

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA**

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

CLAIM NO. ANUHCV 2016/0446

BETWEEN:

DAMANI TABOR

Claimant

and

[1] THE COMMISSIONER OF POLICE OF ANTIGUA AND BARBUDA
[2] THE CHIEF MAGISTRATE OF ANTIGUA AND BARBUDA
[3] THE PRIME MINISTER OF ANTIGUA AND BARBUDA
[4] THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Defendants

Before: The Hon. Mde. Justice Rosalyn E. Wilkinson

Appearances:

Mr. Charlesworth C. M Tabor for the Claimant
Ms. Alicia Aska for the Defendants.

2017: May 23rd
December 12th

JUDGMENT

[1] **WILKINSON, J.:** Mr. Tabor filed his originating motion supported by affidavit on 7th September 2016, and therein he sought the following relief:-

- i. a declaration or declarations that his rights under section 3(a) and (b), 5, 10 and 12 of the Constitution of Antigua and Barbuda had been contravened by the Commissioner of

Police, the Chief Magistrate and the Prime Minister by namely his arrest and detention on 23rd March 2016, on a warrant issued by the Chief Magistrate on even date with respect to the alleged offence of public mischief;

- ii. a declaration or declarations that the fundamental rights and freedoms of Mr. Tabor as guaranteed by section 3(a) and (b) of the Constitution, namely (a) the right to life, liberty, security of person, enjoyment of property and the protection of the law, and (b) freedom of conscience, of expression (including freedom of the press) and of peaceful assembly and association, had been contravened by the Commissioner of Police, the Chief Magistrate and the Prime Minister;
- iii. a declaration or declarations that the fundamental rights and freedoms of Mr. Tabor as guaranteed by section 5 of the Constitution, namely, the protection of right to personal liberty, had been contravened by the Commissioner of Police, the Chief Magistrate and the Prime Minister by the arrest and detention;
- iv. a declaration or declarations that the fundamental rights and freedoms of Mr. Tabor as guaranteed by section 10 of the Constitution, namely, protection of person or property from arbitrary search or entry had been contravened by the unlawful entry and search of his premises without his consent;
- v. a declaration or declarations that the search warrant issued on 23rd March 2016, was issued unlawfully and that the search carried out at Mr. Tabor's premises was unlawful and contravened his constitutional rights under section 10 of the Constitution;
- vi. a declaration or declarations that the fundamental rights and freedoms of Mr. Tabor as guaranteed by section 12 of the Constitution, namely, protection of freedom of expression including freedom of the press, had been contravened by the Commissioner of Police, the Chief Magistrate and the Prime Minister;

- vii. general, aggravated and exemplary damages for trespass, assault, battery, false imprisonment and malicious prosecution;
- viii. damages including vindictory damages in respect of the loss, pain and suffering experienced by Mr. Tabor for the breach of his constitutional rights under section 3, 5, 10 and 12 of the Constitution;
- ix. any further orders and or declarations necessary to enforce the rights of Mr. Tabor under sections 3, 5, 10 and 12 of the Constitution; and
- x. costs of the proceedings.

[2] The grounds set out in the originating motion were:

- i. The Commissioner of Police is the head of the Police Force of Antigua and Barbuda and is responsible for the conduct of the members of the Police Force and those acting as their servants or agents and/or those acting under their direction and control.
- ii. The Magistrate is the Chief Magistrate in Antigua who on 23rd March 2016, issued a search warrant for the premises of Mr. Tabor at Marble Hill, St. John's, Antigua;
- iii. The Prime Minister is the Prime Minister of Antigua and Barbuda and is also the Minister of Finance under whose portfolio the Citizenship by Investment Programme (GIP) falls.
- iv. The Attorney General is the Attorney General of Antigua and Barbuda and is sued in his representative capacity on behalf of the Government of Antigua and Barbuda pursuant to Section 3(2) of the Crown Proceedings Act, Cap. 121 of Laws of Antigua and Barbuda.

- v. On 23rd March 2016, the premises of Mr. Tabor at Marble Hill were searched purportedly under the terms of a warrant issued by the Chief Magistrate on the said date. The cell phone of Mr. Tabor was seized.
- vi. The reason for the seizure of Mr. Tabor's cell phone as stipulated in the search warrant was that it was property on or with respect to which an offence, namely, public mischief, was suspected to have been committed by Mr. Tabor. The offence of public mischief is not known to the statutory laws of Antigua and Barbuda nor is it known to the common law (see the decision **R v Newland** [1954] 1 QB 158 and 2004 Edition of Archbold, paragraph 28-223).
- vii. The alleged offence of public mischief as committed by Mr. Tabor emanated from a comment he made on 12th February 2016, in an interview on Observer Radio where he indicated that the sum of US\$500,000.00 was stolen from the CIP by a "topdog" who had a track record of stealing money.
- viii. Following Mr. Tabor's statement on Observer Radio a chain of events ensued culminating in the arrest of Mr. Tabor for committing the offence of public mischief. Some of the ensuing events included the following:
 - (a) a press release from the Prime Minister's Office dated 12th February 2016, indicating that the statement made by Mr. Tabor was false and that he was criminally liable and will likely be the subject of litigation;
 - (b) the writing of a letter by the Prime Minister to the Commissioner of Police asking him to investigate the statement made by Mr. Tabor on Observer Radio about missing money from the CIP;
 - (c) a statement in Parliament on 22nd March 2016, by the Prime Minister that Mr. Tabor was in hiding and that he should relent and spare the nation the trouble of an

investigation and if he does not and is found guilty of public mischief there could be consequences;

(d) a statement in Parliament on 29th March 2016, by the Prime Minister that Mr. Tabor was not a victim and that the Police had a right to hold him in detention for 48 hours. This no doubt was his reaction to the general concern and disbelief expressed by the society at large to the arbitrary and oppressive use of state power in Mr. Tabor's arrest and detention;

(e) on 29th March, 2016, the Prime Minister had a transcript of the interview which Mr. Tabor gave on Observer AM radio station on 12th February 2016, and he proceeded to read from the transcript in Parliament. With the Prime Minister's regular comments on the matter both inside and outside of Parliament, the matter dominated the local news for days and was also carried by the regional and international press.

ix It is quite clear from the foregoing, that the Prime Minister injected himself as a central figure into the Senator Damani Tabor saga and by his actions has politicized the matter with the sole objective to humiliate, intimidate and silence a strident critic of the Government rather than allowing the law to take its course without the appearance of political interference or the perception of an encroachment on the sacred democratic principle of the separation of powers. It is therefore patently clear that the ensuing prosecution of Mr. Tabor was politically motivated and was a vulgar abuse of state power.

x. The issuance of the search warrant by the Chief Magistrate on 23rd March, 2016, was ab initio null and void since it was issued for the suspected commission of an offence, namely, public mischief, which is not an offence under the statutory laws of Antigua and Barbuda and nor is it an offence known to the common law. In the circumstances, the arrest and subsequent detention of Mr. Tabor for over 25 hours was unlawful ab initio.

- xi. Mr. Tabor was arrested and detained about 5:00 p.m. on 23rd March, 2016 (coincidentally, a day after the Prime Minister made his statement that Mr. Tabor should be arrested). On the evening of 23rd March, 2016 just after 9:00 p.m., Mr. Tabor who is asthmatic, fell ill as a result of the deplorable and inhumane conditions of the cell in which he was detained, it was quite damp and wreaked of the stench of urine and faeces, and was inhabited by mosquitoes and bugs. As a consequence, he was rushed to the Mount St. John's Medical Centre where he remained as a patient until 5:00 a.m. on 24th March 2016, when he was returned to the cell that precipitated his asthmatic attack in the first place.
- xii. On 24th March 2016, Mr. Tabor was interviewed by the Police in the presence of his attorneys. The interview commenced at 9:50 a.m. and ended at 11:05 a.m. However, before the interview commenced Mr. Tabor's attorney's requested that the chains on Mr. Tabor's feet be removed. At the end of the interview the attorneys for Mr. Tabor were advised to be at the St. John's Magistrate court within twenty (20) minutes, where Mr. Tabor would be formally charged and offered bail.
- xiii. The Police never showed up at the Magistrate court. In fact, all activities at the Magistrate court came to an end before 2:00 p.m. since it was the long Easter weekend and the Magistrates all left early on that day. Given the fact that the following day would be Good Friday (which is a public holiday) and the next working day would be Tuesday 29th March, 2016, so as to obviate the need for Mr. Tabor to spend the long weekend in detention (which appears to have been the objective of the Police), Mr. Tabor's attorneys immediately applied to the High Court for the issuance of a writ of habeas corpus. The writ was subsequently granted and Mr. Tabor was released from detention after 6:00 p.m. on 24th March, 2016. After this development the Police have been proclaiming that station bail was available to Mr. Tabor. While that might have been so, it is within the discretion of the Police to grant station bail and (it is) not something that Mr. Tabor can grant unto himself. It is patently clear that the objective of the Police was to keep Mr. Tabor incarcerated over the long Easter weekend as a means to further humiliate and intimidate Mr. Tabor.

- xiv. Mr. Tabor was formally charged by the Police on 24th March 2016, at about 5:30 p.m. with two (2) charges, namely, (i) effecting a public mischief contrary to the common law, and (2) making a false statement contrary to section 35 (a) of the Public Order Act, Cap. 357. Despite the fact that Mr. Tabor's interview was completed with the Police at 11:05 a.m., the charges were only laid minutes before the Police was ordered before the Court on the hearing of the habeas corpus application.
- xv. With respect to the charge of making a false statement contrary to section 35 (a) of the Public Order Act, this requires that the alleged false statement should have been made in any "public place" or at any "public meeting". In the case of the statement made by Mr. Tabor, it was neither made in a public place or at a public meeting and that fact was well known to the Commissioner of Police, the Chief Magistrate and the Prime Minister since they knew that Mr. Tabor's interview on Observer AM was done from his home at Marble Hill. Additionally, the Public Order Act, Cap. 357 defines a public place as follows: "public place means any highway, street, public park or garden, any wharf, pier, beach and any public bridge, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not; it includes any open space and any building or premises to which for the time being, the public have or are permitted to have access whether on payment or otherwise".
- xvi. More importantly, the Privy Council in **Appeal No. 32 of 1988 Tim Hector v AG of Antigua and Barbuda et al** declared the section of the Public Order Act which states that any person who "prints or distributes any false statement, which is likely to cause fear or alarm in or to the public..... shall be guilty of an offence" to be unconstitutional. In fact the Privy Council noted that:

"it would on any view be a grave impediment to the freedom of the press if those who print, or a fortiori those who distribute, matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which the criticism was based".

- xvii. While in the instant case the issue is the freedom of speech of Mr. Tabor, section 12 (3) of the Constitution makes it clear that (the) expression may be oral or written. It follows logically, therefore, that the fetter which the Commissioner of Police, the Chief Magistrate and the Prime Minister wish to place on Mr. Tabor's freedom of expression by charging him with an offence under section 35 (a) of the Public Order Act must perforce be declared unconstitutional as the Privy Council earlier declared re section 35 (b).
- xviii. Mr. Tabor further relies on the evidence filed with and in support of this application, namely, on the affidavit of Damani Tabor.
- xix. Without prejudice to the above and to the detail of the evidence filed, Mr. Tabor alleges that his arrest and detention on 23rd March 2016, were unlawful and contravened his constitutional rights.
- xx. For these reasons, the constitutional rights of Mr. Tabor under sections 3, 5, 10 and 12 of the Constitution of Antigua and Barbuda have been contravened and he is entitled to the declarations and orders sought in this application.
- xxi. Mr. Tabor is further entitled to bring these constitutional proceedings notwithstanding the possible existence of parallel remedies (namely actions for damages under statute or at common law and/or an action for judicial review). Mr. Tabor alleges that the actions of the Commissioner of Police, the Chief Magistrate and the Prime Minister amount to and include an arbitrary use of state power: see the decision of the Privy Council in **AG of Trinidad and Tobago v Ramanoop [2005] UKPC 15**, at paragraph 21.
- xxii. On 26th May, 2016, Mr. Tabor was served with a summons to defend and to appear before the All Saints Magistrate court on 22nd June 2016. On the latter date, the matter was adjourned to 31st August, 2016, for the hearing of a no case submission.

On the hearing of the matter on the returned date of 31st August 2016, the charge of public mischief was withdrawn by the Prosecutor and accordingly dismissed and the charge of making a false statement contrary to section 35 (b) of the Public Order Act, Cap. 357 was also dismissed. It should be noted, however, that at the hearing of the case on 31st August 2016, the Prosecution grounded their argument on section 35 (b) and not section 35 (a), although no application was made by them to the court to make amendments to the charges (since the Defendant was initially charged under 35 (a)). The subsequent dismissal of the charge was therefore not surprising given the decision of the Privy Council in the case **Tim Hector v AG of Antigua and Barbuda et al.**

- [3] At this juncture, the Court must comment on the matter of the lengthy list of grounds. The Court recalls Barrow JA in **Civil Appeal 2/2007 Beach Properties Barbuda Ltd. v. Laurus Master Fund Ltd.** statement on the purpose of grounds. Therein he stated that the requirement of stating grounds serves to clarify for the judge and the opposing party the basis on which the applicant claims to be entitled to the order sought. The **Civil Procedure Vol.1, The White Book Service 2003** states at paragraph 23.0.6 that an application must state (a) what order the applicant is seeking, and (b) briefly, why the applicant is seeking the order.
- [4] Mr. Tabor's lengthy list of grounds was cumbersome, full of evidence, commentary which was subjective and otherwise, submissions on law and in some instances read like an affidavit. If the matters of evidence and those matters which read like an affidavit were permitted, an affidavit becomes otiose. There was much worthy of striking out but opposing Counsel did not address her mind to same.
- [5] On 14th October 2016, the Attorney General filed an application to strike out the originating motion pursuant to **CPR 2000 rule 26.3** and or under the inherent jurisdiction of the Court. The orders sought were: (i) that the originating motion/fixed date claim form filed by Mr. Tabor on 7th September 2016, pursuant to section 18 of the Constitution be struck out and dismissed; (ii) in the event that the application was (not) dismissed, that the Commissioner of Police, Chief Magistrate, Prime Minister and Attorney General be given time to file their respective defences, and (iii) costs.

- [6] The grounds of the application were that the originating motion (i) disclosed no reasonable cause of action especially against the Chief Magistrate and Prime Minister, (ii) was frivolous and vexatious and/or an abuse of process of the Court and alternatively, (iii) Mr. Tabor had more than one adequate alternative remedy under general law.
- [7] The application was supported by the affidavit of the Attorney General, Mr. Steadroy Benjamin. The Attorney General deposed that (i) he was familiar with the matter, (ii) he had read the grounds of his application and they were true, (iii) that the claim was frivolous and vexatious and or an abuse of the process of the Court, and (iv) in the alternative, he had been advised and believed to be true that Mr. Tabor had adequate alternative remedies under general law.

Mr. Tabor's Affidavit

- [8] A review of Mr. Tabor's affidavit finds that it does not comply with **CPR 2000 rule 30.3**. Rule 30.3 (1) provides that the general rule is that an affidavit may contain only such facts as the deponent is able to prove from his own knowledge. There is provision for when an affidavit may contain statements of information and belief at rule 30.3(2) but those instances are not applicable to the matter before the Court.
- [9] Mr. Tabor's affidavit contains commentary on events - see paragraphs 4, 5, 7, 8, 13, 15, 17, 19, 20; paragraph 16 contains statements allegedly made at a hearing before a judge on a habeas corpus application without compliance with the requirements for bringing evidence of another court before the present Court; paragraph 18 contains a statement made without stating the source and paragraph 20 contains legal submission. In relation to the use of the photographs, **rule 31.1** requires that there be disclosure to the other Party of the intention to use photographs. There was no evidence of such intention disclosed. The Court will have no regard to the matters raised.

- [10] Mr. Tabor deposed that he was a senator appointed by the opposition party, the United Progressive Party (UPP) and is the UPP's public relations officer. According to him, as the UPP's public relations officer he is charged with disseminating the UPP's position on national issues and focuses on the governance of the State together with highlighting mistakes and problems of the Government in the conduct of public affairs. In discharging his responsibilities he is interviewed every Friday on the radio station, Observer AM to present UPP's response to the Chief of Staff of the Government, Lionel Hurst's presentation on the same radio station on the previous Thursday.
- [11] · On 12th February, 2016, while being interviewed on Observer AM, he said that it was alleged that approximately US\$500,000.00 was missing from the GIP Unit and that it was taken by a "top dog" who had a track record of stealing. Following his statement, on the same day, the Prime Minister's Office issued a public statement indicating that his claim was false and that he was being put on notice of likely litigation.
- [12] Following on from his statement, the Prime Minister referred the matter to the Police for investigation as well as to the Christian Council for them to recommend an investigator to probe the allegation. The Christian Council subsequently recommended Mr. Robert Linquist, a forensic investigator, to conduct an investigation. The Prime Minister then backed away from the Linquist investigation -on the ground that what Mr. Tabor had said were allegations from anonymous persons. Mr. Tabor said that he was in full support of a comprehensive investigation of the GIP programme and held the view that the Prime Minister owed it to the Nation to have had the investigation undertaken.
- [13] With respect to the Police investigation, Mr. Tabor was contacted by the Police on 2 occasions in February, 2016 to provide a statement. He informed them th t he could not add anything more to the statement he had made on Observer AM and that he had been advised by his father, his attorney that he did not have to make himself available for an interview with the Police. On 2nd March 2016, Detectives Marlon Proctor and Joseph Reid visited his attorney's chambers and sought his assistance in facilitating an interview. His position was repeated to the Detectives in a telephone call. His attorney however, gave the Detectives directions to his home. Notwithstanding

that the Police had directions to his home, the Prime Minister was heard to say in a radio broadcast that Mr. Tabor was in hiding.

- [14] During the Detectives Proctor and Reid visit to Mr. Tabor's attorney's chambers on 2nd March 2016, inquiry was made of them as to what were the charge/s and their response was a charge of public mischief. Mr. Tabor's attorney informed the Detectives that there was no such offence and that if Mr. Tabor was arrested then he would be obligated to sue them for false arrest and false imprisonment. The Detectives responded that they were advised by the Director of Public Prosecutions that such a charge was a good charge.
- [15] On 22nd March 2016, the Prime Minister during his address in Parliament stated that Mr. Tabor should retract his statement about the missing CIP funds and that Mr. Tabor would suffer the consequences if the pending Linquist investigation should prove the statement to be false.
- [16] On 23rd March, 2016, at approximately 3.00p.m, while Mr. Tabor was at home, a black car with 2 Police Officers drove into his property. The Police Officers said to Mr. Tabor that the Police were still looking for him and then drove away. At approximately 4:30 p.m. 3 Police vehicles drove into Mr. Tabor's property. Several armed Police Officers including Detectives Ray John, Proctor and Reid alighted from the vehicles. They entered Mr. Tabor's home and presented a search warrant for a cell phone. Mr. Tabor at that moment attempted to call his attorney and the cell phone was grabbed from his hand. A charge was read to him. He was escorted to his bedroom and there Detective John informed him that they were looking for drugs and other illegal stuff. The Police Officers turned Mr. Tabor's mattress upside down and searched his bedroom. Mr. Tabor stated that the warrant was not for the search of his home and Detective Proctor responded that the search warrant was general. Mr. Tabor who was at the time only dressed in a T-shirt and underwear was handcuffed. He asked the Police Officers how was he to put on my pants in handcuffs? Detective John told him that he would put on his pants for him. Eventually the handcuffs were removed and Mr. Tabor was allowed to put on his pants. Mr. Tabor said that he felt humiliated and embarrassed.
- [17] Mr. Tabor was taken to the Police Station on Newgate Street in the City of Saint John's. There he was placed in a small cell in which there were 4 inmates. In the cell there were a few wooden

benches for sitting and sleeping. Sometime after 5:00 p.m. Mr. Tabor was asked if he would like to make a telephone call to anyone and he provided his attorney's telephone number. His attorney was called. Approximately 20 minutes later his attorney arrived at the cell with sandwiches and juice.

- [18] Around 7.00 p.m. Mr. Tabor, an asthmatic, became ill. He was rushed by ambulance to the public hospital, Mount St. John's Medical Centre. While on the way to the hospital a Police Officer who was seated in the back of the ambulance with Mr. Tabor was cussing all the way to the hospital and said to him that he was notllfucking sick". He was taken in foot chains to the hospital. At the hospital Mr. Tabor's attorney pleaded with the Police Officer present to remove the foot chains because it was digging into his flesh and it made movement very uncomfortable. The request was denied.
- [19] A medical report dated 27th June 2016 and issued by Dr. Gale stated that Mr. Tabor had been presented to the emergency department of the hospital on 23rd March 2016, with the a complaint of difficulty in breathing. On examination Mr. Tabor was not seen in any painful distress at the time and assessment was asthmatic exacerbation. There was prescribed for him medication and nebulization. Mr. Tabor after treatment was discharged. Mr. Tabor being hospitalised from shortly after 7.00 p.m. on 23rd March 2016, until approximately 5.00 a.m. on 24th March 2016, he was hospitalised for approximately 10 hours.
- [20] At the hospital Mr. Tabor's attorney spoke with the attending doctor and a Police Officer. He requested that Mr. Tabor not be returned to the particular cell at the Police station since he was of the view that the condition of the cell triggered the asthma attack. Mr. Tabor was nonetheless returned to the same cell.
- [21] On 24th March, 2016, at about 8:30 a.m. Mr. Tabor was placed in foot chains and brought to an office to await transportation to Longfords Police station to be interviewed. After waiting for over an hour, he was told that the interview would be conducted at Newgate Street Police station. At about 9:45 a.m. he was made to walk up 18 steep steps in foot chains to an office where the

interview was to be conducted by Detective Proctor. Before the interview began, his attorney insisted that the foot chains be removed and they were.

- [22] The interview was completed at about 11:00 a.m. Mr. Tabor's attorneys were advised at that time by a Police Officer that they should proceed to the Magistrates court in St. John's in about twenty (20) minutes. Mr. Tabor was returned to the cell to await transportation to the Magistrate court. Nothing further transpired until about 5:30 p.m. at which time Mr. Tabor was presented with two (2) charges. One of the charges was that of public mischief. He observed that the Prime Minister had said on 22nd March 2016, public mischief was going to be one of the charges against him.
- [23] On said 24th March 2016, Mr. Tabor was transported to the High Court for the hearing of his habeas corpus application before a judge. At that hearing the Commissioner of Police gave evidence. He stated that station bail was always available to Mr. Tabor but that he along with other security officials had been attending a meeting with the Prime Minister for almost the entire afternoon. Mr. Tabor was released from custody on an interim order of the High Court and ordered to return on the 18th April, 2016. On 18th April 2016, a final order was made releasing Mr. Tabor.
- [24] According to Mr. Tabor, on 29th March 2016, the Prime Minister in Parliament stated that "It is important, however, for the people of Antigua and Barbuda to understand that Damani Tabor is not a victim."
- [25] On 26th May, 2016, Mr. Tabor was served with a summons and a notice to attend the All Saints Magistrate Court on 22nd June, 2016. Two (2) complaints were included in the summons. One (1) complaint stated that Mr. Tabor had made a false statement calculated to cause widespread alarm to the public contrary to common law. The other complaint stated that Mr. Tabor had made a statement likely to cause alarm to the public contrary to section 35(b) of the **Public Order Act**. On 31st August, 2016, the complaints came on for hearing and both complaints were dismissed.
- [26] Mr. Tabor is of the view that in all the circumstances, the Police actions were an abuse of power and were politically motivated and so there was a contravention of his constitutional rights. Further, he was caused much unwarranted distress, embarrassment, pain and suffering.

The Law

- [27] The power of the Court to strike out a claim on the grounds sought is provided for in the **Civil Procedure Rules 2000 rule 26.3(1)**. That rule provides that in addition to any other power that the Court has under **CPR** that the Court may strike out a claim or part of a claim if it appears to the Court that the claim or part to be struck out does not disclose any reasonable ground for bringing or defending the claim (rule 26.3(1)(b)), or the statement of case or 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 (rule 26.3(1)(c)).
- [28] There is much authority on the nature of the application before the Court. For first principles on how such an application is to be dealt with, the Court refers to **Civil Appeal No.20A/1997 Baldwin Spencer v. The Attorney General of Antigua and Barbuda et al** where Sir Dennis Bryon said:
- "This summary procedure should only be used in clear and obvious cases, when it can be seen, on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court....
- In determining this appeal, the same principle should guide us. Regardless of the length or difficulty of the argument, which has already been concluded the operative issue for determination must be whether there is "even a scintilla of a cause of action." If the pleadings disclose any viable issue for trial then we should order the trial to proceed but if there is no cause of action we should be equally resolute in making that declaration and dismissing the appeal."
- [29] In the Commonwealth of Dominica cases (joint decision) **Civil Appeal No.6/2003 Bernadette Hector & Anr. v. Neville Joseph** and **Civil Appeal No. 8/2003 Christabel Antoine v. Bernard Antoine** Saunders JA said:
- "[8] Under the old rules, courts proceeded cautiously in exercising the power to summarily strike out pleadings. The reasons for this are not difficult to fathom. The unsuccessful litigant was wholly deprived of the right to a trial and of its ability to strengthen its case through the process of disclosure and other court procedures such as requests for further

information. Striking out was limited to plain and obvious cases where there was no point in having a trial. The power was usually exercised at the instance of one of the parties.

[9] The new rules require the court actively to manage cases. Part 26.3(1) (b) specifically addresses the court's striking out powers. It is tempting to believe that under these new rules the court will be more willing to exercise the power to strike out. This is not necessarily the case. **Blackstone's Civil Practice, 2001**¹ has this to say on the subject:

"...a dramatic change is not expected. In **Swain v Hillman** [1999] CPLR 779 (a summary judgment case), Lord Woolf MR said that Part 24 applications had to be kept within their proper limits, and were not meant to be used to dispense with the need for a trial where there were issues which should be considered at trial. The same could be said in relation to striking out under r. 3.4. In the same vein, before using r. 3.4 to dispose of 'side issues', care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case".

[30] In **HCVAP 2008/022 Citco Global Custody NV v. Y2K Finance Inc.** Edwards JA once again set out the principles governing an application made pursuant to **CPR 26.3 (1) (b)**. She said:

"[12] Striking out under the English CPR, r 3.4(2) (a) which is the equivalent of our CPR 26.3(1) (b), is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognizable claim against the defendant.

[13] On hearing an application made pursuant to CPR 26.3(1) (b) the trial judge should assume that the facts alleged in the statement of case are true. Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny.

¹ Chapter 33.5

[14] Among the governing principles stated in **Blackstone's Civil Practice 2009** the following circumstances are identified as providing reasons for not striking out a statement of case: 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. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as request for information, and the examination and cross-examination of witnesses often change the complexion of a case; Also, before using CPR 26.3 (1) to dispose of "side issues", care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case. Finally, in deciding whether to strike out, the judge should consider the effect of the order on any parallel proceedings and the power of the court in every application must be exercised in accordance with the overriding objective of dealing with cases justly.

[15)....

[18] The powers of the court under CPR 15.2 are seemingly wider than those contained in CPR 26.3(1). In **Swain v. Hillman and another** Lord Woolf MR contrasted the court's power under rule 3.4 (the English CPR equivalent of our CPR 26.3 (1) (b) and rule 24.2. the English summary judgment rule which is similar to our CPR 15.2. Lord Woolf said at page 92:

'Rule 3.4 makes provision for the Court to strike out a statement of case or part of a statement of case, if it appears that it discloses no reasonable grounds for bringing or defending a claim. Clearly there is a relationship between r.3.4 and r.24.2. However the power of the court under Pt. 24 the grounds are set out in r.24, are wider than those contained in r.3.4. The reason for the contrast of language between r.3.4. and r.24.2. is because under r.3.4, unlike 24.2, the Court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim. Under r.24.2. the Court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in the defendant's favour.'

[31] Mr. Tabor grounds his complaint in sections 3, 5, 10 and 12 of the **Antigua and Barbuda Constitution Order 1981**. Those sections provide:

"3. Whereas every person in Antigua and Barbuda is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, regardless of race, place of origin, political opinions or affiliations; colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interests, to each and all of the following, namely-

- a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
- b) freedom of conscience, of expression (including freedom of the press) and of peaceful assembly and association; and
- c) protection for his family life, his personal privacy, the privacy of his home and other property and from deprivation of property without fair compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

5. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say-

(a) ...;

(f) ... upon reasonable suspicion of his having committed or of being about to commit a criminal offence under any law;

(2) Any person who is arrested or detained shall be informed orally and in writing as soon as reasonably practicable, in language that he understands, of the reason for his arrest or detention.

(3)

(5) Any person who is arrested or detained-

(a) ...; or

(b) upon reasonable suspicion of his having committed or being about to commit a criminal offence under any law,

and who is not released shall be brought before the court within forty-eight hours after his detention and, in computing time for the purposes of this subsection, Sundays and public holidays shall be excluded.

· **10;** (1) Except with his own consent, no person shall be subjected to the search of his person or his property or entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, public revenue, town and country planning or the development and utilization of property in such a manner as to promote the public benefit;

b) ...;

c) that is reasonably required for the purpose of preventing or detecting crime;

d) ...;

e) ...'

and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

12. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression.

(2) For the purposes of this section the said freedom includes the freedom to hold opinions without interference, freedom to receive information and ideas without interference, freedom to disseminate information and ideas without interference (whether the dissemination be to the public generally or to any person or class of persons) and freedom from interference with his correspondence or other means of communication.

(3) For the purposes of this section expression may be oral or written or by codes, signals, signs or symbols and includes recordings, broadcasts (whether on radio or television), printed publications...

(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

a) that is reasonably required-

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings and proceedings before statutory tribunals, preventing the disclosure of information received in confidence, maintaining the authority and independence of Parliament and the courts, or regulating telephony, posts, broadcasting or other means of communication, public entertainments, public shows; or

b) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions;

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

[32] Notwithstanding the rights established at sections 3, 5, 10 and 12, there is nevertheless, a recognition in the **Constitution** that not every claim of infringement of one's constitutional right, might indeed be so and so there is reserved in the Court at section 18 the power to assess whether a

constitutional suit ought to be allowed or whether there is available to an applicant for constitutional relief any other redress in law. Section 18 provides:-

"18. (1) If any person alleges that any of the provisions of sections 3 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction -

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section: and

(b) to determine any question arising, in the case of any person that is referred to it in pursuance of subsection (3) of this section,

and may make such declaration and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 17 (inclusive) of this Constitution:

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

(My emphasis)

[33] This issue of when alleged facts before the Court reaches the threshold of being allowed to be pursued as a constitutional case or not, has been discussed in a number of seminal Caribbean cases. In considering whether Mr. Tabor's alleged facts reaches the threshold to give rise to a constitutional suit, the Court considers some of those cases.

[34] In **Kenrajh Harrikissoon v. Attorney General of Trinidad and Tobago** [1980] AC 265 Lord Diplock said:

"These proceedings in which the appellant claims a declaration that human rights guaranteed to him by section 1 of the 1962 Constitution had been contravened and seeks redress from the High Court under section 6, are in their Lordships' view, wholly misconceived....

The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms: but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom." (My emphasis)

[35] In **The Attorney General of Trinidad & Tobago v. Siewchand Ramanoop** [2006] 1 AC 328 Lord Nicholls of Birkenhead said:

"17. Their Lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of chapter 1 rights and freedoms. This jurisdiction is an integral part of the protection chapter 1 of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against mis.use of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court.

18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation....

Misuse of the court's process

21. The Attorney General raised no objection to these proceedings taking the form of an originating motion seeking constitutional relief rather than a common law action for damages in respect of Mr. Ramanoop's unlawful detention and the assaults made upon him by PC Rahim. The Attorney General was right to do so. Police Officers are endowed by the state with coercive powers. This case involves a shameful misuse of this coercive power: compare the approach adopted by the Board in **Thornhill v. Attorney General** [1981] AC 61, 74.

22. Had the facts set out by Mr. Ramanoop in his affidavit been disputed it might well have been appropriate for the court to direct that the proceedings should continue as though they had been by way of writ. An originating motion is a summary procedure. Satisfactory resolution of such disputes usually requires pleadings, discovery and oral evidence.

24. In **Harikissoon** the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant. Speaking in the context of judicial review as a parallel remedy, Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action. Permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have. Lord Diplock observed that an allegation of contravention

of a human right or fundamental freedom does not itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is made "*solely* for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right": [1981] AC 265, 268...

25. In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.

29. From an appellant's point of view this reason for seeking constitutional relief is eminently understandable. But this reason does not in itself furnish a sufficient reason for invoking the constitutional jurisdiction. In the ordinary course it does not constitute a reason why the parallel remedy at law is to be regarded as inadequate. Proceedings brought by way of constitutional motion solely for this reason are a misuse of the section 14 jurisdiction." (My emphasis)

[36] In **Jaroov. Attorney General of Trinidad & Tobago** [2002] 1 AC 871 Lord Hope of Craighead said:

"ABUSE OF PROCESS

29. Nevertheless, it has been made clear more than once by their Lordships' Board that the right to apply to the High Court which section 14 (1) of the Constitution provides should be exercised only in exceptional circumstances where there is a parallel remedy... (My emphasis)

30. Lord Diplock repeated his warning against abuse of the constitutional motion in the context of criminal cases where there was a parallel remedy in **Chokolingo v. Attorney General of Trinidad & Tobago**...The same point was made recently in **Hinds v. The Attorney General** [2001] UKPC 56, where Lord Bingham of Cornhill said in paragraph 24 that Lord Diplock's salutary warning remains pertinent.

31. If, as in this case, it becomes clear after the motion has been filed that the use of the [originating motion] procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse."

[37] Finally, in No. 40/1998 **Attorney General of Trinidad and Tobago v. Luciano Valley Vue Hotel (1998) Ltd. & Anr.** De la Bastida CJ. said:

"This leads me to another aspect of this case which gives rise to some concern. It is that a complaint of what would appear on the face of it to have been a simple trespass to goods by the Comptroller of Customs should have been clothed in the garb of a constitutional motion.

It has become fashionable for anyone with a complaint, of whatever nature, against some organ of the State to bring their action as a constitutional motion alleging a breach of constitutional rights. The obvious attraction of this course is that in this way pleadings may be dispensed with and an early date of hearing obtained...

It is time, in my view, that this abuse of using constitutional motions for the purpose of complaining of breaches of common law rights, should be stopped. The only effective way of doing so is for the Court at first instance to dismiss summarily any process which on the face it seeks to force into the mould of a constitutional motion, a complaint of some tort or other unlawful act for which the normal remedy is an action at common law for damages or injunctive relief."

[38] Should the Court find that Mr. Tabor's alleged facts have reached the threshold of entitling him to file a constitutional motion, the application also raises the ground of who should be the proper defendants in the suit.

[39] The **Crown Proceedings Act** Cap.121 section 2 provides:

"2(1) Any reference in this Act to the provisions of this Act shall, unless the context otherwise requires, include a reference to rules of court and Magistrates' Courts rules made for the purpose of this Act.

(2) In this Act-

"officer" in relation to the Crown includes the Governor-General, a Minister, and any servant of Her Majesty in right of Her Government of Antigua and Barbuda.

3. (1) Where after the commencement of this Act any person has a claim against the Crown as defined in subsection (2) then, subject to the provisions of this Act, the claim may be enforced as of right, and without the consent of the Governor-General, by proceedings taken against the Crown for that purpose in accordance with the provisions of this Act.

(2) The reference to a claim against the Crown in subsection (1) shall be construed as meaning a claim against the Government which, if this Act had not been passed, might have been enforced, subject to the consent of the Governor-General, in a suit instituted by the claimant as plaintiff against the Attorney-General as defendant

(3)

4. (1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject-

(a) in respect of torts committed by its servants or agents;

(b) "";

(c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property;

Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate.

(2) ""

(3) Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by any law, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.

(4) ""

(5) ""

(6) No proceedings shall lie against the Crown by virtue of this section in respect of any act, neglect or default of any officer of the Crown, unless that officer had been directly or indirectly appointed by the Crown and was at the material time paid in respect of his duties as an officer of the Crown wholly out of the general revenue or other government funds of Antigua and Barbuda, or was at the material time holding an office in respect of which the Governor-General certifies that the holder thereof would normally be paid."

[40] In regard to joining the Commissioner of Police, the **Police Act** Cap.330 provides:

"81. Where any action is brought against any police officer for any act done in obedience to the warrant of any Magistrate, the party against whom such action is brought shall not be responsible for any irregularity in the issue of such warrant, or for any want of jurisdiction of the Magistrate issuing same, but may plead the general issue and give such warrant in evidence; and, proving that the signature thereto is the handwriting of the person whose name appears subscribed thereto, and that such person was reputed to be and acted as a Magistrate for the District and that the act or acts complained of was or were done in obedience to such warrant, the Court shall give judgment to the defendant in such action, who shall recover his full cost of suit."

[41] The case of **Ramson v. Barker** (1982) 33 WIR 195, further assist the Court in determining whether the Commissioner of Police ought to be a party in the proceedings. Here it was held that for a Commissioner of Police to be a party to a suit, there must be evidence that he sanctioned or approved the actions of his subordinates.

[42] In regard to the Chief Magistrate, the **Magistrate's Code of Procedure** Cap.255 provides:

"7. A Magistrate shall have and possess all the powers and jurisdiction and shall perform all the duties which are now vested in or imposed upon Magistrates or Justices of the Peace either at common law or by virtue of any Act now in force, or which may hereafter be vested in or imposed upon such Magistrates by virtue of any such Act.

8.....

14. Every action hereafter to be brought against any Magistrate for any act done by him in the execution of his duty as such Magistrate, with respect to any matter within his jurisdiction as such Magistrate, shall be in the nature of an action on the case as for a tort, and in the plaint it shall be expressly alleged that such act was done maliciously and without reasonable or probable cause.

15.....

22. Every Magistrate shall have jurisdiction-

- (a) To receive complaints and information of all offences and to cause to be brought before him either by summons or warrant, all persons charged with such offences;
- (b) To issue search warrants as hereinafter provided;
- (c) To investigate all charges which he is not empowered to try summarily and to dismiss the accused or to commit him for trial before the High Court;
- (d)...."

Findings and Analysis

- [43] Ordinarily, the Court is only to have regard to the pleadings before the Court when applying the principles to strike out a statement of case. In the case before the Court, because of the nature of the suit filed by Mr. Tabor, there are no pleadings but an originating motion supported by affidavit.
- [44] On review of Mr. Tabor's originating motion and affidavit, it is clear that he is suggesting that what transpired had political underpinnings. At this juncture because the Court only has Mr. Tabor's side of the events before it, the Court must exercise some caution while being guided by Edwards JA.
- [45] According to Edwards JA in **Citco Global Custody NVv. Y2K FinanceInc.**² the Court is to assume that the matters set out in the originating motion and affidavit are true. That being the case, a summary of Mr. Tabor's case is that he appeared on Observer AM and made a statement about US\$500,000.00 missing CIP money and it being been stolen by a "top dog who had a track record of stealing nioney, there followed a statement by the Prime Minister and who also holds the government portfolio of Minister of Finance, a request for investigation of Mr. Tabor's statement to

² Ibid.

the Commissioner of Police by the Prime Minister, contact by 2 Police Officers about Mr. Tabor providing a statement and which he refused to do, a search under warrant of Mr. Tabor's home was conducted on 23rd March 2016, his cell phone taken from him, arrest and detention followed on said 23rd March 2016, and Mr. Tabor was taken to the Police station at Newgate, St. Johns', hospitalisation for approximately 8 hours due to an asthma attack and release of Mr. Tabor on 24th March 2016, under interim order on a habeas corpus app'lication, final order of release of Mr. Tabor on the habeas corpus application, appearance at Magistrate court and both charges against Mr. Tabor dismissed as they were not pursuant to either the laws of Antigua and Barbuda or the common law. There were also further statements by the Prime Minister.

- [46] The Court observes that Mr. Tabor does not state that he had any belief in his very serious allegation about the missing US\$500,000.00 nor did he reveal his source of the statement. Rather he says he would have welcomed a Government investigation, thus putting the Government on the defensive.
- [47] The Court then is to apply the principle in **Civil Appeal No.20A of 1997 Baldwin Spencer v. The Attorney General et al.** and which states that the Court need only find a "scintilla of a cause of action" and the claim should be allowed to proceed. The Court believes that there is a scintilla of a cause of action for there must be some duty on the Police, or a prosecutor or the Director of Public Prosecution before causing a charge to be laid and in particular one which will bring about the detention of a person, to ensure that such charge is a good and viable charge because the detention of any citizen for any amount of time outside of the law is unacceptable and detestable in any circumstances.
- [48] The issue now is whether with the warrant being interpreted wider in the search conducted at Mr. Tabor's home, the incorrect charges being laid and the actions which flowed from them are sufficient to enable Mr. Tabor's suit to reached the threshold set by the authorities cited for filling a suit for constitutional relief. The cases of **Kenrajh Harrikisson, Siewchand Ramanoop, Jaroo and Luciano Valley Vue Hotel (1998) Ltd.** are all instructive.
- [49] According to those cases, the jurisdiction of constitutional relief is a separate jurisdiction from all other remedial jurisdiction that the Court has. This separate jurisdiction of constitutional relief ought to guarded jealously and not be allowed to be "watered down" where in the normal way an alternative judicial remedy for unlawful administrative action is available. Paragraph 25 of **Ramanoop** describes

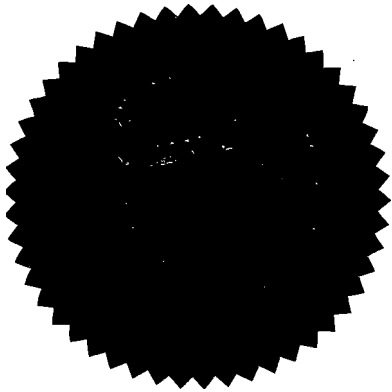
the threshold. The Court has to ask itself, what is the feature which at least arguable indicates that other legal redress is not adequate? A typical example of such a feature would be arbitrary use of state power. This is where Mr. Tabor rest his case.

[50] Alternative judicial redress would include amongst others at least trespass to property and false Imprisonment and exemplary damages.

[51] Having regard to the authorities cited, the Court's position is that on the facts as alleged, that it does not believe that Mr. Tabor has reached the threshold required to file a constitutional claim and believes that there are other adequate means of redress available to Mr. Tabor. In addition, exemplary damages can be prayed for under the other adequate means of redress and so a constitutional motion is not necessary to achieve an order for these. The Court being of this view, the Court need go no further in assessing who are the proper parties in the suit.

[52] Court's order:

1. This claim is struck out.
2. Prescribed costs is awarded.



Rosalyn E. Wilkinson
High Court Judge

By the Court

egistrar