

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2019/PUB/con/00010**

BETWEEN

KEOD SMITH

Plaintiff

And

COMMISSIONER OF POLICE

(in his capacity as Provost Marshal)

1st Defendant

AND

GEORGE FERNANDER

(in his capacity as Deputy Provost Marshal)

2nd Defendant

AND

ATTORNEY GENERAL

3rd Defendant

AND

COALITION TO PROTECT CLIFTON BAY and 2 others

4th Defendants

BEFORE: The Honourable Mr. Justice Bernard Turner

APPEARANCES: Mr Carlton Martin for the Plaintiff

**Mr David Higgins and Ms Adelma Roach for the
1st, 2nd & 3rd Defendants**

**Mr Fred Smith, Q C & Mr Martin Lundy II for the
4th Defendants**

HEARING DATES: 26 April, 3 May & 24 May 2019

DECISION

TURNER J

The Plaintiff herein filed an Ex Parte Summons on 25 April 2019 seeking an injunction:

“...restraining the 1st and 2nd Defendants, Provost Marshal and his Deputy, Mr George Fernander, whether by themselves, their servants or agents or howsoever otherwise, from executing or further executing the Writ or Writs of Fieri Facias filed against the Plaintiff in Action No. 2013/PUB/jrv/00012 and from selling the Plaintiff’s 2010 Jeep Wrangler pursuant to such Writ or Writs or at all until further order of the Court or the trial of this action.”

2. This followed upon the filing of a Writ of Summons on 24 April 2019 and a Statement of Claim filed 25 April 2019 seeking various relief following upon the seizure of what is described as the Plaintiff’s 2010 Jeep Wrangler, further to the referenced Writ or Writs of Fieri Facias.

3. On 26 April 2019, following upon the hearing of the ex parte summons, I granted an interim injunction to the Plaintiff in the following terms:

“IT IS ORDERED AND DIRECTED that the Provost Marshal and his Deputy, Mr George Fernander, are hereby restrained for seven (7) days whether by

themselves, their servants or agents or deputies or howsoever otherwise from selling the Plaintiff's Jeep Wrangler and that the Parties are to appear before the Court on the 3rd day of May 2019 at 2:00pm."

4. On the return date contained in the Order, counsel on behalf of the Defendants appeared and counsel for the 4th Defendants referenced a Summons filed that day for the striking out of the Writ and Statement of Claim filed 24 & 25 April 2019 respectively by the Plaintiff. Upon an undertaking by the Defendants not to seek the sale of the item in question pending the hearing of that Summons, it was agreed that the striking out application be heard on 24 May 2019. This is my decision on that application.

5. The striking out application read, in part, as follows:

"...on the application on the part of the 4th Defendants herein (the Coalition) for an Order pursuant to R.S.C., O. 18, r. 19(1) a, b, c and or d and/or the inherent jurisdiction of the Court that the Plaintiff's Writ of Summons filed herein on 24th April, 2019 and Statement of Claim filed herein on 25th April, 2019 be struck out and the action dismissed.

AND FOR A FURTHER ORDER that the Coalition's costs of this action be paid by the Plaintiff."

6. The Statement of Claim filed pursuant to the generally endorsed Writ, by the Plaintiff, the subject of this application, reads in part:

1. The 4th Defendant in Public Law Division Action No. 2013/PUB/jrv/00012, the Applicants therein, issued or secured the issue of one or two Writs of Fieri Facias (hereinafter called "the said Writ or Writs") against the Plaintiff (therein referred to as the 6th. Respondent) which Writ or Writs commanded

the 1st. Defendant that of the goods, chattels, land and tenements of the Plaintiff authorized by law to be seized in execution, the 1st. Defendant cause to be made the sums and or amounts of money set out therein to be paid to the 4th. Defendant in pursuance as therein stated. The 4th Defendant is a limited company which has been incorporated under the laws of the Bahamas.

2. The said Writ or Writs, which were issued or caused to be issued by the 4th. Defendant against the Plaintiff, was or were not served on the Plaintiff. Upon receiving knowledge of the said Writ or Writs and the seizure, the attorneys for the Plaintiff immediately thereafter wrote by letter dated the 24th. day of April, 2019, to the 1st., 2nd. Defendants putting them on notice that they have no jurisdiction or right to seize and or sell any property of the Plaintiff, in particular the Plaintiffs Jeep Wrangler, pursuant to such Writ or Writs or at all and requesting that they refrain from executing or further executing the said Writ or Writs. The 1st., 2nd. and 3rd. Defendants at all material times were aware of the fact that the issue of the said Writ or Writs was without jurisdiction and that such issue was illegal and null and void. They were malicious or acting with malice in failing to heed the express and or implied call by the Plaintiff to withdraw from the execution or further execution of the said Writ or Writs. The said Writ or Writs were issued or caused to be issued, and the said seizure likewise, by the 4th. Defendant maliciously and without reasonable and or probable cause, they being uncaring as to the outcome or irregular, illegal or wrongful execution thereof.

3. The 1st. 2nd and. Defendants, having received the said letter, completely ignored the irregularity and or illegality of the said Writ or Writs and were careless as to the claim of the Plaintiff that the said Writ or Writs were

illegal and or irregular and or that they had no jurisdiction to do that which the said Writ or Writs commanded him to do, and proceeded in such manner to wrongfully continue in possession of the said Jeep, the property of the Plaintiff, and retained possession of it with a view to selling it. The conduct of the 1st. and 2nd. Defendants in seizing and or taking possession of and continuing in possession of the Jeep is and has at all material times been aided and supported by the 4th. Defendant.

4. On or about the 18th day of March, 2018, the 2nd . Defendant, acting in his capacity of Deputy Provost Marshal or presenting himself in such capacity or as an officer or person with authority to act on behalf of the 1st. Defendant or the Provost Marshal in seizing the Jeep, the property of the Plaintiff, appeared at the Plaintiffs place of business where the Jeep was parked, in front of Mosko Building, Nassau, N. P., and seized and towed away the Jeep for the purpose of selling it as part of the goods and chattels of the Plaintiff pursuant to the said Writ or Writs.

5. The 1st and 2nd. Defendants were at all material times acting together with the 4th. Defendants in seizing the Jeep. The 2nd. Defendant, George Fernander, was duly authorized to act on behalf of the 1st. Defendant and did in fact act on his behalf in seizing the Jeep.

6. The 1st., 2nd. and 4th. Defendants are, and have at all material times been, careless as to whether the Plaintiff suffer or continues to suffer loss and damage as a result of the wrongful seizure of the Jeep.

7. The 2nd. Defendant at the time of the seizure or before it failed to serve the Plaintiff with the said Writ or Writs and seized the Jeep in the absence of the Plaintiff and without notifying him of the seizure, except that the 2nd. Defendant on the 23rd. of April, 2019, upon inquiry to him by

attorney C. A. Martin, informed Mr. Martin that he had seized the Jeep for the purpose of selling it.

8. The said seizure or taking of possession of the Jeep was wrongful, an act of trespass and a breach of the constitutional rights of the Plaintiff under Article 21 of the Constitution which Article guarantees the Plaintiff protection from illegal interference with his property. The said constitutional rights of the Plaintiff has been breached and such breach is continuing.

9. The Jeep is or ought to be known to the 1^{st.}, 2^{nd.} And 4^{th.} Defendants as a rare and unique property, not easily replaceable and as having a value that is not easily assessable or as being immeasurable.

10. The 1^{st.} and 2^{nd.} Defendants, with the support and encouragement of the 4^{th.} Defendants, continue to wrongfully possess and deny the Plaintiff return of the Jeep in spite of the said letter to the 2^{st.} and 2^{nd.} Defendants. As a result of the said conduct of the 1^{st.}, 2^{nd.} and 4^{th.} Defendants the Plaintiff has suffered and continues to suffer loss and damage.

SPECIAL DAMAGES

1. Depreciation of the Jeep, generally and for lack of upkeep, from the 18^{th.} day of March, 2019, to the present and continuing daily.
2. Continuing loss of use of the Jeep at a daily rate of about Two hundred dollars (\$200.00).

AND THE PLAINTIFF CLAIMS against the Defendants the following relief:

1. Pursuant to Articles 27 and 28 of the Constitution the Plaintiff applies to the Supreme Court for relief in respect of such violations, inclusive of an order that the 1^{st.} and 2^{nd.} Defendants do forthwith deliver up or return possession of the Jeep to the Plaintiff.

2. Damages for wrongful seizure or taking of possession of the Jeep, and or, insofar as the 4th. Defendant is concerned, causing possession thereof to be taken and kept by the 1st. and 2nd. Defendants under and or by virtue of the illegality and or irregularity of the seizure or want for jurisdiction of the 1st. and 2nd. Defendants under the said Writ or Writs.

3. Damages for breach of the Plaintiffs constitutional rights and or, insofar as the 4th. Defendant is concerned, causing such rights to be breached and continued to be breached.

4. A declaration that they (the 1st. 2nd. and 4th. (Defendants) have no jurisdiction to seize or cause to be seized or to seize or take possession of the Jeep, the property of the Plaintiff pursuant to the said Writ or Writs or at all.

5. An injunction restraining the 1st. and 2nd. Defendants whether by themselves, their agents or servants or howsoever otherwise from selling or in any manner interfering with the Jeep.

6. Any redress the Court may in the above circumstances deem appropriate.

7. Further or other relief.

8. Costs.

7. The affidavit of Ms Raven Rolle, filed 10 May 2019 in support of the striking out application, reads, in part, beginning at paragraph 24:

“Grounds

Claims in SOC premised on non-existent writ or writs of fifa

24. According to paragraph 1 of the Statement of Claim, Keod Smith's entire case is premised on 1 or 2 Writs of Fifa issued or secured by Coalition in JR – 1 against Keod Smith and which:

“...commanded the [the Provost Marshal that of the goods, chattels, land and tenements of [Keod Smith] authorized by law to be seized in execution, the [the Provost Marshal] cause to be made the sums and or amounts of money set out therein to be paid to [the Coalition]” (emphasis added)

25. However, the relevant portion of each of the Writs of Fifa pursuant to which the Provost Marshal levied execution against the Vehicle reads as follows

"...of the goods and/or chattels of the within named MR. KEOD SMITH authorized by law to be seized in execution..."

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26. Neither Writ of Fifa refers to any land or tenements of Keod Smith.

27. Accordingly, Keod Smith's case is premised on a Writ or Writs of Fifa that are non-existent.

Action by Writ impermissible and or inappropriate

28. Keod Smith seeks to disturb the Provost Marshal's lawful exercise of his duty to levy execution pursuant to the 2 Writs of Fifa (referred to in the chronology above) by way of a Writ action.

29. It is impermissible and or inappropriate for Keod Smith to do so.

30. Under Order 47 of the Rules of the Supreme Court, the appropriate process (subsequent to an order or judgment being made) is for a Judgment Debtor to make application for a stay the execution by Summons supported by an Affidavit which establishes that (a) there are special circumstances which render it inexpedient to enforce the

judgment or order,* or (b) that the applicant is unable for any cause to pay the money.;

31. The Judgment Debtor can stay seek a stay either absolutely or for such period and subject to such conditions as the Court thinks fit.

No action in law against Provost Marshal

32. It is trite that the Provost Marshal and his deputies are immune from suit under s. 4(5) of the Crown Proceedings Act.

Inappropriate claim for Constitutional relief

33. At paragraph 8 of the Statement of Claim, Keod Smith alleges that the seizure of the Vehicle was a breach of his constitutional rights under Article 21 of the Constitution. Based on that claim he claims an order for deliver up and damages.
34. The proviso to Article 28 (2) of the Constitution provides that this Court shall not exercise its powers to grant constitutional relief if the Court is satisfied that adequate means of redress are or have been available to the person concerned under any other law.
35. Order 47 of the Rules of the Supreme Court provides a Judgment Debtor with adequate means of redress to prevent an execution process.
36. Further, Keod Smith seeks constitutional relief against the Coalition which he admits at paragraph 1 of the Statement of Claim is a limited liability company.
37. It is a common principle of law that actions for constitutional reliefs do not lie against private individuals or entities.

Material facts not pleaded

38. The crux of Keod Smith's claim is set out in paragraph 2 of the Statement of Claim where he alleges that:

27.1 The Provost Marshal has no jurisdiction or right to seize and/or sell any of Keod Smith's property, and in particular, the Vehicle"

27.2 The issue of the Writ or Writs of Fifa was without jurisdiction.

39. Under Order 18 Rule 6 of the Rules of the Supreme, every pleading must contain in summary form the material facts on which the party pleading relies for his claim.

40. The Statement of Claim is devoid of any facts in support of Keod Smith's claim that the Provost Marshal has no jurisdiction or right to seize and/or sell any of Keod Smith's property, and in particular, the Vehicle.

41. The Statement of Claim is devoid of any facts in support of Keod Smith's claim the issue of the Writ of Writs of Fifa was without jurisdiction.

42. To the extent, which is not clear from the Statement of Claim, Keod Smith's claim is based on the allegation at the beginning of paragraph 2 that the Writs of Fifa were not served on him, then without prejudice to the earlier grounds herein, Keod Smith's claim discloses no reasonable of cause of action because there is no requirement in the law that a Writ of Fifa must be served on the Judgment Debtor.

43. In view of the foregoing, it is clear that Keod Smith's pleadings disclose no real cause of action and/or are scandalous, frivolous or vexatious and/or they may prejudice, embarrass or delay the fair trial of the action or are otherwise a flagrant abuse of process of this Honourable Court.

44. I therefore pray for an order striking out these proceedings with costs to be paid by Keod Smith to the Coalition.....”

8. Each of the Writs of Fieri Facias, filed 18 February 2019 read, in part:

“WE COMMAND you that of the goods and/or chattels of the within Named MR. KEOD SMITH authorized by law to be seized in execution, you cause to be made the aggregate sum of.....”

9. The central contention of the Plaintiff in the Writ, as explicated in the Statement of Claim, is that the Provost Marshal had no jurisdiction to seize the item in question, the Jeep. As noted in the affidavit of the 4th Defendants, this is stated as a bare assertion without pleading the basis of the assertion:

“39. Under Order 18 Rule 6 of the Rules of the Supreme, every pleading must contain in summary form the material facts on which the party pleading relies for his claim.

40. The Statement of Claim is devoid of any facts in support of Keod Smith's claim that the Provost Marshal has no jurisdiction or right to seize and/or sell any of Keod Smith's property, and in particular, the Vehicle.

41. The Statement of Claim is devoid of any facts in support of Keod Smith's claim the issue of the Writ of Writs of Fieri Facias was without jurisdiction.”

10. It emerged in the submissions filed on behalf of the Plaintiff in opposition to the striking out application that the basis of his central contention is not that the Registrar did not have the authority to issue the writs, but that the Provost Marshal, in executing the writs, was restricted to

executing against the things which are mentioned in section 59 of the Supreme Court Act. That section reads:

“59. By virtue of any writ of fieri facias to be sued out of the Supreme Court, the Provost Marshal, or other officer having the execution thereof, shall seize and take any money and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the person against whose effects such writ of fieri facias is sued out.”

11. The argument, essentially, is that the entire scope of the writ of fieri facias is limited to execution against money, cheques, bills of exchange and the like things mentioned in section 59.

12. In developing this argument further, counsel for the Plaintiff referred to the history of the present Supreme Court Act (the Act), and its passage, in 1996, by Act No. 15 of 1996. He referred to the Act as a consolidating piece of legislation, indeed the preamble to the Act reads:

“An Act to consolidate with amendments the Supreme Court Act and other written laws relating to the Supreme Court in The Bahamas and the administration of justice therein; to repeal certain obsolete or unnecessary written laws so relating; and for connected purposes.”

13. As described in the preamble, those **“obsolete or unnecessary written laws”** are addressed in section 78 of the Act, which does not appear in the 2000 edition of the Statute Laws of The Bahamas, either in book form or online. As found in Acts of The Commonwealth of The Bahamas for the Year 1996, Volume 3, that section reads:

78-(I) The Acts mentioned in Part I of the Second Schedule are repealed to the extent specified in the third column of that Schedule.

(2) The Acts mentioned in Part II of the Second Schedule are amended to the extent specified in the third column of that Schedule.

3) Notwithstanding the repeal of the repealed Act -

(a) rules of court which immediately before the date of commencement of this Act, were in force under the provisions of the repealed Act shall remain in force until other provision shall be made under the provisions of this Act;

(b) any officer appointed to any office under the provisions of the repealed Act, to which an appointment may be made under the provisions of this Act shall be deemed to have been appointed under the provisions of this Act.

Part one of the Second Schedule reads:

SECOND SCHEDULE (Section 78)

Part I

<u>Chapter</u>	<u>Short Title</u>	<u>Extent of Repeal</u>
41	Supreme Court	The whole Act
55	Probate	The whole Act
73	Judgments	The whole Act
74	Prevention of Frivolous and Vexatious Suits	The whole Act
75	Sale of Equitable Estates	The whole Act
76	Money and Securities Attachment	The whole Act
129	Conveyances by Provost Marshal	The whole Act

14. The Plaintiff submits that the repeal of the Conveyances by Provost Marshal Act, the preamble to which reads:

“An Act for Regulating the Mode of Conveying Lands Sold under Legal Process, and for Other Purposes.”

means that the Provost Marshal no longer has the powers as set out under section 9 of that Act; the exact submission is stated as:

“The powers of the Provost Marshal as set out under S. 9 of the Act having been terminated by the repeal of the Act under the Supreme Court Act, left a void insofar as writs of fi fa was concerned.

15. I find that this submission is fundamentally misconceived and based on a misreading of section 9 of the repealed legislation. Not only would the draftsman of the repealed legislation have found a peculiar place to bestow upon the Provost Marshal his general power and authority, in an Act for regulating the mode of conveying land sold under legal process, but the section itself reads:

“9. —(1) The Provost Marshal and his lawful deputies, have, and of right ought to have, power and authority to execute so much of the statute and common law as may lawfully be executed by the sheriff or under sheriffs of any county in England.”

16. I find that that section does not purport to grant to the Provost Marshal any power, but merely states the power and authority which the Provost Marshal, and his lawful Deputies, already had:

“The Provost Marshal and his lawful deputies, have,…”

17. If the section, as I so find, does not grant the power, then the repeal of the Act does not take any power away.

18. The Plaintiff's submission continued with the submission that the "void" which they asserted existed, was filled by section 59 of the present Supreme Court Act and that the powers are limited to the things listed in that section.

19. To understand the origin of section 59 of the present Supreme Court Act, one only has to consider the language of the repealed Money and Securities Attachments Act. The Preamble reads:

AN ACT RELATING TO THE ATTACHMENT AND REALISATION BY THE PROVOST MARSHAL OF MONEYS AND SECURITIES FOR MONEY.

and section 2 reads:

2. By virtue of any writ of fieri facias to be sued out of the Supreme Court, the Provost Marshal, or other officer having the execution thereof, may, and shall seize and take any money and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the person against whose effects such writ of fieri facias is sued out.

20. The repealed legislation, as the preamble indicates, was intended to address the power of the Provost Marshal to attach and seize money and securities for money. The margin note indicates as much, it reads:

"Power of Provost Marshal to attach money, cheques and other securities by writs of execution."

and is copied from the margin note of the repealed Money and Securities Attachments legislation.

21. What section 59 does not do, nor does it purport to do, is to limit the power of the Provost Marshal to seize goods and chattel, or to only authorize the Provost Marshal to seize money and other securities as the only items against which a writ of fieri facias may be executed. Indeed the Court of Appeal of The Bahamas stated, in **THE ESTATE OF ANDERSON DEWEY THOMPSON, EILEEN THOMPSON, Appellants AND EDNOLD DEWEY THOMPSON Respondent, SCCivApp No. 18 of 2018**, at paragraph 14 that:

“14. While a Writ of fi fa is a feature of English law, it should be pointed out that it has been held that Writ if fi fa is more limited in scope in the UK than in the Bahamas.”

22. This finding effectively undermines the entirety of the Plaintiff’s Writ of Summons and Statement of Claim in support. The constitutional argument in respect of unconstitutional deprivation of property falls apart, since the seizure would have been pursuant to lawfully issued Writs of Fieri Facias and the item seized would have been a good or chattel upon which such a Writ could have been executed.

23. The Plaintiff, in his affidavit in opposition to, and in his submissions in opposition to the striking out application, asserted and submitted that the Writs were not served upon him. I concur with the submissions of counsel for the 4th Defendants that there was no requirement to serve the Writ of Fieri Facias upon the Plaintiff.

24. The Plaintiff also prayed in aid of his submissions the fact that in another action, related to the litigation from which these Writs arose, that a Registrar had purported to issue Writs of Fieri Facias against land. Indeed the Plaintiff, initially purported that the Writs issued in the instant matter were against land and were therefore invalid. As seen in the portion of the Writs, set out above, the Writs do not purport to be issued to be executed against land, and in any event, the complaint is in respect of the execution against a vehicle.

25. For these reasons, I find, having regard to the provisions of Order 18, Rule 19 of the Rules of the Supreme Court, that the Plaintiff's Writ and Statement of Claim discloses no reasonable cause of action and I order that it be struck out and dismissed, with costs to the Defendants, to be taxed, if not agreed.

Dated this 5th day of July AD 2019

**Bernard S A Turner
Justice**