

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO: SVGHCV2020/0052

BETWEEN:

ROYDEL SOLOMON

Claimant

and

SHEM NANTON

First Defendant

MARCUS PATRICK

Second Defendant

KEVRON JACK

Third Defendant

DELROY TITTLE

Fourth Defendant

THE COMMISSIONER OF POLICE

Fifth Defendant

THE ATTORNEY GENERAL
OF SAINT VINCENT AND THE GRENADINES

Sixth Defendant

Appearances:

Mr. Jeshua Bardoo for the Claimant

Mrs. Cerepha Harper-Joseph with her Ms. Gabrielle Myers for the Defendants

2021: November 22;
2022: February 15.

RULING

[1] **GILL, M.:** By notice of application filed on 3rd May 2021, the defendants seek the following orders:

1. A declaration that the court has no jurisdiction to hear the claimant's claim pursuant to Rule 9.7 of the Civil Procedure Rules 2000 as amended "CPR 2000");

2. That the claimant's claim against all defendants be struck out pursuant to CPR 9.7(6)(c) and 26.3;
3. That the claim be terminated pursuant to section 5 of the Public Officers' Protection Act ("the Act") Cap. 276 of the Revised Edition of the Laws of St. Vincent and the Grenadines 2009;
4. In the alternative, extension of time to file a defence pursuant to CPR 9.7(7);
5. Such further or other relief as the court deems just; and
6. Costs.

Background

- [2] The claim alleges assault and battery and negligence on the part of the 1st to 4th defendants who are police officers. It arises out of an incident on 31st March 2020, which resulted in the claimant allegedly being shot twice in the leg. The claim stipulates that the 1st to 4th defendants were at all material times acting in the exercise of their duties as police officers employed by the Royal Saint Vincent and the Grenadines Police Force. Consequently, the claim is also brought against the 6th defendant, the Attorney General, pursuant to section 15 of the Crown Proceedings Act, CAP. 85. The claim does not state the basis for including the 5th defendant, the Commissioner of Police, but I note that the Commissioner is the head of the Police Force and the 1st to 4th defendants come under his command. The claimant seeks damages including aggravated and exemplary damages.
- [3] The claimant served a notice of intent pursuant to the Act on the 5th and 6th defendants, the Commissioner of Police and the Attorney General on 3rd June 2020 and 5th June 2020 respectively. However, the 1st, 2nd, 3rd and 4th defendants were not served with the said notice as required by the Act. Thereafter, the claim, filed on 30th March 2021, was served on all defendants. The defendants filed an acknowledgement of service on 26th April 2021, and within the time specified for filing a defence, on 3rd May 2021, filed the instant application for the strike out of the claim on the basis that the court has no jurisdiction to entertain the claim as the 1st to 4th defendants were not served with the requisite notice under the Act.

Issue

- [4] The court must determine whether the failure of the claimant to serve the notice of intent on the 1st to 4th defendants is fatal to the claim against all the defendants.

The Law/Applicable Rules

- [5] CPR 9.7(1) provides that a defendant who disputes the court's jurisdiction to try a claim may apply to the court for a declaration to that effect. Further, the defendant must file an acknowledgment of service and make the application within the period for filing a defence.
- [6] CPR 26.3(1) governs a striking out action. It reads:

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 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*
- (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.*

Defendants' submissions

- [7] The defendants submit that the failure of the claimant to serve the notice of intent on any one defendant is fatal to the claim against all the defendants. The claimant having neglected to effect such service, they argue that he is unable to prove under section 5(a) of the Act that the notice required under section 3 has been given to the 1st to 4th defendants. The defendants contend that this failure must result in the claim being dismissed or otherwise terminated.
- [8] The Act defines "public officer" as any person holding any public office (which shall include the office of a minister) in Saint Vincent and the Grenadines, whether permanent or temporary and whether with or without salary or remuneration. There is no dispute that all the defendants are public officers within the definition of the Act.

[9] Section 3 of the Act makes the notice mandatory. It reads:

No action shall be brought against any public officer for anything done, or purported to be done, in the exercise of his office unless and until two calendar months after notice in writing has been delivered to him or left at his usual place of residence with some person there, by the party who intends to bring such action or his legal practitioner or agent, and in every such notice shall be clearly and explicitly stated –

(a) the cause of action;
(b) the name of the person who is bringing the action; and
(c) the name and address of his legal practitioner or agent, if any,
and no evidence of the cause of action shall be produced, except in so far as the cause of action has been spelt out in the notice.

[10] Section 4 sets a time limit for action as follows:

Every action as set out in section 3 shall be brought within 12 calendar months after the cause of action stated in the notice arose and no such action shall be maintained after the expiry of the said period.

[11] Section 5 mandates the dismissal or other termination of an action in certain cases. It states:

In every proceeding for an action as referred to in section 3, it shall be incumbent on the party bringing the action to prove –

(a) that the notice as required under section 3 has been given;
(b) that the action has been brought within the time specified in section 4; and
(c) the cause of action,
and upon the failure to establish any of the same, the action shall be dismissed or otherwise terminated and a verdict shall be given against the person who brought the action, with or without costs.

[12] The defendants maintain that the 1st to 4th defendants were not served with the required notice and that the claimant has failed to prove such service. In the circumstances, learned counsel for the defendants, Mrs. Harper-Joseph is adamant that the failure to serve the 1st to 4th defendants is fatal to the claim against all defendants.

[13] The defendants submit that where the claimant fails to prove that he has given notice to the defendant who is a public officer as is required by section 3 of the Act, the court has no discretion but to dismiss the claim and enter judgment for the defendants. In support of this

contention, the defendants cite the case of **Ricardo Bascombe (Administrator of the Estate of Patrice Bascombe) v The Attorney General et al**¹ where Lanns M stated:

“When proceedings are instituted against a public officer and the claimant fails to prove at the hearing that he has given notice of the proceedings under section 3 of the Public Officers’ Protection Act the Trial Judge has no discretion in the matter and is bound to enter judgment for the defendant with costs.”

[14] On an application based mainly on the Act, Actie M. (Ag.), as she then was, in **Michael Richards v The Attorney General of St. Vincent & the Grenadines et al**,² stated:

“It is settled law that the failure to comply with the mandatory provisions of section 3 of the Public Officers Protection Act is fatal to a claim being brought against a public officer. It is a condition precedent to the filing of proceedings against public officers performing a public function.”

[15] The defendants rely on the case law to show that failure to serve all defendants with the notice is fatal to the action against all the defendants. Whereas the 5th and 6th defendants were served with a notice pursuant to section 3 of the Act, the 1st to 4th defendants were not likewise served. The defendants point out that the notices were only addressed to the Commissioner of Police and the Attorney General. On this point, they cite the case of **Peter Clarke v The Attorney General et al**³ as being instructive. In that case, the claimant brought an action for damages for false and wrongful imprisonment and assault against the defendants, including three police officers. The required notice was not personally served on the officers nor was it left at their domicile. The notice was addressed to the Attorney General and carbon copied to the three officers, referring to the three officers by name, and specifying the grounds of the action. Having considered the applicable law, at paragraph 40 of the judgment, Edwards J, as she then was, concluded, “It is evident therefore that the consequences of giving a defective Notice or no Notice is fatal to Mr. Clarke’s action against all the defendants.” Her Ladyship struck out the claim.

[16] The cases of **Cumberbatch v Weber**⁴ and **Castillo v Corozal Town Board and another**⁵ were cited and applied in the **Peter Clarke** case. In **Cumberbatch**, at first instance, it was

¹ SVGHCV2007/0302

² SVGHCV2009/0152 at paragraph 27

³ SLUHCv1999/0475

⁴ (1965) 9 WIR 143

⁵ (1983) 37 WIR 86

held that an action against the Commissioner of Police must fail, as the prescribed notice was not given. The Court of Appeal upheld the ruling of the trial judge and reinforced that it was obligatory to give notice and so, the claim was barred in the absence of the notice. In **Castillo**, the Court of Appeal held that the legislation made provision for a mandatory condition precedent to the institution of the suit. It was made clear that where the plaintiff fails to prove that he has given such notice, a trial judge has no discretion in the matter and must enter judgment for the defence with costs.

[17] In **Leonet Anderson v The Attorney General et al**⁶ and **Kiyeh Anderson v The Attorney General et al**,⁷ Henry J and Burnett M (Ag.) respectively found that the court did not have jurisdiction to hear claims as a result of the failure of the claimants to adhere to the requirement in section 3 of the Act.

[18] The defendants urge the court to apply the plain, literal strict meaning of sections 3 and 5 of the Act. They posit that the language of the Act is plain, and highlight the reiteration of the Privy Council in **Alves v Attorney General of the Virgin Islands**⁸ where Lord Hughes stated, “Despite the potentially wide words of PAPA, it must, as has consistently been held, be construed restrictively.” They further bring to the court’s attention the words of the Privy Council (interpreting provisions of the Trinidad and Tobago CPR) as delivered by Lord Dyson in **The Attorney General v Keron Matthews**⁹ that “...if the language of the rules admits of only one interpretation, it must be given effect”.

[19] In summary, the defendants assert that the claim cannot stand by reason of the claimant’s non-compliance with section 3 of the Act to serve notice of the suit on all the defendants, and to prove service as required by section 5. They urge upon the court that the claimant’s contravention of the provisions of the Act must automatically result in the termination of the action at bar as such non-compliance is fatal to the claim and the court has no jurisdiction to hear it.

⁶ SVGHCV2019/0161

⁷ SVGHCV2019/0162

⁸ [2017] UKPC 42 at paragraph 37

⁹ [2011] UKPC 38 at paragraph 20 (Trinidad and Tobago)

Claimant's submissions

- [20] The claimant prays in aid the overriding objective of CPR 2000 to deal with cases justly. Moreover, the claimant submits that while the Eastern Caribbean Supreme Court is a court of law, it is also a court of equity which can take equitable principles into consideration when making its decisions.
- [21] Learned Counsel for the claimant, Mr. Bardoo, urges the court to take an equitable route as was done by the learned master in the **Michael Richards** case. In that case, a claim was brought against the Attorney General, the Commissioner of Police and 4 police officers for damages for assault, battery, wrongful arrest and unlawful detention. The claimant served the Attorney General and the Commissioner of Police with a notice of intent but failed to do so in relation to the 4 police officers in accordance with the Act. The notice was delivered to Police Headquarters and endorsed as having been received for and on behalf of the 4 officers. The court found that service on the officers was defective.
- [22] The claim was filed on 17th November 2009. Thereafter, the parties engaged in discussions for possible settlement of the claim. Over 3 years after filing the claim, on 29th July 2013, the Attorney General's Chambers entered an acknowledgment of service. By notice of application dated 12th November 2013, the Attorney General applied to strike out the statement of case relying on the provisions of sections 3, 4 and 5 of the Act. Taking into consideration the plethora of cases decided in this jurisdiction, the learned master was "of the view that it would be inequitable and unjust in the circumstances to defeat the claimant's claim for failure to satisfy personal service on the 3rd to 6th defendants". Therefore, Mr. Bardoo points out that a failure to comply with section 3 of the Act is not always fatal to the claim and does not always lead to the claim being struck out.
- [23] Mr. Bardoo directs the court to the pronouncement of Lord Collins in delivering the Privy Council judgment in **Texan Management Limited et al v Pacific Electric Wire & Cable Company Limited**¹⁰ where His Lordship stated, "It has often been said that, in the pursuit of justice, procedure is a servant and not a master." Therefore, Counsel submits, this court

¹⁰ [2009] UKPC 46

should not be a slave to procedure in the pursuit of justice, and can and should depart from rigid mandatory declarations invalidating a claim for non-compliance with section 3 of the Act. Section 3, he states, does not commence proceedings, but the notice is nothing more than a pre-action protocol with a drastic sanction against a claimant who fails to comply.

- [24] Mr. Bardoo draws the court's attention to the reasoning the House of Lords in **R v Soneji and another**¹¹ relied on by the claimant in **Michael Richards**. At paragraph 23 of the judgment, Lord Steyn, dealing with the issue of non-compliance with statutory procedural requirements opined:

"Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in *Attorney General's Reference (no 3 of 1999)*, the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction...."

- [25] Learned counsel reminds the court of the maxim "equity will not suffer a wrong to be without a remedy", and quotes from the text Hanbury & Martin **Modern Equity** that "equity will intervene to protect a right which, perhaps because of some technical defect, is not enforceable at law"¹². Mr. Bardoo submits that if the court, which is also a court of equity, were to strictly interpret section 3 of the Act, it would create an unjust consequence and deprive the claimant of a remedy to redress the atrocious acts that he alleges were committed against him by the 1st to 4th defendants. Counsel posits that the justice of this case militates against the nuclear option of striking out the claim.

Discussion and analysis

- [26] Given the current state of the law, and the Attorney General in this case being served with the notice of intent, I raised the issue and asked the question, "If the Attorney General is the proper party to be served in a claim involving public officers, is it fatal to the claim that the public officers themselves were not so served?"

¹¹ [2006] 1 AC 340

¹² 17th Edition, at paragraph 1-025

[27] At first instance, the learned master in **Bryan James v Attorney General**¹³ dismissed the claimant's action against the Attorney General for failure to serve the Attorney General with notice of the claim. On appeal,¹⁴ the decision of the learned master was upheld by a single judge of the Court of Appeal who had no hesitation in reiterating that failure to comply with the mandatory provisions that require notice is fatal.

[28] However, on appeal to the full Court of Appeal, allowing the appeal and setting aside the order of the single judge, the Court held that a claim does not fail where the claimant serves the public officer but fails to similarly serve the Attorney General.¹⁵ Further, at paragraph 27 of the judgment. Pereira CJ considered *obiter dicta*, "It may be arguable that where a claimant serves only the Attorney General with an Article 28 Notice that the claim does not fail but I need not decide this point on this appeal and I refrain from so doing."

[29] Recently, John-Theobalds M (Ag.) ventured and decided the point in **Joanna Joseph v The Attorney General of Saint Lucia et al.**¹⁶ In that case, the defendants applied to remove the 2nd to 5th defendants, all police officers, as parties to the claim on the basis that the Attorney General is the proper party against whom all proceedings against the Crown are to be initiated pursuant to the Crown Proceedings Act. There was no dispute that in relation to the allegations in the claim, the 2nd to 5th defendants were at all material times in the course of their duties as police officers and servants of the Crown. Having considered the authorities, including the reasoning of Pereira CJ in **Bryan James**, the learned master opined:

"...it seems to me that where a claimant brings a civil claim in respect of acts done or omissions by a public officer whom he alleges was at the material time in the course of performing their official function, the **only** proper defendant to such a claim is the Attorney General." (*Emphasis added.*)

[30] In light of section 15 of the Crown Proceedings Act which provides that, similar to the law in St. Lucia, civil proceedings against the Crown shall be instituted against the Attorney

¹³ SLUHCV2009/0532 (heard together with James Enterprises Limited v Attorney General SLUHCV2009/0542)

¹⁴ SLUHCVAP2013/0023

¹⁵ See the consolidated appeals of SLUHCVAP2013/0023 Bryan James v The Attorney General, SLUHCVAP2013/0024 James Enterprises Limited v The Attorney General and SLUHCVAP2014/0021 Fast Kaz Auto Supplies and Curtis Hudson v The Attorney General

¹⁶ SLUHCV2019/0545, delivered October 29, 2021

General¹⁷ and considering CPR 19.3 which allows the court to add, substitute or remove a party on or without an application, I ordered further submissions from both sides as to whether the 1st to 5th defendants are proper parties to the claim. I became aware of the decision in **Joanna Joseph** which was delivered on 29th October 2021 after the parties in the instant application had filed their submissions as ordered. Therefore, before the hearing of the application, I asked Counsel to take that ruling into consideration in oral submissions at the hearing.

- [31] Learned Crown Counsel for the defendants, Mrs. Harper-Joseph, impressed upon the court that the clear distinction between **Joanna Joseph** and the case before this court is that this is an application involving POPA, and that **Joanna Joseph** is not a decision under the Public Officers' Protection Act (or similar legislation), which is not even mentioned by the learned master. Mrs. Harper-Joseph pointed out that Public Officers' Protection Act, a 1981 law, last amended in 1992, came after the Crown Proceedings Act of 1951. The Public Officers' Protection Act, Counsel emphasised, has not been repealed and is still good law, and urged the court to follow the precedents.
- [32] On behalf of the claimant, learned counsel Mr. Bardoo took and ran with the court-highlighted precedent and echoed that the Attorney General is the proper party to these proceedings and that pursuant to CPR 19.3, the 1st to 5th defendants can be removed. Counsel contends that the claim stands because the Attorney General is the proper party. Having stated this, and having joined the 1st to 5th defendants, Counsel falls short of conceding that the 1st to 5th defendants are not proper parties to the claim. He submits that public officers who are notified or added to these proceedings are only added to the extent that they are necessary to prove the liability of the Crown who is represented by the Attorney General. Further, Mr. Bardoo contends that the requirements of sections 3, 4, and 5 of the Act, with the draconian sanction in section 5, are in direct conflict with the Crown Proceedings Act and CPR 2000.
- [33] Learned counsel points out that even if a party is not notified or has not been added to a claim, the court still has the power to add parties before case management, at case

¹⁷ CAP. 85 of the Revised Edition of the Laws of Saint Vincent and the Grenadines 2009, s.15(2)

management and even after the limitation period has passed. Therefore, he analyses, these facts undeniably defeat any objections made under the Act in relation to notice.

[34] Whereas the claimant's action would be viable if the Attorney General was the only defendant in this matter, the fact is that this claim is brought against all 6 defendants. It appears that service of the notice of intent was not an issue in **Joanna Joseph** and the defendants applied to have the 2nd to 5th defendants, all police officers apparently all properly notified, removed as parties to the claim. It would not be out of line for me to assume that had the police officers in this case been served in accordance with the section 3 of the Act, the application before the court would be to remove the 1st to 5th defendants as parties to the claim.

[35] The Act and similar legislation in the region and beyond have created preliminary steps in the institution of proceedings against public officers for alleged unlawful acts committed in the course of their duties. The legislature has seen it fit to afford such officers the legal privilege of being duly notified of impending suit for alleged wrongdoing in their dealings as servants of the Crown. The dire consequence of non-compliance by a claimant with these pre-action requirements is the termination of the claim however grave the cause of action may seem. These draconian provisions are deliberate enactments and cannot be simply side-stepped by a judicial officer who feels that applying them would result in grave injustice to a claimant.

[36] The 1st to 4th defendants were not served with the notice required under section 3 of the Act. Therefore, the claimant cannot comply with section 5. The authorities in this jurisdiction are clear, voluminous and compelling. Repeatedly, failure to serve a notice of intent and/or to prove its service has proved fatal to claims brought against the Crown. The cases are clear that serving a defective notice or failing to serve a notice on any of the defendants is fatal to the claim against all the defendants. The cases stipulate that the court in these situations has no discretion and is bound to enter judgment for the defendants.

[37] For this court to rule that since the Attorney General is the proper party to be served in proceedings against the Crown and therefore the claim is viable, would be to ignore the

clear provisions of the Act, which came into being when the Crown Proceedings Act was already in existence. Had the Attorney General been the sole defendant from the onset, there would have been no issue of notice. Notice only arises because the claimant has chosen to join the 1st to 5th defendants. In that event, he must serve all 5 of them with the requisite notice under the law.

[38] In the absence of a defence or any admission or concession that the 1st to 4th defendants were acting in the course of their duties at the time of the alleged incident, it is not for the court at this stage, of its own initiative, to remove the 1st to 5th defendants as parties to the claim, and leave the Attorney General as the only defendant.

[39] I have considered the urging of learned counsel for the claimant to apply equitable principles and not to strike out the claim as this would create unjust consequences and deprive the claimant of a remedy for the alleged atrocious acts of the 1st to 4th defendants.

[40] In the **Michael Richards** case, the learned master ruled that that case was distinguishable from the decided cases having regard to the facts and conduct of the parties. Notwithstanding the defect in service, the parties were in continuous negotiations and the acknowledgment of service was filed almost 4 years after the filing of the claim. The learned master held that the conduct of the Attorney General was “tantamount to an inducement in the belief that the irregular service had been waived”.¹⁸ At paragraph 37 of the judgment, the learned master stated:

“Having reviewed the facts and the authorities, I am of the view that the justice of this case militates against the nuclear option of striking out. It would be unconscionable to strike out the statement of claim having regard to the combination of time which has elapsed since the filing, the conduct of the parties in an effort to settle the claim and the procedural irregularities by both parties....To strike out the claim having regard to the conduct of the parties would be draconian and unconscionable in the circumstances and in breach of the overriding objective to deal with matters justly.”

[41] There is nothing before this court to allow me to take the approach of the learned master in **Michael Richards**. The conduct of the defendants in relation to the proceedings does not

¹⁸ SVGHCV2009/0152 at paragraph 35

come into play. There is no other factor weighing on the court to permit a departure from the authorities relied on by the defendants. This is simply a case of the claimant neglecting or omitting to take the compulsory preliminary steps in bringing the action against the defendants.

- [42] It appears to be the deliberate intention of the legislature that non-compliance or partial compliance will result in the dismissal or termination of actions against officers of the Crown.

Conclusion

- [43] The claimant has failed to satisfy the mandatory condition precedent to the filing of the claim. The claimant is in breach of section 3 and section 5(a) of the Act. Section 5 mandates that the claim be dismissed or otherwise terminated. The claim is not properly before the court. Therefore, the court has no jurisdiction to entertain it. The court has no discretion in this matter. This claim is obviously unsustainable and must be struck out as an abuse of the process of the court.

Order

- [44] In light of the foregoing, it is hereby ordered as follows:

1. The claim is struck out.
2. The claimant shall pay the defendants costs in the sum of \$500.00.

Tamara Gill
Master

By the Court

Registrar