged duty of care, one way or the other. This does not involve deciding whether, on the assumed facts, it is arguable that there is a duty of care: but rather deciding whether, on the assumed facts, there is, or is not, a duty of care.”

Duty of Care

- [36] As a general rule, the law does not impose liability on a defendant for injury or damage to the person or property of a claimant caused by a third party. In **Halsbury’s Laws of England**¹⁸ the authors state:

“The general duty of the police to preserve the King’s peace and enforce the law is owed to members of the public at large and does not carry with it a private law duty in negligence towards individual members of the public; it does not involve the kind of close or special relationship necessary for the imposition of such a duty of care.”

- [37] The case of **Hill v Chief Constable of West Yorkshire**¹⁹ was significant because it established the concept of a duty of care in relation to the police’s duty to protect the public from harm caused by third parties. The House of Lords held that in the absence of any special characteristic or ingredient above reasonable foreseeability of likely harm, the police did not owe a general duty of care to individual members of the public even though it was reasonably foreseeable that harm was likely to be caused to a member of the public. Furthermore, even if such a duty did exist, public policy requires that the police should not be liable in such circumstances.

- [38] In **Van Colle**, the House of Lords, in considering the liability of the police under the common law, held that:

“97 ... in the absence of special circumstances the police owe no common law duty of care to protect individuals against harm caused by criminals. The two relevant justifications advanced for the principle are (i) that a private law duty of care in relation to individuals would be calculated to distort, by encouraging defensive action, the manner in which the police would otherwise deploy their limited resources; (ii)

¹⁸ Volume 84A (2019), paras 42. Duties of care owed by police; See *Michael v Chief Constable of South Wales Police* [2015] UKSC 2.

¹⁹ [1989] AC 53.

resources would be diverted from the performance of the public duties of the police in order to deal with claims advanced for alleged breaches of private law duties owed to individuals.”

The House reaffirmed the core principle laid down in **Hill** that the police do not owe a common law duty of care to protect individuals against harm caused by criminals.

[39] In **Michael**, the UK Supreme Court discussed the important decisions of **Hill**, **Van Colle** and **Brooks v Metropolitan Police Commissioner and others**,²⁰ amongst others, and held that, fundamentally, the common law does not generally impose liability for pure omissions. The Court (at paragraphs 97 to 100 of the judgment) stated:

“97. ... It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else.

98. The rule is not absolute. Apart from statutory exceptions, there are two well recognised types of situation in which the common law may impose liability for a careless omission.

99. The first is where D was in a position of control over T and should have foreseen the likelihood of T causing damage to somebody in close proximity if D failed to take reasonable care in the exercise of that control. *Dorset Yacht* is the classic example.

100. The second general exception applies where D assumes a positive responsibility to safeguard C under the *Hedley Byrne* principle, as explained by Lord Goff in **Spring v Guardian Assurance Plc**. It is not a new principle. It embraces the relationships in which a duty to take positive action typically arises: contract, fiduciary relationships, employer and employee, school and pupil, health professional and patient. The list is not exhaustive...”

The real question in this case, therefore, is whether an exception should be made to the ordinary application of common law principles which could cover the facts of this case.

²⁰ [2005] 2 All ER 489.

[40] In **Robinson v Chief Constable of West Yorkshire Police**²¹ the UK Supreme Court, after an in-depth analysis of case law, stated at paragraphs 69 (iv) and 70 that:

“69 (iv) The distinction between careless acts causing personal injury, for which the law generally imposes liability, and careless omissions to prevent acts (by other agencies) causing personal injury, for which the common law generally imposes no liability, is not a mere alternative to policy-based reasoning, but is inherent in the nature of the tort of negligence. For the same reason, although the distinction, like any other distinction, can be difficult to draw in borderline cases, it is of fundamental importance. The central point is that the law of negligence generally imposes duties not to cause harm to other people or their property: it does not generally impose duties to provide them with benefits (including the prevention of harm caused by other agencies). Duties to provide benefits are, in general, voluntarily undertaken rather than being imposed by the common law, and are typically within the domain of contract, promises and trusts rather than tort. It follows from that basic characteristic of the law of negligence that liability is generally imposed for causing harm rather than for failing to prevent harm caused by other people or by natural causes. It is also consistent with that characteristic that the exceptions to the general non-imposition of liability for omissions include situations where there has been a voluntary assumption of responsibility to prevent harm (situations which have sometimes been described as being close or akin to contract), situations where a person has assumed a status which carries with it a responsibility to prevent harm, such as being a parent or standing in loco parentis, and situations where the omission arises in the context of the defendant's having acted so as to create or increase a risk of harm.”

“70 ... Applying those principles, they may be under a duty of care to protect an individual from a danger of injury which they have themselves created, including a danger of injury resulting from human agency, as in **Dorset Yacht and Attorney General of the British Virgin Islands v Hartwell**. Applying the same principles, however, the police are not normally under a duty of care to protect individuals from a danger of injury which they have not themselves created, including injury caused by the conduct of third parties, in the absence of special circumstances such as an assumption of responsibility.”

[41] It is clear from this brief review of the authorities, that, in the absence of special circumstances, the common law does not impose liability for omissions or, more particularly, for a failure to prevent harm caused by the conduct of third parties. Accordingly, the police are not generally under a duty of care to provide a benefit

²¹ [2018] UKSC 4

to a party through the performance of their public duties, in the absence of special circumstances such as an assumption of responsibility.

Assumption of Responsibility

[42] The nature of assumed responsibility demands careful consideration before delving into the circumstances of the present dispute. The Court of Appeal in **Tindall** considered a line of authorities on the question of when public authorities may owe a duty of care at common law and produced a set of principles to be applied when considering whether a public authority (such as the police) has assumed responsibility to an individual member of the public so as to give rise to a duty to exercise reasonable care to protect them from harm. The principles are set out in the judgment of Lord Justice Stuart-Smith (at paragraph 54) and can be summarised as follows:

- (1) Where a statutory authority is entrusted with a mere power (rather than a duty) it will not generally be liable for damage sustained as a result of a failure to exercise the power. In general, the duty of a public authority is to avoid causing damage, not to prevent future damage due to causes for which they were not responsible.
- (2) A public authority will not generally be liable where it has intervened but has done so ineffectually.
- (3) Principle (2) applies even where it may be said that the public authority's intervention involves it taking control of operations.
- (4) Knowledge of a danger which the public authority has power to address is not sufficient to give rise to a duty of care, regardless of the expectations of members of the public.
- (5) The presence of a public authority at a scene of potential danger is not sufficient to find a duty of care, regardless of the expectations of members of the public.

- (6) Prior effective intervention by a public authority is not of itself sufficient to give rise to a duty to act again in the same way.
- (7) In cases involving the police, the courts have drawn the distinction between merely acting ineffectually and making matters worse.
- (8) The circumstances in which the police will be held to have assumed responsibility to an individual member of the public to protect them from harm are limited. It is not sufficient that the police are specifically alerted and respond to the risk of damage to identified property or injury to members of the public at large or to an individual.
- (9) It is material to ask whether the relationship between the public authority and the individual is any different from the relationship between the authority and other members of the same class as the individual.

Alleged agreement between 3rd and 4th Respondents and the Appellants

[43] The respondents contended that the master's decision that the specific matters pleaded at paragraphs 25 and 26 C-H of their statement of claim were capable of giving rise to a duty was correct for two reasons. It was submitted that the first basis was on the agreements by the third and fourth respondents with the government to supply goods for national relief in exchange for police protection, which agreements were not honoured. This the respondents contended was arguably capable of constituting an assumption of responsibility by the appellants to the third and fourth respondents.

[44] The matters relied on as giving rise to an assumption of duty by the police with regards to the third and fourth respondents were pleaded in the Statement of Claim in this way:

"E. PARTICULARS OF BREACH OF STATUTORY DUTY AND/OR NEGLIGENCE IN RELATION TO THE 3RD CLAIMANT

- i. During the looting of the 3rd Claimant's business on Tuesday 19th September, the police were called, and the looting was reported, and their assistance requested to stop the looting and secure the property, but the police was unwilling and/or refused to assist in securing the 3rd Claimant's premises;

- ii. On Wednesday, 20th September, the 3rd Claimant's property despite being secured after the Tuesday looting attack, continued to be looted unchecked by the police despite repeated calls to them for assistance in securing the 3rd Claimant's premises. After several calls to the police, two (2) armed policemen came to the 3rd Claimant's premises and the looting stopped for a while until the police abandoned the premises without notice to the 3rd Claimant;
- iii. The looting of the 3rd Claimant's premises continued unchecked into Thursday 21st September with no police presence or intervention to stop it;
- iv. The only times that there were any police present on the 3rd Claimant's property or in the vicinity were on Friday 22nd September, and then on Monday 26th September through to Wednesday 28th September. About 8-10 armed police were deployed for a few hours during each of those days simply to facilitate the loading of salvaged stock from the 3rd Claimants' wholesale for distribution to Red Cross as part of an agreement with the 3rd Claimant to sell the Government goods for the national relief effort in exchange for police protection;
- v. On Saturday 23rd and Sunday 24th September, the 3rd Claimants business was again burgled, vandalized and looted unchecked and unstopped by the members of the police contrary to their assurance given that they would provide security to the 3rd defendants under the aforementioned agreement with the Government."

"F. PARTICULARS OF BREACH OF STATUTORY DUTY AND/OR NEGLIGENCE IN RELATION TO THE 4TH CLAIMANT

- (i) On or about the 21st of September, 2017, one or more Police Officers, including Inspector Lincoln Corbette, was present at the 4th Claimant's said business place but failed to stop the looting of the 4th Claimant's business place, and did not make any attempts to take the looted items or to arrest the looters;
- (ii) The police officer(s) facilitated the looting by controlling the amount of water each person took;
- (iii) The police officer (s) were able to halt the looting in order to load trucks with water for the essential services by firing shots in the air, and also got some members of the crowd to assist in loading the truck....;

- (iv) An agreement was entered into between the said Inspector Lincoln Corbette and the 4th Claimant to provide continuous armed police security to the 4th Claimant's business place in exchange for the said [order] for the essential services. Under this agreement, the 4th Claimant was also to provide meals for these police officers;
- (v) However, such continuous police security was not provided and looters once again broke into and looted the 4th Claimant's business place between the 20th September and 23rd September 2017."

[45] The appellants in their defence denied that they owed to the respondents any general duty of care. It was further denied that the respondents were entitled to rely on public statements made prior to the passage of Hurricane Maria. The appellants averred that these public statements or alleged assurances were made on the basis of meteorological information and were made for public information and were not intended to be binding representations to individual private citizens or companies. It was the appellants' submission that the sheer scale and magnitude of the national destruction and loss of life made these public representations by the government and police irrelevant, redundant and wholly unenforceable.

[46] The court in **Sherratt** found that a duty of care arose from an express assurance by a call handler to the mother of a suicidal woman that the police would dispatch officers to her address. In that case liability was grounded upon a duty of care arising because of the acceptance by the police of responsibility for the welfare of the deceased by 'taking the mother's call; creating an incident log, informing the mother that they would deal with the incident and agreeing to dispatch officers to the house'.

[47] The court in **Woodcock v Chief Constable of Northamptonshire Police**²² considered the issue of whether the police owed a duty of care to a woman to warn her that a neighbour had made an emergency call and informed them that her ex-partner had been loitering outside her house a few minutes before he attacked her. The court held that the exceptions to the general rule that the

²² [2023] EWHC 1062 (KB).

police owed no duty of care for failing to act or failing to prevent harm caused by criminals, applied to the case because special or exceptional circumstances had existed in a limited way, in that: (i) the police had owed her a civil law duty to warn her; (ii) the circumstances (including the fact that the police had been aware of a long history of domestic abuse and the recent threat to kill the claimant) had given rise to a common law duty on the police to call the claimant once a neighbour had informed the police that the attacker had been loitering outside her property; and (iii) that the defendant's failure to call the claimant to protect her in the gap before the allocated police officer had arrived at her premises had been a breach of the duty of care.

[48] It is useful at this juncture to consider paragraphs 49 (4) to 51 of **Woodcock**, where the Court stated:

“49 (4) ...To engage a duty of care on the police to act to protect a member of the public the Courts will carry out a close analysis of the evidence relating to:

- (a) the foreseeability of harm and the seriousness of the foreseeable harm to the specific member of the public (the suggested victim); and
- (b) the reported or known actions and words of the specific alleged protagonist in relation to the feared or threatened harm; and
- (c) the course of dealing between the potential victim, the police and the alleged protagonist focussing on proximity; and
- (d) the express or implied words or actions of the police in relation to protecting the victim from attack by the protagonist and the reliance of the victim (if any) on the police for protection as a result; and
- (e) whether the public policy reasons for refusing to impose a duty of care outweigh the public policy in providing compensation for tortiously caused damage or injury.”

50. In my judgment, only if factors (a) to (c) and (e), and in some cases also (d), are proven on the balance of probabilities by the Claimant, with sufficient weight and severity and immediacy, will the common law, combined with public policy, exceptionally permit the courts to rule that a civil law duty of care was owed by

the police to the specific potential victim to protect him or her from the actions of the specific third party criminal in the circumstances or to warn him or her of danger. All cases in which the exceptions to Hill are asserted are utterly fact specific so I am unable to construct any clearer guidance for myself from the authorities. (emphasis added)

51. Even if a duty of care is so engaged, the Claimant still has to prove breach of the duty by the police and causation of the harm by that breach.”

[49] The House of Lords in **Poole Borough Council v GN and another**²³ at paragraphs 82 and 89 of the judgment held:

“82. It is of course possible, even where no such assumption can be inferred from the nature of the function itself, that it can nevertheless be inferred from the manner in which the public authority has behaved towards the claimant in a particular case. Since such an inference depends on the facts of the individual case, there may well be cases in which the existence or absence of an assumption of responsibility cannot be determined on a strike out application. Nevertheless, the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred. ...”

“89. The existence of an assumption of responsibility can be highly dependent on the facts of a particular case, and where there appears to be a real possibility that such a case might be made out, a court will not decide otherwise on a strike out application. In the circumstances which I have described, however, the particulars of claim do not in my opinion set out any basis on which an assumption of responsibility might be established at trial.”

[50] Further, in **HXA v Surrey CC**,²⁴ the UK Supreme Court held that the law is settled on when a local authority may owe a duty of care through an assumption of responsibility. The Supreme Court determined that a claim may be struck out summarily if there is no arguable case. The primary issue for the Supreme Court was to determine whether there was a duty of care owed at common law by a local authority to protect a child from harm. The court definitively stated that after **N v Poole** this is not a developing or uncertain area of law and found that the decision and reasoning in **Poole** was settled law and sufficiently easy to apply to different scenarios. The court further held that it was possible to strike out a

²³ [2019] UKSC 25

²⁴ [2023] UKSC 52, (judgment was delivered after the hearing of this appeal).

claim if the particulars of claim do not provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred.

Conclusion

- [51] In his judgment in the court below, the master agreed that, although subject to exceptions, no duty is owed by the police to individual members of the public. In the same judgment, the master however agreed with counsel for the respondents that the issue of the duty existing is not settled and that this very involved argument on the state of the law is sufficient to deny the application to strike out the claim. The master further stated that due to the important issues raised in the case it was prudent to allow a trial in the public interest.
- [52] In the case of **Tindall v Chief Constable of Thames Valley Police**, the UK Supreme Court examined the question of whether the police owed a common law duty of care to members of the public when they (the police) were undertaking their functions. The Supreme Court held that they could see no reason why the point of law in that appeal could only be decided after a trial. They considered that the facts as pleaded were clear and there was no reason to think that further examination of the facts could lead to a different outcome. The court held that the law was not in a state of flux and that, on the contrary, the law was settled by successive decisions that are binding upon the court. Although not binding upon our court, the decision of the UKPC in **Tindall** on common law principles on materially similar facts, is highly persuasive and such that it should be followed by our court.
- [53] In terms of special circumstances which could give rise to an exception to the general rule, the party seeking to establish that special circumstances exist must specifically plead and prove the relationship which gives rise to these special circumstances. In so far as there are special circumstances in this case, they are all in the direction of applying rather than excepting the general rule. It is important to remember that the factual genesis of this case lies in the catastrophic category 5 hurricane that struck Dominica in September 2017. Accordingly, in this case, I am of the view that the public policy reasons for

refusing to impose a duty of care outweigh the public policy of providing compensation for tortiously caused damage or injury.

[54] With respect to the question whether, on the particular facts of this case, the police should be held to have assumed responsibility for the safety and security of the business places of the third and fourth respondents because of an alleged agreement between them and the police, the pleaded facts of the case do not lead to this outcome. Where a claim is based upon an oral agreement, the particulars of claim should set out the contractual words used and state by whom, to whom, and when and where, they were spoken. The submissions by the respondents by which they seek to extract an assumption of responsibility from public statements made by the police and governmental officials will not avail them. There is no essential feature differentiating the relationship of the police with the respondents and their relationship with other members of the public, several of whom also suffered major damage from the hurricane.

[55] The pleaded facts of this case derived from the claim form and statement of claim, and also from the defence, combined with the clear principles of law applicable to the case, do not give rise to a cause of action which should lead to a trial, which is bound to fail.

[56] I did not address the claim for breach of statutory duty by the appellants which was made by the respondents in their statement of claim, because both at the hearing in the court below and before this Court the respondents conceded that this claim could not be maintained.

[57] Returning to the question which I posed in paragraph 7 of this judgment as the central issue in the appeal, I am of the view that the police in particular, and the appellants in general, did not owe a duty of care to the respondents to protect their business places in Roseau from looting and damage by members of the public following the passage of Hurricane Maria over Dominica on the night of 18th September to the morning of 19th September 2017. They did not owe this duty whether arising from any alleged agreement between the police and the third and fourth respondents, or all of the respondents; they did not owe a duty

of care to any or all of the respondents arising from negligence in tort; they did not owe a statutory duty to the respondents or to any other individual members of the public to stop the looting and destruction in the aftermath of Hurricane Maria.

[58] Concerning the argument by the respondents that there is a lack of alternative remedy, I echo the words of the Court in **Van Colle** (at paragraph 102) where Lord Hope stated:

“The issues of policy raised by this appeal are not readily resolved by a court of law. It is not easy to evaluate the extent to which the existence of a common law duty of care in relation to protecting members of the public against criminal injury would in fact impact adversely on the performance by the police of their duties. I am inclined to think that this is an area where the law can better be determined by Parliament than by the courts.”

[59] In the circumstances, the master erred in principle in dismissing the strike out application and sending to the court for trial a matter which can only properly lead to one outcome, which outcome will be unfavourable to the party making the claim and will therefore be a waste of the litigants’ resources and the court’s time. His decision exceeded the generous ambit of reasonable judicial disagreement, was clearly or blatantly wrong, and should be set aside.

Order

[60] For all the foregoing reasons, I will allow the appeal, set aside the decision of the learned master, and strike out the claim. I will also award costs to the appellants to be assessed if not agreed within 21 days.

I concur.

Gertel Thom

Justice of Appeal

I concur.

Margaret Price Findlay

Justice of Appeal

By the Court

Deputy Chief Registrar