EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
THE TERRITORYOF THE VIRGIN ISLANDS

CLAIM NO. BVIHCV2012/0314

IN THE MATTER OF THE VIRGIN ISLANDS CONSTITUTION ORDER, 2007

AND

IN THE MATTER OF THE POLICE SERVICE (DELEGATION OF POWERS) REGULATIONS, 2012 (STATUTORY INSTRUMENT NO. 14 OF 2012

AND

IN THE MATTER OF AN APPLICATION BY LEONARD FAHIE AND HENDRICKSON WILLIAMS FOR REDRESS PURSUANT TO SECTION 31(1) OF THE VIRGIN ISLANDS CONSTITUTION ORDER, 2007 FOR CONTRAVENTIONS OF SECTION 91(2) TO (9), 96 AND 97 THEREOF

BETWEEN:

LEONARD FAHIE

AND

HENDRICKSON WILLIAMS

Claimants

AND

THE COMMISSIONER OF POLICE

AND

THE ATTORNEY GENERAL

Defendants

Appearances:
Ms. Dancia Penn QC and Yohanseh Cave for the Claimants
Mrs. Jo-Ann Williams-Roberts for the Defendants

2015: May 29th

JUDGMENT

[1] **ELLIS, J.:** The Claimants are officers of the Royal Virgin Islands Police Force ("RVIPF") and have brought the present Claim against the Commissioner of Police and the Attorney General.

[2] By Fixed Date Claim Form filed on 15th November 2012, the Claimants made two main averments which included (1) that the Claimants' rights under section 12 of the Virgin Islands Constitution Order, 2007 ("the Constitution") have been and are being breached; (2) that the Police Service (Delegation of Powers) Regulations, 2012 ("the 2012 Regulations") made on 16 April 2012, under section 97 (5) of the Constitution are *ultra vires* the Constitution.

[3] The First Claimant, Leonard Fahie, avers at paragraph 24 of his Affidavit that the various actions taken in relation to the RVIPF contravene the provisions of the Constitution, and breach his rights granted under the Constitution and the terms and conditions of his employment as a Police Officer, in particular, his right to promotion.

[4] The Second Claimant, Hendrickson Williams, makes similar averments at paragraph 24 of his Affidavit, asserting that the various actions taken in relation to the RVIPF are in breach of the Constitution and his rights under the Constitution, and have a direct adverse impact on him and the terms and conditions of his employment as a police officer.

[5] The Claimants seek the following constitutional and administrative reliefs of the Court:

(a) a declaration that their rights under section 12 of the Constitution have been and are being breached;

(b) a declaration that the 2012 Regulations made on the 16th day of April 2012, are *ultra vires* the Constitution and are null, void and of no effect;

(c) a declaration that the First Defendant has acted *ultra vires* section 97 of the Constitution;

(d) a declaration that any and all things done and actions taken or directed in pursuant of the 2012 Regulations including the making of the Royal Virgin Islands Police Force Promotion Policy in April 2012 are in consequence *ultra vires* the Constitution, null, void and of no effect;

(e) a declaration that the examinations conducted by the Commissioner of Police acting on the authority purportedly given to him by the 2012 Regulations are of no legal effect in that among other things the appointment of a Promotions Board for the conduct of an examination for promotion within the Royal Virgin Islands Police Force contravenes the Constitution by taking away the role and purpose given to the Police Service Commission under the Constitution;

(f) a declaration that Part IV of the **Police Act, Cap 165** is repugnant to the Constitution, and that the said Act should in accordance with section 115(1) of the Constitution be construed so as to give and preserve the role and purpose of the Police Service Commissioner as provided for in section 96 of the Constitution;

(g) a declaration that the power of delegation given to his Excellency the Governor under section 97(5) of the Constitution was not validly exercised, in that in the making of the 2012 Regulations, due regard was not paid to the provisions of section 96 and section 115 of the Constitution. The exercise of the power granted in section 97(5) resulted in bringing into effect provisions of the Police Act, Chapter 165 which are repugnant to the Constitution;

(h) Damages;

(i) Costs;

(j) Further and other relief.

[6] After acknowledging the Claim, the Defendants filed a Notice of Application on 11th December 2012 in which they seek to strike out of the Claimants' Claim on the following grounds:

i. that the Fixed Date Claim Form and affidavits in support fail to disclose the grounds upon which they seek relief;

ii. the Claim Form and affidavits in support fail to support to disclose all or sufficient facts on which this claim is based;

iii. the Claim Form discloses no reasonable grounds for bringing the Claim; and/or

iv. the Claim Form is an abuse of process of the Court.

[7] The Claimants filed an Affidavit in answer to the Defendants' Application for Strike out on 21st January, 2013. Following this, a further Affidavit in Reply was filed on behalf of the Defendants on 30th January, 2013.

THE PARTIES' SUBMISSIONS

[8] Counsel for the Applicant referred the Court to CPR Part 56.7(4) (d) and (e) which provides as follows:

> 56.7 (4) -The affidavit must state –
>
> (a) the name, address and description of the claimant and the defendant;
>
> (b) the nature of the relief sought identifying –
>
> (i) any interim relief sought; and
>
> (ii) whether the claimant seeks damages, restitution, recovery of any sum due or alleged to be due or an order for the return of property, setting out the facts on which such claim is based and where practicable, specifying the amount of any money claimed;
>
> (c) in the case of a claim under the relevant Constitution – the provision of the Constitution which the claimant alleges has been, is being or is likely to be breached;
>
> (d) **the grounds on which such relief is sought;**

(e) **the facts on which the claim is based;**

(f) the claimant's address for service; and

(g) the names and addresses of all defendants to the claim.

[9] She submitted that the Respondents' Affidavits do not state the grounds on which relief is sought and/or the facts on which the claim is based. Counsel submitted that this was fatal to the claim as this error is not a mere technical failure to comply with a rule, but one that goes to the root of the Applicants' claim. In its current form, the claim discloses no reasonable ground for bringing the claim and no viable cause of action has been pleaded in a way which would allow the Applicant to know the case which it has to answer.

[10] In response, Counsel for the Respondents submitted that they have complied with the relevant provisions of the CPR. She submitted that the primary contention of the Claim is that the Police Service (Delegation of Powers) Regulation 2012 is in conflict with the Virgin Islands Constitution Order 2007, *ultra vires* and therefore void. This contention is elucidated at paragraph 20 of the Affidavits filed by each Claimant in which they depose that the effect of the 2012 Regulations is to weaken the role of the Police Service Commission by taking away a substantial part of its role; and for him as a serving police officer nullifies the protection given by the Constitution which contemplates the existence of a police service commission acting as a buffer between himself as a serving officer and the Commissioner of Police and the Governor.

[11] The Applicants also contends that the Respondents' Claim should be struck out because it has failed to disclose a reasonable ground for bringing the claim. First, the Applicant alleges that the Respondents have failed to state any facts and/or particulars of the actions of Commissioner of Police which have contravened or infringed upon their constitutional rights or the Constitution in general. As a result, Counsel contended that the Claim is vague, disjointed and failed to coherently set out the case which the Applicants have to answer.

[12] In advancing this contention, the Applicants rely on the dicta in **Amerally and Bentham v Attorney General (1978) 25 WIR 272 at 308**[1] in which Crane J stated that a claimant who seeks to claim a breach of constitutional provisions should show on the face of the pleadings the nature of the alleged violation or contravention that this being asserted.

[13] Counsel for the Applicants argued that the Respondents have failed to disclose or particularize facts of discrimination within the law itself or the way the law is administered in relation to their claim. She further argued that the Respondents have failed to particularize the facts of the alleged breach of section 12 of the Constitution and she submitted that the same arguments can be made in respect of each of the other six declarations sought.

[14] More particularly, the Applicants complained that the Respondents have failed to plead and state facts on why or in what way Part IV of the Police Act is repugnant to the Constitution.

[15] Secondly, the Applicants submitted that the Respondents' pleadings are woefully deficient in that they do not go the distance of disclosing a cause of action against the Applicants. Counsel for the Applicants submitted that this failure to properly plead their case renders the Claim unsustainable. Counsel particularly referenced paragraph 24 of the Respondents' affidavits and submitted that it does not disclose reasonable grounds for bringing the claim.

[16] Finally, Counsel further argued that the claim is not maintainable because the factual premise upon which it appears to be based is erroneous. This submission in based on the Respondents misapprehension that the Promotion Policy which came into force on 13th April 2012 came as a result of the authority vested in the Commissioner of Police by the 2012 Regulations. Counsel trenchantly argued that since the Promotion

[1] Applied in Edison James et al v The Speaker of the House of Assembly of the Commonwealth of Dominica DOMHCV 2010/199 and Bernard M Christopher v Skerrit and the Attorney General of Dominica DOMHCV 2010/287

Policy was not created by the 2012 Regulations, no cause of action could be maintained and the relief sought in paragraphs (d) and (e) must be struck out.

[17] Counsel further argued that it was plain that the 2012 Regulations were validly enacted in accordance with section 97 (5) of the Constitution which vest the authority in the Governor acting in consultation with the Police Service Commission to delegate his powers to make appointments to offices in the Police Force. She submitted that any contention that they are *ultra vires*, null and void is therefore absurd and should be struck out.

[18] In responding to this ground of the Application, the Respondents contended that the jurisdiction to strike out must be exercised sparingly and only in plain and obvious cases. So that the mere fact that the case is weak or not likely to succeed is no ground for striking it out.[2] Counsel submitted that if the pleadings could be saved by an amendment, then the proper Order is for leave to amend rather than striking out the claim.[3] If the Court finds that further particularization is necessary, then the Court is entitled to grant leave to amend the pleadings to include the same. Counsel submitted that this would be in keeping with the overriding objective to deal with cases justly.[4]

[19] Counsel also cautioned the Court against undertaking a detailed examination of the facts and allegations of the case to determine whether there is a cause of action contained therein. She advocated that the Court should not make a finding of fact which is inconsistent with the evidence filed by the Respondents; rather, the truth of the Claimants' allegations must be assumed. **M4 Investments and Clico (Barbados) Ltd. [2006] 68 WIR 65.** Counsel argued that the issue of whether the Promotion Policy preceded or followed the Police Service (Delegation of Powers) Regulations is a question of fact to be determined at trial.

[20] In any event, even if the Court accepts the Applicant's contention, Counsel submitted that it is plain on the face of the pleadings that there is an issue to be tried regarding

[2] Wenlock v Maloney [1965] 2 All ER 871
[3] Republic of Peru v Peruvian Guano Co. (1886) L. R. 36 Ch. Div. 489
[4] Biguzzi v Rank Leisure Plc [1999] 1 WLR 1926

the constitutionality of the Police Service (Delegation of Powers) Regulations 2012. Counsel submitted that the Defendants cannot nullify this cause of action which is plainly established by the Claimants on the face of the pleadings by inviting the Court to make a finding of fact inconsistent with those pleadings at this stage of the proceedings and on the basis of the evidence filed in support of the application.

[21] Finally, Counsel for the Applicants submitted that the whole or part of the Claim Form should be struck out as being an abuse of process of the Court because the Claimants have failed or refuse to state any grounds for granting the relief sought or alternatively because the averments set out are misconceived and disclose no cause of action.

[22] This ground was also strongly resisted by the Respondents who argued that striking out a claim on the basis that it constitutes an abuse of process is a jurisdiction which a court may only exercise in the rarest of circumstances, where to allow the claim to proceed would be manifestly unfair to a party to litigation or would otherwise "*bring the administration of justice into disrepute among right thinking people.*" **Hunter v Chief Constable of West Midlands Police [1982] AC 529.**

[23] It is apparent that the Respondents have not sought to raise an identical issue as one decided against them previously in a Court of competent jurisdiction, and none of the acts commonly understood to be an abuse of the process of the Court are alleged. In the premises, Counsel submitted that the Applicants have failed to demonstrate in the present application how the pleadings come within this stringent standard.

GENERAL PRINCIPLES

[24] It is now settled that the jurisdiction to strike out is to be used sparingly. This is largely premised on the fact that the exercise of the jurisdiction has the potential to deprive a party of the right to a trial, and of the ability to strengthen its case through amendment, disclosure and requests for further information. As a result, courts have generally limited the exercise of this jurisdiction to plain and obvious cases. So that

as long as a case discloses a cause of action with some prospects of success, it would not be struck out.[5]

[25] Recent case law demonstrates that courts have not deviated from this approach. In **Partco Group Ltd v Wragg,**[6] Potter LJ attempted to prescribe the cases where striking out would be appropriate. Those include: (a) where the statement of case raises an unwinnable case so that continuing the proceedings is without any possible benefit to the defendant and would waste resources on both sides; (b) where the statement of case does not raise a valid claim or defence as a matter of law; (c) if the facts set out do not constitute the cause of action or defence alleged; or (d) if the relief sought would not be ordered by the court.

[26] The rationale for this approach has been explained by Mitchell JA in **Tawney Assets Limited v East Pine Management**[7] in the following way,

> "The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. **The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial**." Emphasis mine

[27] With these general principles in mind, the Court will turn to consider the particular grounds advanced in the application.

[28] In the Court's view, the first two grounds of the Application raise essentially the same substantive issues. The Applicants' broad contention that there has been an obvious failure to comply with CPR Part 56.7 (4) (d) and (e) which has rendered the claim unmaintainable because no viable cause of action has been pleaded. As a

[5] Provided the statement of case raised some question fit to be tried, it did not matter that the case was weak or unlikely to succeed. Wenlock v Moloney [1965] 1 WLR 1238
[6] [2002] EWCA Civ. 594
[7] Civil Appeal No. 7 of 2012, Territory of the Virgin Islands unreported judgment

consequence no reasonable ground for bringing the claim is disclosed and the Applicants are at a distinct disadvantage as a result.

[29] In **East Caribbean Flour Mills Limited v Ormiston Ken Boyea et al,** Barrow JA in interpreting Part 8.7 of the CPR stated:

> "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".

[30] Having carefully reviewed the case for the Respondents, the Court is satisfied that they have failed to satisfy the requirements of CPR Part 56.7 (4) (d) and (e) and Part 8.7. On the first day of the hearing, there appeared to be some level of concession on the part of the Respondents who reminded the Court that it has the power to permit a litigant to cure defects in their pleadings through amendment. The Applicants however have quite correctly advanced that the power to permit amendment should only be exercised as an alternative to striking out, where there is a real prospect of establishing the amended case.[8] The Court must then consider whether this possibility exists in this case.

[31] A person who wishes to move the court must state a case that is known to, or created by law. The case as stated must disclose sufficient facts that are material to the issue to render the claim viable and which would permit the person who has to answer the case to know what case he has to meet; it must disclose a reasonable cause of action.[9]

[32] A claimant who seeks to claim a breach of constitutional provisions must show on the face of the pleadings the nature of the alleged violation or contravention that is being asserted. The Claimants' first claim for relief alleges an infringement of their rights under section12 of the Constitution. That section provides as follows:

[8] Charles Church Developments plc. V Cronin [1990] FSR 1
[9] Per Lord Diplock in Letang v Cooper [1965] 1 QB 232 at p 242

> **12.**—(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Subject to such limitations as are prescribed by law, equality includes the full and equal enjoyment of all rights and freedoms.

[33] Fortunately, the scope of this right has been judicially defined in regional case law. **In Maha Sabha of Trinidad and Tobago Inc. v Attorney General of Trinidad and Tobago**[10] Jamadar J in discussing section 4 of the Trinidad and Tobago Constitution[11] noted that;

> "equality before the law" and "the protection of the law" [4(b)] encompass both the negative concept that "no person is above the law" and the positive concept that all persons have an inalienable right to enjoy their constitutional rights and freedoms, unrestrained except by equal and impartial laws and provided the same are reasonably justifiable in a democratic society [section 13(1) of the Constitution].
>
> V.G. Ramachandran in his text 'Fundamental Rights and Constitutional Remedies' (discussing the scope of Article 14 of the Indian Constitution – at page 212) states the position as follows:
>
> > No individual or groups of individuals should have differential or preferential treatment over other individuals or groups of individuals similarly circumstanced and with equal qualifications'"

[34] At page 45 of the judgment, Jamadar went on to state that;

> "However, the case law also suggests that common to both 4(b) and (d) is the understanding that "equality" – whether as "equal protection" or "equal treatment" means "equal treatment in similar circumstances," so that "there should be no discrimination between one person and another if as regards the subject matter

[10] HCA Application No 2065/2004, at page 524 cited with approval in Annissa Webster and others (Appellants) v The Attorney General of Trinidad and Tobago (Respondent) [2015] UKPC 10

11 Section 4 (b) of this section is the equivalent to section 12 (a) of the BVI Constitution

> … their position is the same" (**Smith v L.J. Williams**, at page 415). Or, as Cross J.A. put it [in the context of 4(d)]: "It is the lack of even handedness in … treatment … to which the prohibition in section 1(d) of the Constitution (1962) is directed")."

[35] Relevant case law has considered this fundamental right in the context of two distinct categories: (i) legislation and (ii) administrative action (acts of public authorities/officials)[12] and the legal principles have been applied differently in each category. In each case however, the Courts have for some time made it clear that inherent in the equality provisions is an inescapable comparative element. In the Court's judgment, the position was best set out by Jamadar J in **Maha Sabha** where he noted that:

> "…what the concept of equality encompasses is the idea that persons who are alike (similarly situated/circumstanced) should be treated alike; and that persons who are not alike could be treated differently, though in some proportion to the differences. Thus a person is treated unequally if that person is treated differently (and worse) than others who (the comparison group) are similarly situated (circumstanced) to the complainant. In **Bhagwandeen v Attorney General**, P.C. App. No. 45 of 2003, Lord Carswell stated, at paragraph 18:
>
> > A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26 at paragraph 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the legislation of the United Kingdom is that the comparison must be such that the relevant circumstances in the one

[12] In Smith v L.J. Williams (1982) 32 W.I.R. 395 Bernard J., citing with approval Basu's Shorter Constitution of India (1976) 7th ed., Vol. 1 (where Article 14 of the Indian Constitution is dealt with and in particular equality before the law and the equal protection of the law), accepted that "equal protection" may be denied either by legislation or by administrative acts.

> case are the same, or not materially different, in the other."

[36] In the case of administrative action, Caribbean cases judge different and less favourable treatment by a fictional or real comparator who is similarly situated. **Bhagwandeen v AG [2004] UKPC 21, (2004) 64 WIR 402 (T&T).** The Respondents' evidence would therefore have to demonstrate and prove the following": 1. That they were in a similar position to persons of comparable circumstances (the comparator test) - The situations must be comparable, analogous, or broadly similar, but need not be identical. Any differences between them must be material to the difference in treatment; and 2. That they were treated differently from those other person(s).

[37] The Court notes that while it was previously clear that they would also be obliged to show mala fides i.e. proof of an intentional and purposeful or irresponsible act, or "some element of deliberateness in the selection of a person for different treatment" (**per de la Bastide CJ in Civ. Appeal No. 102 of 1999 Boodhoo and Jagram v The Attorney General at page 11**) recent decisions from the Privy Council have raised serious doubt and it now appears that a claimant is only constrained to establish malice on the part of the Respondent where it has been specifically alleged.[13]

[38] What is patently clear is that regardless of the category of complaint (legislation or administrative acts), the burden of proof is on a complainant to show both likeness and differential treatment or inequality.

[39] When the Court turns to the case at bar, there is no suggestion that either the law itself or any specific administrative act is discriminatory. In fact, the whole of the Respondents' case as regards the purported breach of Article 12 of the Constitution is set out at paragraph 24 of their affidavits which provides as follows:

> "I have read the Constitution and believe that the various actions taken in relation to the RVIPF set out herein, are in breach of the Constitution and they have a direct adverse impact on me and breach of my rights as

13 Annissa Webster and others (Appellants) v The Attorney General of Trinidad and Tobago (Respondent) [2015] UKPC 10 at paragraph 23 -24.

granted under the Constitution and the terms and conditions of my employment as a Police Officer."

[40] This is woefully inadequate. Nowhere in the case of either of these Respondents is there even a hint that they have suffered some form of differential treatment or disadvantage in keeping with burden of proof which has been judicially prescribed. It follows that this aspect of the Respondents' case is not maintainable and counsel for the Respondents did not persuade the Court that this defective condition could be cured by amendment. Indeed, nowhere in the written or oral submissions was any attempt made to plainly articulate the Respondents' case in this regard.

[41] Not surprisingly, at the commencement of the second day of the hearing, Counsel for the Respondent wisely conceded that the relief sought in paragraph (a) the Fixed Date Claim Form is wholly unsupported. Counsel indicated that the Respondents do not intend to proceed with these claims and will seek to amend the Claim to reflect this. The concession is accepted by the Court because it is clear that the Respondents have failed to make a case of infringement of the Article 12 rights. This claim for relief is therefore struck out.

[42] The second core issue of the Respondents' Claim commenced with a challenge to the *vires* of the Police Service Regulations 2012. Again, on the second day of the hearing, Counsel for the Respondents conceded that *this* claim for relief is also wholly unsupported. In light of this, Counsel indicated that this aspect of the Claim is also not intended to be pursued. In light of this, the Court will also strike out the claim for relief set out at paragraph (b) of the Fixed Date Claim Form.

[43] In light of these concessions and the Court's findings herein, the only extant claims for relief being pursued by the Respondents were those set out at paragraphs (c) to (j) of the Fixed Date Claim Form. Counsel for Respondents contented that these claims demand a clear judicial interpretation of the scope of Article 97 of the Constitution and the exercise of the Governor's powers thereunder.

[44] Counsel argued that the affidavits of the Respondents raise important triable issues relative to Article 97. When he was asked to clearly articulate the Respondents' complaints, Counsel proceeded to comprehensively set out a case which he later conceded was not made out on the papers before the Court. Indeed, the Court was forced to concur that the case orally advanced by Counsel for the Respondents was such as to significantly alter the case which Applicants are to meet.

[45] When Counsel was asked to identify the gravamen of the complaint, he pointed the Court to paragraph 20 of the Respondents' affidavits which essentially recounts that 2012 Regulations purport to bring back into effect Part IV of the Police Act which in effect weakens the role of the Police Service Commission by taking away a substantial part of the its role. The Respondents contend that as a consequence, they are deprived of a vital buffer between themselves and the Commissioner of Police and the Governor.

[46] However, in pursuing this contention, the Respondents intend to raise challenges to (1) Governor's exercise of his power under Article 97 (1) (whether he must first obtain and then is mandated to comply with the advice of the Police Service Commission); the improper exercise of the Governor's power of delegation under Article 97 (5) of the Constitution; (3) the apparent conflict between section 11 of the Police Act No 12 of 1986 and Article 97 (1) of the 2007 Constitution and the effect of the existing laws under Article 115 of the Constitution; (4) the purported usurpation of the powers of the Police Service Commission (by the Commissioner of Police and/or Promotions Board) consequent upon the delegation of the Governor's powers under the Police Service (Delegation of Powers) Regulations 2012; (5) and in a collateral challenge, the Respondents also seek a declaration that Part IV of the Police Act No. 12 of 1986 is repugnant to the 2007 Constitution and should in accordance with section 115 (1) of the Constitution be construed so as to preserve the role and purpose of the Police Service Commission.

[47] Counsel further argued that the consequential actions which followed the purported delegation including the establishment of the Promotions Board, the Promotions Policy which imposed a mandatory requirement that applicants successfully complete

promotion examinations are all *ultra vires* the Constitution and therefore null and void. He submitted that the Promotions Board and the Commissioner are carrying out functions which are constitutional functions reserved to the Police Service Commission and the Governor.

[48] In this case therefore, the question which the Court must consider is whether on the face of the Respondents' case, all the facts on which they intend to base their claim are before the Court. The answer is clearly no. Having heard Counsel for the Respondents' submissions, the Court is persuaded Respondents' Claim Form does not reflect the case intended to be made out. If this Claim is to be viable, there is no doubt that the Claimant pleadings will require substantial amendments and this is conceded by their Counsel who cited a number of cases in support of the contention that the Claim should be permitted to survive this Application, proceed to first hearing where the court in the exercise of its case management powers should grant the Respondents leave to amend.[14]

[49] The question which then arises is whether it is fair for this court at this early stage to strike out the Claim. Learned Queens Counsel for the Respondents urged the Court to consider the serious legal issues which are raised by the Respondents in the Fixed Date Claim Form which she submitted required judicial guidance and were clearly of public interest. She also reminded the Court of the proper approach in considering striking out a claim. While the Court accepts Counsel's argument that the mere fact that the case is weak and not likely to succeed is not generally a ground for striking out,[15] the Respondents' case faces a fundamental roadblock which equally cannot be ignored.

[50] The Court is satisfied that it is not open to the Claimant to seek constitutional redress under Article 31(1) Constitution in respect of a breach of a constitutional provision

14 Per Lord Millett in R v Secretary of State for Trade and Industry ex parte Lonhro Plc. [1989] 1 WLR 525; Tawney Assets Ltd. v East Pine Management Ltd. HCVAP 2012/007 (BVI); Paul Limirick and Anor v Christian Brown SLUHCV2012/0217

15 Smith v Chief Constable of Sussex [2008] EWCA Civ 39, [2008] PIQR P12

other than those embodied in the Chapter 2 – Fundamental Rights and Freedoms of the Individual.

[51] While the constitutions in several of the other OECS member states contains provisions which provide that "*any person who alleges that any of its provisions other than a provision of Chapter II (Protection of Fundamental Rights and Freedoms) has been or is being contravened may, if he has a relevant interest, may apply for a declaration and relief under that section*",[16] the BVI Constitution has no similar provision.

[52] So that while the claimants in **Innis v Attorney General of St. Kitts and Nevis [2008] 73 WIR 187** and **Fraser v Judicial and Legal Services Commission [2008] 73 WIR 175** could properly maintain claims in respect of constitutional breaches other than fundamental rights provisions, under the BVI Constitution, Article 31 (1) affords relief only in respect of the foregoing provisions of Chapter 2 which deals with Fundamental Rights and Freedoms of the Individual. The Respondents therefore cannot (as they purport to do in the Fixed Date Claim Form) apply for redress "*pursuant to section 31 (1) of the Constitution for alleged contraventions of sections 91 (2) and (9), 96 and 97 of the Constitution*."

[53] In light of this critical matrix, the Court is satisfied that the proper recourse available to the Respondent would be an action for judicial review challenging the exercise of the Governor's powers under section 97 of the Constitution and any decisions and actions taken further to the improper delegation of his functions and the vires of section 11 and Part IV of the Police Act.

[54] In this regard, the Court is guided by the Privy Council dicta in **Kemrajh Harrikissoon v Attorney General of Trinidad and Tobago** (**1979) 31 W.I.R. 348.** In that case, Lord Diplock explained the restrictions upon the use of section 24 as a constitutional review procedure -

[16] St. Kitts Constitution section 96; Antigua and Barbuda Constitution section 119 and St. Lucia Constitution section 105.

> *"The right to apply to the High Court under s.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 administration which involves no contravention of any human right or fundamental freedom."*

[55] In other words, where there is a parallel remedy, constitutional relief should not be sought unless the circumstances under which the 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.[17]

[56] At page 7 of the unreported judgment **In the Application of Corporal No. 10089 Christopher Holder**[18]**,** Bharath J recommended this approach:

> "In my view, comingling of constitutional matters with errors in administrative decisions is inappropriate in judicial review

17Jaroo v Attorney-General of Trinidad and Tobago17
[18] HCA No. 2581 of 1993 Trinidad and Tobago

proceedings and should be struck out. The proper procedure to be followed where there are mixed questions of constitutional and administrative law is to file separate proceedings for review of administrative decisions and constitutional matters from infringement of the Constitution and then consolidate them to be heard together. All proper reliefs with damages can then be granted"

[57] Courts have repeatedly warned against the misapplication of constitutional proceedings. [19] The definitive position is now set out in the decision of the Judicial Committee in **Jaroo v Attorney-General of Trinidad and Tobago**[20] and **Attorney General v Ramanoop.**[21] Where, as in the case at bar, the Respondents no longer contend that the acts complained of have infringed upon their constitutional rights (and it is not alleged that Article 97 give rise to any " fundamental right"), it is clear that constitutional relief under section 31 would not be appropriate.

[58] Counsel for the Applicants contended that in this case, the option was available to the Respondents to approach the Court on a judicial review application seeking administrative orders under CPR Part 56.3. Given the remaining extant issues raised in the Fixed Date Claim and having heard the oral submissions advanced by Counsel for the Respondents, the Court is satisfied that this alternative form of redress would be more appropriate and suitable in the circumstances.

[59] Judicial review is by no means an automatic entitlement. Leave has long been required from the court to commence a claim for judicial review.[22] The application for leave must be filed prior to the filing of the claim form. The application must state the various matters set out in CPR 56.3(3), and by CPR 56.3(4) which must be verified by evidence on affidavit.

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19 Chookolingo v Attorney-General of Trinidad and Tobago [1981] 1 WLR 106, 111-112, and Attorney-General of Trinidad and Tobago v McLeod [1984] 1 WLR 522, 530 and per Lord Bingham of Cornhill in Hinds v Attorney-General of Barbados [2002] 1 AC 854, 870, para 24

20 [2002] 1 AC 871

21 [2005] UKPC 15 and see Felix Augustus Durity v The Attorney General of Trinidad and Tobago, [2009] 4 LRC 376,

22 ECCPR Part 56.3

[60] Although this was not raised by the Respondents, Counsel for the Applicants pointed out that the Court does have discretion under CPR Part 56.6 (3) to give leave for the matter to proceed as if an application for leave had been advanced under CPR Part 56.3. She submitted however that the current state of the case before the Court will in any event require substantial amendment (tantamount to an entirely new claim with different defendants) if the application is to be maintainable. From all accounts, not only would the proper parties not be before the Court, but the relevant grounds of review and their factual underpinning would be largely absent. Counsel for the Applicants emphasized the obvious prejudice which would be suffered if the Court were to adopt this course and she submitted that this prejudice could not be compensated in costs.

[61] In these circumstances, the Court has to consider whether it would be appropriate to exercise its discretion under CPR Part 56.6 (2) and (3). The relevant rule provides as follows:

> **"56.6 (1) This rule applies where a claimant issues a claim for damages or other relief other than an administrative order** but where the facts supporting the claim are such that the only or main relief is an administrative order.
> (2) **The court may at any stage direct that the claim is to proceed by way of an application for an administrative order.**
> **(3) If the appropriate administrative order would be for judicial review, the court may give leave for the matter to proceed as if an application had been made under rule 56.3.**
> (4) If the court makes an order under paragraph (2), it must give such directions as are necessary to enable the claim to proceed under this Part."

[62] The remit and application of this rule was judicially considered by the Eastern Caribbean Court of Appeal in **General Aviation Services Ltd. and Another v The Director General of The Eastern Caribbean Civil Aviation Authority and Another**.[23] In that case, the claimants filed a fixed date claim form seeking various administration orders. In particular, they sought a declaration that the respondents

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had breached the rules of natural justice and they sought an order to quash the decision prohibiting them from operating any aircraft. They also sought damages for loss of income and damages to be assessed. The claimants did not give the requisite one month's notice required by the Article 28 of the Code of Civil Procedure of Saint Lucia nor did they seek and obtain leave to commence judicial review proceedings as required by CPR 56.3. On an application by the respondents, the High Court threw out the claim. The appellants obtained leave to appeal and filed a notice of appeal claiming that the High Court should have acted under CPR 2 26.9 in treating the failure to obtain leave as a mere irregularity which could be corrected. The Claimant argued that CPR 56.6 gives the court a power to convert a claim to an application for leave to commence judicial review proceedings.

[63] In dismissing the appeal, Mitchell JA held that CPR 56.6 does not apply to the facts and circumstances in this case. At paragraph 8 of the judgment he notes the following

> "The courts have long distinguished between public law and private law procedure, and it is established that the judicial review procedure has special provisions designed to protect public bodies, most notably, a short time limit and the need to obtain leave. The courts have had to consider the extent to which a declaration or injunction against a public body may be sought by way of an ordinary claim when the claim raises public law issues that could have been brought by way of a claim for judicial review. The House of Lords has held that, as a general rule, it is contrary to public policy and as such an abuse of process for a person seeking to establish that a decision or action of a body infringes rights which are entitled to protection under public law, to proceed by way of an ordinary claim rather than the judicial review procedure, thereby evading the provisions intended to protect public authorities. In light of the discretion given to the court by CPR 56.6, the rule is not inflexible and private law proceedings should only be struck out if they are an abuse of the process of the court. CPR 56.6 provides that where a claimant issues a claim in private law, e.g., for damages, but the facts are such that the main relief is an administrative order, the court may direct that it is to proceed by way of an application for an administrative order and give the necessary directions to

enable the claim to proceed. This case was not a claim in private law but was clearly a claim in public law being as it was a claim for judicial review. As such, the provisions of CPR 56.6 do not apply."

[64] Although this proposed course was not advanced by the Respondents, applying this binding dictum to the case at bar, the Court notes that the Respondents' claim seeks various administration orders including declaratory relief that relevant statutes and administrative acts are ultra vires. The Fixed Date Claim Form was clearly a claim in public law filed under CPR Part 56 and not an ordinary claim seeking relief other than an administrative order. As such the provisions of CPR Part 56.6 would not apply.

[65] In the circumstances and for the reasons outlined above, it is ordered that:

i. The Respondents' Fixed Date Claim Form is struck out.

ii. There is no order as to costs.

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Vicki Ann Ellis
High Court Judge