

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV2007/O353

BETWEEN:

THE PUBLIC UTILITIES AUTHORITY

CLAIMANT

And

1. LESTER BRYANT BIRD
2. ROBIN YEARWOOD
3. JOHN ST. LUCE
4. ASOT MICHAEL
5. RADFORD HILL
6. KEITH HURST
7. LOUNEL STEVENS
8. APUA FUNDING LIMITED
9. THE BANK OF NOVA SCOTIA
10. ROYAL MERCHANT BANK OF TRINIDAD AND TOBAGO
11. THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

DEFENDANTS

Appearances:

Dr. Fenton Ramsahoye Q.C. and with him, Mr. Craig Christopher, **for the Claimant**

Mr. Hugh Marshal **for the sixth Defendant.**

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2010: October, 12
.....

DECISION

1. The Sixth Defendant applies to the Court for an order that the substantive case against the Sixth defendant be dismissed as disclosing no reasonable cause of action; that it is statute barred; that it is an abuse of the process of the Court and is likely to obstruct the just disposal of the proceedings.¹

¹ See the Sixth defendant's application filed September 10, 2008.

2. The applicant sets out the grounds of the application as²; **(i)** The Civil procedure Rules (CPR2000), Parts 26.3(1)(b) and (c); **(ii)** The Public Authorities Protection Act Cap 354; **(iii)** That the Sixth named defendant is sued in his personal capacity; **(iv)** That no cause of action is established against the Sixth Named Defendant personally ; **(v)** The inherent jurisdiction of the Court.
3. In the substantive matter, in essence the claimant, a statutory corporation incorporated by and under the Public Utilities Act, Chap 359, alleges a scheme by the defendants, several of whom were Ministers of government functioning in Cabinet at the material time, to unlawfully divert some EC\$92,000,000.00 which were ordinarily to be received by the claimant in the normal course of its business. The claimant alleges further that the said sums were applied for a purpose not contemplated by the Public Utilities Act. Several declarations, an accounting, damages and myriad other orders are sought by the claimant in the substantive matter.
4. The fulcrum of the defendant's (Sixth Defendant) application are the issues of **(i)** Whether on the pleadings the Sixth defendant can avail himself of the protection of the Public Authorities protection Act; **(ii)** Whether the claimant has set out a basis to support its claim for restitution or claim of misfeasance in public office and/or conspiracy and/or conversion as against the Sixth defendant³.
5. He submits that the allegation of misfeasance in Public office must fall, it not having been properly pleaded and proved. He submits that in order to succeed on this cause of action against the defendant the claimant is required to plead and prove bad faith against the defendant and "*all of the members of the cabinet who approved the cabinet decision authorizing the alleged transaction*". ⁴ Further, he submits that the defendant is sued in his capacity as a Public officer and that all the allegations against him in the pleadings bear that out. As a consequence, the defendant can avail himself of the protection of the Public Authorities Protection Act, the six months limitation having expired prior to the filing of the substantive action.

MISFEASANCE

6. Counsel for the defendant here refers to several judgments including the Judgments in the Three Rivers DC v Bank of England(No 3)[2000] 2 WLR at pp 1231(h) to 1232(a) and pp 1273(h) to 1274(a); Dunlop v Woollahara Municipal Council[1981] 2 WLR 69 PC; Johnson Jno-Rose v The Dominica Broadcasting Corporation CA No. 11 of 1999 at para 29, page 11, in support of this claim.

² This is a substantial reproduction from the said application of the Sixth defendant

³ See defendant's submission filed in this application.

⁴ See para 14-29 of the defendant's submissions filed March 8th 2010.

7. The matter has not reached trial yet - witness statements have not been filed at the time of the hearing of this application. The requirement to prove any particular set of circumstances at this point is premature. This leaves then, only the contention that the claimant has not properly pleaded Misfeasance. Here the defendant submits that the claimant was required at the very least to plead the following: **(a)** That the defendant as a public officer and at the material time exercised or failed to exercise a statutory duty imposed on him by law; **(b)** That the defendant acted in bad faith or dishonesty, in that, he knew he was acting illegally or unlawfully and/or was dishonest and/or reckless in not caring whether he was acting unlawfully; **(c)** That the defendant knew that by his acts or omissions he would cause material or special harm to some person; **(d)** That the Crown in fact suffered material or special damage.
8. The defendant claims that the claimant has not pleaded bad faith or dishonesty nor, any material facts required to show the requisite dishonest state of mind required to establish Misfeasance of the defendants.
9. If I understand the upshot of the claimant's response; the claimant contends in effect that the pleadings are replete with allegations – facts - that support the elements of the claim and that the specific words of bad "faith" or "dishonesty" for instance, need not be specifically set out⁵. Dr. Ramsahoye Q.C. submitted that the allegations against the defendant are all set out in the pleadings and that he could not understand what further the defendant could want or the claimant could provide in support of its claim.⁶ The claimant's written submissions identify the various paragraphs in the pleadings upon which it relies to support the claimant's case.

APPLICATION OF THE PUBLIC AUTHORITIES PROTECTION ACT

10. The contention of the defendant is that protection under the Act is available if the acts of the defendants were "*done in pursuance or execution or intended execution of any act, or of any public duty or authority*" ⁷ Counsel cited several authorities in support including Hamilton v Halesworth(1937) 58 CLR 369 at p.377; Tobridge v Hardy(1955) 94 CLR 147 at 156-158.
11. Further, the defendant submits that the protection is afforded one invoking the defence that he genuinely but mistakenly believed that he or she was acting within the limits of the authority expressly or impliedly conferred by the relevant statutory provision or office. The defendant concedes that there is a qualification to this

⁵See the claimant's response to the defendant's submissions.

⁶ See para. 3 of the claimants submissions.

⁷ See section 2 of the Act; see para. 5 of the defendants submissions.

invocation of the defence, where it is alleged that the defendant was really actuated, not by an honest desire to do his duty, but by some impermissible purpose. The onus of proving the *impermissible purpose or motive* is on the claimant.

12. The defendant submits that by virtue of the claimant's pleadings and by virtue of the authorities, the defendants have prima facie brought themselves within the words of the statutory requirement in that they were public officers acting in pursuance or execution or intended execution of a public duty or authority.
13. The claimant submits that the defendant was not acting in execution of his duty when he participated in the scheme. Protection to him as a Public officer extends to him only to his official duties which do not include the activities, the subject of the claim. The sixth defendant the claimant contends, did not act in his capacity as a Public officer, but, instead were personal actions involving the misuse of the statutory body's funds and no protection from the Act.

BAD FAITH

14. The defendant submits that the claimant has failed to plead facts sufficient to support the critical element of bad faith in the action for Misfeasance. The claimant alleges that the defendant's participation in the scheme was unlawful and was known to him to be unlawful. In the premises contends the claimant, he also acted in bad faith in relation to the claimant and its monies in the hands of the eighth defendant⁸.

CONSPIRACY

15. The defendant contends that there is no plea remotely capable of establishing this cause of action. He submits that the claimant in its pleadings has failed to meet the bar for conspiracy. The claimant contends that the support for the actions by many persons including the sixth defendant is pleaded in the statement of claim.

FINDINGS - CONCLUSION

16. There is no dispute over the power of the Court to strike out the whole or any part of a statement of case. This power is used to achieve the aim of summarily disposing of issues that do not need full investigation at trial (see para. 33.2 Blackstone's Civil Practice 2003). The main rule governing striking-out is found at Part 26 of CPR 2000 and does not need repeating here. This jurisdiction to strike out is used sparingly. The

⁸ The court resolves the issue of 'bad faith' in favour of the claimant.

learning applicable to striking out is 'legend' and adequately set out I think, in Blackstone's Civil Practice 2003 or any other edition.

17. But further, Blackstone's points out that a judge may refuse to hear a striking application if "... (b) the application will not be decisive or appreciably simplify the eventual trial ." (**Morris v Bank of America National Trust [2000] 1 All ER 954**).

18. When put against the Overriding Objectives of the CPR 2000, more particularly Part 1.1 (i), (2) (b), 2 (c) (i) (ii) (iii), 2 (d) and 2 (e) this application ought not to either be entertained by the Court or should be pared down to fit its appropriate and allotted share of the court's resources. However, the horse has bolted already, as it were and I deal with the matter now.

19. Dealing with the application of the **Public Authorities Protection Act** first; it is clear that the defendant held public office at the material time. This fact is not contested and is set out in the pleadings. Whether in relation to the alleged activities he acted as a Minister or in his personal capacity or otherwise is a question of fact or mixed fact and law. The claimant contends that the defendant acted outside of the bounds of a Public officer. Either way this matter is best left to either the subject of a request for information under Part 34 of the CPR2000 or, preferably for trial.

20. Striking out is the most extreme of sanctions in a matter. In a matter such as this one that has been protracted by so many successive interlocutory applications and which in the larger scheme of things is procedurally not particularly well advanced toward trial, there is ample time to clarify pleadings and issues if necessary. The complexity of the matter contributed to by the number of defendants and applications, has left the issues in the matter still unfolding.

21. Further, the issue as to whether the defendant "*genuinely but mistakenly believed that he [or she] was acting within the limits of the authority expressly or impliedly conferred by the relevant statutory provision or office*" must be found as a question of fact – at trial. So too, must the question of whether he was actuated by some *impermissible purpose*.
22. The question of **Misfeasance in Public Office** is as precarious as the Protection Act, in that the defendant is calling on the court to draw a series of inferences and findings of fact on each of the constituent elements of the cause of action. If there is clarification needed, then the parties are required to utilize, among other things, Part 34 of the CPR2000 to clarify the issues before the court so that it may get at and resolve the real dispute between the parties. Further, I considered the argument against a Public Authority bringing such an action against a Public officer. Counsel for the defendant has submitted the lone authority of Attorney General of Belize v Marin & Coye 41 of 2009, Belize Supreme Court, per Conteh C.J. The capacity of the parties and factual circumstances of that first instance judgment are different than the instant case and are distinguishable. Further, I am not convinced of the rational underlying that court's reasoning on the point.
23. The contention that the claimant has failed to plead certain particulars, such as the Defendant's state of mind, is not a particularly strong one. Again, is the claimant to use the specific words in order to put the defendant on notice of the case it has to answer or in order to satisfy the Law, as suggested by the defendant, or, is it sufficient that the facts relied upon in support of the elements of the cause of action disclose the case for the claimant? I think the latter. The defendant clearly knows the case he has to answer. The content of this application alone, reveals this knowledge.
24. The Defendant submits that the claimant's pleadings are deficient in that it has failed to include all the facts upon which the claimant need rely. Further, it says that notwithstanding the application for further particulars from the claimant, the case for the claimant with respect to Misfeasance in Public office and conspiracy is still not adequately pleaded⁹ .
25. Again, I am unable to accede to the defendant's application. The determination of the issues raised here by the defendant involves the consideration of a mix of fact

⁹ See para. 30-32 of the defendant's submissions.

and law best left to trial. There are 11 defendants in this matter with interlocking and overlaying factual circumstances and causes of action against them respectively. I see no decisive or appreciable simplified trial of the defendant(s) achieved by the striking out of any one of the causes of action against the defendant. I am not satisfied that the CPR2000, including Part 34 has been utilized as envisaged by the Rules and the overriding objectives.

26. The defendant repeatedly refers to there being no evidence of certain particulars being provided in the claim¹⁰. Evidence of course, is for the trial and not the pleadings.

27. All the issues raised by the defendant remain live issues to be determined at trial. Questions of fact the truth of which counsel for the defendant appears to suggest are patent, are not so patent and are in the court's view, required to be given in evidence at the trial. The pleadings of the claimant are not strong pleadings, however, this alone is not sufficient to strike them out. Further, in a matter as complex as this one and for the reasons provided, it is also premature for the court to use its most draconian pre-emptive powers to dispose of the case for the claimant.

28. FOR THE REASONS PROVIDED ABOVE, IT IS HEREBY ORDERED AS FOLLOWS:

- (I) The application of the Sixth defendant filed March the 8th 2010 is dismissed
- (II) Costs to the Respondent.



JUSTICE DAVID C HARRIS

THE HIGH COURT, ANTIGUA AND BARBUDA.

¹⁰ For instance at para. 32 of the defendants' submissions; "*No evidence of malice, conspiracy, intent to defraud etc. has been advanced...*"