

BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No. 1280 of 2012
1281 of 2012
1316 of 2012

BETWEEN:

RICHARD BOYCE
ANTONIO FORTE
ELPHENE MOORE
JOHN MAXWELL
VERNELLA WILTSHIRE
BARRY HUNTE
ELLIOTT BOVELL
TREVOR BLACKMAN
RODERICK WALCOTT
WINSTON HOLDER
VERNON MOORE
SONIA BOYCE
ANDREW MOORE

APPLICANTS/CLAIMANTS

AND

COMMISSIONER OF POLICE
POLICE SERVICE COMMISSION
ATTORNEY GENERAL

FIRST RESPONDENT/DEFENDANT
SECOND RESPONDENT/DEFENDANT
THIRD RESPONDENT/DEFENDANT

BETWEEN

JEDDER FERNEAUX ROBINSON

APPLICANT/CLAIMANT

AND

COMMISSIONER OF POLICE
POLICE SERVICE COMMISSION
ATTORNEY GENERAL

FIRST RESPONDENT/DEFENDANT
SECOND RESPONDENT/DEFENDANT
THIRD RESPONDENT/DEFENDANT

BETWEEN:

ERROL ELLIS

CLAIMANT

AND

**COMMISSIONER OF POLICE
POLICE SERVICE COMMISSION
ATTORNEY GENERAL**

**FIRST RESPONDENT/DEFENDANT
SECOND RESPONDENT/DEFENDANT
THIRD RESPONDENT/DEFENDANT**

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

**Dates of Hearing: 2014 September 30th
October 1st and 17th**

Appearances:

Mr. Ralph Thorne QC in association with Ms. Mechelle Forde for the Claimants (1280 and 1281/2012)

Mr. Alair Shepherd QC in association with Ms Jennivieve Maynard for the Claimant Errol Ellis (#1316/2012)

Mr. Tariq Khan, Attorney-at-Law, for the Police Service Commission

Ms. Donna Brathwaite QC for the Commissioner of Police and the Attorney General

DECISION

Application to Strike Out

Background to this Application

- [1] On March 4th 2014 this Court delivered a decision on a preliminary constitutional issue raised by counsel for the Claimant in suite No. 1316 of 2012.
- [2] On that said date, the further hearing of the matter was adjourned to the earliest date convenient to all parties, that being, April 7th 2014.
- [3] On the 7th April 2014 counsel Mr. Shepherd, speaking on behalf of the parties (his authority to so do having been specifically confirmed by each party) informed the Court that in a prior discussion between them, they had all consented to counsel for the 2nd and 3rd Respondents being granted leave to file an affidavit[s] on behalf of her clients. In response, all other parties reserved their right to file affidavits in reply, if deemed necessary.

- [4] Case management orders were made and the matter adjourned to May 26th 2014, the earliest date convenient to all parties.
- [5] On May 26th 2014 no affidavit having been filed, Counsel for the 2nd and 3rd Respondents requested an extension of seven (7) more days to enable her to file the affidavit of her client the Commissioner of Police (Ag). All counsel having acceded to the request for additional time, further case management orders were made and the matter adjourned to June 24th 2014, the earliest date convenient to all parties.
- [6] The date of June 24th 2014 having to be vacated, the matter was next heard on July 17th 2014. It was noted on that date that an Application to strike out these proceedings had been filed on May 30th 2014 by counsel for the Police Service Commission (hereinafter the PSC), three days before counsel for the Commissioner of Police (hereinafter the COP) was scheduled to file her affidavit.
- [7] Curiously, the Affidavit in Support of this new Application by the PSC was deposed to by the Commissioner of Police (Ag.), the 1st Respondent in these applications.
- [8] Counsel Mr. Khan insisted, (and rightly so) that the Application of May 30th 2014 must first be heard.
- [9] Further case management orders were granted (all parties having admitted to being taken by surprise at this turn of events) allowing the Respondents to this Application to file their Affidavits in Response and their Written Submissions by September 9th 2014.
- [10] At a Mention Date of September 15th 2014, the application of May 30th 2014 was set down for hearing on September 30th 2014.

The Application of May 30th 2014

- [11] The full text of the said Application is set out hereunder:

“The First and Second Respondents/Defendant (“**Police Service Commission**”) hereby applies to the court for the following Orders:

1. That pursuant to General Order 3.20 of General Orders for the Public Service of Barbados 1970, Revised Edition 1997 (“**General Orders**”) and in breach thereof the suits intutiled claim numbers 1280, 1281 and 1316 of 2012 consolidated by the order of the Honourable Justice William Chandler on 1 November 2012, (“**said claims**”) be struck.
2. Alternatively, the said claims be struck as any remedy would be futile and serve no useful purpose.
3. And/or the granting of any relief is likely to cause significant hardship to and substantially prejudice the rights of the officers recommended for promotion, or alternatively, would be detrimental to the good administration of the Royal Barbados Police Force and the claims are accordingly struck.
4. Further and Alternatively:
 - a. That the said claim be struck for disclosing no reasonable grounds for bringing the said claims.
 - b. And or the said claims be struck as an abuse of the process of this Honourable Court as for lacking substance and are in any event frivolous and vexatious.
5. That the Claimants do pay the Police Service Commission’s costs occasioned by this application, to be agreed or taxed as the case may be, and all its costs attendant to its defence in the said claims herein.
6. The grounds of this application are:
 - i. On 4 March 2014 this Honourable Court rejected an application by the Claimants in the said claims seeking a declaration that sections 9 and 10 of the Service Commissions Act CAP 34 of the Laws of Barbados be modified by reading in the words, “such permission (or consent) not to be unreasonably withheld”.
 - ii. Notwithstanding the matters before this Honourable Court, the Claimants have acted precipitately in instituting the said claims by failing to obtain the sanction of the Police Service Commission pursuant to General Order 3.20 of General Orders for the Public Service of Barbados 1970, Revised Edition 1997 (“**General Orders**”).
 - iii. This failure is in itself a breach of the Public Service Act (commencement date 31 December 2007) of the Laws of Barbados. Specifically, section 2 (h) of the Third Schedule ‘Code of Discipline in the Public Service’ which treats the failure to observe the rules and orders, amongst other things, as misconduct of a serious nature.

- iv. Given this failure, it is submitted that on this ground alone the said claims should be struck. A failure to strike the claims would lead to a mockery of the General Orders and potentially serve to destabilize the discipline of the Royal Barbados Police Force.
- v. It is submitted in the alternative, without prejudice to contention that the said claims be struck for failure to comply with General Orders, that any remedy offered by way of the said claims in favour of the Claimants would be limited to remitting the material issues of the promotions to the Police Service Commission for reconsideration which would be futile and serve no useful purpose as there is no realistic prospect were the judicial review remedies granted that they would lead to a different eventual outcome.
- vi. Without prejudice to the foregoing contentions, it is alternatively submitted that the granting of any relief is likely to cause significant hardship to and substantially prejudice the rights of the officers recommended for promotion, or alternatively, would be detrimental and continues to be detrimental to the operation and good administration of the Royal Barbados Police Force given that the said claims are at the point of their second anniversary.
- vii. Further and in the alternative and without prejudice to the foregoing contentions, the Police Service Commission submits that the applications, the said claims, before this Honourable Court lack substance and merit. On any analysis of the substance of the Claimants' case, the Claimants have failed to establish that their case falls as a public law wrong which warrants the interference of this Honourable Court.
- viii. This Claimants have made the cardinal error of conflating promotion which is an administrative or executive act with a judicial function. The use of language such as legitimate expectation in the context of promotion is at once counter-intuitive and wholly inaccurate.
- ix. That the perceived flaw in process allegedly identified by the Claimants herein cannot in any event be said to be material and their failure to seek modifications to the Service Commissions Act CAP 34 is testament to the Claimants' inability to mount a substantive case of merit.
- x. That save and except for their reliance on anecdotal rhetoric, the Claimants have demonstrably failed to establish any prejudice and rely on a conceit that they believe the recommendations for promotions were so unreasonable that they must be flawed. When the failure of the application to modify the Service Commission Act was in effect a fishing expedition seeking disclosure in the hope that it might turn up evidence to support the said claims or another allegation.
- xi. That the said claim invite this Honourable Court to substitute its view on the merits of the actions of the Police Service Commission

- when the conduct of the Police Service Commission viz recommendations for promotions is excluded from judicial control.
- xii. That in any event this Honourable Court must be seized of the impact the interim injunctions continue to have on the operational functionality of the Royal Barbados Police Force which is in effect being hostage to a spes. And in this regard the Police Service Commission relies on the Affidavit file herein by the acting Commissioner of Police.”

[12] As stated above, this Application was supported by the Affidavit of Tyrone Griffith acting Commissioner of Police the stated intention of which was to “explain and advise this Honourable Court of the continued and enduring effects of the injunctions granted in favour of the Applicants/Claimants in all the above actions.”

The Basis in Law of the Application to Strike Out

[13] There has always existed an inherent jurisdiction in the Court to stay or strike out proceedings before it which are obviously frivolous or vexatious or an abuse of its process; a “jurisdiction which ought to be sparingly exercised and only in exceptional cases”: **Lord Hershell in Lawrence v Lord Norreys [1890] App. Cas. 210 at 219. See also Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd [1986] AC 368.**

[14] What constitutes a “frivolous or vexatious action” has been described by Lush J. in the case of **Norman v Mathews[1916] 85 LJ KB 857** as follows:

“... It must appear that his alleged cause of action is one which on the face of it is clearly one which no reasonable person could properly treat as *bona fide*, and contend that he had a grievance which he was entitled to bring before the Court.”

[15] What constitutes an “abuse of process” follows an objective determination that the court’s process has been used improperly to obtain a result that is either unlawful or beyond the process’s scope: see **Black’s Law Dictionary 9th ed.**; see also **The Caribbean Civil Court Practice 2011 Note 23.26** examples of abuse of process.

[16] Reference to the Court's inherent jurisdiction and how it should be used, can also be found in **Blackstone's Civil Practice 2011 at 33.6** as follows:

“Under the old rules it was well settled that the jurisdiction to strike out was to be used sparingly... It was accordingly the accepted rule that striking out was limited to plain and obvious cases where there was no point in having a trial.”

[17] This jurisdiction is discretionary.

[18] Recognition of this jurisdiction can also be found in our 'old' Supreme Court Rules at Order 18 Rule 19 which empowered the Court at any stage to strike out or to order the amendment of the whole or any part of any pleading which discloses no reasonable cause of action or defence or which is scandalous, frivolous or vexatious or which may prejudice, embarrass or delay the fair trial of the action, or which is otherwise an abuse of the process of the Court. In such circumstances, the Court may order the action stayed or dismissed or judgment entered accordingly. See discussion of applications to strike out under the 'old' **rule 18 at para.18/19 The Supreme Court Practice (Whitebook) 1999 Vol.1.**

[19] Under our 'new' Civil Procedure Rules 2008 there are two provisions under which a Court may exercise its discretion to 'strike out'. The interplay between these two provisions has been the subject of some case law as there arises an issue as to whether a Court may treat a defendant's application to strike as if it were an application for summary judgment: see **Taylor v Midland Bank Trust Co Ltd [1999] All ER 831; Belize Telemedia Limited v Magistrate Usher (2008) 75 WIR 138; The Caribbean Civil Court Practice 2011 at Note 23.23.**

[20] Striking out is part of the Court’s active case management role, namely, to identify the issues at an early stage and to decide which issues need full investigation at trial, and to dispose summarily of others.

[21] Thus, under the rubric, ‘Sanctions-striking out statement of case,’ **Rule 26.3 (1) (2) and (3)** provide as follows:

“**26.3 (1)** In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case where it appears to the court 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.

(2) An order under sub-rule (1) may be made on an application upon notice, and may include an order staying or dismissing the claimant’s application or any part of it with costs, where the claimant was in default, or an order entering judgment for the claimant with costs against a defendant who was in default, such a judgment for the claimant to be of the same nature as a judgment in default of the filing of a defence would have been in respect of the same claim.

(3) The court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court

(a) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(b) that the statement of case or the part to be struck out discloses no reasonable ground for bringing or defending a claim; or

(c) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.”

[22] In the opinion of this Court the intended consequence of Part 26 is to provide a Court with the means of enforcing compliance with the provisions of the CPR, practice directions, court orders and the Overriding Objective. In other words, it gives ‘teeth’ to

case management orders and is not meant to unnecessarily deprive a litigant of access to the courts (justice).

[23] The Court can also exercise the power to strike under Part 15.2(a) (i) Summary Judgment, where “the claimant has no real prospect of succeeding on the claim or issue”.

[24] What is meant by the phrase “no real prospect of succeeding” is discussed extensively in the case of **Three Rivers District Council v Bank of England (No. 3)[2003] AC 1** (often quoted as the ‘*locus classicus*’ on this issue).

[25] Blackstone’s Civil Practice 2011 at 34.10 describes the test in the following terms:

“... The word ‘real’ directed the court to the need to see whether there was a realistic, as opposed to a fanciful, prospect of success. The phrase does not mean “real and substantial’ prospect of success. Nor does it mean that summary judgment will only be granted if the claim or defence is ‘bound to be dismissed at trial’. Nor does it require compelling evidence, but simply enough evidence to raise a real prospect of a contrary case.”

The Case for the Applicant and Respondents

[26] The case for the Applicant (PSC) is set out in his Written Submissions filed August 26th 2014 and will not be reproduced here. Counsel advanced twelve (12) reasons/grounds at pages 2 and 3 of his Written Submissions in support of his application to strike out the substantive action.

[27] Similarly, counsel for the Respondents/Claimants have filed Written submissions on September 9th and September 29th 2014 respectively.

[28] Counsel for the 2nd and 3rd Respondents declined to make any submissions with respect to this application.

Discussion

[29] Counsel Mr. Shepherd in his address to the Court took a pointedly significant approach. He first sought the response of counsel Mr. Khan to the query as to which Part of the

CPR was he making his application under, or to use counsel's words, "what part of CPR is being prayed in aid".

[30] It was indeed a trick question, and was so perceived by counsel Mr. Khan who answered promptly and definitively, Part 26.3 (3), (despite the fact that his application references 26.1(2)(i)) going on to reiterate that he had not brought his application under Part 15, but under the Court's general powers of case management.

[31] The posing of this question by counsel Mr. Shepherd QC shows clearly that he follows closely the line of authority referred to above, one side of which takes the definitive view that in an application to 'strike out', the approach of the Court is determined by the grounding of the application; in other words, that unless specifically so grounded, a Court should NOT treat an application to strike out as if it were an application for summary judgment.

[32] In this regard counsel made reference to a recent decision of my brother **Alleyne J.** in the case of **Glendine Blackett v Curtis Alexander & Angela Alexander** where he endorsed the dicta of Michel J (Ag.) (as he then was) in **Choo Loi Poi et al v Donald Frederick (Claim No GDAHCV 2008/0556, Eastern Caribbean Supreme Court)** as to the desirability of displaying the provision on which an application is grounded prominently on the face of the notice of application.

[33] He also cited in support thereof the judgment of **Abdulai Conteh CJ** in the case of **Belize Telemedia Limited V Magistrate Usher (2008) 75 WIR 138.**

[34] Di Mambro in the text 'The Caribbean Civil Court Practice 2011' makes reference to a more purist approach taken by Eastern Caribbean Courts where he states as follows at Page 248:

“In EC, however, this approach was not adopted by the Court of Appeal in **Citco Global Custody v Y2K Finance Inc** where it was held that the application to strike out was obviously an application under 26.3 (1) (b) and the learned judge would be obliged to assume that the facts alleged in the amended statement of claim were true and she would not be entitled to make use of the powers contained in CPR 15.2 in the absence of any application for summary judgment before her. The summary judgment test- whether the claimants had any real prospect of succeeding on the claim was not an option in considering the respondent’s application to strike out the amended statement of claim.”

[35] This is the same approach taken by Shepherd QC when he submits that Mr. Khan’s case at its highest fails to meet the requirements of Part 26.3 (3) (a), (b) or (c).

[36] This Court finds this line of argument attractive and welcomes a definitive ruling on the same by a higher court.

[37] Counsel Mr. Khan headed his Application of May 30th 2014 as follows:

“Application Seeking the Claims Herein Be Struck For Breach of General Orders. Alternatively, That Any Remedy Would be futile Serving No Useful Purpose And Or The Granting Of Any Relief Is Likely To Cause Significant Hardship, Prejudice And Is Detrimental To Good Administration, Further And Alternatively, For Disclosing No Reasonable Grounds For Bringing The Claims Which in Any Event Are By Their Very Nature Vexatious And Frivolous.”

[38] The substantive application in this matter cannot by any application of the test adumbrated above be characterized as “frivolous, vexatious or an abuse of the process of the Court”. The most compelling response to such a submission is the finding of our Court of Appeal in October 2012 that the Learned High Court Judge has properly applied the law (**American Cyanamid Co v Ethicon Ltd [1975] AC 396 and Toojays Ltd v Westhaven Ltd Court Appeal No. 14 of 2008**) in finding that there was a serious issue to be tried and that the balance of justice (convenience) lay in granting the interim injunction sought.

[39] Indeed, in making its ruling in October 2012 that honourable Court observed that this action involved pressing matters of constitutional importance. Were this Court to find that this action was frivolous and vexatious it would be making a ruling the effect of which is to undermine the ruling of a court of equal jurisdiction; and further it would indeed be an abuse of process because it would be overturning/disregarding the ruling of the Court of Appeal.

[40] This submission is accordingly rejected.

[41] Further, it is the considered opinion of this Court that the other grounds listed in the alternative in the heading of the application of May 30th 2014, cannot be dealt with in an application under Part 26.3 (3) of the CPR.

[42] As mentioned above, this Court accepts and shares the viewpoint that an application to strike out is essentially a summary procedure, not suitable for complicated cases. The Court's approach on such an application should be the same as under an application for summary judgment namely, remit the matter for trial: **see Barrett v Universal –Island Records Ltd [2003] 22 LS Gaz R 30, Times, 24th April, Laddie J.**

[43] There are complex issues to be addressed and explored in this action, being, *inter alia*, the boundaries of the doctrine of Legitimate Expectations, aptly described by some jurists as “a runaway horse”; the issue of the constitutional and statutory ousters being invoked by the PSC (that the PSC is constitutionally and statutorily safeguarded from any inquiry by any court); whether the provisions of the **Public Service Act** are a condition precedent to the Court's jurisdiction in the hearing of this matter filed by the police officers (which raise complex issues surrounding the difference between a “right” and a “permission”); the nature of the remedies that can be granted by a court in applications of this nature.

Not to be forgotten, is the primary issue, being the determination of whether the procedure adopted by the PSC contravened the police promotion regulations and the practice relating to the promotion of gazetted officers.

[44] In addition thereto, I share the view of the learned author of the text *The Caribbean Civil Court Practice 2011*, where he states as follows at Note 23.24:

“On the other hand, a case should not be struck out where the claim is in an area of developing jurisprudence and the facts need to be investigated before conclusions can be drawn about the law: **Farah v British Airways plc and the Home Office (2000) Times, 26th January, CA**. For this reason the court refused to strike out a claim by an acquiring company alleging breach of duty by directors of the company acquired: **Partco Ltd V Wragg [2002] EWCA Civ 594**”.

[45] Further, it is in my considered view important to state that courts must carefully scrutinize applications that have the potential to undermine the philosophy behind the concept of “access to justice”, which is underpinned by important constitutional guarantees.

Disposal

[46] For the reasons discussed above, this application is denied.

[47] This Court feels constrained to observe, however, in the face of publicly expressed concerns about the pace of litigation in our courts, and specifically, criticisms concerning the tardiness of this Court in bringing this action to completion, that in March 2014 this Court expressly indicated its intention to hear the substantive action in April 2014, (or as close thereto as convenient to the parties) in priority over the many other matters assigned to it for adjudication. This action raises issues that are undeniably ‘detrimental to good administration’ and which require the timely hearing of the substantive action. This Court was constrained in the conduct of this matter from March 2014 by affording counsel for

the Crown leave to file its Affidavit in this action and in hearing and ruling on the properly filed application of counsel for the PSC to strike out this action.

[48] It is indeed apposite however that I adopt the words of **Lord Scarman** in **Tilling v Whiteman [1980] AC1** in observing that preliminary issues are often “**treacherous shortcuts which could lead to delay, anxiety and expense. (my emphasis)**”.

[49] There shall be no order as to costs.

MARGARET A. REIFER
Judge of the High Court