

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
Civil Division

COMMONWEALTH OF DOMINICA

Claim No. DOMHCV2018/0064

BETWEEN:

- [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

Claimants

-and-

- [1] THE COMMISSIONER OF POLICE
- [2] THE MINISTER OF JUSTICE, IMMIGRATION & NATIONAL SECURITY
- [3] THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF DOMINICA

Defendants

Before Master Alvin S. Pariagsingh

Appearances: Prof. Leslie Thomas KC leading Noelize Knight – Didier, Joelle Harris and Indira St. Jean for the Claimants; and
Antony Astaphan SC (abs) leading Dr. David Dorsette, Vanica Sobers – Joseph Pearlisa Morvan and Kayan Toussaint for the Defendant

2022: November 10;
2023: January 31

DECISION

Defendants' application to strike out

[1] **PARIAGSINGH, M:** - Before the Court is the Defendants' application seeking an order that the Claimants' statement of case be struck out.¹

¹ Filed on March 15, 2022

THE APPLICATION:

[2] The application is made pursuant to **Part 26 Rule 26.3(1)(b) and (c) of the Civil Proceedings Rules 2000**² as well as under the inherent jurisdiction of the Court.

[3] The Applicants seek, as it relates to the Second and/or Third Defendant only, that the claim be dismissed as it discloses no reasonable cause of action against them. The Applicants also seek, as it relates to all Defendants, an order that the claim be struck out as it discloses no reasonable cause of action and/or it is an abuse of process of the Court. The Applicants also seek an order that judgment be entered in favour of the Defendants and costs.

[4] At the commencement of the hearing, it was indicated that the Claimants concede that that they have no claim for breach of statutory duty. The Claimants contend however, that they do have a claim in negligence and rely on the same pleadings.

[5] For the purposes of this decision, I would only consider the submissions and arguments as it relates to the claim in negligence and the alleged breach of a common law duty.

[6] The grounds of the application are that:

1. The Claimants have not pleaded any reasonable cause of action against the Second and/or Third Defendant.
2. There is no reasonable cause of action pleaded concerning the alleged common law duty owed to the Claimants by the Defendants or for damages for the alleged breaches.

² After referred to as CPR

3. The pleaded case for a common duty of care owed by the Defendants is, in the premises, substantially, if not solely, on alleged failures to stop violence or looting of private businesses after hurricane Maria;
4. The common law precludes a claim for damages for an alleged breach of a duty of care against the Defendants and in particular the First Defendant especially in operational matters, unless it is pleaded, and it is not, that the Defendants by their own actions caused, or contributed to the damage and/or the damage was caused by the persons under the control of the Defendants, and not third parties or other members of the public;
5. There is no pleaded allegation or case that the Defendants or persons under their control caused the damage or loss allegedly suffered by the Claimants;
6. Mere omission or failure by the First Defendant and his commanding or other officers to act in the circumstances of devastation and violence as pleaded by the Claimants is wholly insufficient to create any duty of care to the Claimants;
7. Public policy, or the law, requires especially after a Hurricane Maria, and the island wide devastation caused by it, that no private or other duty of care was owned by the Defendants to the Claimants as individual members of the public.

[7] The application is supported by an affidavit of Daniel Carbon.³ The affidavit is expressed to be made in support of the Defendants' application. The affidavits simply says that the deponent has read the grounds of the application and he was advised by his Attorneys at Law that the grounds are true.⁴ The Defendants have filed no affidavit in opposition. Pereira CJ in **Dr. Martin Dider et al v Royal Caribbean Cruises Ltd et al**⁵ at paragraph 28 outlined the approach the court ought to take in an application to strike out:

³ Filed on March 15, 2022

⁴ Paragraph 4 of the Affidavit of Daniel Carbon filed on March 15, 2022.

⁵ SLUHCVP2014/0024

'Therefore, for the strike out procedure, **the pleadings alone are examined** and if the court finds that they are untenable as a matter of law a party may have his/her claim or defence struck out. This does not preclude that party however, from remedying the faults of their claim or defence and bringing further legal proceedings in relation to the same dispute. They are perfectly entitled to do so. The situation is different, however, with the summary judgment procedure since this procedure gives a judgment on the merits which operates as issue estoppel. No further litigation on the same issue(s) will be entertained by the court' **emphasis mine.**

[8] Accordingly, there was no need for an affidavit in support of the application and consequently no need to reply. In any event, the affidavit was of no assistance in resolving the issues to be determined.

THE APPROACH TO STRIKING OUT:

[9] The power to strike out is contained in **CPR 26.3 1(b) and (c)** which 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 –

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

[10] The approach to applications to strike out has been settled in a series of authorities in this jurisdiction including those set out in the written submissions of both parties. In general, the court will not strike out a party's case unless it is clear that the case is doomed to fail and there is no other alternative that can be used that would lead to the case being determined on the merits. The court's approach always favours cases being determined on its merits whilst not being divorced of the notion of procedural justice and fairness.

THE TIMING OF THIS APPLICATION:

[11] The statement of claim in this matter was filed on March 20, 2018, five (5) days short of the fourth year anniversary that this claim has been pending. Pleadings have been closed since June 28, 2018. The matter is at the stage of being fixed for pre-trial review all witness statements having been filed.

[12] The Court is compelled to highlight the lateness of this application and the disservice that does to the Court and the litigants. Nothing is raised in the application that was not at the disposal of the Defendants four (4) years ago. Instead, the Defendants stood silent and waited in the curtains until the eve of the matter progressing to trial and in particular until the Claimants have put their intended evidence before the Court to make this application.

[13] The lateness of this application interrupts the case flow management and the Court now has to go back to looking at the pleadings when the parties have put themselves in a place for trial. Whilst no time is prescribed in the rules for the making of an application to strike out, it must be that an application with the potential to dispose of a case entirely ought to be made at the earliest possible opportunity. The Defendants have not made this application with any promptness having regard to how long they have had this claim in their possession. In this regard, the lateness of making this application will be taken into account in treating with the issue of costs, if it arises.

THE STATEMENT OF CLAIM:

[14] In light of the concession of Counsel for the Claimants that the claim for breach of statutory duty is not being pursued, I will only focus on the relevant parts of the statement of claim.

[15] In summary, the Claimants are all businesses in close proximity to the Dame Eugenia Charles Blvd, Rouseau. The First Defendant is the Commissioner of Police who the Claimants allege commanded and was responsible for the good conduct, control and

discipline of the police force under the general orders of the Minister, the Second Defendant. The Third Defendant is the Attorney General who is vicariously liable for the actions of the servants and/or agents of the State pursuant to Section 14 of the **State Proceedings Act**.⁶

[16] The Claimants' claim is that a general duty of care was owed by the Defendants to enforce the criminal law both during the passage and for a reasonable period after hurricane Maria. Their case is that the Defendants negligently breached that duty resulting in them suffering damages and loss as a result of looting and general destruction after the hurricane.

[17] Each Claimant has pleaded specified facts in relation to their claim. In relation to the First Claimant, its case is that on September 20, 2017 its business place was opened and entered by persons unknown and looted.

[18] The Second Claimant contends that its place of business was flooded by river waters and from high tides from the sea. Its case is that on September 19 and 20, the business was broken into and looted.

[19] The Third Claimant contends that following the hurricane its business was broken into and looted on September 19, 2017. This looting continued and the Third Claimant closed its operations permanently.

[20] The Fourth Claimant contends that on September 20, 2017 its business place was broken into and looted. This continued until September 22, 2017.

[21] The Fifth Claimant contends that on September 19, 2017 after the hurricane, its premises were looted and this continued.

⁶ Chapter 7:08 of the Laws of Dominica.

[22] The Sixth Claimant contends that September 19, 2017 its business place was broken unto and looted.

[23] All the Claimants contend that the looting after the hurricane continued unchecked for a significant period and was directly caused by the Defendants collective breach of statutory duty or negligence.

[24] In relation to their assertion of negligence, the Claimants plead that the Defendants failed to exercise a general duty of care to enforce the criminal law. They also contend that Defendants failed to reasonably foresee the danger of looting occurring at the Claimants' business places; failed to take reasonable steps to prevent the occurrence of looting at the Claimants' business places; failed to protect the Claimants' from loss and damage after assuming responsibility by issuing assurances upon which the Claimants' relied; and failed to have an operational plan and/or an adequate operational plan in order to execute the said assurances to the Claimants.

[25] In addition, specific allegations are made by each Claimant as to how the duty to act which they alleged was owed to them was triggered. In particular:

1. The First Claimant pleaded that the looting was reported to the police who were unwilling and refused to assist.
2. The Second Claimant pleaded that on Tuesday September 19, 2017 to Wednesday September 20, 2017 police officers were seen armed and walking within the vicinity of its business place but made no attempts to stop looters. It is also pleaded that on September 20, 2017 armed police officers were seen standing near and within the crowd of looters while other looters tossed looted items from the roof top and the police officers did not stop or arrest the looters, did not taken the looted items away from the looters or prevent them from going into the business place. The same complaint of failing to act on September 21, 2017 whist in the vicinity of the business place and seeing the looting taking

place is made. The Second Claimant contends that the police simply stood by and watched while the looters passed by with the items looted from its business. The Second Claimant also pleaded that on October 23, 2017 a looter was apprehended by the Managing Director of the Second Claimant whilst attempting to steal and this looter was handed over to the police but was subsequently released by the police as he was a police cadet.

3. The Third Claimant pleaded that on September 19, the police was called, the looting was reported and their assistance was requested but such assistance was not forthcoming. Further the Third Claimant contends that on September 20, repeated calls for assistance were made to the police as their business was being looted. After several calls two (2) armed police officers came to the premises and looting did in fact stop until the officers left. The Third Claimant contends that the looting continued unchecked until September 21. It is pleaded that on Friday September 22 and then on Monday September 26 through to Wednesday September 28, about 8 to 10 armed police officers were deployed for a few hours to facilitate the loading of salvaged stock for distribution to the Red Cross. It is also the Third Claimant's case that on September 23 and 24 its business was once again burgled as it remained unchecked despite assurances given that security would be provided under an arrangement with the Government.
4. The Fourth Claimant pleaded that one or more officers including Inspector Lincoln Corbette, was present at its business place but failed to stop the looting and did not make any attempts to take the looted items or to arrest the looters. It is further pleaded that the police officer(s) facilitated the looting by controlling the amount of water each person took. It is contended that the police officer(s) were able to halt the looting in order to load trucks with water for the essential services by firing shots into the air, and also got some members of the crowd to assist in loading the truck. It is pleaded that an agreement was entered into between the said Inspector Lincoln Corbette and the Fourth Claimant to provide

continuous armed police security to the Fourth Claimant's business place in exchange for the said water for the essential services. Under this agreement, the Fourth Claimant was also to provide meals for these police officers however, such continuous police security was not provided and looters once again broke into and looted the Fourth Claimant's business place.

5. The Fifth Claimant pleaded that on Tuesday September 19, 2017, looters descended on the O.D. Brisbane premises in several hundreds and looters were allowed to loot and vandalize the buildings and vehicles on the said premises unchecked and unstopped by the Police for several weeks. It is further pleaded that armed police officers were at the Rubis gas station in Rockaway and at no time did these officers or any of them make any attempt to stop, or arrest any of the looters nor did they make any attempt to confiscate the looted items from the said looters.
6. The Sixth Claimant pleaded that on Tuesday September 19, the Sixth Claimant's manager was able to apprehend and restrain a looter who he caught exiting the premises. Members of the police force who were in the direct vicinity and viewed this incident were unwilling and refused to arrest the looter, and instead caused the said looter to be released without arrest or charge. It is contended that the looting continued the following day.

[26] The Claimants also each claim a sum representing the loss of their stock, equipment and hardware as well as their loss of profits.

SUMMARY OF THE DEFENDANTS SUBMISIONS:

[27] The crux of the Defendants' submission is that the law which is determinative of this claim is succinctly summarised in **Mitchell v Glasgow City Council**.⁷ The Defendants

⁷ [2009] AC 874

submit that the foreseeability of harm is not of itself enough for the imposition of a duty of care; the law does not normally impose a positive duty on a person to protect others, the common law does not impose liability for what, without more, may be called pure omissions; and the law does not impose a duty to prevent a person from being harmed by the criminal act of a third party based simply on foreseeability.

[28] The Defendants also submit that in general, public policy mitigates against the imposition of liability upon the police when they fail to prevent injury.⁸ They further submit that for there to be a cause of action against public authorities in negligence there must be established a sufficient proximity of relationship between the public body and those who have suffered injury.⁹

[29] The Defendant further submitted that there was no duty of care owed to the Claimants as a matter of law and policy. The law on the duty of care owed to victims of crime and wrongdoing was definitely laid and is settled.¹⁰ The pleaded case advanced no facts which establish a duty of care owed and the claim is “plainly just bad in law”.

SUMMARY OF THE CLAIMANTS’ SUBMISSIONS:

[30] The Claimants’ contention is that they have pleaded positive acts of the police which give rise to a claim in negligence. They make specific reference to Paragraphs 26C to H of their statement of claim. Their submission is that the pleaded facts are that the police facilitated the looting. They further submit that there are special circumstances which if proven will establish that a duty to act existed and was breached.

[31] The Claimants submit that the seminal authority of **Hill v Chief Constable of West Yorkshire**¹¹ sets out the principles regarding whether a duty of care is owed by police

⁸ Costello v Chief Constable of Northumbria [1999] ICR 752

⁹ Yuen Ken Yiu v Attorney General of Hong Kong [1988] AC 175 and Hill v Chief Constable of West Yorkshire [1989] AC 53

¹⁰ Van Colle v Chief Constable of the Hertfordshire Police [2008] UKHL 50 applied in Michael v Chief Constable of South Wales Police [2015] UKSC 2.

¹¹ [1988] 2 All ER 238,

to victims of crime. They contend that whilst as a general proposition no duty of care existed, that is subject to establishing the requisite proximity of relationship between the parties. The Claimants submit that this case falls squarely within exceptions to the Hill principle. They submit that the facts pleaded take their claim outside the Hill principle on three grounds:

1. Assumption of duty of care/ assumption of responsibility given specific assurances given
2. Wilful acts or omissions of the police
3. Exceptional circumstances and lack of alternative remedy.

[32] Whether the Claimants' pleaded case puts them within the exception to the Hill principle the Claimants submit is an issue that can only be resolved at a trial. Further, the Claimants submit that no issue of public policy or immunity was pleaded by the Defendants. They further contend that issues of reliance on the representations of the First and Second Defendants and what was operating in their minds at the time they were made are not issues for determination at this stage but rather trial.

[33] The Claimants also submit that any issue of immunity generally conferred on police officers as matter of public policy from actions in negligence involved a balanced assessment of all public policy considerations. This it is submitted can only be decided on at a trial when all the facts are known to the Court.¹²

ANALYSIS:

[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.

¹² Swinney v Chief Constable of Northumbria Police Force - 1999 WL 477396

[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.**¹³ The remedy of striking out should 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**¹⁴ "... the claim should not be struck out if there is even a scintilla of a cause of action."

[36] In this claim the reference to **Blackstone's Civil Practice**¹⁵ by Edwards JA (as she then was) in **Citco Global Custody NV v Y2K Finance Inc**¹⁶ to circumstances where the Court should not strike out a statement of case is of note:

'...where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully investigated'

[37] I have considered the test commended by the Defendants which was recently stated by the Board in **Frank & Anor v Attorney General of Antigua and Barbuda**¹⁷ that is; whether the claim has a realistic prospect of success. Noteworthy is that **Frank** was a constitutional claim which the Board concluded was straightforward as the facts were not in dispute and the Court below was presented with a pure question of law. That certainly is not the case here. There is a vast disagreement between the parties on the law in relation to whether a duty of care was owed by the police in this case.

[38] The Defendants submitted as a general proposition that the Court should hold that as a matter of law no duty was owed by the police. This proposition is not based in statute but based on the common law.

[39] I agree with the Counsel for the Claimants that as a general proposition no duty is owed. This is however subject to exceptions. A review of the following authorities (in

¹³ Civil Appeal No. 20A of 1997 (Antigua & Barbuda)

¹⁴ (1986) LRC (Const) 421

¹⁵ 2009 (at page 432)

¹⁶ Civil Appeal No. 22 of 2009 (BVI)

¹⁷ [2022] UKPC 25

chronological order) in my view accords with the submissions of the Claimants. An exception to the general position is if exceptional circumstances are shown. It is not a blanket position as contended by Counsel for the Defendants.

[40] In **Hill v Chief Constable of West Yorkshire**¹⁸ it was held that:

"The question of law which is opened up by the case is whether the individual members of a police force, in the course of carrying out their functions of controlling and keeping down the incidence of crime, owe a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals, such as to result in liability in damages, on the ground of negligence, to anyone who suffers such injury by reason of breach of that duty ...

"There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence. Instances where liability for negligence has been established are *Knightly v. Johns* [1982] 1 WLR. 349 and *Rigby v. Chief Constable of Northamptonshire* [1985] 1 WLR. 1242. Further, a police officer may be guilty of a criminal offence if he willfully fails to perform a duty which he is bound to perform by common law or by statute: *Rec. v. Dytham* [1979] Q.B. 722, where a constable was convicted of wilful neglect of duty because, being present at the scene of a violent assault resulting in the death of the victim, he had taken no steps to intervene ...

"The common law, while laying upon chief officers of police an obligation to enforce the law, makes no specific requirements as to the manner in which the obligation is to be discharged. That is not a situation where there can readily be inferred an intention of the common law to create a duty towards individual members of the public.

"The foundation of the duty of care was said to be reasonable foreseeability of harm to potential future victims if Sutcliffe were not promptly apprehended. Lord Atkin's classic propositions in *Donoghue v. Stevenson* [1932] AC 562. 580 were prayed in aid. As was Lord Wilberforce's well-known two stage test of liability in negligence in *Anns* [1978] AC 728, 751, 752. It has been said almost too frequently to require repetition that foreseeability of likely harm is not in itself a sufficient test of liability in negligence. Some further ingredient is invariably needed to establish the requisite proximity of relationship between plaintiff and defendant, and all the circumstances of the case must be carefully considered and analysed in order to ascertain whether such an ingredient is present. The nature of the ingredient will be found to vary in a number of different categories of decided cases. In the *Anns* case there was held to

¹⁸ [1988] 2 All ER 238

be sufficient proximity of relationship between the borough and future owners and occupiers of a particular building the foundations of which it was decided to inspect, and there was also a close relationship between the borough and the builder who had constructed the foundations.

"The conclusion must be that although there existed reasonable foreseeability of likely harm to such as Miss Hill if Sutcliffe were not identified and apprehended, there is absent from the case any such ingredient or characteristic as led to the liability of the Home Office in the Dorset Yacht case. Nor is there present any additional characteristic such as might make up the deficiency. The circumstances of the case are therefore not capable of establishing a duty of care owed towards Miss Hill by the West Yorkshire Police.

"That is sufficient for the disposal of the appeal. But in my opinion there is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy"

[41] In **Van Colle and another v Chief Constable of Herefordshire**¹⁹ it was held that:

"it was a core principle of public policy that, in the absence of special circumstances, the police owed no common law duty of care to protect individuals from harm caused by criminals since such a duty would encourage defensive policing and divert manpower and resources from their primary function of suppressing crime and apprehending criminals in the interest of the community as a whole; that the public interest was best served by maintaining the full width of the core principle and an exception which imposed a duty of care in circumstances such as arose in the claimant's case, where the police were discharging their general public duty of law enforcement, could not be accommodated within it; and that, accordingly, the judge had been correct to strike out the claimant's action."

[42] In **Michael v Chief Constable of South Wales Police**²⁰ it was held that :

" ... that the duty of the police for the preservation of the peace was owed to members of the public at large and did not involve the kind of close or special relationship necessary for the imposition of a private law duty of care; that it did not follow from the setting up of a protective system from public resources that if it failed to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state was not responsible; that to impose such a duty, which could not be rationally confined, would be contrary to the ordinary principles of the common law.

¹⁹ [2009] 1 AC 225

²⁰ [2015] UKSC 2

[43] In **Robinson v Chief Constable of West Yorkshire Police**²¹ it was held that:

" ... that the police generally owed a duty of care in accordance with the ordinary principles of the law of negligence **unless statute or the common law provided otherwise**, and **there was no general rule that they were not under such a duty of care when discharging their functions of preventing and investigating crime**"

"68 4 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 ... it follows that **there is no general rule that the police are not under any duty of care when discharging their function of preventing and investigating crime. They generally owe a duty of care when such a duty arises under ordinary principles of the law of negligence, unless statute or the common law provides otherwise**. 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 the *Dorset Yacht* case (1970] AC 1004 and *Attorney General of the British Virgin Islands v Hartwell* (2004] 1 WLR 1273. 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**.

²¹ [2018] UKSC 4

[44] In **Tindall v Chief Constable of Thames valley Police**²² it was stated:

" when considering whether the police are to be taken as having 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, I must apply the principles derived from the decisions of high authority to which I have referred . In particular:

i) Where a statutory authority (including the police) is entrusted with a mere power it cannot generally be made liable for any damage sustained by a member of the public by reason of a failure to exercise that 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: see *East Suffolk, Stovin*;

ii) It follows that a public authority will not generally be held liable where it has intervened but has done so ineffectually so that it has failed to confer a benefit that would have resulted if it had acted competently [emphasis supplied]: see *Capital & Counties, Gorringer, Robinson*;

iii) Principle (ii) applies even where it may be said that the public authority's intervention involves it taking control of operations: see *East Suffolk, Capital & Counties*;

iv) Knowledge of a danger which the public authority has power to address is not sufficient to give rise to a duty of care to address it effectually or to prevent harm arising from that danger: see *Stovin*;

v) Mere arrival of a public authority upon, or presence at, a scene of potential danger is not sufficient to found a duty of care even if members of the public have an expectation that the public authority will intervene to tackle the potential danger: see *Capital & Counties, Sandhar*;

vi) The fact that a public authority has intervened in the past in a manner that would confer a benefit on members of the public is not of itself sufficient to give rise to a duty to act again in the same way (or at all): see *Gorringer*;

vii) In cases involving the police the courts have consistently drawn the distinction between merely acting ineffectually (e.g. *Ancell, Alexandrou*) and making matters worse (e.g. *Rigby, Knightly, Robinson*);

viii) 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

²² [2022] EWCA Civ 25

and respond to the risk of damage to identified property (Alexandrou) or injury to members of the public at large (Ancel/) or to an individual (Michael);

ix) In determining whether a public authority owes a private law duty to an individual, it is material to ask whether the relationship between the authority and the individual is any different from the relationship between the authority and other members of the same class as the individual: see *Gorringe*, per Lord Scott.

[45] In **Royal Bank of Scotland International Ltd v JP SPC 4**²³ it was stated that:

"82. The Supreme Court has extensively examined the law on the duty of care in the context of such failures in *Michael* and *N v Poole*. In *Michael*, the deceased had rung the police to report that her former partner had threatened to return to kill her. The police delayed in responding to that call and, in the interim, the deceased was stabbed to death by her former partner. It was held that there was no duty of care owed by the police to prevent the harm to the deceased. In *N v Poole*, the claimant children, along with their mother, were placed by the defendant public authority in accommodation where they were subjected to harassment and abuse by a neighbouring family. It was again held that no duty of care was owed by the public authority to prevent the harm to the children. In both cases it was emphasised that the common law does not generally impose liability for failure to prevent harm caused by others. As Lord Toulson expressed it at para 97 in *Michael*:

"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."

83. In those cases, therefore, the Supreme Court recognised that for a duty of care to arise restrictive principles needed to be satisfied. Those principles are, most importantly and relevantly, that the defendant has some special level of control over the source of danger or has assumed a responsibility to protect the claimant from the danger: see *Michael* at paras 99-100; and *N v Poole* at para 76."

[46] In my view the authorities spanning between **Hill** in 1989 to **JP** in 2022 states as a general rule that no common law duty exists unless exceptional circumstances are shown. These exceptional circumstances are not defined in any exhaustive list. From these authorities, they can relate to the proximity of the police and the Claimant as well as any agreements, contracts or assumption of risk.

²³ [2022] UKPC 18

[47] The Court accept and agrees with Counsel for the Claimants that the issues of the duty existing is not settled as the Defendant submits. There are exceptions to the general rule. This very involved argument on the state of the law alone in my view is sufficient not to grant this application following the guidance of the Court of Appeal in **Citco**.

[48] The case of **C.O. Williams Construction Ltd v Blackman & Anor** ²⁴ reinforces the position and approach in **Citco**. This case concerned an appeal against a decision striking out the proceedings on the ground that it disclosed no cause of action. In reversing both courts below it was held that even if the court was of the view that there was merit in the argument that the “prospect of obtaining effective relief” was doubtful, the better course is to let the matter go to trial. Evidential analysis is not generally necessary. This was especially so where difficult and important issues were involved. The following passages highlight the approach taken by the court:

“It is well settled that proceedings may only be struck out if it is clear that they are bound to fail....
[...]

In considering an application to strike out it is normally not necessary to look beyond the pleaded case of the party against whom the order is sought.
[...]

It would be quite inappropriate at this stage for their lordships to comment in detail on the effect of this evidence. They need say no more than that it is, in their judgment, sufficient to sustain a prima facie case for impugning the Cabinet's decision on one or more of the grounds on which it is attacked under section 4 of the Administrative Justice Act.

The question whether the appellant has any prospect of obtaining effective relief in the proceedings is, in their lordships' judgment, the most difficult question which arises, although it was not canvassed in the courts below. It is obviously impossible now, when Rayside has finished or nearly finished the contract works, to put the clock back and reverse the effect of the Cabinet's decision. The relief claimed by the appellant is a declaration that the Cabinet's decision was invalid and damages. In these circumstances Mr Newman, for the Attorney-General, forcibly argued: (i) that the possible grant of a declaration alone would be academic and of no value to the appellant and could not justify the continuation of the proceedings; (ii) that the

²⁴ (1994) 45 WIR 94

appellant, even if successful in striking down the Cabinet's decision, has no remedy in damages at common law; and (iii) that section 5(2)(f) of the Administrative Justice Act, on its true construction, was only intended to authorise the recovery in judicial review proceedings of damages otherwise recoverable at common law, not to create an independent cause of action for damages sustained in consequence of an administrative malfeasance under section 4.

Their lordships appreciate the force of these arguments and would be inclined to accede to the first and second. But the interpretation of section 5 of the administrative Justice Act raises a question of difficulty and importance which it would be quite inappropriate for their lordships to determine without the benefit of any opinion expressed by the courts in Barbados and on an application to strike out."

[49] I consider that there are important issues raised in the case at bar and it is prudent to allow a trial in the public interest.

[50] The next issue to be determined is whether the statement of claim properly pleads any facts which goes towards establishing any exceptional circumstances.

[51] The Court is satisfied that the pleadings are paragraphs 25 and 26 C to H taken at its highest to be true, does disclose grounds for bringing of a claim on the basis of a duty of care existing as an exception to the general rule.

[52] For completeness I will deal with the ground that the Claimants have not pleaded any reasonable cause of action against the Second and Third Defendants.

[53] The Claimants' pleading is that the Second Defendant is the Minister responsible for the police force pursuant to Section 3 (2) of the **Police Act**²⁵. It is pleaded that the Commissioner of Police's command to the force is subject to the general orders of the Second Defendant. In their defence, the Defendants admit this paragraph but say it is irrelevant.

²⁵ Chapter 14:01 of the Laws of the Commonwealth of Dominica

[54] The Claimants further pleaded that it was the responsibility of the Government through the Second Defendant to ensure that the force is adequately manned, armed and equipped to provide security. The Defendants do not deny this in their defence. Instead, they say that the imposition of such a responsibility in light of the magnitude of the hurricane was unreasonable.

[55] Save that the responsibility of the Second Defendant is admitted, no other factual allegations are made against him.

[56] The Third Defendant was sued pursuant to Section 14 of the State Proceedings Act.²⁶ This section gives the Claimants a statutory right to sue the Attorney General.

[57] The Claimants pleaded case in a nutshell is that a duty of care arose by assumption of duty, specific assurances given, wilful acts or omissions or exceptional circumstances. Their factual contention is that the police officers were under the command of the First Defendant who subject to the general orders of the Second Defendant.

[58] Whilst no robust arguments were made at the hearing regarding striking out the Second and Third Defendants, although raised as a ground, the Court is of the view that it is not in the good administration of justice or furtherance of the overriding objective to strike out any parties at this stage. This is so as:

1. The proceedings have been pending for four (4) years and the parties point was never raised;
2. The parties including those sought to be removed, have all participated in these proceedings;
3. The parties including those sought to be removed, have all filed evidence in these proceedings;

²⁶ Chapter 7:80 of the Laws of the Commonwealth of Dominica

4. The Defendants are represented by the office of the Attorney General and do not have separate legal representation;
5. The Defendants have filed one joint defence to this claim;
6. There is very little prejudice in the Defendants remaining parties to the claim;
and
7. Based on the pleaded defence, it is unlikely that any personal liability will attach to the First or Second Defendant personally if the Claimants are successful.

[59] For these reasons, the Defendants' application to strike out is dismissed.

COSTS:

[60] The general rule is that costs follow the event. There are no reasons to depart from the general rule. Given the lateness of this application, the Court is not minded to apply reduction to the costs recoverable by the Claimants on this application. Applications to strike out ought to be made early or certainly at least as soon as a party feels the conviction to make them. They ought not to be made on a pleading point after witness statements are filed. Such a litigation decision will be met with an order for costs to reflect the Court's displeasure at the timing that this application was made.

[61] The Defendant must therefore pay the Claimants' costs of this application to be assessed by this Court in default of agreement within 28 days from today on the application of either party.

ORDERS:

[62] In the circumstances, it is hereby ordered that:

1. The Defendants' application filed on March 15, 2022 is dismissed; and
2. The Defendants shall pay the Claimants' costs of the application to be assessed by this Court in default of agreement within 28 days of the today's date on the application of either party.

**Alvin Shiva Pariagsingh
High Court Master**

By the Court,

Registrar

POSTSCRIPT

I would like to place in record my sincerest thanks to Counsel for this assistance in this matter.