COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2016/CLE/gen/00581

BETWEEN:

TARQUIN KELLY
LAMONT BAIN
NEHARIAH HEPBURN
CEDRIC ROLLE

Plaintiffs

AND

THE COMMISSIONER OF POLICE
(Ellison Greenslade)
AND
MINISTRY OF NATIONAL SECURITY

Defendants

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Monique Gomez for the First Plaintiff Kelsie Munroe for the Second Plaintiff Maria Daxon, Benjamin McKinney and Joel Seymour for the Third and Fourth Plaintiffs Sophia Thompson-Williams and Danielle Francis for the Defendants
Hearing Dates:	12 April 2021, 7 May 2021

RULING

KLEIN, J.

Civil Practice and Procedure—Rules of the Supreme Court (R.S.C.) 1978, Order 3, r. 4—Application for Extension of Time in which to serve statement of claim—Factors considered—Delay—Explanation for delay—Relationship of Ord. 3, r. 4 to Ord. 31A, r. 18(2)—Order 19, r.1—Abuse of Process

INTRODUCTION

1. I have before me two procedural applications. The first is a conjoined application on behalf of the plaintiffs by summons filed 26 July 2019 for an extension of time ("EOT") in which to file and serve their statements of claim ("the claims"). The defendants oppose the application and filed a cross summons on 14 April 2021 seeking to have the plaintiffs' writ of summons dismissed under Order 19, r. 1 of the Rules of the Supreme Court (R.S.C.) 1978, or alternatively as an abuse of the process of the court.

The background

2. The plaintiffs are all former subordinate police officers, who were discharged by the Royal Bahamas Police Force ("RBPF") over different time periods, either after being interdicted because of criminal charges and convictions against them, or for disciplinary or other reasons.

3. The first plaintiff was charged with armed robbery and possession of an illegal firearm in 2007, and subsequently another charge of armed robbery in 2008. He was acquitted of the firearms charge by the Magistrate's Court in February of 2008, which was upheld by the Court of Appeal on 9 September 2009 on the Attorney General's appeal. He was discharged on 8 July 2009 pursuant to section 26(c) of the Police Act, Ch. 205 (a section we shall come to examine later). He was subsequently convicted of the 2008 charge of armed robbery by the Supreme Court in 2010, but this was overturned by the Court of Appeal on 13 July 2011. It does not appear that the 2007 armed robbery charges had been heard at the point these applications were being considered.

4. The second plaintiff was charged with burglary in April 2011, convicted before the Supreme Court in November of 2014 and sentenced shortly thereafter. He was apparently discharged from the RBPF upon being sentenced (the specific date in 2014 is not given), although his conviction was overturned on appeal on 14 July 2015 by the Court of Appeal.

5. The third plaintiff was discharged on the 20 July 2015 pursuant to the Police Act on the grounds, *inter alia*, of being unfit.

6. The fourth plaintiff was charged with causing harm and burglary in November 2007 and was discharged by the Commissioner of Police ("COP") on 13 November 2007. He was subsequently acquitted on the 14 October 2015, after the prosecution withdrew the charges before the Magistrate.

7. The plaintiffs, then represented by a single counsel (the firm of Dulwich Law Chambers), filed a generally indorsed writ on 26 April 2016 asserting two main causes of action: (i) breach of their fundamental rights under arts. 15, 17(a), 26(1) and (2) of the Constitution of The Bahamas not to be treated unfairly; and (ii) breach of contract by unfair dismissal or discharge. Initially, the writ included a fifth plaintiff, Ms. Maria Daxon, who was incidentally also the principal in the firm representing the plaintiffs. There were six named public defendants: (1) Mr. Ellison Greenslade; (2) Commissioner of Police; (3) Ministry of National Security; (4) Police Service Commission; (5) Ministry of the Public Service; and (5) the Attorney General. Leave was given for the removal of the fifth plaintiff by K. Thompson J., which appears to have been done on 5 February 2019. At some point, the first and third to sixth defendants were also removed, even though the material before the court does not disclose that any Order was ever made for this purpose.

8. In respect of the claims alleged in the writ, the plaintiffs sought numerous declarations and claimed multiple heads of damages in their prayer for relief, which were pleaded in a discursive manner. The prayer for relief is reproduced below (without editing):

> "**THE PLAINTIFF SEEKS THE FOLLOWING DECLARATIONS**:
>
> 1. A Declaration that the proceedings against the Plaintiffs constitutes malicious prosecution and unconstitutional, void and of no effect;

2. A Declaration that the proceedings against the Plaintiffs were not impartial and unconstitutional, ultra vires, void and of no effect;
3. A Declaration that the investigations were unfair, unreasonable, and not impartial;
4. A Declaration that the arrest, detention and imprisonment of the Plaintiff were unconstitutional, and unlawful;
5. A Declaration that the Commissioner of Police acted maliciously and without proper authority and jurisdiction to discharged, interdicted and dismissed the Plaintiffs;
6. The Declaration that all the Defendants be jointly and severally responsible for loss and damages for this claim;
7. A Declaration that the Defendants breach of the Plaintiffs rights under Article 1991) and (2) of the Constitution of the Bahamas.
8. A Declaration that the Defendants breach of their fundamental rights and freedoms not to be treated unfairly according to Article 2691) and (2) of the Constitution of the Bahamas.

AND THE PLAINTIFF CLAIMS:

1. Damages for termination pay including notice pay, basic pay, ½ pay, future loss of earning, pension pay, gratuity pay;
2. Damages for breach of common law duty of care;
3. Damages for Unfair Dismissal;
4. Damages for Breach of Employer's Duty;
5. Damages for Victimization;
6. A Declaration that all Defendants be jointly and severally responsible for losses, degrading treatment and damages for this claim;
7. The Declaration that the First Defendants compensate the Plaintiffs at a rate to be determined by the courts for loss and damages;
8. Damages for breach of contract;
9. Damages for Unlawful Detention and False Imprisonment;
10. Damages for Malicious Prosecution;
11. Damages for Defamation;
12. Mental Suffering;
13. Loss of their reputation;
14. Injury to the Plaintiffs dignity and pride;
15. Entitles to be compensated for the loss of their personal liberty;
16. Damages to their self-esteem and public image resulting from their arrest;
17. Aggravated damages;
18. Potential loss of Earning;
19. Defamation;
20. Any other relief the court deems just;
21. Interest pursuant to the Civil Procedure (Award of Interest) Act;
22. Costs".

The application for extension of time

9. The plaintiffs have filed a series of summonses for EOT. The first was filed on 19 July 2018, followed by summonses filed 7 and 13 February 2019 and 26 July 2019, which is the summons currently before the Court. They are all in identical terms. By the time these applications

came before me, several of the plaintiffs were separately represented. The first plaintiff was represented by Ms. Monique Gomez, the second plaintiff by Mr. Kelvin Munroe, and the third and fourth plaintiffs by Ms. Maria Daxon.

10. All of the plaintiffs filed "affidavits of delay" at some point in the proceedings. The most recent affidavits of delay by the first to third plaintiffs were filed 13 February 2019, and the fourth plaintiff filed his on the 28 March 2019. They are all in the same format and contain the very same explanation for the delay in respect of each of the plaintiffs: "*That due to severe financial and personal problems, I was not able to continue with this matter on a timely basis*."

11. The first, third and fourth plaintiffs also filed affidavits in support of the application for EOT to file their claim on 6 August 2019, exhibiting the draft statements of claim. An additional affidavit was filed on 5 May 2021 by the first plaintiff in response to the affidavit of Kirkland Mackey ("the Mackey affidavit") filed 29 April 2021 by the defendants in opposition to the EOT application. At the time of the hearing of the applications, no supporting affidavit had been filed on behalf of the second plaintiff. However, during the course of the hearing, counsel for the second plaintiff undertook to file an affidavit exhibiting the draft statement of claim (which had apparently been drafted by Dulwich Law Chambers, the firm which originally represented all of the plaintiffs in the action). This was done on 4 May 2021.

12. The reasons given in the affidavits for delay basically mirror each other, and that of the first plaintiff may stand (*mutatis mutandis*) as an example:

> "4. That the reasons for the delay in filing and serving the First Plaintiff, Tarquin Kelly Statement of Claim, due to the personal ability to pay his legal fees and due to unemployment opportunities. […]
> 6. That there were no other attorneys working at the firm to ensure that the Statement of Claim was filed within the prescribed time limit contained in the Rules of the Supreme Court because the First Plaintiff, Tarquin Kelly, was experiencing financial hardships as he was unemployed and unable to meet his financial obligations to sustain the livelihood of himself."

13. The draft statements of claim submitted to the Court were also prepared by the firm originally representing all the plaintiffs and are in similar form, allowing for differences because of the peculiar facts relating to the individual claims. They plead what are variously said to be particulars of unlawful arrest, defamation, injury to feelings, malicious prosecution, breaches of constitutional rights, and unlawful dismissal. In respect of the alleged causes of actions, the plaintiffs claim multiple heads of damages and declarations, as set out above in the general indorsement.

14. I pause here to note that it is a matter of some consternation as to how a single, generally indorsed writ was filed on behalf of the four (initially five) plaintiffs alleging claims arising out of different transactions that took place over different periods of time. Similarly, there is no explanation as to how that single writ spawned disparate statements of claim pleading causes of action on behalf of the individual plaintiffs that were not even alleged in the omnibus writ. These were no doubt serious procedural breaches that could have been challenged by the defendants, but it is now too late in the day for that.

Legal Principles

Extension of Time

15. The rules regulating extension of time are to be found under R.S.C. Order 3, r. 4, which provides:

> "(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these Rules, or by any judgment, order or direction, to do any act in any proceedings.
> (2) The Court may extend any such period as is referred to in paragraph (1) although the application is not made until after the expiration of that period.
> (3) The period within which a person is required by these Rules or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose."

16. This is supplemented by R.S.C. Order 31A, r. 18(2), which provides that, "*Except where these Rules provide otherwise*", the Court may:

> "(b) extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed;" …

17. The practice of the court with respect to applications under Ord. 3, r. 4 is conveniently summarized in note 3/5/1 of the 1995 edition of the Supreme Court Practice ("the White Book") as follows (quoted elliptically):

> "The object of the rule is to give the court a discretion to extend time with a view to the avoidance of injustice to the parties (**Schafer v Blyth** [1920] 3 K.B. 143; **Saunders v. Pawley** (1885) 14 Q.B.D. 237). "When an irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but in other cases the objection of lateness ought not to be listened to and any injury caused by delay may be compensated for by the payment of costs" (per Bramwell L.J., in **Atwood v Chichester** (1878) 3 Q.B.D. 722, p. 723, C.A.). A special circumstance, however, such as excessive delay may induce a court in its discretion to refuse to extend the time (per Jesse M.R., **Eaton v Storer** (1882) 22 Ch. D. 91, C.A., p. 92). […]
>
> The R.S.C. as to time have to be observed, and if substantial delay occurs without any explanation being offered, the court is entitled, in the exercise of its discretion, to refuse the extension of time, e.g. to serve a notice of appeal from the master to the judge in chambers, even though the delay could be compensated for by costs

> and no injustice would be done to the other party (**Revici v. Prentice Hall Inc**. [1969] 1 W.L.R 157 [1969] All E.R. 772, C.A. […]
>
> In the absence of agreement before the Court would consider exercising its discretion to extend under O. 3, r. 5, it would normally need to be satisfied that there was an acceptable explanation for the delay. If there was none the question of prejudice was unlikely to arise. If there was an acceptable explanation the court might still refuse to extend time if the delay was substantial or if to do so would cause significant prejudice to the respondent.
>
> The provision of a chronological list of events leading to delay, which omits any explanation for the delay, will not justify an extension of time; O.3, r. 5 is not to be used merely as an "escape route" where practitioners have not been prompt in dealing with cases (**Smith v Secretary of State for the Environment**, The Times, July 6, 1987, C.A.)."

18. Order 19, r. 1 provides that where a plaintiff has failed to serve a statement of claim within the period fixed for service of the statement of claim, the defendant may "*apply to the court for an order to dismiss the action*", and the court may dismiss the action or make any other order as it sees fit.

19. The legal principles are not in dispute between the parties. They have been applied in a number of Supreme Court and Court of Appeal cases which the parties have cited in their arguments, but which do not all need to be referenced here. The parties agree that the leading factors for the court to take into consideration in considering an application for extension of time are: (i) the length of the delay; (ii) whether any good reasons are provided for the delay; and (iii) any prejudice that might be caused to the other side.

20. These were most notably set out by the Court of Appeal in **Glen Alexander Colebrooke and Anor. v. National Insurance Board** (2008 SCCivApp. No. 137). The appeals Court in the **Colebrooke** case also referred with approval to the English case of **London Borough of Southwark v. Hejad and Others** [1999] 1 Costs L.R. 62, where it was stated that "*the courts should not adopt a mechanistic approach to questions of extending time*" (pg. 69) and in particular that it should not fetter its discretion to extend time simply because there was no acceptable explanation for any delay.

21. In an earlier Court of Appeal case, **Michael Wilson & Partners Ltd. v Thomas Ian Sinclair** [SCCivApp No. 40 of 2007], Conteh JA, who was part of a 2-1 majority that allowed an extension of time to file a bill of costs where the delay was at a minimum about 2 years, or in excess of 3 years (depending on which of two starting point was used to calculate the delay), had echoed similar sentiments:

> "However, on the balancing act which the court must embark upon in order to exercise its discretion under Rule 9 judiciously, whether or not to grant an extension of time, to enable the applicant to proceed to the taxation of costs, I am persuaded that it should not be a mere mechanistic exercise. It must be a careful

> and judicious exercise, taking all the facts in the case in the round, and informed by the special circumstances of the case. Each case, of course, must depend on its surrounding circumstances."

22. The cases on extension of time do not, however, speak with one voice. They oscillate between those cases taking a restrictive view of the exercise of the discretion in obeisance to the Rules of Court (e.g., **Revici v. Prentice Hall Inc.** [1969] 1 W.L.R. 157, **Colebooke**, *supra*) and those advocating a more liberal approach. An example of the latter is **Costellow v. Somerset County Council** [1993] 1 W.L.R. 256, where the court stated that in cases of procedural default not involving procedural abuse, questionable tactics or contumelious default in the face of peremptory orders, the discretion should normally be favourably exercised.

23. The tension between these two approaches is highlighted in the **Costellow** case, a passage worth setting out at some length, where Sir Thomas Bingham, MR, said (at pg. 959):

> "As so often happens, this problem arises at the intersection of two principles, each in itself salutary. The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit: Ord. 19, 4. 1; Ord. 24, r. 16(1) and (5); rd. 28, r. 10(1) and Ord. 34, r. 24 (2) are examples. This principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution.
>
> The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by Ord. 3, r. 5, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings.
>
> Neither of these principles is absolute. If the first principle were rigidly enforced, procedural default would lead to a dismissal of actions without any consideration of whether the plaintiff's default has caused prejudice to the defendant. But the court's practice has been to treat the existence of such prejudice as a crucial, and often a decisive, natter. If the second principle were followed without exception, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by Ord. 3, r. 5, and would indeed involve a substantial rewriting of the rule. […]
>
> The resolution of problems such as the present cannot in my view by governed by a single universally applicable rule of thumb. A rigid, mechanistic approach is

> inappropriate. Where, as here, the defendant seeks to dismiss and the plaintiff seeks an extension of time, there can be no general rule that the plaintiff's application should be heard first, with dismissal of his action as an inevitable consequence if he fails to show a good reason for his procedural default. In the great mass of cases, it is appropriate for the court to hear both summonses together, since in considering what justice requires the court is concerned to do justice to both parties, the plaintiff as well as the defendant, and the case is best viewed in the round. […]
>
> [I]n the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant. A similar approach should govern applications made under Orders 19, 24, 25 and 34. The approach to applications under Ord. 3, 4. 5 should not in most cases be very different. Save in special or exceptional circumstances, it can rarely be appropriate on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, had caused the plaintiff no prejudice for which he cannot be compensated by an award of costs. In short, an application under Ord. 3, r. 5 should ordinarily granted where the overall justice of the case requires that the action be allowed to proceed."

24. As indicated, the Ord. 3, r. 5 discretion is now complemented by the additional power given to the court under the 2004 amendment to the R.S.C. which introduced new case management powers. These included the power to extend time and strike out for non-compliance (Ord. 31A, r. 18(2)). Order 31A was inspired by and basically mirror the case management powers provided for under Part 3 of the UK Civil Procedure Rules 1998 ("CPR"), which replaced the former *Supreme Court Practice* ("*The White Book*").

25. There is very little jurisprudence in this jurisdiction as to the practice of the court in applications under O.31A, r. 18(2). But as the rules are materially indistinguishable from the English CPR, I am of the view that the English jurisprudence is highly persuasive. In this regard, in considering an application for extension of time under 3.1 of the CPR, the UK cases have held that it is appropriate for the court to have regard to the check-list in CPR 3.9 (relief from sanction): see **Sayers v Clarke Walker (a firm)** [2002] 1 WLR 3095. The factors provided under 3.9 are very similar to those provided under Order 31A, r. 25, which provides as follows:

> "(3) In considering whether to grant relief [from sanction] the Court must have regard to—
>
> (a) the interest of the administration of justice;
> (b) whether the failure was due to the party or that party's counsel and attorney;
> (c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which granting of the relief or not would have on each party."

26. In written submissions, Ms. Daxon contended on behalf of the second and third defendants that by virtue of Ord. 31A, r. 18(1) and r. 31, the provisions of Ord. 31A "*extend and supersedes the existing Rules of the Supreme Court*." Those provisions are as follows:

> "18 (1): The Court's powers in this rule are in addition to any powers given to the Court by any rule, practice or enactment. […]
>
> 31. Where the rules of this Order conflict with the rules of any other Order, these rules shall prevail."

27. In my view, it is clearly erroneous to make the unqualified assertion that Ord. 31A supersedes the existing rules of court. Rule 18(1) makes it plain that the rules are intended to function on the basis of complementarity, and r. 31 is only triggered if there is a conflict. I certainly do not perceive there to be any conflict between Ord. 3, r. 5 and Ord. 31A, r. 18(2). Both provide the court with a general power to extend time for procedural non-compliance, even after expiration of the time period.

28. Further, the introductory words of Ord. 18(2) ("*except where these rules provide otherwise*") are not of any significance, as there are no other provisions in the R.S.C. making specific provision for extension of time for service of a statement of claim. (This may be contrasted, for example, with the UK position, where the Courts have held that the provisions of CPR 7.6 (3) providing specific conditions for extension of time to serve a statement of claim ousts the general power under CPR 3.1 (the equivalent of Ord. 18) to extend time: **Vinos v Mark and Spencer plc** (2000) Independent 17 July, CA, May LJ, [2000] Lexis Citation 2058.)

29. In my judgment, all that Ord. 31A adds to the exercise of the discretion to extend time is a list of additional factors that the court may (or should) take into consideration in conducting the balancing exercise. As has been indicated by the Court of Appeal cases referred to, it is not a mechanistic exercise and all the facts are to be considered in the round in the court's exercise of its discretion.

Plaintiffs' arguments

30. There is little daylight between the arguments of the plaintiffs in aid of the claim for extension of time. Not surprisingly, they all argue that the court should apply the liberal approach. In this regard, the arguments of counsel for the second and third plaintiffs, Ms. Daxon, may stand as being representative of the other parties. In particular, Ms. Daxon, relies heavily on the **Costellow** case, which she submits is similar to the case at hand. In that case, the Court of Appeal allowed the appeal of the plaintiff against the order of the district judge dismissing the plaintiff's claim for failure to serve the statement of claim, where the delay had been over some 4½ months.

It is contended therefore, that even in the case of unjustifiable delay, dismissal of the claim should not inexorably follow unless there are other aggravating factors of procedural abuse.

31. Dealing with the specific factors the Court will consider under an Ord. 3, r. 4 application, Ms. Daxon accepts that there was delay in the application for EOT to file the statement of claim, but contends that it was not "inordinate". She relies on several local cases to support this proposition, in particular, **Reef Construction Limited v. Tropical Shipping International Ltd. and another** [2009] 1 BHS J. No. 42, where Evans J. found that a delay of more than four years in progressing an action was inordinate and inexcusable, but refused to dismiss it on the basis that the defendants had shown no prejudice.

32. The plaintiffs do not seek to advance the argument that there was good reason for the delay. Instead, they rely on cases such as **Costellow** and other local cases to support the principle that the court may nevertheless grant the extension where the default did not amount to procedural abuse or was not contumelious or intentional. While accepting that there is some element of prejudice inherent in delay, the plaintiffs contend that the defendants failed to adduce any evidence as to any prejudice they had suffered or were likely to suffer if any extension were granted. In this regard, Ms. Daxon urges on the court the principle laid down in **Birkett v James** [1977] 2 All ER 801 (per Lord Diplock, at 805), that to justify dismissal of an action for want of prosecution –

> "…some prejudice to the defendant additional to that inevitably flowing from the plaintiff's tardiness in issuing the writ must be shown to have resulted from his subsequent delay…".

Defendants' arguments

32. The defendants take the position that the plaintiffs have been guilty of inordinate and inexcusable delay, which they describe as "*intentional dereliction or incompetence on the part of the plaintiffs or counsel*". Moreover, they argue that the plaintiffs have not provided any credible or reasonable excuse or explanation for the delay, such as to provide some basis for the court to exercise its discretion to grant an extension.

33. In this regard, the affidavits of delay are said to be wholly deficient and fail to give full and frank disclosure as to the events that have taken place since they were filed. In the Mackey affidavit, it is asserted that the "…*affidavits filed on behalf of all the plaintiffs were identical*" and failed to provide any "…*detailed explanation for the delay in failing to file their Statement of Claim*."

34. Moreover, the defendants assert in their written submissions that even though they might not be "severely prejudiced" by the late application, they do stand to suffer prejudice for a variety of reasons. Firstly, this is because persons who might need to be called as witnesses are no longer members of the Police Force or Police Service Commission ("PSC"), and may not readily be

available to give evidence. Secondly, they contend that they have suffered prejudice simply by the claim forms being filed and hanging over their heads for such a long period without knowing the nature of the case that was being made against them.

35. In addition to the arguments resisting the application for extension, the defendants direct several arguments to the dismissal of the action. First, in the Mackey affidavit, they aver that the "action" is statute-barred under s. 12 of the Limitation Act, which is the special limitation period of one year available to public authorities.

36. They also submit that, to the extent that the plaintiffs are primarily challenging their dismissal from the Police Force, the claims are an abuse of process, as the plaintiffs exercised their statutory right to appeal to the PSC and their appeals were heard. In each case, the decision of the Commissioner of Police ("COP") to discharge them was upheld.

37. In this regard, the defendants rely on the Court of Appeal case of **McDonald v The Public Services Board of Appeal** SSCiv App. No. 26 of 2014, which involved the case of teacher who was terminated by the PSC and who appealed unsuccessfully to the Public Services Board of Appeal ("PSBA"). The further appeal to the Court of Appeal was also dismissed, and that Court, after examining the constitutional provisions providing for the functions of the PSC and the PSBA, held that it was not proper for a person by another action to launch a collateral attack on the decision of the PSBA. The court reasoned in part as follows (Isaacs, JA):

> "23. Article 125(4)(a) of the Constitution declares: "(4) Any question whether—
> (a) any Commission established by this Chapter has validly performed any functions vested in it or under this Chapter;…shall not be inquired into in any court. …
>
> 25. Hence, it is not competent for a person to seek to challenge in any court, even by judicial review, whether the PSBA has validly heard and determined an appeal. To my mind, this Article gives effect to the principle that appeals to the PSBA are intended to be final. Corollary proceedings are not permissible.
>
> 26. Leave to apply for judicial review ought not to have be granted for the appellant to make the application before Barnett, CJ, because of the above-mentioned Articles of the Constitution; but having been given, ought to have been given shorty shrift by him.
>
> 27. I hold the view that the appellant exhausted his right of appeal when he was entertained by the PSBA. He could not via a collateral attack seek relief from the Supreme Court."

38. The Mackey affidavit also drew to the attention of the court that the third plaintiff filed an application for judicial review based on the same facts and claims that are asserted in the action herein, which Charles J. dismissed on 7 April 2021, and also refused leave to appeal to the Court of Appeal.

39. Putting to one side the attempts to have the dismissal decisions appealed or reviewed, the defendants assert that in any event it was well within the discretion of the Commissioner of Police to discharge any officer on various grounds pursuant to s. 26 of the Police Act. In particular, s. 26 (c) provides for a subordinate police officer to be discharged if he:

> "…is considered by the Commissioner unlikely to become or has ceased to be an efficient police officer or for any other reason his discharge is deemed necessary in the public interest".

ANALYSIS AND DISCUSSION

40. I now turn to consider the merits of the application, both on the traditional Ord. 3, r. 4 grounds, and the expanded factors the court may advert to under Ord. 31A, r.18.

41. So far as the delay goes, the writ was filed on 26 April 2016. The defendants assert in their submissions that the time for filing the statement of claim would have expired on 9 May 2016 (14 days after the filing of the writ). This does not seem to be the correct starting point, however, as it appears that the defendants did not enter an appearance until 25 April 2017, nearly a full year after the writ was issued. Therefore, time would have expired 14 days after appearance, which would have been in or about the second week of May 2017. As indicated, an application was made for leave to extend the time in which to serve the SOC from as early as July 2018, but the affidavits containing the draft statements were not filed until 6 August 2019 on behalf of the first, third and fourth plaintiffs, and not until 4 May 2021 in respect of the second plaintiff—in the latter case, a delay of over 4 years.

42. In **Birkett v. James** (*supra*), the Court defined "inordinate delay" as being "*materially longer that the time usually regarded by the profession and Courts as an acceptable period*". In my judgment, a delay of over two years in serving a statement of claim (even in draft form) is inordinate delay. In coming to this conclusion, I am aware that there have been cases where the delay has been in excess of two years (see **Michael Wilson**, *supra*, 2-3 years, and **Reef Construction Ltd.**, *supra*, over four years) and the court nevertheless exercised its discretion to extend time. But in all of those cases, the court either found that there was an acceptable explanation for the delay, or that there was no prejudice asserted or caused to the defendant by the extension of time. Neither holds true here.

43. As to reasons for the delay, I accept the submissions of the defendants that the plaintiffs have really only proffered a boiler-plate explanation for the delay by claiming lack of funds to continue the litigation. While I would readily accept that impecuniosity may have a role in explaining delay, the court is also aware that it can all too easily be invoked to attempt to explain away dilatory conduct. As said in the Jamaican Court of Appeal case of **Alcron Development Ltd. v Port Authority of Jamaica** [2014] JMCA App. 4, in rejecting an application to extend time for a judicial review application "… *the court is mindful of the fact that absence of funds may be unjustifiably proffered as a reason for delay in un-deserving instances*."

44. Indeed, the second limb of the explanation proffered by the plaintiffs—that there were not sufficient lawyers working at the firm to ensure that the statements were filed—seriously undermines the claim as to lack of funds being the real reasons. In fact, it seems that there was

default by counsel in failing to issue the statements of claim. I am not, therefore, satisfied that the defendants have adduced any reasonable excuse for their failure to file the statements of claim in time.

45. On the point of prejudice, the plaintiffs assert that the defendants have not provided any evidence that they will suffer anything more that minimal prejudice caused by the delay in providing their statements of claim. It is understandable that the plaintiffs might take such a view, since the defendants themselves (curiously to say the least) described themselves as not being seriously prejudiced. They do point to the fact, however, that the delay might result in necessary witnesses not being available.

46. In the cases dealing with strike out for want of prosecution, the court will usually require some evidence that the delay post commencement of the action has added to the substantial risk that there cannot be a fair trial, but in appropriate cases the court can draw inferences from the affidavits that the defendants will be prejudiced (see, **Hornagold v Fairclough Building Ltd. and Another** [1993] Lexis Citation 1615). As mentioned, the defendants do assert a limitation defence. There can be no greater prejudice to the defendants than if by extension of time the court would be facilitating claims in respect of which the defendants would otherwise be entitled to claim a limitation defence provided by Parliament.

47. For example, the first plaintiff was discharged in July of 2009, the second plaintiff in late 2014, the third plaintiff on 20 July 2015 and the fourth plaintiff on 13 November 2007. Respectively, the alleged breaches would have occurred 7 years, just under two years, just under a year and in the latter case some 9 years before the writ was instituted. Thus, the claims of the first and fourth plaintiff would be outside of even the general limitation periods for contractual or tortious claims, and except for the claim of the third plaintiff, they would all be outside of the 1-year special limitation period. To the extent that the plaintiffs have mixed in constitutional claims, as contended by the defendants, these are susceptible to being struck out on the grounds of being an abuse of process.

48. It is also clear that in these kinds of applications, the court may take into consideration delay prior to the commencement of proceedings. As was said by Mustill LJ in **Department of Transport v. Chris Smaller Ltd.** [1989] AC 1197 at pg. 1207:

> "Furthermore, it should not be forgotten that long delay before the issue of the writ will have the effect of any post writ delay being looked at critically by the court, and more readily being regarded as inordinate and inexcusable, than would be the case if the action had been commenced soon after the accrual of the cause of action. That if the defendant has suffered prejudice as a result of such delay before issue of the writ he will only have to show something more than minimal additional prejudice as a result of the post writ delay to justify striking out the action."

49. I therefore would hold that the defendants are more than minimally prejudiced by the delay. As pointed out, apart from any issues caused by the delay in issuing the statement of claim, at least three of the plaintiffs' claims are caught by the general or specific limitation periods.

Additional factors

50. I now turn to look at some of the other factors under the expanded case management powers of the court under Ord. 31A, r. 18(2), to the extent that they raise different considerations from those discussed under Ord. 3, r.4.

51. The interest of justice (item (a)) is a very open-textured factor, and here the court must seek to balance the requirement of ensuring compliance with the Rules with the just resolution of the case, while not denying adjudication of a party's claims simply because of procedural defaults. In this regard, it might be said that the superimposition of modern case management rules into the RSC 1978 provides the court with greater flexibility in the approach to the imposition of penalties for procedural errors.

52. I do not think, however, that making recourse to these expanded case management powers improves the position of the plaintiffs. It is clear that the claims suffer from far greater procedural and substantive defects than mere failure to comply with the timeline for filing the statement of claim. As indicated, several of the claims are likely outside of the statutory limitation periods and they may constitute an abuse of process, considering that the plaintiffs have had recourse to the statutory appellate process. Furthermore, the statements of claim, such as they are, are themselves irregular in that they are all enlarged beyond the causes of action pleaded in the single writ filed on their behalf. In fact, having regard to the issues which are peculiar to the individual plaintiffs, and the different time periods, I am of the view that the statements of claim clearly do not show that they have a joint cause of action or that their several causes of action are in respect of, or arise out of, the same transaction or series of transactions (even if they involve some common issues), so as to have been pursued jointly under a single writ.

53. As to the responsibility for the failure to comply (item (b)), this has already been addressed above. By their own evidence, the plaintiffs posit that the failure was caused partly by their legal representatives at the time and partly by their lack of funds. On the point of whether the failure can be remedied within a reasonable time (item (c)), theoretically it can be remedied by the court extending time for the filing of the statement of claim. But as indicated, there are additional aggravating factors of inordinate and inexcusable delay, and prejudice to the defendants. The defendants were not presented with the statements until 2019 and 2021 (in the case of the second plaintiff) two and four years respectively after the expiration of time for filing the statements. Those periods cannot be considered a reasonable time in which the plaintiffs sought to remedy their failure to comply. The issue of maintaining a trial date (item "d") is not relevant, as none had been set.

54. Finally, as to the effect on either party of granting the extension (item "e"), the Court is a well aware that a refusal to extend time could have the possible effect of derailing the plaintiffs' claims, subject to any appeal. But in all the circumstances of this case, the plaintiffs' approach to this case, both in terms of the pre-commencement delay in filing the claims and post-filing delay in prosecuting it, have been egregious and inexcusable. Moreover, as has already been pointed out, there are limitation issues to be confronted. This is not a matter in which the procedural default can simply be made good by payment of costs thrown away.

55. Drawing all of these threads together, and having regard to all the circumstances of the case, my conclusions on the applications in this matter are these. I refuse to exercise my discretion pursuant to Ord. 3, r. 5, as augmented by Ord. 31A, r. 18(2), to extend time for filing and service of the statements of claim. I also accede to the defendants' application and dismiss the claims pursuant to Ord. 19, r. 1. As a result of the conclusion I have come to in refusing the extension of time, it has not necessary to decide whether the claims ought to be dismissed on the alternative claim of abuse of process.

CONCLUSION AND DISPOSITION

56. For the reasons given above, I refuse the extension of time for the plaintiffs to file their statements of claim and also dismiss the action. Cost to be those of the defendants to be taxed if not agreed.

Klein, J.

27 February 2025