MONTSERRAT

IN THE COURT OF APPEAL

HCVAP 2008/008

BETWEEN:

[1] THE ATTORNEY GENERAL
[2] THE COMMISSIONER OF POLICE

Appellants

and

GERALDINE CABEY

Respondent

Before:

The Hon. Mde. Ola Mae Edwards	Justice of Appeal [Ag.]
The Hon. Mr. Michael Gordon,QC	Justice of Appeal [Ag.]
The Hon. Mde. Justice Indra Hariprashad-Charles	Justice of Appeal [Ag.]

Appearances:

Mr. Dane Hamilton Q.C. with Ms. Shona Griffith for the appellants
Mr. Kenneth Allen Q.C. holding papers for Mr. Jean Kelsick for the respondent

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2008: November 24;
2009: January 12.

Civil Appeal – Claim of malicious prosecution – elements to satisfy such a claim – reasonable and probable cause - Part 26.3(1)(b), (c) Civil Procedure Rules 2000 (CPR) – non disclosure of cause of action - abuse of process of the court – Failure to satisfy the requirements of Part 8.7(1) CPR –

The respondent filed a claim in the tort of malicious prosecution and the appellants sought to dismiss it on the grounds that the statement of case of the claimant disclosed no cause of action and was an abuse of the process of the court. This application was dismissed and the appellants have appealed. The appellants' case on appeal was that the learned master misdirected herself on the issue of whether the pleadings before the court could, as a matter of law, satisfy the threshold requirement of want of reasonable and probable cause and that the respondent failed to satisfy the requirements of Part 8(7) of CPR 2000.

Held: dismissing the appeal and awarding costs to the respondent:

(1) That if the claimant was able to prove her allegations, there would be material for a court to determine whether malice existed on the part of the appellants and, if so, whether the threshold of reasonable and probable cause had been met.

(2) That the learned master's exercise of her discretion on the adequacy of the pleadings was in conformity with the decision of this court in East Caribbean Flour Mills Limited v Ormiston Ken Boyea and did not exceed the generous ambit within which reasonable disagreement is possible and therefore cannot be said to be clearly or blatantly wrong.

Michael Dufour et al v Helen Air Corporation Ltd et al Saint Lucia Civil Appeal No. 4 of 1995 delivered Feb. 12, 1996 followed.

JUDGMENT

[1] GORDON, J.A. [AG]: At the commencement of the hearing of this matter learned Queen's Counsel Mr. Kenneth Allen rose to advise the court that at very short notice he was asked by learned counsel Jean Kelsick to hold papers for the latter as he, the latter, had to rush off to Antigua to attend on a close family member who had been struck gravely ill. Mr. Kelsick had also written to the Registrar to similar effect by letter dated the day of the hearing. The court is appreciative of the courtesy shown by Mr. Kelsick in the circumstances.

[2] In addition to advising the court of his inability to attend, Mr. Kelsick indicated that he would be well content to have the court hear the matter on his written submissions. When the matter was put to learned Queen's Counsel, Mr. Hamilton, counsel for the appellants, he too indicated that he would be content to have the matter determined on the written submissions filed by both sides. In the circumstances the court advised that it would reserve its decision which would be arrived at, taking into account the written submissions of both sides.

[3] On the 16th December 2002, the 2nd appellant laid an information before the magistrate for the territory against the respondent as a result of which the magistrate issued a warrant for the search of the respondent's dwelling house which warrant was duly executed. That was the start of a judicial process which resulted, at its various stages, in the respondent being arrested, charged, committed for trial, tried in the High Court, convicted and sentenced to two month's imprisonment (which sentence the respondent served) all on a multiplicity of

charges. The respondent appealed to this court challenging her conviction and this court quashed all of the respondent's convictions.

[4] In May of 2006, after the decision of the court of appeal, the respondent filed a claim form with a statement of claim attached. There were in fact a number of interlocutory applications by both sides before this stage was reached. Such applications do not, however, impact on the matter at bar. The essence of the respondent's claim against the appellants was a claim in the tort of malicious prosecution.

[5] By application filed on 11th October 2006, the appellants sought an order of the court dismissing the respondent's claim pursuant to Part 26.3(1)(b) and (c) of the Civil Procedure Rules 2000 (hereafter CPR) on the grounds that the claim did not disclose any cause of action and was an abuse of the process of the court. The application came before the learned master who dismissed the same. As a result, the appellants have filed an appeal to this court. The relevant part of CPR 26 reads 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 if it appears to the court that –
>
> (a) …;
>
> (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
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> (c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or …"

[6] The learned master, in a succinct, written judgment, after recapitulating the arguments offered on behalf of both the appellants and the respondent concluded in the following terms:

> "I have seen and examined the Claimant's pleadings and the further information filed on 6th July 2006, and I have considered the submissions of counsel for the parties. What is disclosed in the pleadings, as well as in the further information as filed, fortifies my opinion that the Claimant's Claim is sufficiently particularized and that the allegations contained therein including the allegations of misconduct on the part of the authorities are questions of fact to be decided by a judge at trial. Facts need to be proved and evidence of those facts need to be filed and served. I am not inclined to the view that the case is a plain and obvious one for striking out at this stage when all the facts are not yet before the court. In relation to want of reasonable and probable cause, it is common ground that it is a matter for the judge at trial to determine whether there was reasonable and probable cause. If a

> claimant in a claim for malicious prosecution was indicted for more than one charge, it is sufficient for him to show that there was no reasonable and probable cause for some of the charges in the indictment, although there may have been cause for others. The prosecution of one of the charges was determined in favour of the Claimant and the Claimant need only to show reasonable and probable cause in relation to that charge. It logically follows that details of want of reasonable and probable cause are essentially an evidential matter to be given in a claimant's witness statements and may be also be elicited at the trial by cross examination.[1]"

[7] The appellants' grounds of appeal though, three in number, raise only two separate issues for decision. Grounds 3.1 and 3.3 are capable of being conveniently dealt with together and ground 3.2 will be dealt with separately.

[8] Ground 3.2 as filed reads as follows:

> "3.2 The Learned Master erred in law and/or misdirected herself on the question whether on the pleadings before the court the Claimant could as a matter of law satisfy the threshold requirement of want of reasonable and probable cause, and further misdirected herself on the principle stated in Riches v Director of Public Prosecutions [1973] 1 WLR 1019."

[9] Learned Queen's Counsel for the appellants stated, in his written argument at paragraph 10, the following: "In Riches v Director of Public Prosecutions [1973] 1 WLR 1019 it was held that where a magistrate committed a plaintiff for trial on evidence before them [sic] and the jury found him guilty on that evidence, it was impossible to establish any want of reasonable and probable cause by the prosecution and therefore the plaintiff could not possibly succeed in his action for malicious prosecution. In the result the action was an abuse of the process of the court. This case is still good law…"

[10] With the greatest of respect to learned Queen's Counsel, the proposition that he asserts is propounded by Riches is taken from the head-note, which, unfortunately for him, is not an accurate reflection of the learning in the body of the judgment. At page 1025 Stephenson LJ says the following:

> "We have also been referred to the observation of Pickford L.J, in Bradshaw, Waterlow & Sons Ltd. [1915] 3 K.B.527,535, where he said:

[1] Paragraph 30 of judgment

> "…it is difficult to see how under those circumstances there can be said to be an absence of reasonable and probable cause when the Attorney-General had granted his fiat and the facts were not shown to be unfairly put before him."

I do not wish to be taken as saying that there may never be a case where a prosecution has been initiated and pursued by the Director of Public Prosecutions in which it would be impossible for an acquitted defendant to succeed in an action for malicious prosecution, or as saying that the existence of the Attorney-General's fiat, where required, conclusively negates the existence of malice and conclusively proves that there was reasonable and probable cause for the prosecution. There may be cases where there has been, by even a responsible authority, the suppression of evidence which has led to a false view being taken by those who carried on a prosecution and by those who ultimately convicted. But that case is, as it seems to me, many miles from this one."

[11] In this case, the claimant pleaded that:

- she was "denied access by the First Defendant to evidence that would have aided her defence";
- the motive of the First Defendant in prosecuting was to remove her as Accountant General so that she could be replaced by someone more malleable;
- the evidence presented at her trial was selective and speculative.

I am of the view that if the respondent could successfully lead evidence in support of her allegations, there would be material on which a court would have to make a determination as to whether malice existed on the part of either appellant and, if so, whether the threshold of reasonable and probable cause had been reached. I find this ground of appeal unsustainable.

[12] The second issue for decision of this court I shall refer to as the "pleading" issue. Grounds 3.1 and 3.3 read as follows:

> "3.1 Having found that all of the facts on which the Claimant based her claim are not before the Court, the Learned Master erred in law and/or misdirected herself in holding that the Claimant's Claim is sufficiently particularized and the allegations of misconduct on the part of the authorities are questions of fact to be decided by a Judge at trial.
>
> "3.3 The Learned Master misdirected herself in law in her finding that although all of the facts relating to the misconduct of the authorities were not yet before

> the Court that at this stage, it was not yet a plain and obvious one for striking out and further fail to find that the Claimant's duty under Part 8.7(1) of the CPR 2000 was to include all of the facts in the Statement of Claim on which she relies.

[13] This pleading ground was expanded in the written argument of learned Queen's Counsel for the appellants. In short, the argument was made that CPR Part 8.7 (1) states "The claimant must include in the claim form or in the statement of claim a statement of all of the facts on which the claimant relies". The claimant, argues learned counsel for the appellants, failed completely to satisfy the requirements of Part 8.7 of CPR.

[14] This court has adjudicated on the issue of the interpretation of CPR 8.7 in a number of cases. For the purposes of this judgment it is only necessary to refer to East Caribbean Flour Mills Limited v Ormiston Ken Boyea et al[2] in which Barrow JA stated:

> "Unlike this court, counsel are in a position to know why this claim has taken so long to reach this point. We do know, however, the cause of the delay for the past year and it is the unfortunate tendency of which Saville LJ spoke in British Airways Pension Trustees Ltd. Sir Robert McAlpine & Sons Ltd., quoted by Lord Hope in the Three Rivers (No. 3) case, and they merit further repetition:
>
> > "The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularization even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is being made by the other and is able properly to prepare to deal with it."

[15] The learned master, in the exercise of her discretion had this to say at paragraph 31of her judgment:

> "There are no witness statements, so all the facts on which the claimant intends to rely have not been disclosed. Witness statements usually amplify the pleadings. In this case therefore the question is not the quality of the pleadings but whether all the facts on which the claimant intends to base her claim are before the court. The answer is no. The question then arises as to whether it is fair for this court to rule at this early stage prior to the service of witness statements and discovery, that

[2] SVG Civil Appeal No. 12 of 2006 delivered 16 July 2007

there is no prospect of the claimant successfully proving absence of want of reasonable cause or that the claimant's case is incurably bad. It is my view that to do so would be premature and would work an injustice on the claimant and would not advance the overriding objective of the Rules to deal with cases justly."

[16] In Michel Dufour et al v Helen Air Corporation Ltd et al[3] Sir Vincent Floissac, Chief Justice, said the following, which has been quoted and followed in this court on occasions too numerous to count:

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

The first condition was explained by *Viscount Simon* L.C. in Charles Osenton & Co. v Johnston (1941) 2 AER 245 at 250. There, the noble Lord Chancellor said:

> "The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If; however, the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."

The second condition was explained by *Asquith L.J.* in Bellenden (formerly Satterthwaite) v Satterthwaite (1948) 1 AER 343 at 345 in language which was approved and adopted by the House of Lords in G v G (1985) 2 AER 225 and which I have gratefully adopted in this judgment. *Asquith L. J.* said:

> "……We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

[3] SLU Civil Appeal No 4 of 1995 delivered Feb. 12, 1996

[17] I am not satisfied that either condition 1 or 2, as articulated by Sir Vincent, has been met in this case. I would dismiss the appeal with costs in the sum of $2500 to the respondent.

Michael Gordon, QC
Justice of Appeal [Ag.]

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]

I concur.

Indra Hariprashad-Charles
Justice of Appeal [Ag.]