COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2018/PUB/con/00022

BETWEEN:

WDC 1896 MARIA DAXON

Plaintiff

AND

1. **W/INSP. DONELL BROWN**
2. **SGT. 88 PAUL JONES**
3. **MARK BARRETT**
4. **LEON BETHEL**
5. **ELLISON ELROY GREENSLADE**
6. **THE MINISTRY OF NATIONAL SECURITY**
7. **THE POLICE SERVICE COMMISSION**

Defendants

Before: The Honourable Mr. Justice Loren Klein
Appearances: Kevin Williams for the Plaintiff
Sophia Thompson-Williams, Danielle Francis for the Defendants

Hearing Date: 26 November 2021

RULING

KLEIN, J.

Civil Practice and Procedure—Rules of the Supreme Court (R.S.C.) 1978—Order 18, r. 19(1) (b) and (d)—Application to Strike out writ and statement of claim—Frivolous and Vexatious—Abuse of Process—Multiple causes of action—Unlawful arrest—Malicious Prosecution—Defamation—Misfeasance in Public Office—Fundamental Rights—Limitation Defences—Public Authorities

INTRODUCTION AND BACKGROUND

[1] This is an application by the defendants to strike out the plaintiff's writ and statement of claim in this action, in which she is alleging multiple claims common law and constitutional claims against the defendants.

[2] The plaintiff is a former police officer and the claims arise out of what can only be described as a tumultuous employment relationship with her former employer, the Royal Bahamas Police Force ("the Force"). In fact, this is one of several legal claims the plaintiff has issued against the Force and other public defendants based on events and incidences which have occurred during her tenure with the Force (see the Court's ruling in *WPC Maria Daxon v. Drexel Armbrister et. al.* [2013/PUB/CON/00006], delivered the same date as this Ruling).

Essential background

[3] This particular action arises out of the following events. According to the defendants, on 26 August 2016, the plaintiff, then a serving police officer, made a FaceBook post which was titled "STOP STEALING THE JUNIOR OFFICERS FUNDS". The post included allegations against the Commissioner of Police ("COP") and his executive team that they were not paying junior officers their entitlements, including overtime money and pay for private engagements that officers are allowed to undertake with the permission of the Force.

[4] On 31 August 2016, the plaintiff was interviewed and charged with two counts of "Intentional Libel, Contrary to Section 315(2) of the Penal Code, Chapter 84" and arrested by the police. She was arraigned before the Magistrates' Court on 1 September 2016 and remanded to the Bahamas Department of Corrections, Fox Hill ("BDOCS"). She was granted bail the following day in the sum of $100.00 and released from BDOCS. The prosecution entered a *nolle prosequi* on 19 April 2017 and on 20 April 2017 the plaintiff was discharged by Deputy Chief Magistrate Andrew Forbes.

The applications

[5] The plaintiff filed a generally indorsed writ on 18 April 2018 in the following terms:

> "The Plaintiff claims against the Defendants jointly and or severally damages for violation of the Plaintiff's Constitutional Rights, Freedom of Movement, Malicious Prosecution, Defamation of Character, Unlawful Arrest and Detention, False Imprisonment, Exemplary Damages, Aggravated Damages and interest thereon caused by the negligence and breach of duty on the part of the Defendants whereof the Plaintiff has suffered damages, stress, inconveniences, victimization, and losses."

[6] The statement of claim was filed 13 June 2018, which asserted multiple causes of action as follows: (i) unlawful arrest; (ii) malicious prosecution; (iii) misfeasance in public office; (iv) defamation; and (v) breaches of fundamental rights under Articles 15, 17(a), 19(1) and (2) and 26(1) and (2) of the Constitution.

[7] In respect of these claims, the plaintiff prays a laundry list of declarations and damages as follows, which I reproduce without editing, omitting consequential relief such as costs and interest:

> "1. Cost for Station Visit, Bail Application and Preparation for Trial $10,000;
> 2. A Declaration that the proceedings against the Plaintiff constitutes malicious prosecution and unconstitutional, void and of no effect:
> 3. A Declaration that the investigation was not impartial and unconstitutional, ultra vires, void and of no effect;
> 4. A Declaration that the investigation was unfair, unreasonable and not impartial;
> 5. A Declaration that the arrest, detention and imprisonment of the Plaintiff was unconstitutional and unlawful.
> 6. A Declaration that the Defendants and each of them conspired to injure the Plaintiff;
> 7. A Declaration that the Defendants and each of them conspired to defame the Plaintiff;
> 8. The Declaration that the Fourth and Fifth Defendants compensate the Plaintiff at a rate to be determined by the courts for the loss and damages;

9. The Declaration that the Fifth, Sixth and Seventh Defendant compensate the Plaintiff at a rate to be determined by the courts for loss and damages;
10. Breach of the Plaintiff's rights under Article 19(1) and (2) of the Constitution of The Bahamas;
11. Breach of her fundamental rights and freedoms not to be treated unfairly according to Article 26(1) and (2) of the Constitution of the Bahamas;
12. A Declaration that the Defendant's acted arbitrarily, capriciously and abusively towards the Plaintiff;
13. A Declaration of conspiracy to injure the Plaintiff;
14. A Declaration of Misfeasance in Public Office;
15. Damages for libel;
16. Damages for conspiracy to commit libel;
17. Exemplary Damages;
18. Damages for Unlawful Detention and False Imprisonment;
19. Damages for malicious prosecution;
20. Damages for defamation;
21. Mental suffering;
22. Loss of Reputation;
23. Injury to the Plaintiff dignity and pride;
24. Entitled to be compensated for the loss of her personal liberty;
25. Damage to her self-esteem and public images resulting from her arrest;"

[8] The defendants filed a summons on 26 April 2021, the material parts of which were in the following terms:

"1. An Order that this action be struck out and/or dismissed pursuant to the inherent jurisdiction of the Court and/or Order 18, Rule 19(1) (a), (b) and (d) of the Rules of the Supreme Court (1978); and/or:
2. That, without prejudice to (2) above, should the action not be dismissed, for an Order that the Defendants be granted a further extension pursuant to Order 3(4)(2) of the Rules of the Supreme Court (1978) to file a Defence; if necessary, and/or;
3. The Defendants will further aver that this action having accrued since (*sic*) is statute barred pursuant to Section 12 of the Limitation Act, Chapter 83, of the Statute Law of the Bahamas 2000."

[9] The summons was supported by an affidavit of Fern Bowleg filed 23 August 2021. The plaintiff laid over with the Court the draft affidavit of Christopher Brennen, a legal assistant in the Office of the plaintiff's firm, which was dated the 11 November 2021, on the undertaking to file the same. The court does not recall receiving a filed copy of the affidavit, but did consider it de *bene esse*.

STRIKING-OUT PRINCIPLES

The Rules

[10] The rules and principles on which these applications are to be determined are not in dispute. The defendants' application to strike out was brought on two main grounds: (i) Order 18, r. 19(1) (a) (b) and (d) of the *Rules of the Supreme Court* 1978 (R.S.C. 1978); and (ii) s. 12 of the Limitations Act.

Ord. 18, r. 19 (1)

[11] Order 18, r. 19 of the *Rules of the Supreme Court* 1978, (R.S.C. 1978) provides in material part as follows:

> "19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, 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,
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

[12] A similar power inheres under the inherent jurisdiction of the Court to stay or dismiss actions which are vexatious, frivolous or otherwise an abuse of the process of the Court: see "The Supreme Court Practice 1997", Vol. 1, at para. 18/19/18; *Reichel v Magrath* (1889) 14 App. Cas. 665).

A reasonable cause of action

[13] The requirement of a reasonable cause of action has been described as *"...a cause of action with some chance of success, when…only the allegations in the pleadings are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out": Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094, CA, per Lord Pearson at p. 1101-f.

[14] Thus, the court will strike out the pleading or part of it if satisfied that even if the allegations of fact set out in the pleading are proved, those facts would not establish the essential ingredients of a cause of action. But it will not strike out an action on these grounds if it discloses some cause of action or question fit to be decided by a court, even if the claim is weak (*Davey v Bentick* [1893] 1 QB 185, CA). Neither will the court strike out a claim on the basis of a limitation defence under this rule, as the Limitation Act bars the remedy rather than the claim. But this does not preclude the court striking out based on a limitation defence under other grounds, such as the claim being frivolous or vexatious or an abuse of process (para. 32, *infra*).

[15] No evidence is admissible under this ground (Ord. 18, r. 19(2)), and when considering the pleadings the court is inhibited from conducting a mini-trial on the papers to ascertain whether there is a cause of action (*see Wenlock v Moloney [1965] 2 All ER 871*). But when an application is made under the inherent jurisdiction of the Court, or on any of the other grounds, all the facts can be gone into, and affidavits are admissible: *Willis v Earl Howe* [1893] 2 Ch. 189, pp. 551, 554. The defendants rely on all limbs of Ord. 18, r. 19(1), and they have invoked both the statutory and inherent jurisdiction of the court.

Scandalous, frivolous or vexatious

[16] Cases coming under the umbrella of scandalous, frivolous or vexatious include, for instance, cases which are obviously unsustainable and or spurious, cases brought to harass or embarrass a party, and cases which were viable when instituted but by reason of subsequent events have become doomed to failure ("The Supreme Court Practice 1997" (The White Book), at paras. 18/19/15). However, a pleading or matter will not be struck out solely because it is scandalous or unnecessary, unless the allegations are also irrelevant and to allow them to stand would incur useless expense and involve the parties in unnecessary argument (*Willouby v Eckstein* [1936] 1 All ER 650). The court has also struck out cases under this rule where it was clear that the defendant intended to avail themselves of a limitation defence (*Ronex Properties v. John Laing Construction Ltd.* (1983) QB 398).

Abuse of process

[17] Abuse of process can take many forms and concerns pleadings which involve the improper use of the court's machinery, such as the institution of proceedings for improper or collateral purposes, the bringing of concurrent proceedings in different courts, or attempts to litigate matters already decided ("*res judicata*") or which should have been litigated in previous proceedings (see *Hunter v Chief Constable of West Midlands Police* [1982] AC 529*).*

Limitation Act

[18] The third ground relied on by the defendants is the special limitation protection available to public authorities under s. 12 of the Limitation Act. That provides in part as follows:

> "12. (1) Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the provisions of subsection (2) shall have effect.
>
> (2) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of a continuance of injury or damage within twelve months next after the ceasing thereof."

General principles

[19] In addition to the specific rules or statutes which enables a party to attack the pleadings of another party for non-compliance, advertence must also be made to the general body of principles governing strike out actions.

[20] The most firmly established and oft-repeated of these is that the jurisdiction to strike out ought to be sparingly exercised and is only intended for plain and obvious cases. This is because striking out applications are often described as draconian in nature, since they have the potential of denying a party the right to trial. Perhaps the most complete exposition of this principle under the former UK Rules of the Supreme Court, which correspond to the 1978

R.S.C., has been given by Lord Pearson in the *Drummond-Jackson* case (*supra*) (pp. 1101-1102). It is a passage which bears setting out in some detail:

> "Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases. […]
>
> In my opinion the traditional and hitherto accepted view—that the power should only be used in plain and obvious cases—is correct according to the evident intention of the rules for several reasons. First, there is in r 19(1)(a) the expression 'reasonable cause of action' to which Sir Nathaniel Lindley MR called attention in *Hubbuck & Sons Ltd. v Wilkinson, Heywood and Clark*. No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action' with some change of success, when (as required by r 19(2) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In *Nagel v. Feilden* Danckwerts LJ said:
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> > 'The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the court.'
> >
> > Salmon L.J. said:
> >
> > 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable.'
>
> Secondly, r 19 (1)(a) takes some colour from its context in r 1991) (b)—'scandalous, frivolous and vexatious'—r 19(1) (c)—'prejudice, embarrass or delay the fair trial of the action'—and r. 1991) (d)—otherwise an abuse of the process of the court'. <u>The defect referred to in r 19 (1)(a) is a radical defence ranking with those referred to in the other paragraphs.</u> Thirdly, an application for the statement to claim to be struck out under this rule is made at a very early state of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success." [Emphasis added.]

[21] This principle has been consistently applied by our Courts: see, for example, *B. E. Holdings Limited v Lianji (also known as Linda Piao – Evans or Lian Ji Piao – Evans) [2017] 1 BHS J No. 28,* per Charles J (as she then was, now Snr. J.) [para. 7, 8]; and *Sandy Port Homeowners Association Limited v Bain [2015] 2 BHS J. No. 102,* per Crane-Scott JA [para. 14,18].

[22] However, it is accepted that where the Court harbours doubt about the soundness of a pleading and is satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for trial, it will invoke its jurisdiction to strike out: *Williams Humbert Ltd. v. W& H trade Mark (Jersey) Ltd.* [1986] AC 368, 436A, 441 D-H.

[23] Another principle is that the court will generally not strike out a claim which can be remedied by amendment. On the other hand, if it is clear that no amendment, however ingenious, will cure the defect, the Court should dismiss the action and summarily put an end to the litigation: *Griffiths v London Docks Co*., 13 Q.B.D. 259. Further, if matter in the pleadings is so

intertwined with the rest of the pleading as to not be severable without difficulty, the whole of the pleading containing it may be struck out: *Williamson v L. & N. W. Ry.*, 12 CH. D. 787.

[24] It should also be borne in mind that length and complexity of a statement of claim, or the fact that the strike-out application might involve prolonged arguments, are not factors which should deter the exercise of the court's jurisdiction to strike out in a proper case. As was said in *Manuel v. Attorney General* [1983] Ch. 77 [at 82], the court:

> "…must beware of any assumption that because a case takes a long time to argue, the points at issue must be doubtful. Arguments must be assessed on their quality rather than on duration, and sometimes the weaker the case the greater the profusion of ingenuity in supporting it."

[25] Importantly, it has also been held that claims seeking relief under Article 28 of the Constitution (i.e., raising issues of fundamental rights) are not immune from the strike-out jurisdiction of the court under *RSC O. 18, R. 19,* or in the exercise of the Court's inherent jurisdiction (see *Maurice Glinton and Leandra Esfakis v. Rt. Hon. Hubert A. Ingraham, et al.,* Privy Council Appeal No. 53 of 2005 (see paras. 11-13).

[26] There, in response to an argument that constitutional claims were not amenable to the Court's strike out jurisdiction under Order 18, r. 19(1)(a), their Lordships said (at paras. 11-13):

> "…the Court of Appeal was right to direct itself that claims should only be struck out in plain and obvious cases and, of course, courts should look with particular care at constitutional claims, constitutional rights emanating from a higher law. But constitutional claims cannot be impervious to the strike out jurisdiction and it would be most unfortunate if they were. It cannot be right that anyone issuing proceedings under article 28 of the Constitution is guaranteed a full hearing of his claim irrespective of how ill-founded, hopeless, abusive or vexatious it may be."

[27] Lastly, the power to strike out is a discretionary power that the court may exercise of its own initiative or on application by a party. The court's power to strike out is complementary to and a corollary to its case-management powers. In addition to the Ord. 19, r. 19 powers, the court is given specific powers to strike out for failure to comply with a rule, practice direction or court order under Ord. 31A, r. 20(1). In this regard, Charles Snr. J. (as she then was) helpfully reminds us in the *B. E. Holdings Limited* case that the court must also consider the matter in the round and in accordance with modern case management principles:

> "8. In *Walsh v Misseldine* [2000] CPR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the Court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The Court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the Statement of Claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial."

ANALYSIS AND DISCUSSION

[28] Before looking at the merits of the application to strike out, it is useful to set some context by saying something about the role of pleadings. In this regard, Teare J.'s analysis of the purpose of pleadings in *Towler v. Wills* [2010] EWHC 1209 is instructive:

> "18. The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case so that he may plead to it in his response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is being brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies;…".

[29] In *Alpha Aviation Limited et al v Randy Larry Butler et al (2021/CLE/gen/01128, unrept., Supreme Court)* I said the following about the requirements of pleadings (paras. 23 and 24):

> "[23] Order 18, r. 6(1) requires a plaintiff to plead the material facts relied on for his claim, although not the evidence required to prove the alleged facts. It provides in material part as follows:
>
> > "[E]very pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits."
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> As to what facts are material, in *Bruce v Odhams Press Ltd*., [1936] 1 KB 697 [at pg. 712], Scott LJ said:
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> > "The cardinal provision in r. 4 is that the statement of claim must state the material facts. The word 'material' means necessary for the purpose of formulating a complete cause of action, and if any one 'material' fact is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under Order 8 XXV., r. 4; see *Phillips v Phillips*; or "a further and better statement of claim" maybe ordered under Order XIX., r. 7."
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> [24] This rule imposes a general obligation on a claimant to plead to his case with sufficient clarity and particularity so that his opponent is not taken by surprise and knows exactly the case he has to meet at trial (see, e.g., *Spedding v. Fitzpatrick* (1888) 38 Ch. D. 410, CA; *Bruce v Odhams Press Ltd*. (supra). But it does not require him to overload his statement with exhaustive particulars or minor details. The SOC should contain a concise statement of the facts on which the claimant relies to frame his cause of action, but other details are left to be supplied at later stages in the case, such as by the submission of witness statements and through the use of the processes of discovery and disclosure."

<u>The Causes of Action</u>

Unlawful arrest

[30] The plaintiff's first claim is that she was unlawfully arrested. The narrative given in the introductory averments is that she was arrested by the Fifth Defendant "and or his agents" on 31 August 2016, following complaints made by the fourth and fifth defendants on 30 August 2016, in which they requested investigation and prosecution of the plaintiff for libel and slander based on the Facebook post. These allegations were said to be likely to "injure and expose" the officers to "general hatred, contempt or ridicule". The plaintiff states that she was interviewed later that day by the second defendant (it appears she may have been interviewed by the first defendant also), and the following day she was arraigned before the Magistrate's court on two counts of intentional libel. She was remanded to the Bahamas Department of Corrections, but granted bail the following day, 2 September 2016.

[31] In the "Particulars of Unlawful Arrest", the plaintiff indicates that she was handcuffed and taken to the Cable Beach Police Station, where she was detained, before being taken to the magistrates' court. She further alleges that the charges were brought by the Fourth and Fifth Defendants "maliciously and without reasonable and probable cause". As a result, she contends that she was "wrongfully detained, arrested and deprived of her rights and liberty" and the defendants are liable to her in respect of such detention.

[32] The Defendants assert that the Plaintiff was lawfully arrested and detained following the lawful charge of intentional libel pursuant to s. 316 of the Penal Code, and following proper investigation. They point out the material relevant provisions of the Penal Code providing for the offence of criminal libel, which are as follows:

"s. 315 (2):	Whoever is convicted of intentional libel shall be liable to imprisonment for two years.
s. 316:	A person is guilty of libel who by print, writing, painting, effigy or by any means otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes any defamatory matter concerning another person, either negligently or with intent to defame that other person.
s. 317(1)	Matter is defamatory which imputes to a persons any crime or misconduct in public office, or which is likely to injure him in his occupation, calling or office or expose him to general hatred, contempt or ridicule.

[33] The law is rather clear as to the legal principles relating to effecting a lawful arrest, and have been set out in a series of cases in the UK, Caribbean and locally, which do not need to be discussed in any great detail (see, for example, *Dallison v Caffery* [1964] 2 All ER 610; *Holgate-Mohammed v Duke* [1984] 1 All ER 1054; and *Ramsing v Attorney General* [2013] 1 LRC 461. There is also statutory authority. For example, s. 31 (2) of the Police Act 2009 provides that, in addition to any common law or other powers, a police officer may "*without a warrant, arrest a person…(a) he reasonably suspects of having committed an offence*."

[34] Distilled, there are a number of substantive and procedural safeguard which must be followed in relation to effecting a lawful arrest, and failure to do so can result in an unlawful arrest. They may be generally stated as follows: (i) there must be reasonable suspicion for the arrest

(sometimes described as reasonable grounds or probable cause); (ii) the defendant must be physically arrested or informed of his arrest; (iii) the defendant must be informed of the ground for his arrest; (iv) the defendant must be taken before the court as soon as practicable, or within the timeframe set by law in relation to the charge.

[35] There is, unfortunately, nothing in Plaintiff's particulars that could possibly sustain a claim for unlawful arrest. In fact, the only default pleaded in the particulars is that the "fourth and fifth defendants" brought the charge without reasonable or probable cause, which might be an element in pleading malicious prosecution, but has no relevance whatsoever for the claim of unlawful arrest. For example, there are no allegations that that there was a lack of lawful authority or reasonable grounds for the arrest, or that the arresting officer could not and did not suspect, reasonably or at all, that the plaintiff was guilty of any offence, or that any of the procedural safeguards were not followed. I have no hesitation in coming to the conclusion that there is no proper pleading of a claim for unlawful arrest in the statement of claim.

Malicious Prosecution

[36] The second claim made by the plaintiff is that of malicious prosecution. According to the facts as pleaded in the statement of claim, the plaintiff appeared before the magistrate on several occasions beginning in December 2016 for the hearing of the charges. She was discharged before the magistrate's court on 20 April 2017, after the Attorney General entered a *nolle prosequi* on 27 March 2016.

[37] I would observe at the outset, that the particulars of the claim in relation to malicious prosecution are rather unorthodox and clearly lacking. Under the rubric "Malice/Absence of Reasonable and Probable Cause", the plaintiff alleges that "*the fourth and fifth defendants fabricated evidence to the effect that the Plaintiff had defamed them*" and that "*This evidence was given in the knowledge that it was untrue and that the Plaintiff would as a result be prosecuted for the offence*". This is the only allegation that goes specifically to the claim. Other "particulars" are not particulars but generic and irrelevant assertions, of which the following examples might suffice: (i) "*The Plaintiff faced the fear and anxiety of a groundless prosecution against her*"; (ii) "*The Plaintiff will rely on the acts of the Fourth and Fifth Defendant insofar as she fails (sic) to make a full and proper apology to the Plaintiff for the way in which the Plaintiff has been treated*."

[38] The defendants contend that no cause of action is disclosed for malicious prosecution. They refer the court to the local leading case on the subject of *Merson v Cartwright et. al.* (No. 1131 of 1987), in which Sawyer, J. as she then was, rehearsed the requirements to establish malicious prosecution on a balance of probability as follows:

> "(1) that she was prosecuted by the defendants; (that is, that criminal charges were laid against her which required her to appear before a magistrate to defend herself against those charges);
> (2) that the trial of those criminal charges had been determined in her favour;
> (3) that there was no reasonable and probable cause for the prosecution; and
> (4) that the prosecution had been instituted for an improper motive."

[39] It is common ground that the first element was satisfied. It is also not disputed that the charge was also determined in the plaintiff's favour, in that it was eventually discontinued. The defendants contend, however, that entry of a *nolle prosequi* does mean that they acted without reasonable and probable cause. In fact, they submit that the arrest came about as a result of "evidence from the plaintiff's own actions" and that it was only after the police were satisfied with the outcome of the investigation did they arrest, detain and charge the plaintiff. In this regard, reliance is placed on *Laing v Storr, Commissioner of Police and Attorney General* [2012/PUB/con/01490], where Isaacs J. said as follows:

> "40. The fact that a nolle prosequi was entered in the case against the plaintiff for the murder of Ozell Moncur does not establish malicious prosecution. As Lord Radcliff said in *Glinski* (supra)
>
> "For if a man is prosecuted, though unsuccessfully and has been acting merely from a sense of public duty, then he is not guilty of malice, so there has been no malicious prosecution."

[40] While it is accepted that the plaintiff need not plead every particular or minor detail in connection with the cause of action asserted, he or she must plead the material facts to support the action. In my judgment, the pleadings here fall far short of asserting a cause of action in malicious prosecution. Notably, the plaintiff does not ever assert that there was no reasonable and proper cause for the prosecution, or that the prosecutors were actuated by malice, which are elements that the plaintiff is required to plead and establish.

Misfeasance in Public Office

[41] The third claim made by the plaintiff is misfeasance in public office, alleged against the fourth and fifth defendants, in the person of Assistant Commissioner of Police Leon Bethel and Commissioner of Police Ellison Greenslade. The defendants submit the claim should be struck out for failure to plead the necessary elements. They contend that the plaintiff was only charged and prosecuted after the police obtained evidence to support the charges of intentional libel, and that in doing so they were not acting unlawfully or in excess of the powers granted to them.

[42] The defendants referred to two local cases in which the court set out the ingredients required to prove misfeasance in public office: *Bahamas Telecommunications Company Ltd. v Island Bell Ltd.* (SSCivApp. No. 188 of 2014, CA; and *Grant-Bethel v. Barnett et. al.* [PUB/jrv 25 of 2010). In the Bahamas Telecommunications Ltd. case, the Court of Appeal said:

> "28. Misfeasance in public office is a tort remedy for harm caused by acts or omissions which amount to an abuse of public power or authority by a public officer who either knew he was abusing his power or authority or was recklessly indifferent as to the limits of, or the restraints upon, that power or authority and who acted or omitted to act with either the intention of harming the claimant (so-called targeted malice); or with the knowledge that his acts would probably harm the claimant, or with a conscious or reckless indifference to the probability of harming the claimant.

> 29. As an intentional tort, misfeasance is public office requires prof of bad faith both in terms of the unlawful conduct or omission, and in relation to the harm suffered. The importance of sufficiently particularized pleadings in intentional torts was emphasized in Three Rivers District Council v. Governor and Company of The Bank of England (No. 3) 2003 2 A.C. 1…".

[43] Simplified, the ingredients of the tort are as follows:

(i) The defendants must be public officers;
(ii) The impugned conduct must be committed in the course of official functions;
(iii) Proof of malice: this consists of either "targeted malice", such as intentional harm, or "untargeted malice", such as unlawful acts or acts done with reckless indifference to lack of authority and the possibility of harm to the plaintiff;
(iv) Forseeability of damages to plaintiff of the kind suffered.

[44] Because it is an intentional tort, which is essentially founded on bad faith, misfeasance must be carefully pleaded and particularized. As said in *Seymour v. Chief Constable of the Warwickshire Police et. al.* [2021] EWHC 3453 by Spencer J:

> "26. …In line with the heavy burden thus imposed, the claimant must specifically plead and properly particularize the bad faith or reckless indifference relied upon. It may be possible to infer malice. But if what is pleaded as giving rise to an inference is equally consistent with mistake or negligence, then such a pleading will be insufficient and will be liable to be struck out. The claimant must also specifically plead and properly particularise both the damage and why the public officer must have foreseen it. A pleading that fails to do so is similarly liable to be struck out."

[45] In light of the above, it is necessary to see the way in which the plaintiff frames the case for misfeasance, the gist of which is set out at paragraphs 43-45 as follows:

> "43. The Fourth and Fifth Defendants and/or its senior officers committed misfeasance in public office by 'turning a blind eye' to the use of threats, harassment and intimidation by the Fifth Defendant against the plaintiff. In particular, the Fifth Defendant and/or its senior officers knowingly or recklessly failed to observe their duty to take appropriate action in relation to reports of the actions, statements and intimidations and misconduct by the Fifth Defendant towards the Plaintiff.
> …
> (a) Such failure occurred with the intention of causing or permitting the loss and injury to the Plaintiff or being recklessly indifferent to such loss or injury.
> …
> 45. The Fourth and Fifth defendant further committed misfeasance in public office that they fraudulently made a report that the Plaintiff intentionally caused injuries to both Defendants' reputation which resulted in the arrest of the Plaintiff knowing full well that to do so was in breach of their authority and with the intention of causing injury, loss and distress to the Plaintiff."

[46] Other than the fact that the fourth and fifth defendants are public officers, I have grave concerns that any of the other elements of the tort are properly pleaded and that the action could be sustained on the facts. The core complaint of the plaintiff is that the fourth and fifth defendants

made a "fraudulent" report that they had been defamed by the plaintiff's FB post, and that they ignored the "threats, harassment and intimidation" by the fifth defendant. Firstly, it is cannot be said that in reporting what they considered was defamation of their characters and the possible commission of the offence of intentional libel for further investigation and any necessary action by police, that the fourth and fifth defendants were acting in their public capacities. Notwithstanding their position as senior police officers, they made a complaint regarding a possible offence as citizens, which was investigated by the police and as a result of which charges were laid. Secondly, there are no allegations or particulars to substantiate that either the fourth or fifth defendant acted with malice, or reckless indifference. In addition, there are no particulars provided of the "threats, harassment and intimidation" on which the plaintiff relies. In my judgment, the case for misfeasance is insufficiently pleaded and doomed to fail as pleaded.

Defamation

[47] As to the claim in defamation, there is very little to detain this Ruling. As I understand it, and it is not clear from the pleadings, the claim is that she was defamed because the matter concerning her arrest was publicized in the media. In point of fact, there is no specific assertion of defamation as a cause of action, although there is a rubric that says "Particulars of Defamation", which I will come to. But in the introductory averments, this is pleaded (reproduced without editing):

> "25. In its natural and ordinary meaning of the words, the said words were understood to mean that the Plaintiff had committed a major breach of criminal offences and that the Plaintiff was intending to defame the Fourth and Fifth Defendants.
> 27. The Fourth Defendant whether by himself and/or as an agent of the Fifth Defendant knew and intended that these words, or their gist would be repeated to other employees, members of the Bar Association and the entire legal and professional and or/authorised their repletion that the Plaintiff defame both Defendants."

[48] Under the particulars, the plaintiff asserts that she will "*rely on the information that was in the Punch and other newspapers insofar as that the Defendant failed to retract the information that were placed in the newspapers for the way in which the Plaintiff has been treated*."

[49] As a matter of general legal principle, in order to succeed in a defamation action, a plaintiff must establish that (i) the words were defamatory; (ii) they refer to him; and (iii) that they were published to one other person other than himself. On even a cursory analysis of the pleadings, it does not appear that the plaintiff has pleaded a cause of action in defamation. Firstly, the pleadings do not even identify the words that are said to be defamatory, although it appears that this is a vague reference to the fourth defendant's written report requesting "*investigation and prosecution of Maria Daxon for libel and slander*". While imputation of a criminal offence punishable by imprisonment might constitute defamation, it is impossible to see how a report of an alleged offence to the police can amount to such. Secondly, to the extent that the plaintiff relies on publication of the allegations against her in the newspapers, there is no allegation that the fourth or fifth defendant were the publishers of such information; in fact it is clear that they were not. And, even if any of the media reports could be said to be defamatory

of the plaintiff—and they are not, since the fair reporting of court proceedings is covered by absolute privilege—the plaintiff has not named any of the publishers as the proper party.

[50] I agree wholeheartedly with the defendants that there is no reasonable cause of action asserted in defamation, and that the claim is frivolous and vexatious. As a result therefore, I strike out the defamation claim.

Breaches of fundamental rights

[51] As to the breaches of fundamental rights, it is almost inescapable not to conclude that these have been tossed in as a kind of a 'top-up'. In fact, there are no specific allegations of breaches of fundamental rights in the pleadings, only what are said to be "particulars" of breaches which do no more than assert that a particular right has been violated. For example, the substance of the pleaded constitutional breaches are as follows (reproduced without editing):

> "[…] c. Allowed the Plaintiffs to be subjected to degrading or inhumane treatment such as victimization: Breach of the Plaintiff rights under Article 19(1) and (2) of the Constitution of the Bahamas;
> d. Breach of her fundamental rights and freedom not to be treated unfairly according to Article 26(1) and (2) of the Constitution of The Bahamas;
> e. The Defendant intentional and unlawful breach of the Plaintiff's fundamental rights not to be treated unfairly according to Article 15, 17(a) 26(1) and 2 of the Constitution of The Bahamas;
> f. Further, in the premises the said conduct was arbitrary, oppressive and or in breach of Articles of the Constitution; and the Plaintiff claims exemplary damages."

[52] It is plain that the constitutional claims, apart from being pleaded in a convoluted and incoherent manner, suffer from lack of particularization and supporting factual allegations. As to 19(1), (2), I have already dealt with these elements in the claim for unlawful arrest.

[53] As to the claims under 26(2), there is no allegation of how the plaintiff's constitutional right not to be discriminated against was breached. The remit of the constitutional claim to discrimination is limited to different treatment based specifically on '*race, place of origin, political opinions, colour or creed*' and discrimination on some other ground will not found a constitutional claim (see, the West Indian case of *Nielsen v Barker* [1982] WIR 252 (at pg. 280), interpreting art. 149 of the Guyanese constitution, which is identical to art. 26 (3) of the Bahamian constitution).

[54] The plaintiff never discloses what right she claims is protected under art. 15 has been violated in relation to her. In any event, the law is settled, at least for those Caribbean countries that subscribe to the Privy Council as the apex court, that art. 15 in the Bahamian constitution and those with similar enacting formulae, contains only a preambular statement of subsequently conferred rights which are not justiciable (see, *Newbold and Ors. v. Commissioner of Police and Ors*. [2014] UKPC 12; *cf. Nervais v The Queen and Severin v. The Queen* [2019] CCJ 19 (AJ)].

[55] Finally, with respect to art. 17(1) (there is no 17(a)), it is not specified what treatment or act meted out by any of the defendants is said to be degrading or inhumane.

[56] Despite the plaintiff's assertion that this claim raises important constitutional issues, in my view there are no constitutional breaches pleaded that give rise to any reasonable cause of action. In any event, recourse to constitutional relief, given the plethora of common law remedies the plaintiff has asserted (even if inadequately pleaded) smacks of an abuse of the constitutional process, and I would proceed by striking out these claims.

Limitation defence

[57] I have been content to decide this application on the broader Ord. 18, r. 19 grounds, but I should mention for the sake of completeness the defendants' assertion of the one-year limitation defence as an alternative ground for striking out, on the basis that to proceed with a claim in the face of an insurmountable limitation defence would be frivolous vexatious or an abuse of the process of the court (*Ronex Properties Ltd. v John Laing Construction and others* [1983] QB 29, per Stephenson LJ, at pg. 408).

[58] Despite the tendency of public law defendants to over-rely on the special limitation period available to public authorities, it is clearly the case that it does not apply to every default by a public authority or person acting under statutory powers. As was said by the Privy Council in *Alves v Attorney General of the Virgin Islands* [2017] UKPC 42, commenting on the Public Authorities Protection Act (the similar legislation to s. 12 of the Limitation Act), it is to be "construed restrictively":

> "37. […] It only applies to public authorities, and not to al persons acting under statutory authority. It does not apply to all actions performed by public authorities, but only to those where the obligation sued upon is owed generally to the public or a section of it. Where the obligation sued upon arises simply out of a relationship with the claimant which would be the same for any non-public person or body, and where there is no question of a public law challenge, the Act has no application."

[59] In *Alves*, the PC accepted that there has been considerable difficulty in determining the ambit of the Public Authorities Protection Act, and that the cases on the point were difficult to reconcile. But I would have found that while the one-year limitation period might have applied to the actions for unlawful arrest, malicious prosecution and misfeasance in public office (a tort which necessarily involves the performance or failure to perform some statutory or public function), it would not have applied to the claim for defamation, since that would have its basis in a duty of care arising in private law. Further, as I observed in *WPC Maria Daxon v. Drexel Armbrister et. al.* [2013/PUB/CON/00006] (*supra*), the limitation periods, special or general, do not strictly apply to constitutional claims (see *Edwards v. The Attorney General* [2008] CCJ 10 (AJ)); *Durity v Attorney General* [2003] 1 LRC 210, PC). On this basis, I would not have found that any of the constitutional claims were liable to being struck out. But as I have already found that the claims as pleaded do not disclose a reasonable cause of action, the issue becomes academic.

CONCLUSION AND DISPOSITION

[60] For all of the reasons given above, I have come to the conclusion that the action should be struck out in its entirety, as the claims either disclose no reasonable cause of action with any real prospect of success, or are frivolous, vexatious or an abuse of process. The pleadings are deficient in every which way, and no party should be vexed with having to plead to them nor any court saddled with having to discern what is the real case that is being put for determination. I am also of the view that the claims cannot be saved by amendment and would have to be essentially repleaded.

[61] I order cost to the defendants to be taxed if not agreed.

30 November 2023

Klein, J.