

THE EASTERN CARIBBEAN SUPREME COURT

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: SLUHCV2018/0308

BETWEEN:

JOEL DONAVAN PHILGENCE

Claimant

and

- 1. DIRECTOR OF PUBLIC PROSECUTION**
- 2. ATTORNEY GENERAL OF SAINT LUCIA**

Defendants

BEFORE: **His Lordship, the Honourable Justice Rohan A Phillip**
(Judge via Zoom)

APPEARANCES: Mr Gerard Williams for Claimant
Ms Kozel Creece and Mrs Rochelle John-Charles, Crown Counsel, for Defendants

PRESENT: Claimant

2021: February 17;
2023: August 24.

DECISION

Background/Nature of Proceedings

[1] This is an application by the defendants to strike out under the Civil Procedure Rules 2000 (as amended) ("CPR") 26.3 (1) (c) the claimant's amended statement of claim filed on 21st January 2019. The case against public officers for damages and the negligence claim is prescribed under Articles 2124 and 2122 of the Civil Code¹, respectively. In comparison, the claim for damages for breach of his constitutional rights is an abuse of process as adequate redress of alternative

¹ Cap 4.01 of the Revised Laws of Saint Lucia

remedies is available to him. Therefore, under the proviso to section 16 (2) of the Constitution², the court should decline to exercise its discretion to entertain the constitutional claim.

- [2] The claimant opposed the application and responded that the claim was of fraud and bad faith against the first defendant and the public officer. The claimant faced a disability while incarcerated at the Bordelais Correctional Facility (“BCF”) and could not defend the notice of application for the restraining order. Accordingly, his cause of action arose upon his release from prison on bail, and the prescription for negligence under Article 2122 of the Civil Code only commences when both parties are aware of the negligence.
- [3] This case falls under Article 2119 of the Civil Code using the same formula for fraud concerning recession of contract as there is no other provision in the Civil Code or the Code of Civil Procedures setting the prescription period for actions alleging fraud. Consequently, there is a ten-year period for bringing this action. Also, if Article 2119 is inapplicable and the Civil Code and the Code of Civil Procedures are silent, the English Limitation Act is incorporated into the jurisdiction of Saint Lucia.
- [4] Further, the claimant contends that the oppressive nature of the State attacking the claimant meant several constitutional breaches occasioned the restraining order. Consequently, common law actions in trespass to goods and the person cannot effectively remedy the many violations of the claimant’s constitutional rights. The availability of a common law remedy is not the be-all and the end-all for deciding whether a constitutional motion is inappropriate. The first defendant’s decision to reopen the restraining order application with no evidence that the claimant committed the offences indicates the first defendant’s insistence on violating the claimant’s constitutional rights. The constitutional motion is appropriate as there is no dispute that the first defendant did not prove that the claimant is guilty of the offences charged before the criminal court.

Issues

- [5] This court is, therefore, called upon to decide the following issues:
- (1) Is the claimant’s amended statement of claim for damages against the public officer prescribed?
 - (2) Is the claimant’s amended statement of claim for negligence prescribed?

² Cap 1.01 of the Revised Laws of Saint Lucia

- (3) Whether the claimant's amended statement of claim for damages for breach of his constitutional rights should be allowed.

The Law

[6] Before addressing these issues in detail, it is prudent to set out the applicable law for striking out a statement of case. The relevant provisions of CPR 26.3 provide:

- “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 –
- (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings
 - (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; or
 - (d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.
- (2)”

[7] The principles the court must apply in determining whether it should exercise its powers to strike out a party's statement of case was aptly set out in *Ian Peters v Robert George Spence*³ by The Hon. Mde. Janice George-Creque, JA (as she then was):

- The court must approach the matter assuming that the primary facts pleaded in the statement of case are true.
- The court may strike out if the facts disclosed reveal no legally recognisable claim, even if the court has proceeded on the assumption that the facts pleaded are true.
- The court should not strike out where a substantive point of law arises that does not admit a plain answer; or where the applicable law is in a state of development.
- The court should not strike out where it will deprive a party of the right to a trial on issues essential to its case.
- The court should ultimately use its power of strikeout sparingly. It must be mindful of the overriding objective of dealing with cases justly.
- A statement of case is unsuitable for striking out if it raises a serious live issue of fact that can only be appropriately determined by hearing oral evidence.

³ ANUHCVP2009/016, at paragraphs [16] to [19].

- [8] In *Clifford Robertson v H. M. Bhola & Co. Ltd.*⁴, the court held (para [13]) that a claim filed where the cause of action is statute-barred is an abuse of the process of the court. Thus, the court may strike out a party's statement of case under CPR 26.3 (1) (c), where the claim is prescribed or statute-barred.

Whether the Claim is Prescribed - Damages Against the Public Officer and Negligence

- [9] The defendants' counsel submitted that the restraint order concerning the claimant's properties was granted on 18th November 2011 and was valid for six (6) months. Its renewal was granted on 16th May 2012 and was valid for six (6) months. The claimant's alleged causes of action would have arisen from the date of the restraint order or its renewal and be prescribed for damages against a public officer six months after that as the claimant has failed to show on the statement of claim bad faith on the part of the public officer enabling the extension of the limitation period. Similarly, the causes of action for negligence would be prescribed in November 2014 and May 2015, respectively. However, the claimant filed his statement of claim on 5th October 2018 and amended it on 21st January 2019.
- [10] The defendants maintained that the restraint application was a judicial process. Under the provision of the Crown Proceedings Act,⁵ no action can be instituted against the Crown or any person discharging or purporting to discharge their duties concerning the execution of a judicial process.
- [11] The claimant countered that the first defendant did not serve him with the Restraint Orders. He was on remand at the BCF and faced a disability of not being in any position to defend the notice of application for the Restraining Order. Therefore, his cause of action arose upon his release from prison on bail. Also, he does not have to prove bad faith on the pleadings but on the evidence, as the six-month prescription is determined at the trial and not before. However, having pleaded that the first defendant's actions (the public officer) were motivated by fraud, neither Article 2122 nor Article 2124 rescues such a public officer. Instead, in the case of fraud, Article 2119 applies with a ten (10) years prescription period. Suppose no specific article in the Civil Code deals with the

⁴ GDAHCV2011/0037

⁵ Cap 2.05 of the Revised Laws of Saint Lucia

limitation period for fraud. In that case, the English Limitation Act applies, which is ten years to commence the action.

Discussion

[12] Article 2124 of the Civil Code states: “*Actions against public officers in respect of acts done by them in good faith and in respect of their public duties are prescribed by six months.*” While, Article 2066 states, “*Good faith is always presumed. He or she who alleges bad faith must prove it.*”

[13] Our courts judicially considered these provisions. In ***Jewel Thornhill v The Attorney General***⁶, the Court of Appeal held that:

“[37] ... in determining bad faith one should look at the entire course of conduct as a continuum, as bad faith is usually to be inferred from a certain state of things which may include conduct not only at the specific point in time of the action complained of but also actions taken before and after as all of these may be relevant in divining bad faith in respect of the act.”

And in ***Michael Christopher and Tamara Barrow v PC240 John Flavien and The Honourable Attorney General of Saint Lucia***⁷, which was referred to by the Court of Appeal in ***Thornhill***, the learned judge opined:

“[39] Under the Civil Code, in the case of a delict, an allegation of bad faith in a statement of case against a public officer performing his public duties, serves to take the prescription period beyond the six months stipulated in Article 2124 for bringing the claim, and effectively extend the prescription period to 3 years as stipulated by Article 2122.2. That is my interpretation of Articles 2124 and 2122.2.

[40] Article 2066 makes it very clear in my view, that a Claimant or Defendant whose case depends on a finding by the court of bad faith concerning the conduct of the other party, must ALLEGE bad faith and PROVE bad faith. Consequently, you cannot prove what you have not alleged. This mandatory requirement that allegations of bad faith, like dishonesty and fraud, should be pleaded, was considered in **Three Rivers District Council v Bank of England (No. 3)** [2000] 3 All. E.R. 1 by Lord Hope of Craighead. He said at paragraph 51: “**On the other hand it is clear as a general rule; the more serious the allegation of misconduct, the greater is the need for particulars to be given which explains the basis for the allegations. This is especially so where the allegation being made is of bad faith or dishonesty. The point is well established in the case of fraud.**” Lord Hope continued at paragraph 55: “**We are concerned at this stage with what must be alleged. A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the**

⁶ SLUHC VAP2012/0035 (delivered on 16th April 2015)

⁷ SLUHC V2004/0502 and SLUHC V2006/0182 (consolidated and delivered on 25th July 2007, per Edwards, J.)

facts on which he relies are equivocal. So too with dishonesty [and bad faith]. If there is not specific allegation of dishonesty it is not open to court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence. As Miller L.J. said in *Armitage v Nurse* [1997] 2 AER p. 705 at 715: “it is not necessary to use the word “fraud” or “dishonesty” [or bad faith if I might add for the purposes of Ms. Barrow’s claim] if the facts which make the conduct fraudulent [or which amount to bad faith] are pleaded, but this will not do if language used is equivocal (See *Belmont Finance Corporation Ltd v Williams Furniture Limited* [1979] 1 AER p118 at 311). In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself must be struck out.” Though Lord Hope’s statements were made in relation to the tort of misfeasance in public office, in my view they are eminently applicable to Ms. Barrow’s claim.

[41] In the absence of a plea of bad faith in Ms. Barrow’s statement of case there is no question of fact to be determined by evidence at the trial, as to whether PC Flavien was acting in bad faith or good faith in my view. It seems to me from Article 2066, that the presumption of good faith can only be rebutted by pleading and then proving bad faith.”

[14] Contrary to the claimant’s submissions, it follows from the above extract that I must first interrogate the claimant’s statement of claim to ensure that he pleaded bad faith to foreshadow any such evidence they may give at a trial. If no such unequivocal pleading is present, then the court may not extend the six-month prescription period in Article 2124 to three years under Article 2122.

[15] The claimant’s amended statement of claim (para 19 - particulars of dishonesty, malice, bad faith fraud and negligence) states as follows:

- “a. Dishonestly, maliciously, negligently and in bad faith transferring the Appropriation by Deception charge to the High Court in order to have the bail of the claimant revoked;
- b. Maliciously, fraudulently, negligently, dishonestly and in bad faith refusing to serve the Notice of Application and Orders on the Claimant knowing that he was incarcerated and had no way of knowing that his assets were frozen;
- c. Maliciously, dishonestly, negligently, fraudulently and in bad faith preventing the claimant from applying to the High Court to vary or discharge the Order;
- d. Maliciously, dishonestly, negligently, fraudulently and in bad faith creating a situation where the Bank was prevented from allocation the salary deductions to offsetting the Mortgage;
- e. Maliciously, negligently and in bad faith causing the interest rates of the claimant to escalate;

- f. Maliciously, negligently and in bad faith causing the Inland Revenue Department to impose Taxation on the claimant which he was not required to pay having regard to [h]is existing mortgage;
- g. acting in the absence of reasonable grounds for believing that the claimant benefitted from the alleged stealing and appropriation by deception offences;
- h. Dishonestly, negligently, maliciously and in bad faith concealing from the institutions affected by the Order the fact that the Restraining Order was dismissed.”

[16] These particulars must be interrogated in the context of the powers and wide discretion of the first defendant under section 73 of the Constitution⁸ to deal with criminal prosecutions. The alleged transfer of the charge (para a.) would be within the first defendant’s wide power and discretion to determine where to prosecute a matter. Still, a perusal of the Criminal Code confirms the offence of Obtaining by Deception (as no offence of Appropriation by Deception exists) was indeed an indictable offence and never capable of being tried by the Magistrate.

[17] On the other hand, the suggestion that the first defendant caused the revocation of the claimant’s bail (para a.) and the consequences that flow from granting the restraining order (paras d., e., and f.) cannot be sustained. The decision of granting, refusing and or revoking bail and granting a restraining order are indeed judicial decisions not within the purview of the first defendant.

⁸ *Supra* note 2, at 1. **“73. Control of public prosecutions**

- (1) There shall be a Director of Public Prosecutions whose office shall be a public office.
- (2) The Director of Public Prosecutions shall have power in any case in which he or she considers it desirable so to do—
 - (a) to institute and undertake criminal proceedings against any person before any court of law (other than a court-martial) in respect of any offence alleged to have been committed by that person;
 - (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
 - (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or herself or any other person or authority.
- (3) The powers of the Director of Public Prosecutions under subsection (2) may be exercised by him or her in person or through other persons acting under and in accordance with his or her general or special instructions.
- (4) The powers conferred on the Director of Public Prosecutions by subsections (2)(b) and (2)(c) shall be vested in him or her to the exclusion of any other person or authority:
 Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.
- (5) For the purposes of this section any appeal from a judgment in criminal proceedings before any court or any case stated or question of law reserved for the purpose of any such proceedings, to any other court (including Her Majesty in Council) shall be deemed to be part of those proceedings:
 Provided that the power conferred on the Director of Public Prosecutions by subsection (2)(c) shall not be exercised in relation to any appeal by a person convicted in any criminal proceedings or to any case stated or question of law reserved at the instance of such a person.
- (6) In the exercise of the powers vested in him or her by subsection (2) and section 46, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.”

Therefore, these matters cannot be inputted to the first defendant even though the judicial decision is incorrect.

- [18] Finally, the allegations (paras b., and c. presumably as a consequence of b.) and (para h.) are the ones most likely to raise conduct that may have some potential of raising bad faith. However, by the claimant's pleading (para 9 of the amended statement of claim), the fact of the restraining order came to his attention by May 2012. Further, although the particulars (para h.) are not explicit, it appears to be misconceived because the restraining order by operation of the law⁹ had a particular life span of no more than six months. Accordingly, the refusal to extend the restraining order by Astaphan, J. would not have been necessary to be reported to the institutions.
- [19] Considering the facts as pleaded in the particulars of bad faith and the circumstance of the case in which the first defendant sought and obtained restraining orders, I am not satisfied that the first defendant's conduct was calculated, aimed at or in furtherance of a specific objective that can amount to bad faith. The Proceeds of Crime Act provide for the forfeiture or confiscation of the proceeds of certain crimes and connected matters. Its object is to ensure that offenders do not benefit from their crimes, and restraining orders are one of the connected matters or tools available to the first defendant to ensure that. In my view, the alleged particulars of bad faith do not encompass serious carelessness or recklessness on the part of the first defendant or her office.
- [20] Consequently, the claimant has not shown bad faith in the public officer in his pleadings. So the claim for damages against a public officer would be prescribed under article 2124 of the Civil Code as more than six months have elapsed since the cause of action arose.
- [21] However, if I am wrong on the issue of bad faith and the prescription period ought to be extended, at best, it would be caught by Article 2122 of the Civil Code, which applies to the claim for negligence. It states:

“The following actions are prescribed by 3 years;

1. For seduction, or lying-in expenses;
2. For damages resulting from delicts or quasi-delicts, whenever other provisions do not apply;
3. For wages or salaries of employees not reputed domestics and who are engaged or hired for a year or longer period;

⁹ Section 39 of the Proceeds of Crime Act, Cap 3.04 of the Revised Laws of Saint Lucia

4. For sums due to schoolmasters and teachers, for tuition and board and lodging furnishing by them.” [underlined added]

[22] The claimant argued that his cause of action arose upon his release on bail from remand at the BCF because he faced a disability of not being in any position to defend the notice of application for the restraining order, which they did not serve him. The court issued the restraining orders on 18th November 2011 and 16th May 2012. By the claimant's pleading (para 9 of the amended statement of claim), the restraining orders came to his attention by May 2012. However, the claimant filed his statement of claim on 5th October 2018 and amended it on 21st January 2019. Therefore, the prescription period of three years under Article 2122 would have long expired, even on the most lenient interpretation of the earliest time the claimant could have brought the action, as the restraining orders came to his attention by May 2012.

[23] On the authority and reasoning in **Walcott v Serieux**¹⁰ of our Court of Appeal's interpretation of Article 2129 of the Civil Code, having found that the prescription period has expired, I have no discretion but to uphold it. Consequently, to permit the cause of actions for damages against the public officer and for negligence to continue would be an abuse of the process of the court. It would be unjust and contrary to the overriding objective of CPR 1.2.

[24] For completeness, it is useful to note that I do not accept the claimant's submission that Article 2119 of the Civil Code applies to the subject matter of this claim. The language of the Article is clear as to what it applies. Similarly, there is no basis for reverting to the English Limitation Act because Articles 2124 or 2122 apply to the subject matter of the claim being a delict or quasi-delict¹¹.

Constitutional Claim

[25] The claimant pleaded in his amended statement of claim that he suffered significant loss and damages due to the breaches of his constitutional rights. The particulars of the constitutional violations were:

¹⁰ Saint Lucia Civil Appeal No. 12 of 1975

¹¹ “Each of the terms “delict” and “quasi-delict” indicates an injurious act or incident which, in the absence of any contract gives rise to an obligation towards the injured person (the creditor), on the part of another person (the debtor). The act or incident is termed “delict” when there is, and “quasidelict” when there is not, injurious intention or culpable negligence on the part of the debtor.” (Article 1.15 of the Civil Code)

- “(i) The Proceeds of Crime Act was not passed by a special majority in accordance with sections 41 and 42 of the Constitution.
- (ii) The Proceeds of Crime Act was not approved on a referendum as required by section 41 and 42 of the Constitution of Saint Lucia.
- (iii) Breaching the Claimant’s right to property without compensation.
- (iv) Interfering with the right to respect for private and family life.
- (v) Withholding the property of the Claimant contrary to section 6(5) of the Constitution.
- (vi) Restraining the property of the Claimant contrary to section 6(6) of the Constitution.
- (vii) Authorising the seizure and detention of property by means of a Restraining Order which did not satisfy the law contrary to section 7 of the Constitution.
- (viii) Contravening section 8(2)(a) of the Constitution by requiring the Claimant to prove his innocence in a civil trial.
- (ix) Compelling the Claimant to give evidence in a Civil Trial contrary to section 8(7) of the Constitution.
- (x) Failing to provide the Claimant with a fair hearing in accordance with section 8(8) of the Constitution.
- (xi) Compelling the Claimant to prove his innocence by showing that he did not commit a criminal offence.
- (xii) Shifting the burden on the Claimant to apply to discharge or vary an illegally obtained Restraining Order.
- (xiii) Obtaining a Restraining Order contrary to law.”

[26] The claimant alleged that the defendants insisted on breaching his constitutional rights as they filed additional applications for a Restraining Order violating the Constitution and the Proceeds of Crime Act. The court dismissed another of their applications. Further, the defendants unlawfully and through their servants and agents unconstitutionally and unlawfully seized and restrained him from dealing with his properties. Due to the unconstitutional and unlawful restraint which was put and continues to be placed on his properties, he has suffered tremendous loss and damages.

[27] Consequently, among other things, the claimant sought the following reliefs:

- “a. A Declaration that the decision of the Defendants to obtain two (2) Restraining Orders infringed his rights under the Constitution of Saint Lucia to respect for my private and family life and the right to acquire and possess property.
- b. A Declaration that there is apparent bias on the part of the DPP in seeking to obtain a Restraining Order contrary to the Constitution and the Proceeds of Crime Act Chapter 3.04 of the Revised Laws of Saint Lucia. As a result of this unlawful and unconstitutional conduct of the DPP, the Claimant cannot have a fair criminal trial.
- c. A Declaration that the DPP has acted unconstitutionally by seeking a Restraining Order against the requirements of sections 30 and 31 of the Proceeds of Crime Act. The DPP was only authorised to interfere with the property of the Claimant if it was authorised by law.

...

- f. An Order that sections 2, 30, 31, and 39 of the Proceeds of Crimes Act are inconsistent with the Constitution of Saint Lucia and are therefore void to the extent of the inconsistencies.
- g. A Declaration that the Director of Public Prosecution has acted contrary to his Constitutional role as Minister of Justice under section 73 of the Constitution. The DPP was acting in a way intended to subvert and undermine the constitutional rights of the Claimant.
- h. A Declaration that section 39 of the Proceeds of Crime Act is designed to alter the entrenched right of the Claimant to property and the benefits derived therefrom without adequate compensation and do not conform to the exceptions in section 6(6) of the Constitution which enables a law to have effect if it was designed to act as **“a penalty for breach of any law or forfeiture in consequence of breach of any law.”**
- i. A Declaration that section 30 and 31 of the Proceeds of Crime Act Chapter 3:04 violates the Presumption of Innocence as protected in the Constitution. They breach the right to remain silent and the privilege against self-incrimination. Those sections demand that the gives evidence of his Defence at a criminal trial in a civil hearing. The Claimant must prove that he did not commit the Criminal Offence at both the hearing and on an application for a variation.
- j. A Declaration that the Proceeds of Crimes Act infringes the constitutional protection of the right to personal liberty as contained in section 3 of the Constitution by permitting the Police Authorities to unconstitutionally and unlawfully arrest and falsely imprison the Claimant contrary to the permissible constitutional exceptions to the right to personal liberty as contained therein.
- k. A Declaration that the Proceeds of Crimes Act violates section 3(7) of the Constitution by authorizing the unlawful arrest and detention of the Claimant without compensation from either the Police Authorities or the Executive arm of the State on whose behalf the Police Authorities are acting.
- l. A Declaration that sections 2, 30, 31, and 39 of the Proceeds of Crimes Act amended section 41 of the Constitution by providing for alteration of deeply entrenched rights without the need to adhere to the requirements of the Constitution for the passage of such pieces of legislation.
- m. An Order granting compensatory damages for breach of Constitutional rights.
- n. An Order granting Vindictory Damages for breach of Constitutional Rights.”

[28] The defendants assert that the court exercised its discretion under sections 30 and 31 of the Proceeds of Crime Act in granting the restraint order and renewal thereof. The court is empowered to grant a restraint order with the necessary conditions as it may specify or refuse to give the order. Granting the restraint order and renewal thereof does not violate the claimant’s constitutional rights and relied on ***Kent Andrews et al. v Attorney General of Saint Vincent and the Grenadines***¹².

¹² SVGHCVAP2010/019 (delivered 7th November 2011)

- [29] Furthermore, the defendant states the Proceeds of Crime Act provides an alternative remedy of variation or discharge of a restraint order to any person affected by the same, and since the claimant did not make use of this alternative remedy, he cannot now proposition this court to exercise its constitutional jurisdiction. In any event, the restraint order regarding the claimant's properties merely seeks to prevent him from disposing of the same, pending the outcome of the criminal proceedings. As such, the claimant cannot maintain a claim for constitutional redress against the defendants.
- [30] On the other hand, the claimant countered the defendants failed to conform to the Proceeds of Crime Act as they did not meet a single requirement of the Act in obtaining the restraining orders. As a result of the circumvention of the Proceeds of Crime Act, the claimant suffered loss and damage. Further, the oppressive nature in which the State launched its attack on him meant that several constitutional breaches occasioned the restraining order. The decision of the defendant to reopen the notice of application for the restraining order with no evidence that the claimant committed the offences charged is ample testimony that the defendant insists on violating the claimant's constitutional rights.
- [31] The constitutional motion is the appropriate action as there is no dispute on the fact that the defendant has not and did not prove that the claimant is guilty of the offences charged and before the criminal court. In that case, a common law action in trespass to goods and the person cannot effectively remedy the many violations of his constitutional rights. The availability of a common law remedy is not the be-all and the end-all for deciding whether a constitutional motion is inappropriate.
- [32] The claimant relied on *The Attorney General of Trinidad and Tobago v Seuichand Ramanoop*¹³, which he states, makes it clear it is not in all cases where an alternative remedy can be sought or is available the constitutional originating motion should be abandoned. He contended that there could be constitutional compensation, even when alternative remedies were available, especially when the actions greatly infringed a citizen's constitutional rights. That all together, the common law action in trespass yields to damages of an insignificant kind when compared to the senseless and high handed breaches which this action has occasioned.

¹³ [2005] UKPC 15 (23rd March 2005)

Discussion

[33] A perusal of the alleged breaches of the Constitution and the orders sought concerning them, as pleaded in the amended statement of claim, indicate that they are not sustainable as a matter of law. The claimant's legal challenges regarding the constitutionality of the Proceeds of Crime Act and the effect of its provisions for obtaining an ex parte restraining order were judicially considered in the **Kent Andrews** case, which in my view, is a plain and complete answer to the claimant's constitutional claims. The relevant provisions of the Proceeds of Crime Act and the Constitution of Saint Lucia of concern, in this case, are in *pari materia* with St. Vincent and the Grenadines counterpart considered in **Kent Andrews** case, where the Court of Appeal of the Eastern Caribbean Supreme Court, dismissing the appeal, held that:

- "1. The **Proceeds of Crime Act** does not infringe the appellants' rights under the Constitution. It does not have the effect of adding to, varying, or repealing any provision of the Constitution. Consequently, section 38 of the Constitution was not engaged. Sections 26, 49 and 50 of the **Proceeds of Crime Act** make provisions for the making of orders which the Constitution contemplates as exceptions to the right against deprivation of property. These sections do not violate the applicable principles of due process and protection of the law provided for by the Constitution.
2. A restraint order to prohibit any person from dealing with realizable property, made pursuant to section 26 of the **Proceeds of Crime Act** does not violate the principles of natural justice, due process and equal protection before the law. Section 26 confers a discretion on the Director of Public Prosecutions to make an application for a restraint order ex parte and the court in the exercise of its discretion will decide whether to grant the application. Furthermore, the section does not impose a fetter on the manner in which the court may exercise its discretion; hence, it does not deprive the court of the power to ensure, so far as practicable, fairness between the parties. The grant of a power to make ex parte order is not unusual but should always be regarded as exceptional. It involves a departure, albeit temporary, from the general requirement of procedural fairness that no order adverse to a party should be made without that party having an opportunity to be heard. Mareva or assets preservation orders are often sought ex parte on the basis that notice to the affected party is likely to result in concealment or dissipation of assets which it is intended the proposed order will protect
International Finance Trust Company Limited v New South Wales Crime Commission [2009] HCA 49 applied in part and also distinguished; **Mootoo v Attorney General of Trinidad and Tobago** [1979] 1 WLR 1334, at 1338 – 1339 applied; **The State v Boyce** [2006] UKPC1 mentioned; **Ferguson v The Attorney General of Trinidad and Tobago** [2001] UKPC considered.

3. The process contemplated by section 50 of the **Proceeds of Crime Act** is not in the nature of a criminal charge. It is a civil process. Section 8(8) of the Constitution applies to proceedings determining the existence or extent of civil rights or obligations. A restraint order is preemptive and provisional. It is an interim measure, protective in nature, does not determine civil rights and obligations and would not normally fall within the protection afforded by section 8(8) of the Constitution. At the restraint order stage, the court makes no final decision as to the defendant's "benefit" or "realizable property". As a general rule, the right to fair hearing does not apply to interim measures. It can only apply if the practical effect of the interim measure is to determine the rights in question. In the present case, it is clear in that the practical effect of the restraint order was not to determine any civil right or obligation. In the circumstances, the restraint order would not engage section 8(8) of the Constitution.
J v Crown Prosecution Service [2005] EWCA Civ 746 applied; **Trent Strategic Health Authority v Jain & Anor** [2009] UKHL4 applied.
4. Sections 26, 49 and 50 of the **Proceeds of Crime Act** have to be read contextually; the context here is section 6 of the Constitution. Sections 6(1) and 6(6) of the Constitution contemplate the existence or enactment of a statute dealing with forfeiture of property either by way of penalty for breach of any law or for forfeiture in consequence of a breach of law within subsection 6(6)(a)(ii)..They further contemplate action, inclusive of the taking of possession of or acquisition of property for as long as may be necessary for the purposes of examination, investigation, trial or enquiry: section 6(6)(a)(vii). An enactment in the nature of the **Proceeds of Crime Act** is clearly authorized by the Constitution and falls within the ambit of section 6(6) thereof.
5. The expression "reasonably justifiable in a democratic society" concerns whether the provision in question "arbitrarily or excessively invades the enjoyment of the guaranteed rights according to the standards of a society that has proper respect for the rights and freedoms of the individual". The court uses a three fold analysis to determine whether a limitation is arbitrary or excessive: (i) Is the legislative objective sufficiently important to justify limiting a fundamental right? (ii) Are the measures designed to meet the legislative objective rationally connected to it? (iii) Are the means used to impair the right or freedom no more than is necessary to accomplish the objective? The **Proceeds of Crime Act** provides for the prevention of money laundering and related matters. Looking at the Act in the round and applying the three fold analysis, it cannot be said that its provisions either arbitrarily or excessively invade the enjoyment of the guaranteed rights according to the standards of a society like St. Vincent and the Grenadines that has proper respect for the rights and freedoms of the individual. The Proceeds of Crime Act is reasonably justifiable in a democratic society like St. Vincent and the Grenadines. The appellants have not demonstrated that the Act was not reasonably justifiable.
de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and others [1998] UKPC 30 applied.

[34] Thus, even assuming that the facts pleaded are true, based on the earlier observations of this court (para [16] and [17]) coupled with the reasoning of the **Kent Andrews** case by analogy, it would not be consonant with the overriding objective of dealing with cases justly to have these claims proceed to a trial. In any event, the claimant has demonstrated by his amended claim that he had alternative means of vindicating any loss and damage suffered other than recourse to constitutional redress.

Conclusion

[35] Finally, in the alternative to striking out the claimant's amended statement of claim filed on 21st January 2019 based on prescription, the defendants seek to have the constitutional redress claims (paras 21 to 25 thereof) and the declarations and orders prayed (paras a. to o.) struck out. However, they have not presented any basis in their application, supporting affidavits or submissions for challenging the allegations of para 22, which states:

"22. The Defendants failed to conform to the Proceeds of Crime Act Chapter 3.04 of the Revised Laws of Saint Lucia. The Defendants did not meet a single requirement of the Act in obtaining the Restraining Order. That as a result of the circumvention of the Proceeds of Crime Act the Claimant suffered loss and damage.

PARTICULARS OF BREACH OF PROCEEDS OF CRIME ACT

- (i) Failed to establish the grounds that the Claimant committed the offences for which he was charged.
- (ii) Failed to identify the grounds for the belief that the property is tainted property in relation to the offence;
- (iii) Failed to outline the grounds for the belief that the defendant derived a benefit directly or indirectly from the commission of the offence.
- (iv) Failed to demonstrate the grounds for the belief that that a forfeiture order or a confiscation order may be or is likely to be made under the Act in respect of the property.
- (v) Failed to prove to the satisfaction of the Court that the Claimant committed the criminal offences for which he is charged.
- (vi) There was no evidence before the Court showing the grounds for the belief that the property is tainted property in relation to the offence;
- (vii) The Restraining Order was granted without the Court having before it the grounds for the belief that the defendant derived a benefit directly or indirectly from the commission of the offence;
- (viii) The Court issued the Restraining Order in the absence of evidence of the grounds for the belief that the property is tainted property in relation to the offences for which the Claimant was charged.
- (ix) There was also no evidence on which the court could have relied to show the grounds for the belief that a forfeiture order or a confiscation order may be likely or is likely to be made under the Act in relation to the property.

- (x) The Defendants failed to give an undertaking in damages so as to cover any losses suffered.
- (xi) The Order of Justice Astaphan established that the Restraining Order was illegally obtained.”

[36] Consequently, I do not propose to address this matter. I would send the case to the Honourable Master for further directions and case management.

[37] In the circumstances, and for the reasons given above, IT IS ORDERED THAT:

1. The claims for damages against a public or negligence (paras 17, 19 and 20 of the amended statement of claim filed on 21st January 2019) are prescribed under Articles 2124, 2122 and 2129 of the Civil Code.
2. The constitutional redress claim (paras 21, 23, 24 and 25 of the amended statement of claim filed on 21st January 2019) and the corresponding declarations and orders prayed (paras a. to c. and f. to n.) will be struck out.
3. The court office shall fix the case and notify the parties for further directions and case management before the Honourable Master.
4. There shall be no order as to costs for this application.

Justice Rohan A Phillip
High Court Judge

By the Court



Dp. Registrar