EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT & THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV 2009/0152

BETWEEN:

MICHAEL RICHARDS
(The Next Friend of JENMARK JACKSON)

Claimant

and

[1] The Attorney General of St. Vincent & the Grenadines
[2] The Commissioner of Police
[3] Officer Hadley Balantyne
[4] Officer Oldrick Charles
[5] Officer Casanki Quow
[6] Elmore Alexander aka "Six"

Defendants

Before:
Ms. Agnes Actie — Master [Ag.]

Appearances:
Mr. Jomo Thomas of counsel for the Claimant
Ms. Karen Duncan and Ms. Michelle Davidson of counsel for the Defendants

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2013: December 11;
2014: March 28.

JUDGMENT

[1] ACTIE M. [AG.]: This is an application to strike out a statement of claim.

[2] The Attorney General by application dated 12th November 2013, applied to strike out the statement of case filed by the claimant on 17th November 2009, on the grounds that (i) the claim is statute barred and (ii) for noncompliance with sections 3, 4 & 5 of the Public Officers' Protection Act, Cap 276 of the Revised Laws of Saint Vincent & The Grenadines.

[3] The application is vigorously opposed by the claimant.

Background

[4] The background facts are that the 3rd to 6th named defendants were police officers attached to Criminal Investigation Department (C.I.D) of the Royal St. Vincent and the Grenadines Police Force.

[5] Sometime on or about 18th November 2008, Jenmark Jackson, the claimant and a friend, Mr. Mc Dowall, were approached by officers Hadley Ballantyne and Oldrick Charles, the 3rd and 4th defendants. The claimant claims that he and Mc Dowall were pushed into a motor vehicle by the said officers and taken to CID where on arrival an officer on duty directed the 3rd and 4th defendants to squeeze their necks and carry them down the corridor. As the claimant and Mc Dowall sat on a bench in the corridor, they were approached by officer Casanki Quow, the 5th defendant, who pointed a pistol at them and said "ah feel like shooting all yo". Officer Quow left and officer "six", the 6th defendant, came in the corridor and started to slap the claimant. The claimant attempted to block the slaps with his hands and officer "six" punched him in his neck. Officer "six" then began a savage beating of Mc Dowall across his head and blood started to ooze from his ears at which point officer 'six' left the corridor and told them to remain in the dark.

[6] Sometime after dark, Officer Ballantyne escorted the claimant and Mc Dowall from the corridor to the general area of the CID office. Officer Charles entered a room and came out with a hose. Officer Ballantyne being dissatisfied with a response given by claimant struck him with the hose. The claimant raised his hand to fend off the lash and his finger got busted. The claimant claims that he was held down by his hands and feet by a number of police officers across a desk and Officer Quow beat him all over his body. He was then held by his hands and feet by the officers and was dropped on the floor twice.

[7] While on the floor, officer Charles kicked the claimant in his belly and he eventually fell asleep. The claimant woke with a pain in his chest where he called out and ask to go to the hospital. In response officers Charles, Balantyne and another

approached both boys and kicked them some more. The claimant started to vomit following the kicks in his chest and belly. The claimant avers that a female guard advised that the claimant be taken to the hospital. In response, officer Balantyne filled a Ju-C bottle with water and poured it on the claimant's face and said "He ain't want to go to no hospital". The claimant states that he was eventually taken to the hospital where he was admitted due to internal bleeding. The claimant claims to have blacked out on the morning of 19th November and went into a coma with tubes in his throat to assist with his breathing. The claimant further states that he spent 13 days in the hospital, 7 of which he was sedated in unconscious traumatized state.

[8] By claim form with statement of claim filed on 17th November 2009, the claimant by his next friend Michael Richards claims for general damages for (1) assault; (2) battery; (3) wrongful arrest; (4) unlawful detention, aggravated damages, interest and such other relief as the court deems necessary and costs against the Attorney General, the Commissioner of Police and four (4) police officers namely: (1) Hadley Balantyne, (ii) Oldrick Charle,s (iii) Casanki Quow and (iv) Elmore Alexander aka "Six".

[9] The Attorney General Chambers entered an acknowledgment of service of the claim on 29th July 2013 and by application dated 30th September 2013, applied for an extension of time to file a defence. A further application was made on 2nd October 2013 for relief from sanctions.

[10] The claimant on 30th October 2013 filed a notice of opposition to the Attorney General's application to extend time to file defence.

[11] The Attorney General by notice of application dated 12th November 2013, applied to strike out the statement of case.

[12] Chronologically, the Attorney General's application to extend the time to file the defence was first in time and should be firstly considered. However in the

circumstances I will first consider the application to strike out which, if successful, will render the application for the extension of time to file a defence otiose.

The Application for Striking Out

[13] The Attorney General's main contention in its application to strike out is that the claimant has failed to satisfy the mandatory provisions Sections 3, 4 & 5 of the Public Officers' Protection Act, Cap 276 of the Revised Laws of Saint Vincent & The Grenadines which provides as follows:

> "3. No action shall be brought against any public officer for anything done, or purported to be done, in the exercise of his office unless and until two calendar months after notice in writing has been delivered to him or at his usual place of residence with some person there, by the party who intends to bring such action or his legal practitioner or agent, and in every such notice shall be clearly and explicitly stated:
>
> (a) the cause of action
>
> (b) the name and address of the person who is bringing the action
>
> (c) and the name and address of his legal practitioner or agent, if any, and no evidence of the cause of action shall be produced except in so far as the cause of action has been spelt out in the notice.
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> 4. Every action as set out in Section 3 shall be brought out within twelve calendar months next after the cause of action stated in the notice arose and no such action shall be maintainable after the expiry of the said period.
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> 5. In every proceeding for an action as referred to in Section 3 it shall be incumbent upon the party bringing the action to prove –
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> (a) that the notice as required under section 3 has been given;
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> (b) that the action has been brought within the time specified in Section 4 and
>
> (c) the cause of action
>
> And upon failure to establish any of the same, the action shall be dismissed or otherwise terminated and a verdict shall be given against the person who brought the action, with or without costs."

[14] The Attorney General in the application to strike out the claim states that the claimant served the 1st and 2nd defendants but has to date failed to serve the 3rd to 6th defendants. The Attorney General avers that the 3rd to 6th defendants are police officers to which the Public Officers Protection Act governs the institution of proceedings against public officers in their exercise of their office and/or functions as public officers.

[15] The Attorney General claims that section 3 of the Public Officers' Protection Act imposes a mandatory precondition which requires the claimant to file a Notice of Action setting out clearly and explicitly the information required under subparagraphs (a) (b) and (c) of the Act prior to the institution of the claim. The Act also requires the Notice of Action to be delivered to the defendants personally or left at their usual place of residence with some persons there. The Attorney General claims that the claimant failed to comply with the mandatory provisions of the Act and consequently the claim and statement of claim filed on 17th November 2009 is a nullity and should be struck out.

[16] The applicant further contends that section 4 of the Public Officers Protection Act Cap 209 provides that every action should be brought within 12 calendar months after the cause of action arose and no such action shall be maintainable after the expiration of the said period. Consequently no action is maintainable due to the failure to serve notice on the 3rd to 6th defendants within the 12 month period.

[17] The applicant in support relies on the following authorities namely:

(1) Peter Clarke v The Attorney General[1].

(2) Ricardo Bascombe (Administrator in the estate of Patrice Bascombe of Arnos Vale) and the Attorney General etal[2]

(3) Richard Macleish et al v The Attorney General[3]

[1] SLUHCV 1999/0477
[2] SVGHCV 2007/0302

[18] The claimant in response states that there has been substantial compliance with the Public Officers Protection Act. The claimant avers that the notice was served on the office of the Attorney General and the office of the Commissioner of Police. The claimant contends that the parties had for over 4 years been engaged in negotiations for possible settlement of the claim. The claimant states that the defendants had notice of the claim and states that the continuous negotiations between the parties for possible settlement of the claim amount to substantial compliance with the provisions of the Act or in the alternative amount to a waiver. The claimant further states that the respondents' application for leave to file their defence out of time amounts to an admission of knowledge and notice of the claim. The claimant in support of his submissions relies on the House of Lords decision in R v Soneji and another[4].

[19] The claimant further contends that the statutory limitation period being raised by the defendant/applicant can only be raised in a defence and not in the application to strike out the claim. The claimant in support of his submissions relies on Halsbury's Laws Paragraph 950 where it states:

> "Statutory limitation periods generally bar the remedy only and not the claim itself; thus a defendant must raise his contention of a limitation bar expressly in his defence in order for the limitation period to operate." …[5]. "It cannot be predicted that the defendant will appeal to the statute of limitation for his protection, many people, or some people at all events, do not do so; therefore you must wait to hear from the defendant whether he desires to avail himself of the defence of the statute of limitation or not".[6]

Analysis

[20] It is settled law that when proceedings are instituted against a public authority the plaintiff must prove service on the defendant in accordance with the Public Officers Protection Act. In Peter Clarke, the court relied on the cases of Castillo v Corozal Town Board and Another[7] and Cumberbatch v Weber[8]

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[3] SVGHCV 1998/0305
[4] [2006] 1 AC 340 para D at page 343
[5] Kettleman v Hansel Properties Ltd. (1987) AC 189 at 219 per Lord Griffiths
[6] Dawkins v Lord Penrhyn (1878) 4 App Cas 51 at 59, HL".
[7] (1983) 37 WIR 86.

where the appellant brought an action in negligence claiming damages against the respondent, a public authority to which the provisions of the Public Authorities Protection Ordinance applied in which Section 3(1) stated:

> "No writ shall be sued out against, nor a copy of any process be served upon any public authority for anything done in the exercise of his office, until one month after notice in writing has been delivered to him, or left at his usual place of abode … ."

No notice was given by the appellant to the first respondent pursuant to section 3(1) of the Act. The court held that:

> "when proceedings are instituted against a public authority and the plaintiff fails to prove at the hearing that he has given notice of the proceedings under section 3(1) of the Public Authorities Protection Ordinance (as is required by section 3(2)) the trial judge has no discretion in the matter and is bound to enter judgment for the defence with cost."

[21] The evidence before the court indicates that the notice of intended action was delivered at the Police Headquarters. The notice was endorsed by one Sharlene Williams as having been received for and on behalf of officers Ballantyne, Charles Chow and aka' "six", the 3rd to 6th defendants. The claimant contends that the officers are attached to the Criminal Investigation Department and spend an enormous amount of time at Police Headquarters. As a result the claim form was left at their place of employment, where they, on occasions, spend even more time than their own homes.

[22] It is evident from the evidence before the court that the service on the 3rd to 6th defendants was defective having failed to satisfy the strict requirement of section 3 of the Public Officers Protection Act in relation to the 3rd to 6th defendants.

[23] The claimant contends that the Attorney General by her own admission states that the parties had knowledge of the claim and been engaged in discussions for possible settlement of the claim. The claimant avers that the officers had adequate notice and knowledge of the pending action as the continuous negotiations between the parties amount to substantial compliance with the

[8] (1965) 9 WIR 143.

provisions of the Act or in the alternative amount to a waiver. The claimant avers that the matter only resuscitated due to the failure of settlement.

[24] The claimant is asking the court to depart from the rigid mandatory declaration invalidating the claim for noncompliance with the provisions of Public Officers Protection Act which requires personal service on the 3rd to 6th defendants as the prevailing House of Lords decision R v Soneji and another seems to deviate substantially from that position where Lord Steyn in interpreting similar provisions states:

> "Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead as was held in *Attorney General's Reference (No 3 of 1999)*, the emphasis ought to be on the consequences of non-compliance, and posing the questions whether Parliament can fairly be taken to have intended total invalidity. This is how I would approach what is ultimately a question of statutory construction……"[9]

[25] It is to be noted that this matter is of some vintage and it is unfortunate that these issues are arising at this late stage. The evidence before the court indicates that the notice of intended action dated and filed on 19th May 2009, was served on the Attorney General Chambers. The notice was also served and received at the office of the Commissioner of Police on 19th May 2009 for and behalf of officers Ballantyne, Charles, Quow and aka "six". The claim form and statement of claim was filed on 17th November 2009. The matter remained dormant in the court's system in excess of three (3) years. On 29th July 2013 the Attorney General entered an unconditional acknowledgement of service, in excess of three years after the claim was served on the office of the Attorney General.

[26] The Attorney General on 30th September 2013, two (2) months after the entry of appearance, made an application for an extension of time to file a defence. The application is grounded on the fact that the parties were trying to settle the matter

[9] At paragraph 23 of the judgment

out of court. Negotiations fell through and the applicant made the application to put matters right so as to proceed in accordance with CPR 2000.

[27] It is settled law that the failure to comply with the mandatory provisions of section 3 of the Public Officers Protection Act is fatal to a claim being brought against a public officer. It is a condition precedent to the filing of proceedings against public officers performing a public function.

[28] Should the court exercise this coercive penalty of striking out the claim having regard to the conduct of the parties since the filing of the claim? The evidence before the court indicates a period of substantial inactivity in pursuing the claim as the parties entered into negotiations which were unequivocally referable to the issues on the merit of the claim filed by the claimant. The Attorney General as principal counsel for the State engaged and participated in the discussions on behalf of the 3rd to 6th defendants who are public officers as defined by the Crown Proceedings Act. The Attorney General did acts in reference to the proceedings namely; (a) entered into negotiations for possible settlement and (2) unconditionally acknowledged service on behalf of all the defendants.

[29] The Attorney General entered an unconditional acknowledgement of service on 30th July 2013 in excess of 3 years of being served with the claim. The Attorney General in flagrant breach of CPR 9.3 which requires acknowledgment of service to be entered within 14 days of service, is now challenging the failure of the claimant to serve the pre action notice personally on the 3rd to 6th defendants as required by the Act. The first defendant's liability arose vicariously through the actions of the 3rd to 6th defendants. It can only be assumed that the discussions were in relation to the vicarious liability of the State from the alleged unlawful acts of the 3rd to 6th defendants. Any action against public officers must be brought against the Attorney General either jointly or severally pursuant to the Crown Proceedings Act.

[30] In Halsbury's Laws of England[10]

> "Parties to litigation who have continued the proceedings with knowledge of an irregularity of which they might have availed themselves are estopped from afterwards setting it up; and, a fortiori, on a somewhat different principle, such a party cannot take advantage of an error to which he has contributed'.

[31] Lord Evershed MR, in In re Dules' Settlement (No. 2) Dulles v Vidler[11]

> "it is, of course, plain that where a question of jurisdiction arises a man cannot both have his cake and eat it. He cannot fight the issue on the merits, and at the same time preserve the right to say, if the worse comes to the worst, that the court has no jurisdiction to decide against him. And he cannot consistently with that principle take any steps unequivocally referable to the issue on merits".

I wholly adopt the statement of Lord Evershed. Both parties were dilatory in the prosecution of the claim having regard to the ongoing negotiations in an attempt to reach an out of court settlement. The unequivocal course of conduct by the Attorney General amounts to a representation, such that a reasonable person in the circumstances would take to mean that the defendants with knowledge of the matter before the court had submitted to the jurisdiction of the court to deal with the matter failing negotiation. I am aware of the seminal case of Castillo v Corozal Town Board and Another and the plethora of cases decided in this jurisdiction which make it mandatory for the personal service of the notice of the intended action and the consequences of the failure to so. However the Court is a court of equity. Taking everything in the round I am of the view that it would be inequitable and unjust in the circumstances to defeat the claimant's claim for failure to satisfy personal service on the 3rd to 6th defendants. I am of the view that this case is distinguishable from the decided cases relied on by the applicant having regard to facts and conduct of the parties. Lord Collins in Texan Management Limited et al v Pacific Electric Wire & Cable Company Limited[12] said; "It has often been said that, in the pursuit of justice, procedure is a servant and not a master". It would be unconscionable at this late stage to strike out the claim which will evidently leave the claimant without any recourse as the matter

[10] 4th edition para 1055.
[11] [1951] Ch 842 .
[12] Privy Council Decision delivered on 26th November 2009.

would be statute barred. I am of the view that the conduct of the Attorney General as principal counsel for the State constitutes a waiver of the requirement for personal service on the 3rd to 6th defendants as it is evident that they possessed knowledge of the claim and participated in the negotiations for possible settlement of the claim.

[32] In **Hughes v Metropolitan Railway** in which Lord Cairns LC at page 448 on the principle of waiver states:

> "… it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results … afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

The doctrines of waiver and estoppel are of the same genre rooted in the equitable notion of fairness.

Striking Out

[33] The striking out of a party's statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases. The seminal test for striking out was restated by Sir Dennis Byron CJ in Baldwin Spencer v the Attorney General of Antigua & Barbuda (Civil Appeal No. 20A of 1977) where he stated:

> "This summary procedure should only be used in clear obvious cases when it can 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".

[34] The evidence shows that the parties were in dialogue with a view of settling the claim. The Attorney General by its own admission in the application to extend the time for filing a defence, states that the failure to file within the time prescribed by the rules was due to the fact that the parties had been in negotiations for possible settlement of the claim. The Attorney General with knowledge of the claim and having negotiated on behalf of the 3rd to 6th defendants in excess of three years is

only now at this late stage when negotiations between the parties fell through seeking the protection of the Act to defeat the claim. It is to be assumed that the Attorney General submitted to jurisdiction of the court regardless of the defective service. The purpose of the requirement of service is not to create technical hurdles but to put mandatory provisions to ensure the defendant receives proper notice of the claim. The evidence indicates that the Attorney General was properly served with the notice of intended action and the statement of case. The Attorney General having engaged and participated in the settlement negotiations is deemed to have had sufficient notice and the conduct is tantamount to a waiver of personal service on the 3rd to 6th defendants. It would be unconscionable at this late stage to challenge the jurisdiction to deal with this matter on the ground of defective service. Had the matter been settled, surely the issue of service on the 3rd to 6th Defendants would not have arisen.

[35] The Attorney General failed to take advantage of the procedural irregularity in making an application to strike out the claim from the time of filing the claim but rather choose to engage in continuous negotiation over time in spite of the defect. It is to be noted that the Attorney General filed an unconditional acknowledgment of service on 29th July 2013, almost 4 years after the filing of the claim. The conduct of the Attorney General is tantamount to an inducement in the belief that the irregular service had been waived. Parties in litigation who have continued the proceedings with knowledge of the irregularity of which they might have availed themselves are estopped from insisting on their strict procedural rights. The court should not countenance the Attorney General's inordinate breach of the CPR in filing an acknowledgement of service over the claimant's breach of personal service of the notice of the intended action on the 3rd to 6th defendants. Both parties are in respective breach of procedural requirements. i.e. the Public Officers' Protection Act and CPR 2000 9.3(1) which is assumed were taken for granted having regard to the ongoing discussions for the possible settlement of claim.

[36] Having reviewed the facts and the authorities, I am of the view that the justice of this case militates against the nuclear option of striking out. It would be unconscionable to strike out the statement of claim having regard to the combination of time which has elapsed since the filing, the conduct of the parties in an effort to settle the claim and the procedural irregularities by both parties. Although nothing turns on that point, it is to be noted that criminal charges were successfully brought against 3rd to 6th defendants and confirmed by the court of appeal in relation to the same facts. I am of the view that the 3rd to 6th defendants would not be prejudiced by the procedural inadequacies in this case. To strike out the claim having regard to the conduct of the parties would be draconian and unconscionable in the circumstances and in breach of the overriding objective to deal with matters justly.

Order

[37] For the foregoing reasons I make the following order:

(1) The application to strike out the claim is refused.

(2) The matter is referred to case management for determination of the application for the extension of time to file defence filed by the defendants and for further case management.

(3) Cost to the claimant in the sum of $750.00.

Agnes Actie
Master [Ag.]