

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(Civil)**

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

SAINT CHRISTOPHER CIRCUIT

SKBHCV2020/0094

BETWEEN:

LENNOX GUMBS

Claimant/Respondent

and

[1] DENZIL HARRIS, CHIEF PRISON OFFICER FOR HER
MAJESTY'S PRISON
[2] DR. THE HONOURABLE TIMOTHY HARRIS, MINISTER
OF NATIONAL SECURITY
[3] THE ATTORNEY GENERAL OF ST. CHRISTOPHER
AND NEVIS

Defendants/Applicants

Before:

Mrs. Michelle John-Theobalds

Master [Ag.]

Appearances (via Zoom):

Mr. Jason Hamilton and Ms. Keisha Spence for the Claimant/Respondent
Ms. Nisharma Rattan-Mack for the Defendants/Applicants

2021: February 18;
2022: February 22.

JUDGMENT

[1] **JOHN-THEOBALDS M [AG.]:** This is an application filed by the defendants seeking the removal of the first and second defendants as parties to the instant claim as well as for an order striking out the claim against the defendants in its entirety. The relevant background to the application is set out below.

Background

- [2] The claimant, Lennox Gumbs ("Mr. Gumbs"), was an inmate at Her Majesty's Prison from 30th November 2015 until 22nd December 2019. Mr. Gumbs claims that, during his imprisonment, he was held in confinement for an extended period and was never brought before a disciplinary tribunal as required by the **Prison Act**.¹ As a consequence, he brought a claim against the defendants seeking damages for breach of statutory duty and/or negligence.
- [3] Mr. Gumbs alleges that the first defendant, Mr. Denzil Harris ("Mr. Harris"), the Chief Prison Officer for Her Majesty's Prison, acted in an arbitrary, unreasonable and discriminatory manner towards him and caused him to remain in confinement at Her Majesty's Prison. Mr. Gumbs also alleges that the second defendant, the Minister of National Security, acted in breach of the **Prison Act** and **Prison Rules** thereto in failing to establish a visitors' committee, thereby denying him a mechanism through which to lodge his complaint and to review the lawfulness of his confinement.
- [4] The defendants did not file a defence to Mr. Gumbs' claim but, on 26th June 2020, filed an application to remove Mr. Harris and the Minister of National Security as parties and to strike out the claim against the defendants in its entirety. At the hearing of the application, learned counsel for Mr. Gumbs, Mr. Jason Hamilton, conceded that the first and second defendants should be removed as parties to the claim. The aspect of the application which remains for determination is therefore whether the claim should be struck out against the defendants in its entirety.

Power to Strike Out

- [5] Rule 26.3(1) of the **Civil Procedure Rules 2000** as amended ("CPR") provides:
- "In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that – (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim"

¹ Cap. 19.08 of the 2009 Revised Laws of the Federation of Saint Christopher and Nevis.

[6] It is a well-established principle that the power to strike out a statement of claim is a draconian one which should be exercised with extreme caution and only in the more dire of circumstances where it is clear that the claim cannot be sustained, cannot succeed and is therefore an abuse of the court's process. So high is the threshold that it requires an applicant to prove that the statement of case is irredeemable and discloses no reasonable ground for bringing or defending the case, all resulting in there being no real prospect of succeeding at trial.

[7] The defendants on this aspect of their application have essentially raised two issues for determination:

- (i) whether the **Prison Act** and the **Prison Rules** give rise to a private law remedy; and
- (ii) whether the claimant by his pleadings has established the cause of action of misfeasance in public office.

I will take each issue in turn.

Whether the Prison Act and Prison Rules give rise to a private law remedy

[8] Learned counsel for the defendants, Ms. Nisharma Rattan-Mack, essentially submitted that the **Prison Act** and the **Prison Rules** do not give rise to a private law remedy. She argued that, based on the very nature and construction of the legislation, Parliament did not intend for the enactment to avail prisoners of private law remedies. In response, learned counsel for the claimant, Mr. Jason Hamilton, submitted that the **Prison Act** and the **Rules** thereunder do in fact confer upon prisoners a private law remedy.

[9] The issue of what relief should be granted to a prisoner when there is a breach of the **Prison Act** or **Prison Rules** was considered recently by the Court of Appeal in **Stephen Molyneaux v Her Majesty's Prison et al.**² At paragraphs 73 and 74 of the judgment, Thom JA construing the similar provisions of the Prison Act and Prison Rules in Montserrat stated that:

² MNIHCVAP2019/0010 (delivered 30th June 2021, unreported).

“[73] The issue of what relief should be granted to a prisoner when there is a breach of the Prison Rules was considered by the House of Lords in **R v Deputy Governor of Parkhurst Prison and others, ex parte Hague** and the UK Supreme Court in **Bourgass v Secretary of State for Justice** and **Shahid v Scottish Ministers**. In *Shahid v Scottish Ministers* the court considered the effect of a breach of rule 94 of the Prison and Young Offenders Institution (Scotland) Rules 1994 which provides for removal from association of prisoners in certain circumstances and conditions. Shahid was in segregation for 14 months without authorisation contrary to rule 94. Affirming its decisions in **Hague** and **Bourgass**, that a prisoner has no right to associate while in prison, the court found that rule 94 does not of itself confer an entitlement to the appellant to a remedy in damages in the event of a breach of the rule.

...

[74] The above authorities show that a prisoner does not have a cause of action in damages where there is a breach of the prison rules. His recourse would be a remedy applicable to an administrative action. However, where there is an abuse of power, there would be a cause of action for misfeasance in public office. A person who is lawfully committed to prison is subject to the Prison Act and Prison Rules and the regimes established under those legislation.”

- [10] The decision of the House of Lords in **R v Deputy Governor of Parkhurst Prison and others, ex parte Hague** is also quite instructive. In **Hague**, the appellant claimed damages for breach of statutory duty under the UK Prison Act 1952 and the Prison Rules 1964. Hague was a convicted prisoner serving a 15-year sentence. The Deputy Governor in charge of the prison found him to be a troublemaker and ordered him to be held in segregation from other prisoners. The order for his segregation was purportedly made pursuant to rule 43 of the Prison Rules 1964. Hague challenged the legality of his segregation and claimed damages for breach of statutory duty. Before the House of Lords, counsel for Hague argued that rule 43(2) of the Prison Rules 1964 which was intended to protect prisoners from unlawful segregation, must give rise to a cause of action in favour of any prisoner who suffers a detriment from a breach of the duty imposed. The House of Lords found that, while the correct procedure under rule 43 was not followed, neither the Prison Act nor the Prison Rules conferred on prisoners the right to bring private claims for damages based on a breach of statutory duty. In examining the Prison Act and Prison Rules, the House of Lords determined that section 47(1) of the Prison Act 1952 gave the

Secretary of State a wide power to make rules for the regulation and management of prisons. Lord Bridge of Harwich, in construing Rule 43, observed that:

“I can find nothing in rule 43 or in any context that is relevant to the construction of rule 43 which would support the conclusion that it was intended to confer a right of action on an individual prisoner. The purpose of the rule, apart from the case of prisoners who need to be segregated in their own interests, is to give an obviously necessary power to segregate prisoners who are liable for any reason to disturb the orderly conduct of the prison generally. The rule is a purely preventive measure. The power is to be exercised only in accordance with the procedure prescribed by sub-rule (2). But where the power has been exercised in good faith, albeit that the procedure followed in authorising its exercise was not in conformity with rule 43(2), it is inconceivable that the legislature intended to confer a cause of action on the segregated prisoner.”

[11] In **Hague**, Lord Jauncey added that:

“...it must always be a matter for consideration whether the legislature intended that private law rights of action should be conferred upon individuals in respect of breaches of the relevant statutory provision. The fact that a particular provision was intended to protect certain individuals is not of itself sufficient to confer private law rights of action upon them, something more is required to show that the legislature intended such conferment.

...

The [Prison] rules are wide-ranging in their scope covering a mass of matters relevant to the administration and good government of a prison. Many of these do not directly relate to prisoners and I do not consider that those which do were ever intended to confer private law rights in the event of a breach. The [Prison Rules] are regulatory in character, they provide a framework within which the prison regime operates but they are not intended to protect prisoners against loss, injury and damage nor to give them a right of action in respect thereof. I would only add that if a prisoner suffered in health as a result of segregation contrary to the rules he would in all probability have a right of action in negligence against the prison authorities.”

[12] Upon examining the authorities above, it is pellucid that the **Prison Act** and **Prison Rules** do not confer private law rights of action upon a prisoner in respect of a breach of the **Prison Act** or **Rules**. I am of the view that it was not the intention of Parliament to confer such rights upon prisoners and no such intention is borne out upon a consideration of the scheme of the Act. The long title of the **Prison Act** of St. Kitts and Nevis states that the Act was intended to

provide for the regulation of prisons and incidental or related matters. A close reading of the enactment shows that it deals with the administration of prisons and the management and control of prisoners. It covers wide-ranging matters such as prison officers and their powers, the confinement of prisoners, the provision and maintenance of prisons and offences. The **Prison Rules** are also regulatory in nature and cover various administrative matters such as the appointment of visiting justices, the escape and death of prisoners as well as visitors to prisons. In my opinion, neither the **Prison Act** nor the **Prison Rules** are intended to protect prisoners against loss, injury and damage nor to give them a right of action in respect thereof.

[13] In the premises, I am satisfied that Mr. Gumbs' claim against the defendants for damages for breach of statutory duty under the **Prison Act** and **Rules** cannot be sustained and should therefore be struck out.

[14] I now consider whether Mr. Gumbs by his pleadings has established the cause of action of misfeasance in public office.

Misfeasance in Public Office

[15] On this issue, learned counsel for the defendants argued that the claimant has not established the cause of action of misfeasance in public office and therefore the claim in respect thereof should be struck out against the defendants in its entirety. Learned counsel for the claimant submitted that his client has established the cause of action of misfeasance in public office. He cited the decision of the Caribbean Court of Justice in **Florencio Marin and Jose Coye v The Attorney General of Belize**³ and the English Court of Appeal decision of **Ibrahim Karagozlu v Commissioner of Police of the Metropolis**⁴ in support of his submission.

³ [2011] CCJ 9 (AJ).

⁴ [2006] EWCA Civ 1691.

[16] The essential ingredients of the tort of misfeasance in public office were stated in the locus classicus of the House of Lords in **Three Rivers District Council v Bank of England**⁵ as comprising the following:

- (1) The defendant must be a public officer;
- (2) The acts complained of must have been done by the defendant in the exercise of his power as a public officer;
- (3) The defendant's state of mind must have been either that of targeted malice, in that he intended by his conduct to injure a person or persons and he exercised his public powers for an ulterior or improper motive) or that of reckless indifference, in that he acted knowing that he has no power to do the act complained of and that the act would probably injure the plaintiff;
- (4) The plaintiff must have a sufficient interest to found a legal standing to sue; and
- (5) The acts complained of must have caused damage to the plaintiff (which is a question of fact).

[17] In respect of the standard of proof required in cases of alleged misfeasance in public office, Bernard JCCJ in **Florencio Marin** explained at paragraphs 61 and 67 that:

“[61] The abundance of judicial dicta reflected in the cases on the tort of misfeasance demonstrates unequivocally its special nature and characteristics. Strict proof of its ingredients is required, these being establishing that a public officer abused power vested in him by virtue of his office whereby some person or entity with a sufficient interest to sue suffered consequential loss or damage...

[67]...The question of proof of material damage in the tort of misfeasance is one of the main ingredients to ground liability without which no action on the tort can succeed; in fact this being absent in Watkins it was doomed to fail, and was in that instance a fatal objection.”

⁵ [2000] 3 All ER 1.

[18] Upon a review of the claim form and statement of claim, the claim against the first defendant alleges that the first defendant failed to respond to Mr. Gumbs' letter to him seeking an explanation as to the reason Mr. Gumbs was being placed in solitary confinement and labeled a threat and that Mr. Gumbs was never given an opportunity to respond to the first defendant's label and remained unaware of the reason for his confinement. Mr. Gumbs also alleges that the first defendant released other inmates from confinement and allowed them to be returned to the general prison population; however, he was made to remain in confinement. Mr. Gumbs further states that due to the arbitrary and unlawful acts of the first defendant, he remained in confinement for an extended period, was deprived of interaction with other prisoners and no disciplinary hearing was ever convened to give him an opportunity to respond to any charges against him. The allegations against the second defendant relate to the failure of the Minister to appoint visiting justices to investigate all charges brought against prisoners under the **Prison Act** and **Prison Rules**.

[19] In **Saint Lucia Motor and General Insurance Co. Ltd v Peterson Modeste**, the Court of Appeal observed that generally the more serious the allegations of misconduct, the greater is the need for particulars to be given which explain the basis for the allegations. At paragraph 16 of the judgment, the Court of Appeal stated that:

“In *East Caribbean Flour Mills Limited v Ormiston Ken Boyea*, a post CPR decision of this court, Barrow JA, in delivering the judgment of the court cited with approval paragraph 51 of the judgment of Lord Hope of Craighead in *Three Rivers* in which Lord Hope said this:

“..... 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 by authority in the case of fraud’.” (my emphasis)

[20] Although in that case the court was referring specifically to an allegation of fraud, the principles hold for all allegations of misconduct, including misfeasance in public office.

[21] The threshold for establishing misfeasance in public office is a high one. In **Florencio Marin**, de la Bastide PCCJ and Saunders JCCJ in a joint judgment weighing in on the standard in pleading opined at paragraph 35 that:

“...a claimant in tortious misfeasance must meet a very high standard in pleading. Particularising and establishing both the dishonest motive of the defendant and the causation issues involved in proving misfeasance are no less formidable challenges than those that must be overcome in securing a conviction for corruption or for misconduct in public office.”

This is a high threshold with good reason as such allegations are not to be treated lightly.

[22] It is critical that a claim for misfeasance in public office establish the malicious intent or bad faith on the part of the person in power. In this case, it was crucial that the claimant set out in the pleadings that the first defendants’ state of mind was that of targeted malice, in that he intended by his conduct to injure the claimant and that he exercised his public powers for an ulterior or improper motive or that of reckless indifference. Once the element of bad faith is established, this may be sufficient to constitute the tort of misfeasance and the question of intention of malice may then be inferred from it.

[23] In my view, the claimant has failed to establish this crucial element as his statement of claim is devoid of showing or pleading bad faith or targeted malice on the first defendant’s part to cause material damage to him. The defendants contend that such a serious allegation must be firmly established by clear, convincing and probative evidence and not merely by an aside or speculation. I agree. In making a claim for misfeasance in public office the vital elements of the tort must be established in the pleadings. These elements can later be amplified by the evidence adduced but it is critical that the elements be established in the pleadings. The claimant has failed to so do.

[24] In **South Developers Limited v Lester Bryant Bird et al**⁶ the Court of Appeal addressed the issue of whether the statement of claim sufficiently pleaded the

⁶ ANUHCVP2006/020A (delivered on 7th April 2008, unreported).

elements of the tort of misfeasance in public office. In that case, the contention was that the first respondent was sold 25 acres of Crown land at a gross undervalue by the cabinet of ministers, of which the 2nd 3rd and 4th respondents were members. The matter was worsened by the discovery that three of the cabinet members had a vested undisclosed interest in the appellant company. The land was never developed as promised causing the appellant to substantially benefit to the detriment and resulting loss to the State and further by the fact that the appellant then sought to sell the very underdeveloped land to a third party at its true market value. At paragraph 31, the Court of Appeal in considering whether the claimant had sufficiently pleaded the elements of misfeasance in public office held:

“The answer to the second question rests primarily on Lord Steyn’s speech in the House of Lords in the case of **Three Rivers District Council v Bank of England**. In this case His Lordship defined the two different forms of liability with respect to misfeasance in public office. The first is targeted malice by a public officer, being conduct specifically intended to injure a person or persons. The second is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the [claimant]. Lord Millett, in the same case, expressed the view that these are merely different ways in which the necessary element of intention is established. According to His Lordship: “In the first limb it is established by evidence; in the second by inference.”

- [25] While I am guided by the case law that the need for extensive pleadings is reduced by the requirement that witness statements should be filed, I am mindful of the balance which must be struck with the essential requirements for the establishment of a cause of action in the pleadings. In **South Developers Limited**, the Court of Appeal found that the claimant had sufficiently pleaded the tort of misfeasance as it established on the face of its statement of case the element of bad faith in the exercise of a power. The same cannot be said of the case at bar. While the claimant has particularised actions allegedly done by the first defendant he has not highlighted the element of bad faith in either of them. The commission of the acts complained of by the claimant cannot, on its own constitute bad faith to the point that intention can be inferred.

[26] Also, critical to a claim for misfeasance is proof of special damage or loss. The case of **Watkins v Secretary of State for the Home Department**⁷ is instructive in this regard. In that case, the Privy Council was concerned with the question of whether the tort of misfeasance in public office is actionable without proof of financial loss or physical or mental injury. Lord Bingham of Cornhill in his judgment opined that the tort of misfeasance in public office is never actionable without proof of material damage. In the case at bar, nowhere in the claimant's statement of claim is it pleaded what damage or loss was suffered by the him as a result of the first defendant's actions. This is a critical element to pleading any tort, and for public misfeasance where the threshold is even higher, it is even more critical that this be pleaded and particularised. The case law is clear that the failure to do so would be fatal to the claim.⁸

[27] In all the circumstances, and for the reasons outlined above, I do not consider Mr. Gumbs' claim for misfeasance in public office as capable of being sustained. Counsel for the claimant in his submissions gave the alternative of allowing the parties to amend their pleadings if in fact the court did not agree with his submissions. While I am very mindful of the case law which admonishes the court to tread cautiously where striking out a claim is concerned, I am quickly guided by the court's findings in numerous cases that such recourse should be exercised in matters where on the pleadings the claim is unsustainable. I am therefore not minded to allow the claimant to amend his claim. It must be said that, while the claimant's claim as pleaded is unsustainable, it does not automatically follow that there is no other recourse available to him.

[28] Accordingly, I am of the view that Mr. Gumbs' claim against the defendants for misfeasance in public office should be struck out.

Conclusion

[29] In light of the foregoing, I hereby order as follows:

- (1) The claim filed by Mr. Lennox Gumbs on 28th May 2020 is struck out.

⁷ [2006] 2 AC 395.

⁸ The Attorney General v Allen Chastanet SLUHCVP2015/0016 (delivered 4th July 2016, unreported).

(2) Prescribed costs are awarded to the defendants in accordance with rule 65.5 of the CPR.

[30] I am grateful to counsel for their helpful submissions. Lastly, I deeply regret the delay in the delivery of this judgment.

Michelle John-Theobalds
Master [Ag.]

By the Court

Registrar