NWCS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. G. 083/1993

BETWEEN	LEMUEL GORDON (Administrator of the Estate of DESMOND GORDON - Deceased	PLAINTIFF
AND	CONSTABLE E.G. WILLIAMS	1ST DEFENDANT
AND	CONSTABLE D.L. EBANKS	2ND DEFENDANT
AND	THE ATTORNEY GENERAL	3RD DEFENDANT

Colin Henry and Howard Malcolm for Plaintiff

Leighton Pusey and Miss Michelle Henry for third Defendant.

IN CHAMBERS:

Summons To Strike Out Statement Of Claim

Hearing on June 2, July 14 and September 30, 1994

Judgment

BINGHAM J.

By Summons dated 30th August, 1993 the third named defendant sought the following reliefs that:-

"(i) This action be struck out against the defendant on the grounds -

(a) that the action is statute barred by reason of section 2(1)(a) of the Public Authorities Protection Act;

(b) substantively the same action namely Suit No. C.L. G. 270/1991 - Lemuel Gordon and Constable E.G. Williams, Constable D.L. Ebanks and The Attorney General for Jamaica was struck out by this Court on 15th March, 1993;"

The plaintiff's claim is against the defendants for damages in respect of certain alleged unlawful and malicious acts committed by the defendants on the deceased Desmond Gordon while acting in the course of their duty as peace officers. The third defendant is sued in the capacity as the representative of the Crown their employer.

These acts were alleged to have been done on 3rd October, 1991.

Damages are claimed under the following heads:-

1. The Fatal Accidents Act
2. The Law Reform (Miscellaneous Provisions) Act
3. Exemplary, aggravated and punitive damages.

The Writ of Summons and the accompanying Statement of Claim were both filed in this Court on 7th May, 1993. Paragraph 3 of the Statement of Claim alleges that:-

> "The third defendant is sued by virtue of the Crown Proceedings Act as the representative of the Crown and as such as the representative of the Commissioner of Police Jamaica Constabulary Force."

In the light of the above pleading therefore it would be idle for the respondent to contend that the first and second defendants as servants or agents of the Crown were not acting in the capacity of public servants as it is by virtue of this allegation in the pleadings that the third defendant is joined as a defendant to the suit (vide section 13 of the Crown Proceedings Act.)

It was this state of affairs that no doubt prompted the learned counsel for the third defendant to enter an appearance and to seek the reliefs set out in the summons referred to at the commencement of this judgment.

For a better understanding of the secondary relief sought in the summons one has of necessity to resort to a brief outline of the facts in the previous claim C.L. G. 270/1991 Lemuel Gordon v. Constable E.G. Williams, Constable D.L. Ebanks and the Attorney General for Jamaica.

The Writ of Summons dated 9th December 1991 and the accompanying Statement of Claim were both filed in this Court on the same date.

The Statement of Claim at paragraphs 2, 3 and 4 contain similar allegations to those set out in the Statement of Claim in the instant case.

The allegations in both claims by virtue of alleging that the first and second defendants were both doing an act in pursuance or execution of a public duty or authority conferred upon them by virtue of section 13 of the Constabulary Force Act meant that the Public Authorities Protection Act could be invoked. Although the Writ and Statement of Claim in C.L. G. 270/91 was lodged well within the limitation period, the claim was defective in failing to allege that "the acts on the part of the defendants were done maliciously or without reasonable and probable cause."

The absence of these essential words from the Statement of Claim which were necessary to breathe life and force into the claim would have been fatal to the action if the limitation period was permitted to run its course. Section 33 of the Constabulary Force Act stating as it does that:-

> "Every action to be brought against any Constable for any act done by him in execution of his office shall be an action on the case for a tort and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable and probable cause; and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given to the defendants."
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> *(Emphasis supplied)*

This state of affairs seemed to have escaped the notice of the plaintiff's attorneys and their attention was only alerted when following entry of appearance by the third defendant on 8th January,

1992 a summons was taken out by the Director of State Proceedings on 26th November, 1992 to strike out the claim.

It was the gravamen of the submissions of the third defendant that the cause of action having arose on 3rd October, 1991 and this claim having been filed on 7th May, 1993 that given the allegations as set out in paragraphs 2-5 of the claim section 2(1) the Public Authorities Protection Act applied with the result that the Court ought to hold that action was statute barred.

Learned counsel for the applicant further submitted that on an examination of the both claims it was patent that they were substantially the same. As the previous action (C.L. G. 270/91) was struck out as disclosing no reasonable cause of action the present claim could be seen as an attempt by the plaintiff to litigate the matter all over again a course which they ought to be barred from pursuing.

The plaintiff's attorney is resisting the defendant's application has submitted that it was misconceived and that the real purpose of the application was to deprive the plaintiff from "having his day in Court." He contends that the Rules of the Supreme Court relying as he did upon Order 18 Rule 19 of the English Rules require that if a defendant wishes to rely on the Statute of Limitations it is a matter which should be specially pleaded by way of a defence and if considered appropriate, argued at the commencement of the trial or as one of the issues at the trial. Moreover the word "pleading" referred to in sections 191 and 238 of the Civil Procedure Code did not include a summons which was all that the third defendant was relying on in the application to strike out the claim. In the circumstances the Court ought to dismiss the summons thus paving the way for the plaintiff to enter judgment in default of defence in respect of his summons which was pending.

In so far as learned counsel for the plaintiff has sought to contend that sections 191 and 238 of the Code as only applicable where a defence has been pleaded, this contention is clearly untenable

based as it was on a false premise. This submission couched as it was is based upon the English Rules is not of general application as section 2 of the Civil Procedure Code (our rules) defines "pleadings" as:

> "Shall include any petition or summons, and also shall include the statements in writing of the claim or demand of the plaintiff or the defence or further defence of the defendant."
> (Emphasis supplied)

Section 686 of the Code in so far as it incorporated where necessary the practice and procedure in England would only apply where the provisions of the Code are deficient which is not the case here.

The affidavit filed in support of the summons stated the ground at paragraph 4 as being that "the endorsement on the Writ of Summons and the Statement of claim disclosed no cause of action against the defendants."

It appears that no attempt was made by counsel for the plaintiff to cure this defect before the limitation period ran out. They were no doubt aware that the limitation period having run its course, no amendment could be granted to give rise to a cause of action where none existed before or to deprive a defendant of a defence under the Statute of Limitations. See **Charlton v. Reid** [1960] 3 W.I.R. 33 per dictum of McGregor C.J. at 38(I) where the learned Chief Justice in expressing the view of the Court of Appeal of Jamaica said:-

> "We wish first to deal with the principles which will govern a Court when an application is made to amend a claim against a person who is entitled to the benefits of the Public Authorities Protection Law Chapter 316(J). There is an abundance of authority that the Court has always refused to allow a cause of action to be added where if it were allowed the defence of the Statute of Limitations would be defeated. The Court has never treated it as just to deprive a defendant of a legal defence."

Once learned counsel for the plaintiff conceded therefore that the Attorney General (the third defendant and applicant) was a

public authority that was in my view sufficient to put an end to the matter as it followed as a matter of course that the applicant was entitled to invoke the protection of section 2(1) of the Public Authorities Protection Act which reads:-

> "When any action prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any law or public duty or authority, or in respect of any alleged neglect or default in the execution of any such law, duty or authority, the following provisions shall have effect:-
>
> (a) the action, prosecution, or proceeding, shall not lie or be instituted unless it is commenced within one year next after the act, neglect or default complained of, or in the case of a continuance of injury or damage, within one year next after the ceasing thereof."

The act, neglect or default complained of in this matter was alleged to have been committed on 3rd October 1991 and the present claim was filed on 7th May 1993, more than twelve months after the cause of action arose.

In the light of my finding that the act done was one to which the Public Authorities Protection Act applies this is in my view fatal to the claim as the third defendant "by entering an appearance and following this up with a summons to strike out the claim, have made crystal clear their posture that if the action proceeds to trial they will be pleading the statute and relying upon it." Per dictum of Rowe J (as he then was) in C.L. L.083/1978 **Lt. Colonel Leslie H. Lloyd v. The Jamaica Defence Board, Easton Douglas and The Attorney General** at page 8 - a decision based on similar grounds

to the instant case (delivered on 5th December 1978), judgment affirmed on appeal (see S.C.C.A. 59/1978 - same parties) (delivered on 19/6/81).

The only other question to be resolved here, is as to whether I ought to exercise my discretion in favour of the respondent by allowing the matter to proceed to the trial stage with the attendant costs that would flow from a similar application by the third defendant which in my view and for the reasons already stated would be bound to succeed. To do so would fly in the face of the well established principle which the several authorities cited by learned counsel for the respondent clearly lays down, that it is only in plain and obvious cases that the extreme course of striking out a pleading ought to be resorted to. The situation here in my view on the facts makes this application a matter which is a plain and obvious case and one in which such a course ought to be resorted to.

Even if I may have been wrong in arriving at the above conclusion the secondary ground of relief sought in the summons at (b) is no less meritorious or of equal significance as the first. On an examination of the relevant paragraphs of the Statement of Claim in both actions, not only are the parties the same but the issues raised are unquestionably similar. The reliefs in the latter action have been added to but that has not altered the substance of what has been alleged in the pleadings. Paragraphs 2, 3 and 4 of the Statement of Claim in C.L. G. 270/1991 - the action struck out by Ellis J as disclosing no cause of action contain substantially the same allegations as that pleaded in paragraphs 2-5 of the Statement of Claim in the instant case the subject matter of this application.

Moreover there can be no doubt that although the hearing before Ellis J was by way of a proceeding in Chambers the effect of the order was a final determination of the matter, and not having been the subject of an appeal the order stands therefore as a final order.

It is in the light of that order that the present claim can now be seen as an attempt by the plaintiff to seek to litigate the same issues raised in the Statement of Claim in C.L. G. 270/91 all over again. Such being the case this leaves me with two possible courses. Firstly to uphold the submissions of learned counsel for the applicant on the basis that the matter has already been adjudicated by virtue of C.L. G. 270/91 and as such would be a bar to the bringing of the present claim on the ground of Issue Estoppel or to treat the matter as an abuse of the process of the Court and as such falling within the inherent jurisdiction of the Court. Prudence dictates that I ought to adopt the less extreme course and to treat it as the former.

I hold therefore that the application succeeds on both grounds and the Statement of Claim is struck out with costs to the applicant such costs to be taxed if not agreed.