EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

DOMHCV2014/0332

BETWEEN:

[1] EUSTUS BENJAMIN aka EUSTACE BENJAMIN

Applicants

and

[1] INSPECTOR ROMAIN RIVIERE
[2] THE ATTORNEY GENERAL OFTHE COMMONWEALTH OF DOMINICA

Respondents

Appearances:

Mr. David Bruney with Miss Danielle Edwards for the Applicant
Ms. Pearl Williams and Miss Nuraiyah Sebastien for the Respondents

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2015: July

RULING ON WRITTEN SUBMISSIONS

[1] **STEPHENSON, J.:** This is an application by the applicant filed on 1st May 2015 for the defence filed in this matter to be struck out. On 17th April 2015 the applicant was given leave to file and serve a new affidavit in the matter and the defendants were to file and serve their affidavit in response on or before 15th May 2015. Each party was also ordered to file written submissions on or before 30th May 2015. On 4th June 2015, the date set for arguments the parties agreed to rely on their written submissions filed. This is my ruling.

Brief background facts

[2] In this case the applicant has sued the defendants for damages for wrongful imprisonment and malicious prosecution. He claims special damages, damages

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for conversion of his personal property which he contends was wrongfully and tortiously confiscated, aggravated and exemplary damages.

[3] The circumstances of the case can be briefly stated as follows. That on 8th August 2011 the applicant was arrested and charged for the murder of Mr Joseph Costello. The charge of murder was formally discontinued in June 2014. The applicant contends *inter alia* that the very fact that the criminal matter was discontinued is a clear indication that the charge of murder against him was brought maliciously and that he was prosecuted without material cause.

[4] The applicant contends that he was arrested, detained and remanded from 5th August 2011 until 25th September 2012 when he was granted bail in his matter. He contends that his personal belongings were also confiscated by the Police in the course of the matter. Further, that he was extensively interrogated in the absence of his Lawyer. That he was malisciously prosecuted in that the defendants ought to have known that the charge against him was not sustainable and that the actions of the defendant caused him to feel fear and anxiety, not only by him but also by the members of his family.

[5] The defendants deny liability and contend even though the criminal matters against the applicant was discontinued by the learned Director of Public Prosecution, that at all material times the defendants had good, reasonable and probable cause to arrest the applicant. The defendants' contend that the applicant was lawfully arrested, charged and detained and that there was reasonable and probable cause to arrest and charge the applicant.

Applicant's Submissions

[6] In the submissions in support of the application, counsel for the applicant launched into a rather lengthy analysis of the defendant's defence which in my view amounted to submissions which would quite properly be launched possibly at the end of the trial of the matter.

[7] Counsel submitted that the defence failed to comply with the requirements of Civil Procedure Rules "CPR" 2000 10.5(4) which provides that the defendant must state

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his reasons for denying the allegations contained in the statement of claim. Counsel asserts that the defence contains bare naked assertions which do not provide information or the evidence that was allegedly available to the defendants which prompted their actions.

[8] Counsel for the applicant submitted that the defence contains wholly unsubstantiated and bare assertions when, for instance at paragraph 4 of the defence the defendants state that the first defendant had information that the applicant was part of a plot to rob/raid Silks Hotel. That the discontinuance filed by the learned DPP serves as irrefutable proof that such information in the possession of the 1st named defendant was not only insufficient to substantiate a charge of murder against the applicant but devoid of the necessary reasonable and probable cause.

[9] Learned counsel for the applicant contended that the discontinuance in the matter based on authorities cited[1] is evidence of the malicious prosecution. Counsel further submitted that against this back ground the defence plea, that the discontinuance is not evidence of malice is nullified. Counsel submitted that when one considers the fact that there was a discontinuance it is evidence of obvious neglect by the defendants and demonstrates that there was malice on their part.

Defendant's Submission

[10] The Defendants resisted the application and submitted that it should be dismissed by the court with costs.

[11] State counsel on behalf of the defendants contended that the applicant failed to clearly state in his application that there has been any failure by the defendants to comply with any rule, practice direction, order or direction given by the court, or that the defence or part thereof should be struck because it failed to disclose any reasonable ground for defending the claim or that the defence as filed is an abuse of process as is required by Part 10.5 (4) of CPR.

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[1] Khan –v- Sing (1960) 2 WIR 447, Goddard –v-Smith (1704) KB 497, 87 ER 1107. "Introduction to the law relative to trials at nisi prius" by Sir Francis Buller 7th Ed Book IP.18A Para 14.

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[12] State counsel also submitted that the applicant has not established that the defence on the face of it is obviously unsustainable and that it cannot succeed or in some way is an abuse of the process of the court, and in the circumstances the application has no substantial basis to ask the court to exercise its jurisdiction to strike the defence.

[13] State counsel further submitted that even if the defence could have been better pleaded or be more informative this is no ground upon which it could be dismissed. Re: **Sphereinvest Global High Yield Fund Limited et al[2].**

[14] State counsel further submitted that the defence, as filed by the defendant, has clearly established that there are reasonable grounds for defending the claim and that there are issues which should be investigated at trial and that the matter should proceed to trial. Re**: Lennox Linton et al –v- Anthony W Astaphan et[3].**

The Principles for Striking Out:

[15] Defendants have an obligation to set out all the facts on which they wish to rely. They must set out all the facts on which they rely on to dispute the claim.[4] A defendant may not rely on any allegation of factual argument which is not set out in their statement of case, but which could have been set out there unless the court gives permission or the parties agree[5].

[16] The defendants' case is that there was at all material times reasonable grounds for arresting, detaining and charging the applicant.

[17] In civil litigation, courts have the power to remove the whole or part of a statement of case. The court is enabled to do so by Part 26.3 of CPR. The relevant paragraphs read

> CPR 26.3 provides:
> **"Sanctions – striking out statement of case**
> 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

[2] BVIHC(COM) 2011/0087
[3] DOMHCV2008/0436
[4] CPR 2000 Part 10.5(1)
[5] CPR 2000 Parts 8.7A and 10.7

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appears to the court that –
(a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings
(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
(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
(d) 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.
(2) If –
(a) the court has struck out a applicant's statement of case;
(b) the applicant is ordered to pay costs to the defendant; and
(c) before those costs are paid, the applicant starts a similar claim against the same defendant based on substantially the same facts;
the court may on the application of the defendant stay the subsequent claim until the costs of the first claim have been paid."

CPR 26.4 stipulates:
"**Court's general power to strike out statement of case**
26.4 (1) If a party has failed to comply with any of these rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an "unless order".
(2) Such an application may be made without notice but must be supported by evidence on affidavit which –
(a) contains a certificate that the other party is in default;
(b) identifies the rule or order which has not been complied with; and
(c) states the nature of the breach.
(3) The court office must refer any such application immediately to a judge, master or registrar who may –
(a) grant the application;
(b) direct that an appointment be fixed to consider the application and that the court office give to all parties notice of the date, time and place for such appointment; or
(c) seek the views of the other party.
(4) If an appointment is fixed the court must give 7 days notice of the date, time and place of the appointment to all parties.
(5) An "unless order" must identify the breach and require the party in default to remedy the default by a specified date.
(6) The general rule is that the respondent should be ordered to pay the assessed costs of such an application.
(7) If the defaulting party fails to comply with the terms of any "unless order" made by the court that party's statement of case shall be

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struck out.
(8) Rule 26.9 (general power of the court to rectify matters where there has been a procedural error) shall not apply.
• Rule 11.16 deals with applications to set aside any order made on an application made without notice."

CPR 26.5 provides that:
"Judgment without trial after striking out
26.5 (1) This rule applies where the court makes an order which includes a term that the statement of case of a party be struck out if the party does not comply with the "unless order" by the specified date.
(2) If the party against whom the order was made does not comply with the order, any other party may ask for judgment to be entered and for prescribed costs appropriate to the stage that the proceedings have reached."

[18] The principle upon which a judge may strike out a statement of case is not in doubt and is well established. The striking out of a party's statement of case, or most of it, is a severe step which is only to be taken in exceptional cases. In taking such action a court is to act cautiously because the exercise of this jurisdiction denies 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.

[19] It is important that a court is 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.

[20] The statement of Sir Dennis Byron in the case of **Baldwin Spencer –v- The Attorney General of Antigua and Barbuda**[6] which has been quoted and followed in this court on numerous occasions is instructive: He said

> "This summary procedure should only be used in clear and obvious cases, when it can clearly be seen, on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court."

[21] Justice of Appeal Ola Mae Edwards in the much cited case of **Citco Global NV –v- Y2K Finance**[7] stated

[6] CIV. APP. NO.20A of 1997 (Antigua & Barbuda)

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> "[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
>
> [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 plain or obvious answer; or the law as 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 requests 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."[8]

[22] It is to be noted that there is the situation where there are those cases which when a review is conducted of the statements of case the party whose case has been reviewed does not stand any chance of success and to allow the defence to stand or the claim in some instances to stand would likewise cause injustice and would also amount to an abuse of the courts processes to have the party on the other side put to the expense of defending or prosecuting a claim when it is plain and evident that it cannot be successful.

[23] The test therefore can be stated thus that the judge must be persuaded that the party will be unable to defend his or herself or prove the allegations made or that the statement of case is incurably bad, or that the statement of case discloses no reasonable ground for defending or prosecuting the claim and has not real prospect of succeeding in litigating the matter at trial.

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[7] BVI Civil Appeal No 22 of 2009

[8] Ibid paragraphs 13 & 14

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[24] In the case of **Bridgeman –v- Mcalpine Brown**[9] it was held that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly be determined by hearing oral evidence.

[25] It is incumbent on the judge in applications such as the one in the case at bar to also consider the effect of the order on any parallel proceedings. Also, that the power of the court must be exercised in accordance with the Overriding Objective of the CPR that is to deal with the case justly at all times.

[26] The statement of case under attack in the case at bar is the defence. A defence is intended to answer the allegations made in the particulars of claim. As in all statements of claim and in all pleadings as they were called under the previous dispensation of civil procedure should make clear the general nature of the case. The purpose of the defence is to let the other side know the case it has to meet and to prevent surprise at trial. It is essential that it contains particulars that are necessary to serve that purpose. The defence does not necessarily have to be extensive as the defendant in the due course of the matter will have to file witness statements which are intended to provide particulars. Re: **East Caribbean Flours Limited** v **Ormiston Ken Boyea**[10]

Court's Considerations:

[24] I have given careful consideration to the submissions made by both parties in the matter and I have made a finding that effectively disposes of this application.

[27] In the Anguilla case of **Robert Conrich v Ann Van Der Elst**[11] Rawlins J said that "It is only where a statement of case does not amount to a viable claim or defence, or is beyond cure that the court may strike out".

[28] In an application to strike out a statement of case therefore, the court should determine whether the claim is bound to fail and in that regard the court is only concerned with the statement of case which it is alleged discloses no reasonable

[9] [2000]LT.L. January 19 2000 as quoted by Pereira CJ in **Ian Peters –v- Robert George Spencer** HCVAP 2009/016 Antigua & Barbuda

[10] SVG Appeal No. 12 of 2006

[11] AXAHCV2001/0002

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grounds for bringing or defending the claim. Consequently, a defendant cannot be permitted to continue to pursue a defence on a statement of case which has no real prospect of success.

[29] The court's concern at this stage is to determine whether the defence as pleaded, discloses any reasonable ground for defending the action in order that the case may be tried on its merits and also whether the defence has any real prospect of succeeding. I am reminded that at this stage of the matter and in proceedings such as these the court is not required to take an in depth look at the facts of the case or to mount a detailed inquiry into the facts of the case.

[30] I do not consider the suggestion by counsel for the applicant that filing a notice of discontinuation in criminal proceedings in the magistrate's court *ipso facto* means that the investigation of the murder, the charge laid against the applicant and his subsequent remand and seizure of his property automatically amounts to malicious prosecution and wrongful imprisonment entitling him to damages as claimed or that it is a clear and obvious case of liability.

[31] It is clear from the submissions made by counsel for the applicant that there are many factual issues to be investigated and resolved and many inferences to be drawn which in my view can only be done upon a full investigation of the case which would include receipt of evidence by the trial judge who will also review any documentary evidence which would be tendered and who will then be in position to make findings of fact and draw inferences therefrom

[32] I am of the view that the defendants have presented a viable defence and are not in violation of Part 10: 5 (3) of CPR. I decline to strike out the defence as disclosing no reasonable grounds. Applying the well-known principles as stated above to be applied in applications such as this, I consider that the defence raises issues that could only be properly dealt with at trial. The application is therefore struck out and the matter will take its normal course. Costs to the defendant to be assessed if not agreed

M. E. Birnie Stephenson

High Court Judge

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