IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. G-068 OF 2002

BETWEEN	**ANDREW GILLESPIE**	**PLAINTIFF**
A N D	**CONS. DENTON CLARKE**	**1ST DEFENDANT**
A N D	**CONS. DOUGLAS MITCHELL**	**2ND DEFENDANT**
A N D	**CONS. DONALD THOMPSON**	**3RD DEFENDANT**
AND	**CONS. BRODERICK**	**4TH DEFENDANT**
AND	**CONS. POWELL**	**5TH DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**6TH DEFENDANT**

Heard on November 18, 2002, January 2003 and September 11, 2003

Mrs. Antonette Haughton-Cardenas instructed by Haughton and Associates for Plaintiff.
Mrs. Simone Mayhew instructed by the Director of State Proceedings for the 6th Defendant.

ANDERSON, J.

This is an application by way of Summons filed by the sixth Defendant in the substantive suit to strike out the plaintiff's statement of claim and endorsement on the Writ of Summons, filed on the 12th August 2002, and to dismiss the plaintiff's action. In the substantive action, the plaintiff has filed a writ and statement of claim against several defendants, police officers then stationed at the Denham Town Police Station and the sixth defendant pursuant to the Crown Proceedings Act. The statement of claim seeks to recover from the defendants, damages for assault, malicious prosecution and false imprisonment in relation to an incident that took place on or about the 13th of August 1996.

The circumstances upon which the action is allegedly based according to the writ of summons, is that on the 13th of August 1996 the Plaintiff was shot by the defendant policemen, arrested and charged with illegal possession of firearm and ammunition. He was eventually released on bail on 25th October 1996 and the case was eventually dismissed for want of prosecution on January 12, 1999. He is accordingly claiming damages for assault, malicious prosecution and false imprisonment.

The defendant's summons to strike out statement of claim seeks, inter alia, an Order of the Court that;

1. The endorsement on the writ of summons and the statement of claim be struck out against the defendants, and the action against the said defendants be dismissed pursuant to the Statute of Limitations and section 238 of the Judicature (Civil Procedure Code) Law ("JCPC") and the inherent jurisdiction of the court on the grounds that

    a. The action against the defendants is frivolous, vexatious and an abuse of the process of the Court, and

    b. The writ of summons and Statement of Claim discloses no reasonable cause of action against the defendants.

It was submitted by counsel for the sixth defendant that the court had jurisdiction to strike out pleadings pursuant to section 238 of the JCPC. Section 238 is in the following terms.

> The court or a Judge may order any pleadings to be struck out on the ground that it discloses no reasonable cause of action or answer; and in such case, or in the case of the action or defence being shown by the pleadings to be frivolous or

vexatious, the court or Judge may order the action to be stayed or dismissed or judgment be entered accordingly, as may be just.

It was also submitted that the English case of **Ronex Properties v John Long [1983] 1Q.B. 398**, was authority for the proposition that where there is a defence under the Limitation Acts, the defendant may seek to strike out the claim upon the ground that it is frivolous vexatious and an abuse of the process of the court. According to defendant's counsel in written submissions, the "legally recognized exceptions to the application of a limitation defence include allegations of fraud, or allegations that at the time of the accrual of the cause of action the Plaintiff was an infant or *non compos mentis*". According to these submissions, the United Kingdom Limitations Act of 1623 had been received and incorporated as part of the laws of Jamaica by virtue of section 41 of the Interpretation Act as also section 46 of the Limitations of Actions Act of 1881. This proposition was supported by reference to a judgment of Rowe P., in the Jamaican Court of Appeal, **Lance Melbourne v Christina Wan**, [1985] 22J.L.R. 131, where the learned judge said:

The present version of the Limitations of Actions Act is divided into four parts. Part 1 deals with limitations of actions in relation to land, Part 11 Crown suits limitation, Part 111 with Boundaries and the fourth Part with limitations in relation to debt and contract. Apparent on the face of the Statute, then, is the fact that the Limitations of Actions Act does not within its four walls contain detailed statutory provisions limiting the time within which actions in Tort may be brought. To find the applicable statutory provision for Jamaica in this regard,

one must have recourse to a statute of the United Kingdom, passed three hundred and sixty two years ago.

Finding ourselves constrained to consider the application of a seventeenth century statute in the twenty-first century, it is difficult to disagree with Carberry J.A. at page 137 of the Lance Melbourne case, when he quoted Professor Maitland's celebrated observation that "the forms of action we have buried but they still rule us from the grave". Here, the submission is that the allegation that the defendants "wilfully and maliciously shot" the plaintiff, brings that tortious act within a claim for "trespass", and under the relevant statute, should have been brought within four (4) years of August 13, 1996. The filing of the writ and endorsement on August 12 2002, was therefore outside the applicable limitation period and is liable to be dismissed by the court as being frivolous or vexatious or an abuse of the court's process pursuant to the Ronex decision mentioned above.

Paragraph (b) of the summons to strike, bases the application on the allegation that "the writ of summons and Statement of Claim discloses no reasonable cause of action against the Defendants". It is trite law that where an application is made on this basis, no evidence is admissible to establish the claim, and here the defendants offer no affidavit or other evidence.

Counsel for the Plaintiff in responding to the Defendants' submissions, urged the court to the view that, contrary to what had been argued by defendants' counsel, Rowe P in his judgment in Lance Melbourne had fallen into error in that he had omitted to construe section 42 of the Interpretation Act which is in the following terms:

> Where in any act reference is made to any provision of a United Kingdom Act and that provision is subsequently repealed and re-enacted without substantial modification, the reference in such act to the provision of the Act so repealed shall, if the context so requires, and unless a contrary intention appears, be construed as a reference to the provision so re-enacted.

She cites section 2 of the United Kingdom Act of 1980, and further cites dicta of Lord Denning in **Letang v Cooper [1964] 2 All E.R. 929** to the effect that the "distinction between trespass and the case is now obsolete". Her submission with respect to the effect of section 42 is that this section now allows the amendment in the English Act of 1939, now represented by section 2 of the English Limitation Act of 1980 to be imported into Jamaican law. That section is in the following terms:

> An action founded upon Tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

In any event, she argues, the Plaintiff may be accorded the extension available to certain Plaintiffs by virtue of section 7 of the 1623 statute, which allows the extension of the relevant period for persons who were in prison or were non compos mentis. She claims that the psychological trauma suffered by her client allows him to claim the benefit of the section granting the extension. She cites the case of **Dismore v Milton [1938] All E.L.Reports Annotated [Vol 3] 762**, in support of this submission. I am not persuaded that the facts in the instant case could be brought within that section.

Let me say, in any event, that this court is bound by the decision of our Court of Appeal in the Lance Melbourne case to which reference has already been made. In that regard, I not only accept the reasoning and the decision of the then President of the Court, but I also note that in his judgment, Carberry J.A. referred to the considerable period of time devoted to consideration of our own Limitations of Actions Act and the English Act of 1939 by the Law Reform Committee led by the late Attorney General, V.B. Grant, Q.C. in 1966. Recommendations had then been submitted for the enactment of a new statute of Limitations, but those recommendations had withered on the vine.

I accordingly find no merit in the submissions that the part of the endorsement and the statement of claim with respect to the alleged assault have been brought within the four years applicable to an action in trespass. I accept the submissions of the defendant that no exception has been pleaded which would save this part of the action from being out of time.

With respect to paragraph (b) of the application, I would refer to a passage cited by Defendants' counsel from the Ronex case and the judgment of Donaldson L.J. at pages 404 and 405.

At page 404 he said:

> Under R.S.C. Ord. 18 r.19, the power to strike out any pleading or the endorsement of any writ in the action or anything contained therein is exercisable:

"On the ground that (a) it discloses no reasonable cause of action or defence, as the case may be; or (b) it is scandalous, frivolous or vexatious; or (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the court...."

In the case of an application under (a) above, which is the present case, no evidence is admissible.

Authority apart, I would have thought that it was absurd to contend that a writ or third party notice could be struck out as disclosing no cause of action, merely because the defendant may have a defence under the Limitation Acts. Whilst it is possible to have a contractual provision whereby the effluxion of time eliminates a cause of action – and there are some provisions of foreign law which can have that effect – it is trite law that the English Limitation Acts bar the remedy and not the right; and furthermore, that they do not even have this effect unless and until pleaded.

And at page 405 he continued:

Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim on the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence. *But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed.* (Emphasis mine)

I am of the view that these dicta are applicable to the defendant's summons in paragraph (b) and that accordingly, that paragraph must fail. But I have also looked at the affidavit of the plaintiff and am satisfied that there is nothing contained therein which brings his action for assault and false imprisonment, (trespass to the person) within the exception to allow for the extension of the four (4) year time limit for filing such a suit. The claim for false imprisonment would on the facts alleged have arisen on or around October 25, 1996 when the Plaintiff was released on bail.

Even on the defendant's counsel's submissions, however, the claim for malicious prosecution is timely, as that claim would only have accrued when the matter was dismissed for want of prosecution, on or around January 12, 1999.

In the result, my ruling is that the Court has the power under section 238 of the JCPC to grant the application in paragraph (a) of the summons by striking out from the endorsement and other pleadings any claim for assault or false imprisonment. I am, however, of the view that there is no reason why the Plaintiff should not be allowed to pursue his remedies for malicious prosecution, and I so order.

Costs of this application are to be Costs in the cause.

I make one final observation however, that in the event that the Plaintiff should succeed in a suit for malicious prosecution, (as to which I, of course, do not wish to speculate), the State may wish to consider whether some ex gratia payment in all the circumstances ought to be contemplated.