

IN THE EASTERN CARIBBEAN SUPREME COURT

COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV 2016/0067

BETWEEN:

- [1] HECTOR JOHN
- [2] BERTILIE VIDAL
- [3] HAZEL VIDAL
- [4] GIBBS FREDERICK
- [5] KARAM HARRY
- [6] THOMAS LOUIS
- [7] CHESTER EDWARDS
- [8] MICHAEL SHILLINGFORFD
- [9] NESLEY QUASHIE
- [10] CARL MATTHEW
- [11] ROTLEY COMMON
- [12] MATTHEW ETIENNE
- [13] ANNA THECLA ANDREW
- [14] SIMBERT SMITH
- [15] VANIA EUZEBE
- [16] PETER VANTY VIDAL
- [17] BERNARD BOSTON
- [18] DICKY VIDAL
- [19] HILARY JOHN
- [20] ALEX DAVID HOWE
- [21] GILBERT FREDERICK
- [22] KEITH BOUGOUNEAU
- [23] SAMPSON VIDAL
- [24] DELVIN VIDAL
- [25] ROSETTE JNO CHARLES

[26]DERRICK PETER
[27]LENNARY JOHN
[28]GIFFORD PAUL
[29]LEROY WILLIAMS
[30]CUTHBERT VIDAL

Claimants

and

[1] THE ATTORNEY GENERAL OF THE
COMMONWEALTH OF DOMINICA
[2] THE CHIEF MAGISTRATE
[3] INSPECTOR JOHNNY WILLIAMS

Defendants

Before: The Hon. Madam Justice M E Birnie Stephenson

Appearances:

Miss Cara Shillingford with Mr Julian Prevost and Mr Ronald Charles for the
Claimants/Respondents

Mr Anthony Astaphan SC with Miss Tameka Hyacinth-Burton, Solicitor General
instructed by Miss Arthlyn Nesty, State Counsel for the Defendant/Applicants

2016: October 5

2018: April 18

RULING

[1] STEPHENSON J. The Constitution of the Commonwealth of Dominica (The Constitution) is the supreme law of the land and if any other law is inconsistent with this Constitution, the Constitution shall prevail and that other law shall, to the extent of the inconsistency, be void. This is enshrined in section 117 of The Constitution and stated in these terms:

“The Constitution is the supreme law of Dominica and, subject to the provisions of this Constitution if any other law is inconsistent with this Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

- [2] The High Courts are required to safeguard the supremacy of The Constitution.
- [3] The Claimants filed a Fixed Date Claim Form on the 3rd March 2016 in which they seek, among other reliefs, a declaration that:
- I. various sections of the Riot Act¹ and the Riot Act as a whole, contravenes various sections of The Constitution and are therefore void and of no legal effect;
 - II. **the Claimant’s rights to freedom of expression as protected by various** sections of the Constitution have been contravened by the third named Defendant in filing criminal complaints against them on the 7th day of December 2015 and 11th June 2015;
 - III. the criminal complaints which have been brought against the Claimants **before the Magistrate’s Court which allege contravention of the Riot Act be** all dismissed;
 - IV. an injunction restraining the magistrates for calling or hearing the said complaints.
- [4] On the 18th day of March 2016 the Defendants filed an application to strike out the Fixed Date Claim on the following grounds that:
- (i) the fixed date claim filed by the Claimants pursuant to section 16 and 103 of The Constitution should be struck out and dismissed on the grounds that:
 - a. They disclose no reasonable cause of action;
 - b. Its frivolous and vexatious and/or an abuse of process of the court.

¹ Chapter 10:02 of the Laws of the Commonwealth of Dominica

- (ii) the criminal charges filed against the Claimants/Respondents on the 7thDecember 2015 and 11th June 2015 do not contravene any of the fundamental rights and freedoms of the Claimants/Respondents;
- (iii) the application for an interim injunction against the Second Applicant/Defendant is misconceived and should be dismissed
- (iv) in the event that this application is dismissed, the Defendants be given time to file their respective defences.

- [5] The Claimants opposed the application and contended that:
- a. there is a cause of action which is clearly disclosed in their fixed date claim form;
 - b. that the application to strike is misconceived in that the substantive ground for striking the claim is in fact the substantive issue to be decided and ought not to be the basis of a preliminary objection;
 - c. that the criminal complaints against the Claimants allege contravention of the Riot Act which Act the Claimants allege is unconstitutional in that it contravenes sections 2,3,5,8,20 and 12 of the Constitution and it is the duty of the Court to hear the Claimants' case, **consider the Defendants' defence** and determine the matter; and
 - d. the Claimants are also claiming that they were discriminated against in contravention of section 13 of The Constitution.

The Basic Facts

- [6] The Claimants are all persons who live in the village of Salisbury. Salisbury, according to Mr Hector John who is the parliamentary representative of that area,² is an agricultural community located on the West Coast of the Commonwealth of Dominica.

² See First Affidavit of Hector John sworn on the 29th February 2016 and filed on the 3 March 2017

[7] That there are farms that are located a considerable distance away in the heights of Salisbury which are accessible by road way which road way is in a deplorable condition and are in desperate need of repair. That there have been many attempts to bring to the attention of the government the need for these roads to be repaired. That the roads have not been repaired and have deteriorated to the point that the farms are only accessible by foot.

[8] The concerns of villagers from Salisbury in the past have been raised in parliament and they have in the past also mounted peaceful protests but to no avail. On the morning of the 11th May 2015, the E O Leblanc High Way in the vicinity of Salisbury was blocked by persons unknown. Later in the day many persons were on the road in the vicinity of the blocked road.

[9] There were persons on the road chanting "fix the roads", the police came to the scene and ordered the persons to disperse and when the crowds did not disperse the police fired off rounds and tear gas at the crowds and in the vicinity of the protest. The Claimants contend that it was at all material times a peaceful process.

[10] The Claimants were persons allegedly involved in the protest and they were subsequently charged and brought before the Magistrates Court, charged with committing an offence contrary to section 4 of the Riot Act Chapter 10:02 of the Dominica Revised Laws of 1990.

Principles of Striking Out

[11] Under the provisions of CPR 2000 Part 26.3 (1), the Court may strike out a statement of case or part of a statement of case where:

- "(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 process of the Court, or is likely to disrupt 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."

[12] The principles on which the jurisdiction of the Court is exercised when striking out a statement of case were stated by the Court of Appeal in the case *Baldwin Spencer v Attorney-General of Antigua and Barbuda*³. The principle adumbrated in this case has been applied by the Courts throughout the jurisdiction and is considered the principle to be followed. It is noted that this case was decided under the 1970 Rules of the Supreme Court however those principles have been held to remain the same under CPR 2000.

[13] In the *Baldwin Spencer* case Byron C.J. stated the principles as follows:

"In brief the Court is empowered to dismiss an action in a summary way without a trial where the statement of claim discloses no cause of action, or is shown to be frivolous or vexatious or is otherwise an abuse of the process of the Court. This summary procedure should only be used in clear and obvious cases, when it can clearly be seen on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court. In one of the cases from Canada on which reliance was placed, the standard was expressed in terms that the Claim should not be struck out if there is even a scintilla of a cause of action (*Operation Dismantle v the Queen* (1986) L.R.C. (Constitutional) p. 421)."

[14] Further at page 8 of the *Baldwin Spencer* case the Learned Chief Justice stated:

"... the operative issue for determination must be whether there is even a scintilla of a cause of action. If the pleadings disclose any viable issue for trial then we should order the trial to proceed but if there is no cause of

³Civil Appeal No. 20A of 1997

action we should be equally resolute in making that declaration and dismiss the appeal."

[15] It is generally accepted that striking out is a draconian step and one which the court will use sparingly. At this stage the Court is not required to consider the prospect of success of the case.

[16] In *Robert Conrich v Ann Van Der List*⁴ Rawlins J in considering an application to strike out stated:

"It is only where a statement of case does not amount to available claim or defence, or is beyond cure that the court may strike out,..."

[17] In *Citco Global Custody vY2K Finance*⁵ Edwards JA in considering the principles to be applied on an application to strike out a statement of case pursuant to CPR 2000 part 6(3)(1) had this to say:

"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 a plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial and its ability to strengthen its cases through the process of disclosure and other court procedure 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

⁴AXAHCV 2001/002

⁵BVIHCVAP 2008/022

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."

[18] A statement of case before the Court must disclose a reasonable cause of action which is simply stated as "a factual situation, the existence to which entitles a party to obtain from a Court a remedy against another person. A statement of claim can be struck out if it discloses no reasonable cause of action. What is a reasonable cause of action? "A reasonable cause of action is one with some chance of success when only **the allegations on the pleadings are concerned.**" ⁶

[19] In considering applications to strike out a statement of case, the Court ought to bear in mind that "so long as the statement of claim or the particulars disclose some cause of action, or raises some question fit to be decided by the judge or jury, the mere fact that the case is weak and not likely to succeed is no ground for striking out". ⁷

[20] At this stage of the proceedings the Court is not required to carry out a detailed and minute examination of the facts, allegations and documents of the case to see whether there is a cause of action contained therein. "... The purpose of considering an application to strike out a statement of claim, the truth of the allegations contained in **the pleading is assumed**" ⁸

The Applicants' Submissions

⁶Per Lord Pearson in *Drummond Jackson -v- British Medical Association* [1970] 1 All ER 1094 CA

⁷*Re: Davey -v- Benton* [1893] 1 QB 185, *Moore -v- Lawson*(1915) 31 TLR 48 CA, *Wenlock -v- Maloney* [1965] 2 All E R 871 (CA).

⁸Per William JA in *M4 Investments -v- Clico (Barbados) Ltd.* (2006) 68 WIR 65 at Page 82, paragraph 36

[21] It is the submission of the Applicants that the Claimants' action discloses no reasonable cause of action and is frivolous and vexatious. It was contended that the Claimants have no constitutional rights which were breached by the proclamation and orders to disperse under the Riot Act. Further, that criminal charges brought against them are entirely proper and constitutional which are to be determined by the Criminal Courts.

[22] The Applicants also contend that the fundamental rights provisions of The Constitution are not absolute and do not guarantee or protect the right to block highways or commit acts of violence or riot. That in the circumstances of this case the Riot Act does not contravene any provisions of the fundamental rights provisions.

[23] The Applicants also contend that in the alternative, the Riot Act is reasonable required in the interest of maintaining public safety and order, and for the purposes of protecting the rights and freedoms of others. Furthermore, that the Riot Act is reasonably justifiable in a democratic society.

[24] It was also submitted on behalf of the Applicants **that the High Court's function is not** to determine whether or not the Claimants committed the offences as charged; this determination is for the criminal court. Re: Chief of Police –v- Nias⁹

[25] The Applicants also contended that it is inappropriate to bring a constitutional claim where the facts are in dispute and further, that the constitutional jurisdiction of the Court should not be invoked where there is an alternative and adequate means of redress, in that it is open for the Claimants to contest the constitutionality of the Riot Act before the Magistrates Court or the High Court.

The Claimants (Respondents') Submissions

[26] The Claimants vigorously opposed the application made by the Defendants to strike out their claim. Learned Counsel Miss Shillingford on their behalf submitted that the **application should not be granted and that the pleadings “undoubtedly” disclose a**

⁹(2008) 73 WIR 201

cause of action. It was submitted that the Riot Act which was enacted in 1987 contains **provisions which allow the “killing, maiming and hurting” of persons with impunity.** It was also contended that there are provisions of the Riot Act which are extremely vague and ambiguous.¹⁰

[27] Learned Counsel also submitted that the Riot Act contravenes several provisions of The Constitution, and that it is the contention of the Claimants that it has no place in the twenty – first century in civilized society.

[28] Learned Counsel on behalf of the Claimants urged the Court to consider the Courts decision and the test as laid down in *Spencer –v- Attorney General*¹¹.

[29] Learned Counsel also urged the Court to consider the case of *Ingram and others – v- Glington and another*¹² which stated “... ***claims should only be struck out in plain and obvious cases and of course, courts should look with particular care at constitutional claims, constitutional rights emanating from a higher order law***”.

[30] Learned Counsel Miss Shillingford also submitted that it is the role of the judiciary to assess legislation to review legislation in order to determine whether they comply with the provisions of the constitution, and that in interpreting the provisions of The Constitution, the Court must be mindful of the current values of the Society.

[31] It was submitted additionally, that the Riot Act contravenes the rule of law, constitutional doctrine and should therefore be declared null and void and that the Claimants’ rights to freedom of expression under section 10, freedom of assembly and association under section 11, freedom of movement under section 12 and protection from discrimination under section 13 have been contravened by the third Defendant in filing criminal complaints against them.

[32] It was submitted by Miss Shillingford that the Riot Act, which was enacted in 1897, contains certain provisions which were acceptable to the society in 1897, however in

¹⁰See paragraph 5 of the Claimants Skeletal Arguments

¹¹ [1999] 3 LRC 1

¹²(2006) 69 WIR 20 @ page 11

2016 the provisions of the Riot Act are not consistent with the values of our society today and they contravene the provisions of The Constitution.

[33] Learned Counsel sought to review the history and the sections of the Rule of Law which she submitted was unconstitutional and should be considered by the Court.

[34] Learned Counsel also submitted that the Riot Act was uncertain and unclear and in doing so the Act ran afoul of the Rule of Law, in that, the Rule of Law requires the law to be obeyed and ought not to be vague and ambiguous. Learned Counsel relied on the learning found in Fundamentals of Caribbean Constitutional Law¹³

“The rule of law demands that laws be certain so that citizens can regulate their conduct. This is a dimension of accessibility of law to the public. We must be able to adequately discover what is permitted and what our duties and rights are. Legislation that is “hopelessly vague must be struck down as unconstitutional”.... Criminal statute will violate the due process right and, likewise, the right to the protection of the law if it is so vague that a citizen cannot regulate his or her conduct...”

[35] Learned Counsel Miss Shillingford also argued that the Riot Act permits killing, maiming or hurting persons suspected of committing an offence without affording those persons a fair hearing and that this contravenes section 8 of the constitution which provides persons guaranteed protection of the law. Further that the immunity **provided by the Riot Act contravenes the victims’ rights to access to the law** which must be addressed.

[36] Learned Counsel went on in her submissions to review other parts of the Riot Act **which she contends contravenes her client’s constitutional rights. I am of the view that** it is not necessary at this stage to delve into all of the aspects of the Constitution which Counsel Contends that the Act contravenes.

¹³by Tracy Robinson, Arif Bulkan and Adrian Saunders at page 270:

The Court's Considerations

[37] To start, the point must be made abundantly clear that the Court is not concerned with **whether any person is 'guilty' of rioting or riotous conduct**. Rather, the concern is to determine whether a reasonable cause of action has been made out by the Claimants in their application for the Riot Act to be deemed unconstitutional for the reason they claim.

[38] A Claimant who comes to the Court must state a case that is known to or created by law. The case (statement of claim or statement of case) 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.

[39] The Court has the discretion to strike out a party's statement of case either in the whole or in part as stated in Part 26 (3) of the CPR 2000 ("CPR").¹⁴ The Court in its inherent jurisdiction can also strike out a statement of case which discloses no cause of action, or parts of the case which are vague, immaterial, unknown to law, or which is found to be abusive of the process of Court or is frivolous or vexatious.

[40] It is settled law that the jurisdiction to strike out is to be used sparingly and is appropriate only in plain and obvious cases. *Re: Tawney Assets Limited-v-East Pine Management Limited and Ors*¹⁵

[41] Our Court of Appeal in *Spencer v Attorney General and others*¹⁶ set out the approach to be taken by a judge on an application to strike out in a constitutional action. While that decision dealt with Order 18, rule 19 of the old Rules of the Supreme Court, Part 26.3 and 26.4 has now replaced the old rule and is now relevant. The Court of Appeal in the *Spencer* Case upheld the decision of the trial judge. The court held that the trial Judge had exercised his discretion properly in disposing of the matter at the first opportunity. Byron, CJ stated that:

¹⁴ Quoted Above

¹⁵ *Civ Appeal HCVAP 2012/007 at paragraph 22*

¹⁶ (1999) 3 LRC 1

"Regardless of the length or difficulty of the argument, which has already been concluded the operative issue for determination must be whether there is a 'scintilla of a cause of action'. If the pleadings disclose any viable issue for trial then we should order the trial to proceed but if there is no cause of action we should be equally resolute in making the declaration and dismissing the appeal."¹⁷

[42] In the Lonhro Case¹⁸ Millet J had this to say:

"When dealing with such applications the Court's function is limited to the scrutiny of the statement of claim. It tests the particulars which have been given in each averment to see whether they are sufficient to establish a cause of action. It is not the Court's function to examine the evidence to see whether the plaintiff can prove his case or to assess its prospects of **success...** "

[43] The Court will therefore examine the pleadings to determine whether there is a 'scintilla of a cause of action' or whether the action is indeed frivolous, vexatious or an abuse of the process of the Court.

[44] A statement of case before the Court must disclose a reasonable cause of action which is simply stated as "a factual situation, the existence to which entitles a party to **obtain from a Court a remedy against another person**".¹⁹

[45] A statement of claim can be struck out if it discloses no reasonable cause of action. What is a reasonable cause of action? "A reasonable cause of action is one with some chance of success when only the allegations on the pleadings are concerned. Per Lord Pearson in Drummond Jackson -v- British Medical Association²⁰

¹⁷ Ibid at page 10

¹⁸[1991]4 All E R 965

¹⁹ Per Lord Diplock in Letang -v- Cooper [1965] 1Q8 232 at p242

²⁰ [1970] 1All ER 1094 CA

[46] In considering applications to strike out a statement of case, the Court ought to bear in mind that "so long as the statement of claim or the particulars disclose some cause of action, or raises some question fit to be decided by the judge or jury, the mere fact that the case is weak and not likely to succeed is no ground for striking out" Re: Davey -v- Benton²¹, Moore -v- Lawson²², Wenlock -v- Maloney ²³

[47] At this stage of the proceedings the Court is not required to carry out a detailed and minute examination of the facts, allegations and documents of the case to see whether there is a cause of action contained therein. "... The purpose of considering an application to strike out a statement of claim, the truth of the allegations contained in **the pleading is assumed**" ²⁴

[48] I have reviewed all of the submissions filed by the parties in this matter and it is not necessary to refer to all of the submissions made.

[49] **To the Court's mind the question to be decided at this instance is whether having perused the Claimants' statement of case**, whether or not a case is disclosed with even a scintilla of a chance.

[50] The Court has taken cognizance of the fact that what is being claimed includes a **breach of the Claimants' Constitutional Rights**, and this Court is of the considered view that given the nature of the Claimants Case, striking out would be inappropriate. Further considering the allegations being made by the Claimants, the Court should be slow and hesitant to drive the Claimants from the seat of judgment.

[51] Therefore, the Application made by the Defendants is not granted and leave is granted **to them to file their defence within twenty eight days of today's date.**

²¹ [1893] 1 QB 185

²² (1915) 31 TLR 48 CA

²³[1965] 2All E R 871 (CA).

²⁴Per William JA in M4 Investments -v- Clico (Barbados) Ltd. (2006) 68 WIR 65 at Page 82, paragraph 36.

[52] The first hearing of the Fixed Date Claim filed herein will take place on 24th May 2018.

[36] As a post script, this decision was essentially completed to be delivered in January 2018 but due to the unavailability of full court facilities to ensure the timely delivery and proper editing and presentation of this ruling, there was a delay in delivering this ruling and the Court apologises for this and for any errors which may appear herein. Though the Civil High Court is not ready I opted to go ahead and deliver the decision in chambers in the presence of Counsel solely as there was no space to accommodate the parties.

M E Birnie Stephenson
High Court Judge

[SEAL]

By the Court

Registrar