[2012] JMSC Civil 154

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 05104 OF 2011

BETWEEN	**PETER KAVANAUGH**	**CLAIMANT**
AND	**THE ATTORNEY-GENERAL**	**1st DEFENDANT**
AND	**DET. INSPECTOR CAREY LAWES**	**2nd DEFENDANT**

Mr. Owen Crosbie, instructed by Owen S. Crosbie & Company for the Claimant/Applicant.

Ms. Alethia Whyte & Mr. I. St. Jude Alder, instructed by the Director of State Proceedings for the 1st Defendant/Respondent.

Application to Strike out Defence – Whether Particulars of Claim Should Have Been Filed - Whether Defence Filed and Served within Time Allowed by Claimant's Attorneys-at-law – Whether Defence Filed in Keeping with Rules of Court – The Overriding Objective – Civil Procedure Rules – Rules 1, 3.12, 8, 10.5 & 26.

IN CHAMBERS

Heard: October 4 & November 15, 2012.

Coram: F. Williams, J.

Introduction

[1] By Notice of Application dated December 9, 2011 and filed on December 13, 2011, the claimant seeks the following orders:

"(i) Defence filed be struck out or ignored as not a Defence filed in law not being in accordance with Rules of Court and judgment in default of Defence be entered.

(ii) Such other relief/s including costs to be taxed if not agreed as the court sees fit."

[2] The grounds upon which the application is based might be shortly stated to be:

"(i) Failing to observe and comply with Rules of Court in connection with filing a Defence.

(ii) Further or in the alternative, Defence filed is not a defence in law."

[3] Before proceeding to examine the provisions of the Civil Procedure Rules (CPR) that have a bearing on this matter, it is useful to give the origins and substance of the claim that has been brought.

The Claim

[4] The claim in this matter was commenced by the filing of a claim form on August 17, 2011. By this means, the claimant seeks damages for what he contends to have been his malicious prosecution by the 2nd defendant (a detective inspector of police), for the offence of obtaining money (the sum of $16,000), by means of false pretences.

[5] The allegations are that on or about October 30, 2009, the 2nd defendant maliciously and/or without reasonable and probable cause laid an information against the claimant on the basis that the claimant had, contrary to section 35 (1) of the Larceny Act, obtained the sum of $16,000, being the proceeds of cheque # 5990065, which represented services he provided on behalf of the Jamaica Information Service (JIS), to

which he was employed. Put another way, the substance of the charge was that the claimant performed services for which his employer was retained or engaged (and to which payment would have been due), and then collected the money in his personal capacity, rather than having it go to his employer, as he or it should.

[6] The claimant was summoned to appear before the Resident Magistrate's Court for the parish of Manchester, holden at Mandeville, on November 11, 2009; and, after several court appearances, he was discharged, the following endorsement having been made on the information by the learned resident magistrate before whom he appeared on that final day – March 31, 2010:

> *"No order made. Insufficient evidence".*

Subsequent Events

[7] The claim form having been filed on August 17, 2011, it was served on the 1st defendant on August 18, 2011.

[8] An acknowledgement of service was filed on behalf of the 1st defendant on August 30, 2011 and another document, headed "Amended Acknowledgement of Service" was filed on September 26, 2011. The difference between the documents (apart from the date), is the denial in the amended document that the particulars of claim were received. There is no other difference between them.

[9] At the time of the filing and service of the claim form, there was also filed and served an affidavit of the claimant. This affidavit goes into some detail about the facts and circumstances leading up to the claimant being charged and to the proceedings ultimately being terminated in his favour.

[10] Thereafter, correspondence and telephone conversations ensued between the attorneys-at-law for the parties as to the need or otherwise for the filing of particulars of claim, before the filing of a defence. Ms. Whyte took the view (initially, at least), that it

was necessary for particulars of claim to have been filed and served; whereas Mr. Crosbie, on the other hand, took the view that the affidavit that was filed would suffice.

[11] Among the written correspondence, for example, was a letter dated October 31, 2011 by which Ms. Whyte requested that particulars of claim be filed within 7 days. There was also a letter from her dated November 15, 2011, enclosing forms of consent for the filing of the defence out of time and requesting thirty (30) days within which to file the defence.

[12] Responding to this letter (which he acknowledged was received via facsimile), by way of letter dated November 17, 2011, Mr. Crosbie recounted the history of the matter, setting out the contents of some of the letters that passed between them and concluding:

> *"...please treat this as our consent for you to file and serve your Defence out of time and fix Friday 25th November, 2011 as the last and final date for you to file and serve your defence."*

[13] The letter ended by stating that five copies of the consent were being forwarded by priority mail.

[14] Thereafter followed a letter dated November 23, 2011 from Ms. Whyte indicating to Mr. Crosbie that the forms of consent which were said to have been enclosed in his letter dated November 17, 2011, were not in fact enclosed. By a response dated November 23, 2011, Mr. Crosbie insisted that the forms of consent were sent and sought an explanation of Ms. Whyte as to when his last letter to her had been received and why it was not received before.

The Filing and Serving of the Defence

[15] The defence was filed on November 24, 2011.

[16] There is affidavit evidence to suggest that an attempt was made to serve it on Mr. Crosbie's office on November 25, 2011; but that that attempt was thwarted by a non-functioning facsimile machine. That date being a Friday, on the next working day (Monday, November 28, 2011), a letter was sent by priority mail, enclosing two copies of the defence.

[17] On December 8, 2011 (that is, a day before the date of this notice of application and some five days before its filing), a document headed "Consent to File Defence out of Time" was filed by the 1st defendant, signed by Ms. Whyte, indicating that the claimant's attorneys-at-law had consented to the defence being filed out of time and attaching a copy of the letter from Mr. Crosbie dated November 17, 2011.

[18] That is a summary of the history of the matter. We must now look at the Civil Procedure Rules (the CPR), to see what is permitted or required so far as the filing of particulars of claim is concerned; and to see what time periods are delimited for the filing and serving of a defence.

The Civil Procedure Rules

The Requirement for Filing Particulars of Claim – Part 8

[19] The Rule in the CPR governing the filing of particulars of claim might usefully be discussed in this judgment. The relevant rule is Rule 8.

[20] Rule 8 addresses how civil proceedings are generally begun in the Supreme Court of Judicature of Jamaica. In a case such as this, that is usually done by the filing and serving of a claim form and particulars of claim. In fact Rule 8.1(1) (b) states that, along with the claim form "must" also be filed:

> *"unless either rule 8.2(1) (b) or 8.2(2) applies –*
>
> *(i) the particulars of claim; or*

(ii) where any rule or practice direction so requires or allows, an affidavit or other document giving the details of the claim required under this Part".

[21] Rule 8.2(1) (a) permits a litigant to issue and serve a claim form without the particulars of claim "only if":

> "the claimant has included in the claim form all the information required by rules 8.6, 8.7, 8.8, 8.9 and 8.10..."

Rule 8.6 deals with declaratory judgments; rule 8.7 speaks to the contents of a claim form; rule 8.8 deals with contents of a fixed date claim form; rule 8.9 deals with a claimant's duty to set out his case; and rule 8.10 deals with certificates of value. The main rule that is relevant, therefore, is rule 8.7, indicating what must be included in a claim form. Rule 8.9 (3) is also of some relevance – especially given a point raised by the claimant against the 1st defendant, which will be discussed later.

Rule 8.2 (1) (b) deals with cases in which the court has given permission. As the court has given no such permission in this case, that rule cannot apply.

[22] Rule 8.2 (2) deals with cases of emergency in which it is not practicable to obtain the permission of the court to serve the claim form without the particulars of claim. As this is not a case of such an emergency, that rule also cannot apply to this case.

[23] The only possibilities that exist, therefore, for the non-filing and non-serving of the particulars of claim being permissible pursuant to the rules, are rule 8.7 (as to the required contents of a claim form) that is, if the claim form sets out all the matters required by the CPR to be set out; and rule 8.1(b) (ii) – dealing with "any rule or practice direction" so requiring or allowing an affidavit or other document in place of the particulars of claim.

[24] It might be useful at this point to make a distinction between pleadings or statements of case, on the one hand; and evidence, on the other. In the CPR (rule 2.4), "statement of case" is defined as including such documents as the:

> *"(a) claim form, particulars of claim, defence, counterclaim, ancillary claim form or defence and a reply; and*
>
> *(b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court; …".*

[25] Part 34 deals with "Requests for Information" and so is not relevant to this case.

[26] On the other hand, "evidence" may be defined as "information used to establish facts in a legal investigation or admissible as testimony in a law court." (see the **Concise Oxford Dictionary**, 10th edition).

[27] So that, if an analogy from the field of construction might be used, the pleadings or statements of case are the foundation on which the evidential structure will be built.

[28] How is this evidential structure usually built? The answer to this question is to be found in rule 29.2(1); and the court's experience of the practice in this court in a matter of this nature.

[29] Rule 29.2(1) reads as follows:

> *"The general rule is that any fact which needs to be proved by evidence of witnesses is to be proved –*
>
> *(a) at trial, by their oral evidence given in public, and*

(b) at any other hearing, by affidavit."

[30] The only limitation on this rule is to be found in rule 29.2(2), which makes the general rule subject to any provision to the contrary contained in the rules or elsewhere; and to any order of the court. By rule 29.4, a witness statement is required to be filed and served as a pre-requisite for a witness giving evidence at trial, that witness statement : "containing the evidence which it is intended that that person will give orally". (See rule 29.4(1) (b)). The court may also permit evidence to be given by affidavit (see Rule 30.1(1)), either in addition to or instead of oral evidence.

[31] In the court's experience, the practice in a claim for malicious prosecution is for there to be a trial in open court, where a witness statement is filed and oral evidence given. Affidavit evidence is not normally taken – certainly not the evidence of the claimant – though previously-filed affidavits might be used in cross-examination, usually in an attempt to establish previous inconsistent statements. The court's experience of the practice in these matters, therefore, ties in with rule 29.2(1) (a) and (b), which prescribes in trial matters in open court the taking of oral evidence preceded by the filing and serving of witness statements. Affidavits are usually used in hearings in chambers and normally accompany fixed date claim forms.

[32] The court is not aware of any practice direction or other provision to the contrary. Additionally, the claimant has not (as required by rule 8.7(1) (d)), stated his occupation in the claim form. (Neither has he exhibited to the claim form the information with the learned resident magistrate's endorsement, terminating the proceedings in his favour – to which he refers in paragraph 3 of the claim form, and on which he, presumably, will be relying). Further, in paragraph 4 of the claim form, the claimant seeks to incorporate by way of reference "other matters shown in the Claimant's Affidavit hereunto annexed..." (see paragraph 4 of the claim form). (Incidentally, the said affidavit was not annexed to the claim form as filed). This makes it clear that the affidavit was being used as a part of the claimant's pleadings, to supplement the information in the claim form.

[33] The court is decidedly of the view, therefore, that after the filing and serving of the claim form, particulars of claim, and not an affidavit, should have been filed. This is so even though the affidavit that has been filed contains what appears to be all the information that would be expected and required in particulars of claim in a malicious-prosecution case. That notwithstanding, strictly speaking, the filing and serving of particulars of claim was what was required in this case. Its non-filing amounts to an irregularity.

[34] The significance of this finding will be given further consideration later in this judgment. We may now proceed to examine the rules relating to the filing of a defence.

Time for Filing a Defence

[35] Rule 10 is that rule dealing with defences.

[36] Rule 10.3(1) states the general rule relating to the filing of defences, which is that the time for filing a defence is 42 days from the service of the claim form (bearing in mind, of course, that the particulars of claim would normally be filed and served at the same time).

[37] In the instant case, the claim form was served on the 1st defendant on August 18, 2011 – that is, during what is known as "the long vacation". Time does not run for the filing and serving of any statement of case during the long vacation (see rule 3.5(1)). Time would, therefore, have commenced running at the start of the Michaelmas Term for that year, which would have been around September 16, 2011 (see rule 3.3). The 42 days allowed for the filing of the defence, therefore, would have expired on or about October 30, 2011.

[38] What happens or may happen after the time for filing a defence has expired is dealt with in rule 10.3 (5) to (9), which read as follows:

"(5) The parties may agree to extend the period for filing a defence specified..."

(6) The parties may not make more than two agreements under paragraph (5).

(7) The maximum total extension of time that may be agreed is 56 days.

(8) The defendant must file details of such an agreement.

(9) The defendant may apply for an order extending the time for filing a defence."

[39] As has been previously recounted, the parties' attorneys-at-law attempted to avail themselves of these provisions (in particular, rule 10.3 (5)); by attempting to agree to the filing of the defence out of time.

[40] As has also been previously recounted, the consent was for the defence to have been filed and served by November 25, 2011. It is common ground that the defence was filed on November 24, 2011.

[41] Two primary issues arise in relation to the defence: - (i) whether the defence is properly filed, seeing that the "details" of the agreement to file it out of time (that is, the consent), was not filed simultaneously; and (ii) whether it should be regarded as having been properly served.

Was the Defence Properly Filed?

[42] The peculiar facts and circumstances that figure prominently in this case, must influence the court's resolution of these issues. What are these peculiar facts? For one, it will be recalled that the 1st defendant's attorney-at-law is asserting that she never

received the forms of consent that the claimant's attorneys-at-law is saying were enclosed in the letter from them dated November 17, 2011. Indeed, it is interesting to see the document which was eventually filed on December 8, 2011 indicating that the claimant's consent had been given and attaching the letter from the claimant's attorneys-at-law dated November 17, 2011, giving that consent (see Exhibit AW8 to the affidavit of Alethia Whyte sworn on the 11th September, 2012). That document is interesting as it is signed by Ms. Whyte, instead of by Mr. Crosbie, the person giving the consent, as is usually the case; and as the form of consent which she sent to Mr. Crosbie required. This unusual form of the consent is a reflection of Ms. Whyte's position that she did not receive from Mr. Crosbie's office, the forms of consent that she had asked him to sign and return. It might be said that her position is not inconsistent with the position stated by Mr. Crosbie in his latter dated November 17, 2011 (third page, last paragraph of the said letter), when he wrote:

> *"...please treat this as our consent for you to file and serve your Defence out of time..."* (emphasis added).

[43] (It should also be mentioned for completeness, however, that the paragraph following that one states that five copies of the consent were being enclosed in that letter.)

[44] In relation to the non-filing of the consent (or the letter indicating the consent) at the same time the defence was filed, the claimant's position is that this renders the filing of the defence invalid: the consent must be filed at the same time. On the other hand, the position of the 1st defendant is that this is not fatal to the valid filing of the defence, mainly because there is no stipulation in the relevant rule for the "details" of the agreement to be filed at the same time.

[45] Whilst it is true that the present rule does not specifically state that the evidence or details of the consent must be filed at the same time, the predominant practice, in the court's experience, is and has been for the two documents to be filed together. This

practice is, in the court's view, a salutary one as it prevents or removes any possible doubt as to whether a defence is being filed in accordance with the rules. So that if, for example, there is a pending request for judgment in default of defence to be entered, and the claimant relents and consents for the defence to be filed out of time, the consent being filed with the late defence would indicate to the Registrar the claimant's change in position, thus preventing the judgment from being entered and so saving time.

[46] But should the non-filing of the consent at the same time that the defence is filed be fatal in this (or, indeed, any other) case? In the court's view, the answer to this question must be "no". It is important, in trying to ascertain the reason for the answer to this question, to not lose sight of the particular facts and circumstances of this case. These facts and circumstances make it palpably clear that there was consent in fact to the filing and serving of the defence by November 25, 2011. The facts and circumstances also make it clear that there was an issue as to whether the signed forms of consent (which would normally be filed with the defence, and not a letter) were actually received by the 1st defendant. Additionally the "consent" was filed eventually, although belatedly on December 8, 2011, before the notice of application in this case was filed.

[47] In considering this issue the court is bound to have regard to Part 1 of the CPR, in particular rule 1.1(1) and 1.2, which read as follows:

> *"1.1(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.*
>
> *1.2 The court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules."*

[48] Applying the overriding objective to a consideration of this issue, it seems to the court that what is important is whether there is or was consent in fact to the filing out of time of a defence or this particular defence. If there is consent in fact, then the defence has been properly filed; if there is none, then it could not have been properly filed. For the court to view this issue any other way, would be to give pre-eminence to form over substance, which would, in the court's view, not be in keeping with the overriding objective and would work an injustice to the 1st defendant in the instant case.

[49] The court has also given consideration to the case that was cited by Ms. Whyte in this connection – that is, **The Attorney-General v Keron Matthews** – [2011] UKPC 38, (an appeal to the Privy Council from the Court of Appeal of Trinidad & Tobago). She relied on this case in support of her submission that a defence can be filed at any time where there is no application to enter judgment and so the defence in the instant case was properly filed. Mr. Crosbie, on the other hand, submitted that the rules dealt with in that case are different from the Jamaican rules and so that case is inapplicable to the instant case.

[50] That case dealt with, in the main, a consideration of the overriding objective, against the background of an application to enter judgment, heard at the same time as an application to extend the time for filing a defence. Looming large in the court's consideration of the issues in that case was a concern with whether setting aside a default judgment amounted to an application for relief from sanctions. The pith and substance of the court's ruling in that case that is relevant to the issues in this case, are encapsulated in paragraph 14 of the judgment, delivered on behalf of the Board by Lord Dyson, which is to the following effect:

> *"...a defence can be filed without the permission of the court after the time for filing has expired. If the claimant does nothing or waives late service, the defence stands and no question of sanction arises..."*

[51] That is the general principle to be extracted from that case that relates to the issues in this case; and the court accepts that principle as being correct and sound. The only difference in this case, however, is that this claimant, by this application, is taking issue with the filing and service of the defence.

[52] However, in the particular facts and circumstances of this case, which indicate that the defence was in actuality filed with the claimant's attorneys-at-law's consent, the court finds that the defence was properly filed and the non-filing of the form of consent at the same time was not fatal.

[53] That is the court's position so far as the filing of the defence is concerned. We may now examine the other issue – that of service of the defence.

Was the Defence Properly Served?

[54] It will be remembered that the consent that was given was for the defence to have been filed and served by November 25, 2011.

[55] With that said, it is best to now look at the only evidence that exists in relation to the serving of the defence. That evidence is contained in the affidavit of Alethia Whyte filed in opposition to the claimant's application, specifically at paragraphs 16 to 18. This is that evidence:

> *"16. I am informed and verily believe that on Friday November 25, 2011, an attempt was made by my secretary at the time, Mrs. Johnson, to serve the Defence via fax. However, she was informed by Mr. Crosbie's office that their fax machine was not functioning.*
>
> *17. On Monday November 28, 2011, 2 copies of the Defence in the matter were sent by priority mail to Mr. Crosbie under cover of letter dated November 28, 2011. A copy of this letter*

is exhibited hereto and marked "AW7" for identification.

18. By letter dated November 30, 2011, Mr. Crosbie confirmed that he had received the Defences and enquired whether anything else was filed on November 24, 2011, apart from the Defences."

[56] In summary, therefore, an attempt was made to serve the defence via facsimile on the last date for service consented to by the claimant's attorneys-at-law; but this was not possible due to a difficulty with the claimant's attorneys-at-law's facsimile machine. The copies of the defence were sent via priority mail on the next business or working day (Monday November 28); and their receipt was confirmed by Mr. Crosbie on November 30.

[57] This is the unchallenged evidence. No reason has been given why it should not be accepted.

[58] What it means is that an attempt was in fact made to serve the claimant's attorneys-at-law within the time allowed by them; however, this was not possible. This failure was not due to any fault on the part of the 1st defendant's attorney-at-law. The affidavit evidence shows that correspondence had been successfully sent and received between the attorneys-at-law for the parties via facsimile several times before an attempt was made to serve the defence. With this practice, it would not have seemed unreasonable for the 1st defendant's attorney-at-law to have attempted service in this manner, given that the 1st defendant's chambers are located in the Corporate Area; whereas the chambers of the claimant's attorneys-at-law are located in the salubrious climes of Mandeville. The court considers as well that attempting to serve the defence by this means (via facsimile) is a method of service permitted by rule 6.2 of the CPR. It therefore appears that no sustainable objection could be taken to the attempt to serve the defence by this method.

[59] In these circumstances, the court finds that the defence should be regarded as having been properly served. And even if it was not, then considering (i) that it was properly filed; (ii) that it was sent by priority mail the next working day after the failed attempt at service on the Friday; (iii) the loss of time occasioned by the dispute as to whether the consent was returned or not; (iv) the loss of time caused by the disagreement as to whether particulars of claim should have been filed and served, (which, the court finds, they should); and (v) the overriding objective, in all the circumstances, the court is of the view that a striking out of the defence would not be fair and just and is not warranted. The court would, therefore, not exercise its discretion by striking out the defence.

[60] For what it is worth, it should be pointed out that the present rules do not expressly speak to when a defence should be served; but only when it is to be filed. Rule 10.4 (1), dealing with service of a copy of the defence, states:

> *"On filing a defence, the defendant must also serve a copy on every other party."*

[61] This is a departure from the clear language used in the previous rules that were to have been found in the Judicature (Civil Procedure Code) Law, where, at section 199, is mentioned:

> *"Where a defendant has entered an appearance, he shall file his defence, and deliver a copy thereof, within fourteen days from the time limited for appearance or from the delivery of the statement of claim whichever is the later..." (emphasis added).*

[62] Perhaps the present rule could be amended so that any doubt as to the time for serving a defence might be removed. However, the practice, as the court knows it, has been and is for the defence to be served within the time limited for its filing. Additionally,

an interpretation that allowed a defendant to file a defence within a certain period; but to serve it whenever he or she pleased would clearly not conduce to good administration and would run counter to the overriding objective – in particular, that aspect requiring that matters be dealt with expeditiously. It would also, in the court's view, run counter to the general tenor of the CPR, in which timelines are set for the completion of most other acts. Setting timelines for filing documents would be virtually meaningless if it were left to litigants to serve them whenever they pleased.

[63] There now remains the issue of whether the defence filed is "a defence in law", as stated in the claimant's grounds for the application.

Is the Defence a Defence in Law?

[64] In written submissions filed on the claimant's behalf, it is contended, in summary, that: (i) What is set out in the defence is irrelevant and inadmissible hearsay as it speaks of what the 2nd defendant (who has not been served) is saying. This is in breach of rule 10.5(1) of the CPR, which requires that the defence set out "the facts" on which the defendant relies; (ii) the defence is not in compliance with rule 10.5(6) in that it does not have annexed to it any document on which the defendant relies; (iii) The certificate of truth on the defence is not in compliance with rule 10.5(8) and is an admission that the contents of the defence are inadmissible hearsay; (iv) The defence has not denied paragraph 3 of the claim form (and paragraph 9 of the affidavit of the claimant), to the effect that the proceedings against the claimant were terminated in his favour, with the resident magistrate having endorsed on the record: "No order made. Insufficient evidence"; (v) Neither is there any reply to paragraphs 6, 7, 10, 10(a) and 14 of the claimant's affidavit, which, in essence, aver an absence of reasonable and probable cause; (vi) The 2nd defendant had no power to have arrested the claimant under common law or pursuant to sections 16 or 18 of the Constabulary Force Act.

[65] In response to these submissions, counsel for the 1st defendant in turn made a number of submissions. These will be considered under the heads used by counsel for the claimant.

Does the Defence Contain Inadmissible Hearsay?

[66] It was submitted on behalf of the 1st defendant that the submission made on behalf of the claimant on this aspect of the matter, was made without having regard to the unique position of the Attorney-General; and to the provisions of the Crown Proceedings Act, specifically section 3(1) (a), which makes the Crown liable for the torts of Crown servants; and section 13, which makes the Attorney-General the representative of the Crown for the purposes of suing and being sued. Indeed, it is only the 1st defendant who should be sued and not the 2nd defendant. It is proper for the defence to contain the information that it contains, as the 1st defendant is acting on the instructions of or filing a defence based on the information that it has received from the 2nd defendant, the Crown servant. The case of **The Attorney General v Gladstone Miller** – SCCA # 95 of 1997 was cited in this regard.

Discussion

[67] The sections of the Crown Proceedings Act that are relevant to this discussion are sections 3(1) (a) and 13(2). These sections, so far as are relevant, read as follows:

> *"3(1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject –*
>
> *(a) in respect of torts committed by its servants or agents;"*
>
> *"13(2) Civil proceedings against the Crown shall be instituted against the Attorney-General."*

[68] As the cause of action in this case – that of malicious prosecution – is a well-known tort, section 3 of the Crown Proceedings Act clearly applies. So does section 13(2).

[69] The position is made clear by Bingham JA in the **Gladstone Miller** case when he stated, at page 14 of that judgment:

> *"...where suits are brought against the Crown or Crown servants, the proper defendant is the Attorney General. Once the pleadings indicate that the claim is directed against the Crown or a Crown servant the Attorney General, by virtue of his office, is entitled, if not named a party to the suit, to put in a defence and take over proceedings on behalf of the Crown".*

[70] Also of relevance and perhaps more to the point on this issue are the observations of the learned judge to be found at page 9 of the said judgment:

> *"Although claims in tort could still be brought against the Crown-servant or employee alone, once it was established that he was acting within the course or the scope of his employment, the proper defendant to be sued was the Attorney General, he being the official representative of the Crown by virtue of his office".*

It is to be observed as well that this is not one of those cases in which the Attorney-General is raising an issue where the matter of vicarious liability is concerned. It is not seeking to disavow the actions of the Crown servant. What is being contended is that the Crown servant acted without malice and with reasonable and probable cause. It is

not being contended that he was on a frolic of his own. There is therefore no likelihood of the matter proceeding ultimately against the Crown servant alone.

[71] On the basis of these dicta, the facts of this case and the clear provisions of the Crown Proceedings Act, the court holds that the Attorney-General is the only proper party to this suit. There is no need for the 2nd defendant to remain a party – that is, if it was at all necessary for him to have been sued at all. All the acts alleged to have been done against the claimant were done by the 2nd defendant pursuant to his powers and duties as a member of the Jamaica Constabulary Force and vicarious liability is not in issue.

[72] In these circumstances, the defence must be a reflection of the instructions that the 1st defendant receives from the 2nd defendant. It is important as well on this aspect of the matter to recall the distinction that was earlier drawn (see paragraphs 24 and 26 of this judgment), between pleadings or a statement of case, on the one hand; and evidence, on the other. The hearsay rule is an evidential one and so relates to evidence; and not so much to pleadings or statements of case. The court therefore finds for the 1st defendant on this aspect of the matter. The defence contains "the facts" or instructions given to it by the 2nd defendant on which it intends to rely at trial.

Is the Defence in Breach of Rule 10.5(6)?

[73] These are the terms of rule 10.5(6):

> *"The defendant must identify in or annex to the defence any document which the defendant considers to be necessary to the defence".*

[74] On behalf of the 1st defendant it was submitted that the rule provides an alternative to annexing the documents – that is, to identify them; and that the 1st defendant has identified the documents that are relevant to the defence – that is, the cheque numbered 5990065; the relevant audit report by which the subject of the criminal case

was apparently discovered and the statement of the representative of the claimant's employee (one Ms. Crossman) who had made the report to the 2nd defendant.

[75] On this aspect of the matter as well, the court must agree with the submissions made on behalf of he 1st defendant. In the court's view, having regard to the plain meaning of the relevant rule, the use of the word "or" in this rule clearly gives to a defendant an option or choice. Whichever option a defendant chooses to exercise, he or she would have complied with the rule, as did the 1st defendant in this case. Where the document is identified and not annexed to the defence, it is obtainable by a claimant through the discovery process. Indeed, a request for their specific disclosure (if thought necessary), might be made at the case management conference. It must be noted as well that if the 1st defendant is in error in not annexing any documents to its defence, then the claimant would also be in error in not annexing any documents to its claim form, as was mentioned earlier in paragraph 32 of this judgment.

Is the Certificate of Truth in Breach of Rule 10.5(8)?

[76] This rule (rule 10.5(8)), calls for a defendant to verify the facts set out in the defence by a certificate of truth which should be in accordance with rule 3.12. An examination of rule 3.12 is, therefore, required.

[77] Rule 3.12 requires that every statement of case contain a certificate of truth. The general rule is for the "lay party" to give the certificate personally. However, where that is not possible or practical, then the attorney-at-law may give the certificate (see rule 3.12(3)), stating why it is impractical for the lay party to give the certificate. The next sub-rule that is of importance to this case is rule 3.12(8) which reads as follows:

> *"A certificate given by the attorney-at-law for a party must be in the following form-*
> *"I [name of the individual attorney-at-law giving the certificate] certify that –*
> *(a) the [claimant or as the case may be] states that*

he believes that the facts stated in this [name document] are true; and

(b) this certificate is given on the [claimant's or as the case may be] instructions. The [claimant or as the case may be] cannot give the certificate because [state reason]."

[78] This is the certificate given on the defence in question:

> *"I, ALETHIA WHYTE, Attorney-at-law instructed by the Director of State Proceedings, Attorney-at-law for the 1st Defendant, certify that the instructions for the Defence were given by the servants and/or agents of the Crown who were privy to the facts out of which the claim arose. The 1st Defendant was joined in these proceedings in a representative capacity under and by virtue of the Crown Proceedings Act and has no personal knowledge of the allegations made in the claim, and in the circumstances cannot give the certificate. I therefore certify on his behalf that all the facts set out in this Defence are true to the best of my knowledge, information and belief."*

[79] The submission made on behalf of the 1st defendant is that this certificate complies with rule 3.12(3) and (4).

[80] In examining this issue, it is important to remember the peculiar position of the Attorney-General who is mandated by the Crown Proceedings Act to be the nominal defendant in all actions against the Crown, alleging wrongs by Crown servants. One significance of this is that it is unlikely that there will ever be a situation in which in a suit against the Attorney-General a statement of case filed by the Attorney-General will be

certified by a lay party. Because of the peculiar position of the Attorney-General, a statement of case filed by his or her chambers will invariably (or, at the very least, in the vast majority of cases) be signed by an attorney-at-law who settles the particular statement of case. In this case, however, while it appears that the certificate complies with rule 3.12(3) and (4), as counsel for the 1st defendant submitted, it also appears that it does not, strictly speaking, comply with rule 3.12(8) (a) of the CPR.

[81] That rule seems to contemplate a confirmation or certification by the attorney-at-law that the lay party or person from whom the instructions come, believes the facts stated in the defence (or other statement of case) to be true. Such a statement in the belief in the truth of instructions is not included in the relevant certificate of truth. However, does that mean that the defence is therefore rendered defective to the extent that it ought to be struck out?

[82] In the court's view, the answer to this question is "no", as there has been substantial compliance with the provisions of this rule; there is no ascertainable prejudice to the claimant and to strike out this statement of case on the basis of what amounts in the court's view to a technicality, would not be in keeping with the overriding objective.

[83] Further, as Beswick, J approached the issue of a case in which a certificate of truth was not given at all in a statement of case, (a more serious breach, in the court's view, than the instant case), such a defect is not fatal to the particular statement of case, as, by rule 26.9(2), an error of procedure or failure to comply with a rule, does not render invalid any step erroneously taken, unless the court so orders (see **Dixon v Jackson**, suit no. C.L. D 042 of 2002). It is open to the court (by rule 26.9(3)), to "put matters right".

(For what it is worth, as well, the claimant might also technically be in breach of rule 3.12 (7), as careful comparison of the rule along with the claimant's certificate of truth shows that the latter does not scrupulously and exactly conform with the former).

Does a Failure to Reply to Several
Paragraphs of the Affidavit Render the Defence Defective?

[84] The answer to this question ought to be "no", in the submission of the attorney-at-law for the 1st defendant. The reason for this is that the defence sets out in substance the respects in which the 1st defendant joins issue with the claimant. For example, it sets out the basis on which the 1st defendant is saying the particular Crown servant acted, with a view to negating the claimant's assertion that the Crown servant acted with malice and/or without reasonable and probable cause. The non-denial of the fact that the claimant was discharged could not be fatal to the defence as there are other elements to the tort of malicious prosecution which the claimant would have to establish.

[85] The court is satisfied as to the soundness of the 1st defendant's submissions in this regard. As is well known there are several elements to the tort of malicious prosecution which a claimant must establish to a trial court's satisfaction. These have been said to be: (i) a prosecution; (ii) a termination of that prosecution in favour of the claimant; (iii) absence of reasonable and probable cause; and (iv) malice. The 1st defendant in this case does not deny that there was a prosecution or that it was terminated in the claimant's favour. The focus of the defence is to join issue with the claimant in relation to the other two elements – that of malice and reasonable and probable cause.

[86] Whether the Crown servant in this case was actuated by malice and acted without reasonable and probable cause will be issues for the judge to resolve at trial. In the court's view, therefore, the denials made in the defence are sufficient to put in issue such matters as are necessary for the matter to proceed to trial.

[87] Additionally, some of the challenges mounted to the defence include the contention that it fails to reply to certain paragraphs of the claimant's affidavit. However, as the court has previously observed, this is not the type of case that normally proceeds on the basis of affidavit evidence. If the claimant had filed particulars of claim and there was a

failure to reply to the pleadings, then the claimant's contention in this regard might have carried greater weight. In the circumstances, however, that contention will have to be rejected.

The 2nd Defendant's Power of Arrest

[88] The 1st defendant's response to this point that was raised on behalf of the claimant is two-fold: (i) that it is not relevant, given that there was no arrest in this case, as the claimant was summoned to answer to the criminal charge; and (ii) such a power of arrest does exist and is to be found in section 13 of the Constabulary Force Act.

[89] Section 13 of the Constabulary Force Act reads as follows:

> *"13. The duties of the Police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence, to serve and to execute all summonses, warrants, subpoenas, notices, and criminal processes issued from any Court of Criminal Justice or by any Justice in a criminal matter and to do and perform all the duties appertaining to the office of a Constable..."*

[90] The short answer to this issue, therefore, in light of this section, and the factual background to this case, is that the section empowers the police to summon the claimant as was done in this case; and also to have arrested him pursuant to a warrant on information.

Disposition

[91] All in all, the court is unable to grant the claimant the orders that he seeks. One reason for this is his failure to file and serve particulars of claim in this matter. And, whilst the defendant's certificate of truth might be questionable, the rules and authorities are largely against the claimant in respect of the other issues that he has raised in making his application to this court. Even if the court should be found to be in error in holding that it was necessary for particulars of claim to have been filed and served in the instant case, the particular facts and circumstances of this case support the 1st defendant's contention that the defence was validly filed and should be regarded as having been validly served.

[92] Since there are irregularities on both sides (but, more so, in the court's view, on the part of the claimant), it now falls to the court to make orders that will (in the words of rule 26.9(3), "put matters right".

[93] The orders of the court will, therefore, be as follows:

i. Application dismissed.
ii. The claimant is to file and serve particulars of claim on the 1st defendant within fourteen (14) days of the date hereof.
iii. The defendant is permitted to file and serve an amended defence within fourteen (14) days of service of the said particulars of claim, the said defence to contain a certificate of truth that complies with the requirements of rule 3.12(8)(a) of the CPR.
iv. The name of the 2nd defendant is struck out and the matter is to proceed only against the Attorney-General.
v. Half costs to the 1st defendant to be agreed or taxed.