

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Numbers: **BVIHCV2019/0056**

Between

Mitch Christopher

Claimant

and

**(1) The Attorney General of the Virgin Islands
(2) Commissioner of Police**

Defendants

Before: MASTER Ricardo Sandcroft [Ag]

Appearances

Mr. Jamal S. Smith of Counsel for the Claimant
Mr. Christopher Forde Counsel for the Defendants

2020: January, 28th
2020: March, 4

JUDGMENT

Introduction

- [1] **R. SANDCROFT, M. [Ag.]:** This is an application by the Defendants for removal of the Commissioner of Police as a misjoinder by the Claimant, and to strike out a section of the Claimant's Amended Statement of Claim as being scandalous and prejudicial to the Defendant's case.

Background/Chronology

- [2] The Claimant, Mr. Mitch Christopher of Harrigan Estate, Tortola, Virgin Islands (UK), claims against the Defendants, The Attorney General of The Virgin Islands and The Commissioner of Police, as a result of an unlawful search, wrongful arrest, false imprisonment and malicious prosecution.

[3] On the 8th day of May, 2019 an Amended Defence was filed on behalf of the 1st and 2nd Defendants. The Claimant filed an Amended Claim Form and an Amended Statement of Claim pursuant to a Court Order that was filed by the Claimant.

Defendant's/Applicants' Submissions

[4] The Defendant has applied to strike out the Claimant's Amended statement of case against the 2nd Defendant, based on several grounds. Those grounds are that:

- 'i) The claimant's statement of case and amended statement of case do not set his case; and**
- ii) pursuant to rule 26 the court is empowered to dismiss or give judgment on a claim after a decision on a preliminary issue.**
- iii) Pursuant to rule 26.3 the court is empowered to strike out the statement of case if it appears to the court that the claim is:**
 - a. same is an abuse of the process of the court;**
 - b. discloses no reasonable grounds for bringing the claim; or**
 - c. prolix or does not comply with the requirements of Part 8.**
- iv) Furthering the over-riding objective would justify granting the orders sought. The time allocated for trial herein would be a waste of court time and costs.**
- v) That this is a fair, just and reasonable manner of disposing of this matter."**

[5] Mr. Forde also submitted that the Claimant had by its Amended Statement of Claim in paragraph 6 contravened **Part 30.3(3) of the Civil Procedure Rules 2000**. He also submitted that in the circumstances as they have evolved, the Claimant's Amended Statement of Claim mentions a

paragraph which is scandalous and prejudicial to the defence of the Claim and if it was allowed to stand as is, it would have more prejudicial value than probative value.

Claimant's/Respondent's Submissions

[6] Mr. J. Smith, for the Claimant, submitted that the paragraph (para. 6 of the Amended statement of claim) complained of by the Defendants is not scandalous or vexatious because it is relevant to the cause(s) of action that the claimant has filed in its claim and avers in its statement of claim. Mr. Smith contends that the said paragraph should not be struck from the statement of claim but allowed to stand as it is of a more probative value than prejudicial value and goes to the root of the claimant's case.

[7] Mr. Smith further submits that the overriding objective of the rules of the CPR (as amended 2000) is to ensure that cases are dealt with justly, ensuring that justice is done by all the parties involved. Mr. Smith states that the claim should not be struck out as against the 2nd defendant because the 2nd defendant is properly joined as a party to the matter, the Claimant would be the one to be prejudiced, being deprived of the right to a hearing on the merits of the case before the Court as against the 2nd defendant. The Claimant therefore submitted that the present Application be dismissed to further the overriding objective of the CPR, and that costs be granted to the Claimant and further directions be given for the matter to proceed to trial.

Issues

The issues that arise to be resolved by the Court are as follows:

- [8] (a) Whether this Court should strike out the claim and dismiss the claim against the 2nd Defendant, The Commissioner of Police; or
- (b) Whether the Court should strike out paragraph 6 of the Claimant's Amended Statement of Claim on the ground that it is scandalous.

Court Analysis

[9] As stated earlier, the Attorney General Chambers seeks to have paragraph 6 of the Amended Statement of Claim struck out on the basis that it contains scandalous material and in addition, he says that it contains evidence which is prejudicial to the case of the Defendants.

[10] **Blackstone's Civil Practice**¹ described the type of matters to be raised in a Reply as:

“Conventionally, a reply may respond to any matters raised in the defence which were not, and which should not have been, dealt with in the particulars of claim, and exists solely for the purpose of dealing disjunctively with matters which could not properly have been dealt with in the particulars of claim, but which require a response once they have been raised in the defence. It has always been a cardinal principle of pleading (which has certainly not been altered by the CPR) that a claim should not anticipate a potential defence (popularly known as ‘jumping the stile’). Once, however, a defence has been raised which requires a response so that the issues between the parties can be defined, a reply becomes necessary for the purpose of setting out the claimant’s case on that point. The reply is, however, neither an opportunity to restate the claim, nor is it, nor should it be drafted as, a ‘defence to the defence’.”

[11] I have paid particular regard to the submissions of Counsel and have perused the Amended Statement of Claim in question.

[12] In this application, Mr. Forde proposes to rely on **Part 26.3(1) (a) and Part 30.3(3) of the Civil Procedure Rules 2000**. Further, **Part 26.3 (1) of CPR 2000** empowers the Court to strike out a statement of case or part thereof if it amounts to an abuse of the process of the Court or if it is likely to obstruct the just disposal of the proceedings.

[13] **Part 26.3(1) of the Civil Procedure Rules** also provides that: “In addition to any other powers

¹ (2012) paragraph 27.2 at page 439.

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:

- (a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;

[14] It is the law that the Court, acting under its inherent jurisdiction is clothed with the power to strike out part or paragraphs of an affidavit that contains scandalous, frivolous and vexatious information.

[15] **Part 30.3 (1) of CPR 2000** provides that the general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge. **Part 30.3 (3) of CPR 2000** enables the Court to order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit. **Part 30.3 (2) (a) and (b) of CPR 2000** states that an affidavit may contain statements of information and belief:

- (a) if any of these Rules so allows; and
 - (b) if the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates-
 - (i) which of the statements in it made from the deponent's own knowledge and which are matters of information or belief; and
 - (ii) the source of any matters of information and belief.

[16] The Court is therefore empowered to strike out any matter in an affidavit which may be scandalous, irrelevant or otherwise oppressive. The primary test of whether a matter is scandalous is whether it is relevant to an issue raised. The test of relevance in this context is admissibility in evidence. The sole question is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation. Analogously, where unnecessary matter in a pleading contains any mitigation on the opponent or makes any degrading charges or allegations of misconduct or bad faith against him or anyone else, then it becomes scandalous and will be struck out. The mere

fact than an allegation is unnecessary is no ground for striking it out.

[17] A review of the paragraph in question has given the Court some cause for pause. I do not share learned Counsel Mr. Smith's views that the particular paragraph is not scandalous. In addition, the Court has no doubt that the assertion that seeks to impugn the character of the opposing side are so stated in a manner that if it was to be answered by Mr. Forde, they will have no effect other than to be prejudicial to the defence in this matter.

[18] Where objectionable matter is included in an affidavit in an oppressive manner, the Court in its inherent jurisdiction is clothed with the discretion to strike out those parts of the affidavit. There is no doubt that paragraph 6 of the Amended Statement of Claim made by Mr. Christopher was done to impugn the members of the police force. I am of the view that the said paragraph is unnecessary and scandalous.

Discussion & Findings of Whether the Commissioner of Police is a proper party to these Proceedings

[19] A convenient starting point is section 13(2) of the CPA which provides that **“Civil proceedings against the Crown may be instituted either against the Attorney General or against an authorised officer in his official name”**.²

[20] On a proper reading of section 13(3), it is clear that civil proceedings against the Crown may be instituted either against the Attorney General or against an authorised officer in his official name but not against both. However, the CPA does not define civil proceedings. It does however, set out in section 19, the proceedings against the Crown which falls under the CPA. Section 19(2) stated as follows:

“Subject to the provisions of this section, any reference in this Part to civil proceedings against the Crown shall be construed as a reference to the following proceedings only- (a) proceedings for the enforcement or

² This provision is different from section 13 of the Crown Proceedings Act of Jamaica which expressly states that civil proceedings against the Crown must be instituted against the Attorney-General.

vindication of any right or the obtaining of any relief which, if this Ordinance had not been passed and the Crown Suits Act had not been repealed, might have been enforced or vindicated or obtained by the proceedings mentioned in paragraph 2 of the Schedule or by an action against the Attorney General under the Crown Suits Act;

(b) all such proceedings as any person is entitled to bring against the Crown by virtue of this or any other Ordinance, or any law;

and the expression “civil proceedings by and against the Crown shall be construed accordingly.”

The type of proceedings mentioned in paragraph 2 of the Schedule is “proceedings against Her Majesty by way of *monstrans de droit*.”

[21] In the recent Saint Lucian case of **Richard Frederick et al v The Comptroller of Customs and the Attorney General**³, even though it is a case which deals with Judicial Review, our Court of Appeal made similar pronouncements but went a step further after considering CPR 2000. At page 8 of the judgment, George-Creque J.A. stated (at para. 29):

“...the object of the CPA was to provide for the institution and maintenance of actions by and against the Crown in much the same way as between subjects (as distinct from as between a subject and the state or the Crown) in respect of liabilities arising in contract, tort or like actions committed by its servants or officers. The purpose was to take away the immunity from suit previously enjoyed to a large degree by the Crown and thereby rendering the Crown liable in respect of the acts of its officers. As earlier stated, the claim made in this case does not fall into those classes of ‘civil proceedings’ but is more in the nature of a review of the exercise of the

³ HVCAP 2008/037, Judgment delivered on 6th July 2009 [unreported].

power used by the Comptroller held up against the fundamental protections guaranteed by the Constitution as the benchmark for such review.”

[22] The liability of the Government for the wrongs of its employees is based on the doctrine of vicarious liability, which, simply defined, is the liability of a master for the wrongs done by his servant in the course of his employment. The view has been expressed that the basis of the master's liability is a requirement of public policy that the master be responsible for wrongs done by his servants in the course of their employment. And it has been said that it is "socially convenient and rough justice" to make an employer liable for the torts (i.e. delicts) of his servant. See **I.C.I. Ltd. v. Shatwell** [1965] A.C. 656 per Lord Pearce at p. 685. See also **Riddick v. Thames Board Mills Ltd.** [1977] Q.B. 881 at p. 894a per Lord Denning M.R. The doctrine of vicarious liability, so far as it affects the British Virgin Islands Government, was given statutory recognition by the enactment of the Crown Proceedings Act [Cap. 21].

[23] Lord Diplock in delivering the majority judgment in **Maharaj v A.G. of Trinidad** [1978] 2 All ER 670 at 677 stated-

It is against State action that fundamental rights are guaranteed. Wrongful individual acts unsupported by State authority are not reached by fundamental rights. Fundamental rights are claimed against the State and its instrumentality and not against private parties.

[24] Therefore, a delictual action based in Private Civil Law cannot be instituted against the Commissioner of Police in his vicarious capacity as an employer of his Subordinate Officers. All Police Officers are in the employment of the State and are not employees of the Commissioner, who himself is a State employee. In the Sri Lankan case of **Ratnasara Thero v. Udugampola** (1983) 1. SR1 L. 461, a Superintendent of Police obtained a warrant and seized 20,000 pamphlets which the petitioner had intended to publish. They were suspected to contain seditious material. The Court held that

It was in the exercise of the Police powers vested in him that (the Police Officer) in the discharge of what he conceived to be his duty, (seized the pamphlets) and arrested the petitioner. He acted thus in the name of, and for the State. His action bears the stamp of State action even though he failed to observe the forms and rules of law. He has used the State power to commit the contravention which the Constitution prohibits. The Commission of the wrong has been rendered possible by the State power of which he was a repository and hence his action is that of the State.

- [25] On the basis of these authorities, and on a consideration of the provisions of the Civil Procedure Rules, the Constitution of the British Virgin Islands, and also of the **British Virgin Islands Crown Proceedings Act (Cap 21)**, any Civil action based on any act or omission of a Police Officer must be instituted against the Government of the British Virgin Islands and not the Commissioner of Police. The Claimant in the present case therefore has no cause of action against the Commissioner of Police in a vicarious capacity.

Discussion & Conclusion

- [26] Mr. Forde referred to **Part 30.3 of the CPR** where the power to strike out parts of an affidavit are clearly set out. According to this provision, the court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out from any affidavit. Evidence is scandalous, he submitted, if it is irrelevant to an issue raised in the proceedings. The Jamaican case of **Thomas v Wilkins**, Claim No HCV 2007/0530, decided on 18th December 2008 is congruent with this point. Therefore, I agree with Counsel for the Defence and further, that if irrelevant, the evidence is inadmissible, and that if the issue is one of relevance, the question for the court is whether the impugned paragraph is material to resolving the matters in dispute before the court (**JIPFA v Minister of Physical Planning and Others**, Claim NO BVIHCV 2011/0040 (decided October 31, 2011)). I find that paragraph 6 of the Amended Statement of Claim is not relevant to resolving the matters in dispute before the Court.

[27] Striking out of a claim, should always be a matter of last resort and thus, should only be ordered by a court in plain and obvious cases: **Three Rivers District Council v Bank of England (No. 3)** – [2003] 2 AC 1, esp. at [96] – [97].

[28] **Rule 26.1 (j) of the C.P.R** allows this court to dismiss or give judgment on a claim after a decision on a preliminary issue.

[29] I have borne in mind that the Court should only exercise its power to strike out in “plain and obvious” cases. This power is to be exercised with caution, as striking out will have the effect of depriving a litigant of the opportunity to have his claim tried by the court: **Kwa Ban Cheong**, citing **North West Water Ltd v Binnie & Partners** [1990] 3 All ER 547 at 553. I am fully cognisant that the role of the Court at this stage is not to carry out a minute and protracted examination of the documents and the facts of the case: see **Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others** [1997] 3 SLR(R) 649 at [18] and The “**Osprey**” [1999] 3 SLR(R) 1099 at [6]. Otherwise, the Court hearing the striking out application would effectively be usurping the proper function of the trial court, and conducting a trial of the case in chambers on affidavits only, without discovery and without evidence tested by cross-examination in the ordinary way: see **Ko Teck Siang and another v Low Fong Mei and another and other actions** [1992] 1 SLR(R) 22 at [15], citing **Wenlock v Moloney** [1965] 2 All ER 871 at 874.

[30] Finally, I wish to thank learned Counsel for their submissions in this matter.

[31] The defendants’ application to strike out the claimant’s amended statement of case as against the 2nd defendant is granted and these are the orders that follow:

[32] **Orders**

- (i) In view of the foregoing, it is ordered that paragraph 6 of the Amended Statement of Claimant mentioned below be struck out, because the allegation is not connected with the cause(s) of action in the Amended Statement of Claim:

“One of the police officers drove his knee into the Claimant’s back after he had already given himself up with his hands raised in the air.”

- (ii) The Claim as against the 2nd defendant; The Commissioner of Police is struck out.
- (iii) The costs of the defendants’ application to strike out are awarded to the Defendant and such costs shall be taxed, if not sooner agreed upon.
- (iv) The Defendants shall file and serve this order.

Ricardo Sandcroft
Master [Ag]

By the Court
Registrar