COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2018/PUB/Con/00024

B E T W E E N:

WILLIS SYMONETTE
(Former Police Officer)

Applicant

AND

1. **THE POLICE SERVICE COMMISSION**
2. **THE MINISTRY OF THE PUBLIC SERVICE**
3. **THE COMISSIONER OF POLICE**

Respondents

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Maria Daxon for the Applicant
	Luana Ingraham for the Respondents
Hearing dates:	2 February 2023; further submissions 16 February 2023

R U L I N G

KLEIN J.

Civil Practice and Procedure—Originating Summons—Two sets of proceedings, filed 1995 and 2018—Rules of the Supreme Court (R.S.C) 1978—Order 18, r.19—Ord. 31A, r. 20(1)—Application to Strike out— Principles—Abuse of the process of the court—Re-litigation of matters—Unreasonable Delay—Striking out—Plain and obvious cases—Limitation Act—Inherent Jurisdiction of the Court to control process

Police Act 1965—Dismissal of police officer pursuant to s. 26(c)—Appeal to Governor General—Police Service Commission—Constitution—Arts. 20(8), 28(2)—Constitutional Redress—Articles 79(4) and 125(4) of Constitution

INTRODUCTION AND BACKGROUND

1. This is an application by the Office of the Attorney General ("OAG") to strike out an originating summons filed in 2018 seeking to litigate matters arising out of the applicant's dismissal from the Royal Bahamas Police Force ("RBPF") by the Commissioner of Police ("COP") in June 1993, more than 3 decades ago.

2. The OAG contends that the proceedings are statute-barred and in any event are an abuse of process, not only because of the egregious delay, but because the 2018 proceedings were filed on top of an extant 1995 action which essentially raised the same issues. It does not appear that the earlier action was ever determined.

3. In opposition to the OAG's claim, the applicant submits that he is entitled to bring an action to redress the failure of the Police Service Commission ("PSC") to hear and determine his appeal

(nominally made to the Governor General) against his dismissal. He alleges this is a 'continuing breach' of his constitutional right to a fair hearing within a reasonable time and that his claim is not subject to any limitation period.

Background

4. The history of the matter giving rise to the two sets of proceedings is as follows. The applicant enlisted in the RBPF as a constable in April of 1992. In October 1992, he was charged before the magistrate's court with causing harm and damage, and suspended on half-pay pending the determination of the matter. On 15 April 1993, he was invited by the COP to show cause why he should not be dismissed pursuant to s. 26 (c) of the *Police Act 1965* ("the Act") on public interest grounds, namely that his "*image and integrity as a police officer had been tarnished*" and that it was "*likely that he would not be able to function properly as a Police Officer*". He responded to the show-cause letter, but in any event was discharged on 10 June 1993. By letter dated 15 June 1993, he appealed his discharge to the Governor-General, pursuant to s. 101 (now 102) of the Act. There does not appear to have been any outcome from the appeal. On 8 June 1994, he was discharged in the Magistrate's Court on both counts.

The Proceedings

5. On 27 February 1995 he filed an Originating Summons seeking various constitutional and other relief (Common Law Action No. 256 of 1995) ("the 1995 action"). It does not appear that this matter was ever heard, although case management directions were given and the OAG eventually filed an affidavit in response on 6 January 2005. The COP and the Attorney General are respectively the first and second defendants in the 1995 action. That action challenged the decision of the COP to discharge him and sought declarations along the following lines:

> "(a) A declaration that the purported discharge of the Plaintiff is void for being in contravention of the Constitution;
> (b) A declaration that the Plaintiff is entitled to damages as a result of the said breach and an accounting of all damage to which the Plaintiff is entitled as a result of the said breach;
> (c) A declaration that the purported discharge of the Plaintiff is void for non-compliance with s. 26 (c) of the Police Act, Chapter 191."

6. On 13 July 2018, some 25 years after his discharge, he instructed new counsel to file a fresh originating summons (2018/PUB/con/00024) ("the 2018 Action") seeking various declarations and constitutional relief. The originating summons was intituled under arts. 20(8) and 28(2) of the Constitution, and the main declarations reliefs sought were set out at paras. 1-8 as follows:

> "1. A Declaration that the delay in adjudicating the appeal of the Applicant reference to his dismissal is a violation of his right to a fair hearing within a reasonable time as guaranteed by the Constitution;
> 2. A Declaration that the Applicant was entitled to have his appeal heard before being dismissed;
> 3. A Declaration that by reason of the delay, a hearing of the said matter would be an abuse of the process of the court;
> 4. A Declaration that the purported decision of the First Respondent to withhold the salary and all benefits of the Applicant before the appeal was completed is unlawful, void, illegal and of no effect;

5. A Declaration that that Applicant's right to be treated fairly with due process and in accordance with the Constitution and the Rules of Natural Justice have been, and are being breached;
6. A Declaration that the First Respondent has acted unfairly, unlawfully, unreasonably, arbitrarily, capriciously and abusive towards the Applicant;
7. A Declaration that the Applicant is entitled to damages as a result thereof, and an accounting of all damages to which the Applicant is entitled;
8. A Declaration that the Applicant is entitled to damages as a result of the abuse of discretion, and an accounting of his said entitlement…".

7. Claims were also made for general and exemplary damages.

8. The application was supported by the affidavit of Willis Symonette, filed the same date as the originating summons. Three further affidavits were filed: one by Caraneka Smith filed 27 July 2021, and two by Cara Ellis on 16 June 2022 (both filed the same date). The purpose of these affidavits was simply to exhibit the relevant letters and other documents written on behalf of Mr. Symonette in respect of his claims and any replies from the respondents, and I must say there was considerable overlap and repetition in them. For example, the longer of the Ellis affidavits seems to have incorporated much of what was in the other affidavits, although it added some further details.

The strike out application

9. Following some back and forth between the parties on several interlocutory applications, the matter was referred to case management in November 2019, and the OAG filed a summons on 7 April 2021, pursuant to Ord 18, r. 19 and/or the inherent jurisdiction of the Court to strike out the originating summons. The grounds were that the inordinate delay would now prejudice the trial of any action, that the attempt to re-litigate matters that could have been raised in the 1995 action was an abuse of process, and that the action was statute barred by s. 12 of the Limitation Act or, in any event, was susceptible to being struck out under the Rules or the Court's inherent powers. The summons was supported by the affidavit of Fern Bowleg filed 17 December 2019 and a supplemental affidavit filed 29 April 2021.

10. The matter was case-managed over five hearings, during which the applicant and respondents were given leave to file additional affidavit evidence, and directions given for filing submissions.

STRIKE-OUT PRINCIPLES

The Rules

11. The rules and principles on which these applications are to be determined are not in dispute. The respondents' application to strike out was brought under Order 18, r. 19(1), *Rules of the Supreme Court* 1978 (R.S.C. 1978) and s. 12 of the Limitation Act 1995.

Ord. 18, r. 19 (1)

12. Order 18, r. 19(1) 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."

13. 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).

14. The applicants specifically invoked sub-paragraph (c) of Rule 19(1) (may prejudice fair trial of the action), sub-paragraph (d) (abuse of process), and s. 12 of the Limitation Act.

Prejudice, embarrassment or delay fair trial of the action

15. The prejudice which the respondents assert does not arise from vague or imprecise pleadings, but inordinate delay that is likely to cause prejudice to the defendants or a third party during the trial process. The principle was stated in the leading case of **Birkett v James** [1978] A.C. 297 by Lord Diplock as follows [pg. 297]:

> "The [strike out] power should be exercised only where the court is satisfied that (1) the default has been intentional and contumelious, e.g., disobedience to a peremptory order of court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial on the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

See also, **Allen v Sir Alfred McAlpine & Sons Ltd.** [1986] 2 Q.B. 229.

Abuse of process

16. 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*);* **Yat Tung Investment Co. Ltd. v Dao Heng Bank** [1975] AC 581 (applied in **Johnson v The Grand Bahama Utility Company Ltd.** [2012] 1 BHS J. No. 110).

17. Explaining the principle in **Yat Tung Investment Co. Ltd.**, Lord Kilbrandon said:

> "But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of *res judicata* is the judgment of Wigram V.-C in *Henderson v Henderson* [1843] 3 Hare 100, 115 where the judge says:
>
> …where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

18. In **Department of Transport v Chris Smaller Ltd.** [1989] AC 1197, although this was a case dealing with striking out for want of prosecution, Mustill LJ said [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 delay and inexcusable, than would be the case if the action had been commenced soon after the accrual of the cause of action. Thus if the defendant has suffered prejudice as a result of such delay before the 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."

Limitation Act

19. The third ground relied on by the respondents 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."

20. It is also trite that the court is able to exercise the strike out power under the "*scandalous, frivolous or vexatious*" limb of Ord. 19, r. 1, if a party indicates an intention

to avail to avail themselves of a limitation defence (*Ronex Properties v. John Laing Construction Ltd.* (1983) QB 398).

General principles

21. In addition to the specific rules that enable a party to attack the pleadings of another party for non-compliance with the rules or any relevant limitation statute, the court must also advert to the general principles governing the exercise of its strike-out jurisdiction. 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: see, **Drummond-Jackson v British Medical Association and others** [19780] 1 ALL ER 1094 (pp. 1110-1102); applied in **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) [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. 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 (paras. 11-13). 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."

23. 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. 18, 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. 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 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."

The Parties' arguments

Respondents

24. The respondents made three main points in their oral and written submissions in support of their application to strike out. Firstly, they allege that the inordinate delay in bringing the 2018 action will inherently prejudice the respondents in the trial of that action.

25. Next, they submit that it is an abuse of process, in that the 2018 action is in effect seeking to re-litigate the same or similar issues that were the subject of the 1995 action. They rely on **Johnson v GB Utility Co.** (where the court quoted the passage from **Yat Tung Investments Co. Ltd**.), excerpted above. They also rely on a reference in **Johnson** to **Greenhalph v Mallard** [1947] 2 All ER 255 in **Johnson**, where Somervell LJ, expanding on the concept of the phrase "*every point which properly belonged to the subject of litigation*", said:

> "…*res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but …it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

26. The OAG acknowledged that not all of the parties to the 1995 action are the same as in the 2018 action. However, the COP is the first defendant/respondent in both, and they say that the subject matter of the actions is the same, even though the 2018 actions attempts to put a different spin on the matter by attacking the appeal process to the PSC, as opposed to the dismissal.

27. The final point taken by the respondents is that delay in the 2018 action either renders it statute-barred as being outside the special limitation period of one year applicable under s. 12 to public authorities, and that in any event it would be an abuse of the process of the court even, if for any reason the limitation period was not applicable.

28. The latter argument is made in the context of the constitutional claims pursuant to arts. 20(8) and 28(2) of the Constitution, and the respondents accept that strictly speaking there is no limitation period for an aggrieved person to seek to redress rights pursuant to art. 28(2). However, they submit that an inordinate and unexplained delay of over 25 years in commencing the action is unreasonable and amounts to an abuse of process, in respect of which the Court should exercise its strike out power either pursuant to the Rules or under its inherent jurisdiction. They rely on **Stephen Edwards v The Attorney General of Guyana and the Public Service Commission** [2008] CCJ 10 (AJ), and **Durity v Attorney General of Trinidad and Tobago** [2002] UKPC 20.

29. In **Edwards**, the applicant was dismissed from his employment in the public service in 1980 and commenced action some 7 years later in 1988, which was dismissed on the ground that it was statute-barred. He instituted proceedings some 20 years later citing a breach of his constitutional rights. His eventual appeal to the CCJ was dismissed, the court stating that the second action was effectively seeking to "*circumvent the decision of the first action filed in 1988*" and that the delay in bringing the second action "amounted to an abuse of process".

30. In **Durity**, the Privy Council affirmed that constitutional claims were not caught by the one-year limitation period that applied by the provisions of the Public Authorities Protection Act in Trinidad and Tobago (the equivalent of s. 12 of the Limitation Act), but made the following observations about delay and the court's powers in the case of late constitutional applications [35]:

> "[35] …When a court is exercising its jurisdiction under section 14 of the Constitution and has to consider whether there has been such delay as would render the proceedings an abuse of process or disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction. This principle is well established. On this, it is sufficient to refer to the much repeated cautionary words of Lord Diplock in *Harrikissoon v A-G* (1979) 31 WIR 348 at 349. An application made under s. 14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process.
>
> [36]...In the present case Sinanan J held this was the position regarding Mr. Durity's application for constitutional relief in respect of the commission's decision to suspend him from office. The commission made this decision in August 1989. It was over five years later that Mr. Durity first sought to challenge this decision. As already noted, the Court of Appeal refused an application by Mr. Durity to amend his judicial review proceedings to introduce such a challenge. Given the lapse of time and absence of explanation, that decision by the Court of Appeal was plainly correct."

The Applicant

31. Ms. Daxon, on behalf of the applicant, addressed extensive arguments to the merits of the claim during her oral submissions, and needed to be reminded on several occasions that the Court was not hearing the merits of the originating summons. For example, she referred the court to the affidavits that catalogued the many efforts of Mr. Symonette's legal representatives to get feedback on the outcome of his appeal under s. 102 of the Police Act, many of which were said to have gone unanswered. She also claimed that pursuant to s. 11 of the Regulations (Police Disciplinary Regulations) the filing of an appeal under s. 102 should have had the effect of suspending the punishment until the case was determined, and that the failure to determine the appeal was a breach of the applicant's fundamental right to a fair hearing within a reasonable time. As indicated, the merits of the action (if any), fell to be determined on another occasion—if the application survived the peremptory challenge. However, the applicant did address written submissions to the strike out challenge.

32. With respect to the challenge on the grounds that the delay would prejudice the fair trial of the action, the applicant contends that the respondent failed to provide any evidence of the prejudice that would be caused by the delay.

33. Secondly, it is said that the 2018 action is a "*new cause of action*", which deals with the delay in the appeals process, while the 1995 action was directed to the dismissal of the applicant. This is said to take the case outside the **Henderson-Henderson** principles and rebuts the claim that the applicant is seeking to re-litigate matters that could have been raised or were raised in the

1995 action. In any event, it is said that as there has not been any judgment on the 1995 action, the "*cause of action has not been extinguished*".

34. Third, it is submitted that the applicant is entitled to the constitutional relief sought in the 2018 action because the PSC refused to address or deal with the appeal process from 1993. In particular, it is said that the applicant had a right to a fair trial within a reasonable time, which was breached and which continues to be breached. Thus, he is entitled to bring an action, notwithstanding the delay, to redress the complaint, as there is no statute of limitation in respect of constitutional rights.

35. The applicant also relies on a passage in **Durity**, where the Privy Council said [para. 30]:

> "Clearly, the inherent jurisdiction of the High Court to prevent abuse of its process applies as much to constitutional proceedings as it does to other proceedings. And the grant or refusal of a remedy in constitutional proceedings is a matter in respect of which the court has a judicial discretion. These limitations on a citizen's right to pursue constitutional proceedings and obtain a remedy from the court are inherent in the High Court's jurisdiction in respect of alleged contraventions of fundamental rights and freedoms. But the Constitutional itself contains no express limitation period of the commencement of constitutional proceedings. The court should therefore be very slow indeed to hold that by side wind the initiation of constitutional proceedings is subject to a rigid and short time bar."

36. The final strand of the argument made by the applicant is that the 2018 action discloses a reasonable cause of action which should be ventilated during a hearing. As put in the written submissions:

> "The Originating Summons currently before the court does in fact disclose several causes of action and alleged breaches of the [Applicant's] rights. They have not been addressed at all by the Respondents. …[I]f full and due consideration is given to the Bahamian and English cases cited above, this Honourable Court may be convinced that, in exercising its discretion, the same ought to be done in the favour of the Applicant, thereby allow the factual dispute and points of law to be fully examined at trial."

Several of the cases cited by the applicant in this regard were **Dyson v Attorney-General** [1911] 1 K.B. 410 and **Drummond-Jackon v British Medical Association** (*supra*).

ANALYSIS AND DISCUSSION

37. I start by indicating that the manner in which Mr. Symonette's case was dealt with by the Public Service may have been cause for legitimate concern and challenge. However, there were alternative legal remedies by which those defects could have been redressed and, as indicated, indeed an attempt was made in 1995, although for whatever reason it was not followed through. Nevertheless, I think the OAG are right in their contentions that the 2018 action is an abuse of the process of the court and ought to be struck out for the reasons which they have given.

Delay prejudices the fair trial of the action

38. It is correct that neither of the respondent's affidavits specifically speaks to the alleged prejudice that the delay will cause if the matter proceeds to trial, although the allegations are made in the summons and affidavit, and repeated in oral submissions. 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, although the court may still draw inferences from the affidavits that the delay will cause prejudice (**Dept. of Transport v Chris Smaller**, **Hornagold v Fairclough Building Limited and Another** [1993] Lexis Citation 1615).

39. However, the cases mentioned were all matters where there had been extensive pre- and post-commencement delay, but which were all filed within the requisite limitation period. In the instant case, and leaving to one side the argument that the limitation period does not apply to constitutional cases, the 2018 action was commenced outside of any conceivable analogous common law limitation period, and I am of the opinion that the failure to specifically allege the prejudice does not undermine the respondents' claim in this regard. The court can infer from the circumstances that the delay will prejudice the respondents. For example, the composition of the PSC would most certainly have changed numerous times since then, and the police officials who presided at the period in question are not likely to still be available to testify.

Re-litigation of same issues

40. I also accept the respondents' argument that the 2018 action would be an abuse of the process of the court, in that it seeks to litigate issues that ought properly to have been taken (and most of which were taken) in the 1995 action. Ms. Daxon tried valiantly to distinguish two actions on the basis that the 1995 action challenged the decision of the Commissioner of Police to dismiss, while the 2018 process challenged the outstanding statutory appeal to the Police Service Commission, via the Governor General. In any event, the appeal was extant at the time the 1995 proceedings were instituted, and in fact in the supporting affidavit the applicant complained that "*I have appealed to the Governor General pursuant to s. 101 of the Police Act Chapter 191, but have had no response to the Appeal*". Thus it is clear that both actions are founded on the same cause of action, which is the applicant's dismissal from the Police Force, and any issues as to the appeal could have been taken in the 1995 action.

41. Furthermore, none of the affidavits filed by the applicant even attempted to explain the delay in commencing the 2018 action (even if thought to be a different action), and neither was there any explanation as to why the 1995 action, which was filed just over 1 year after his dismissal, was not pursued. I should also mention that the 1995 action was only brought to the attention of the court under cover of the AG's supplemental affidavit.

42. I would therefore hold that the 2018 action was also an abuse of process on the grounds that it sought to litigate matters that ought to have been raised in 1995 proceedings and which, conceivably, could still be pursued thereunder.

The limitation defence

43. It is accepted, based on ***Durity,*** that the limitation periods do not apply to constitutional breaches in a strict sense, and therefore the one-year limitation at s. 12 does not avail the respondents. But I find without any reluctance that even a constitutional claim instituted 25 years after the complaint which it seeks to address, with no explanation for why an extant and contemporaneous claim was not pursued, is an abuse of process, and is not immune from strike-out either under the Rules or the Court's inherent jurisdiction, both of which are invoked.

44. Further, the proviso to art. 28(2) makes it clear that where ordinary actions at common law are available to redress the complaint, those should be given recourse to (**Durity**, **Harrikisoon v Attorney General**), and the common law actions are subject to limitation periods. In fact, the formulation of the proviso to art. 28(2) of the Bahamian Constitution states plainly that the alternative remedies clause is not discretionary and the right to pursue constitutional remedies may be lost if not pursued in time:

> "Provided that the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law." [Emphasis supplied.]

Reasonable cause of action

45. I think the applicant's arguments on this point are misconceived, as the OAG never invoked the ground under sub-paragraph (a) of Ord. 18, r. 19—disclosing no reasonable cause of action. Although there is obviously some overlap between the grounds, sub-paras (a) to (d) are discrete grounds on which a party might move to strike out pleadings. It is also clear, that in the ordinary course, no affidavit evidence is allowed in respect of sub-paragraph (a), and it was clear that the OAG was relying on its affidavits. Thus the principles expressed in **Dyson** and **Drummond-Jackson** that the court should not use the summary procedure to strike out matters as disclosing no reasonable cause of action where there may be matters of law or fact which require investigation are not applicable to the instant facts.

Additional point

46. There is one additional point that I need to mention before closing. It turned out not be necessary for the determination of the OAG's application, but I add it for completeness. During arguments, I raised with counsel whether the provisions of arts. 79(4) and 125(4) of the Constitution, which purport to oust the power of the Court to enquire into certain functions performed by the Governor-General and PSC, were of any relevance to the application before the Court. Counsel were invited to make short submissions on the point, which they did.

47. Art. 79(4) provides that where the Governor General is directed to exercise any function on the advice, etc., with any person or authority, "*the question whether he has so exercised that function shall not be enquired into in any court*." Art. 125(4) provides similarly that the question of whether any Commission (Service Commissions) has validly performed any function vested in it under the Constitution "*shall not be enquired into in any court*".

48. The Privy Council considered art. 79(4) in **Knowles and Others v Superintendent of HM Prison Fox Hill and Others** [2005] 4 LRC 313, and concluded that art. 79(4) does not mean that

the acts of the Governor general are wholly immune from judicial review, and does not "*exclude on the face of it all inquiry as to whether the Governor General has validly or constitutionally exercised a function under it*", only whether or not he actually acted on the advice, etc., of any person or authority.

49. Counsel for the applicant urged on the court that in any event, as no decision was apparently made in the public service appeal, there were no decisions to be enquired into in any event, and so these articles were not relevant to the matter. I agree with that submission, and nothing further needs to be said on this.

50. I should also mention that counsel for the respondents was at pain to point out during her submissions that they were not attacking the 1995 action, which was probably still extant, so the applicant was not totally without remedies. However, it is very likely that any attempt to resuscitate the 1995 action will also run hard up against the grounds of want of prosecution because of the excessive delay. But this is an argument for another day.

CONCLUSION AND DISPOSITION

51. For all the foregoing reasons, I accede to the OAG's summons to strike out the 2018 action. I invite counsel to draw up the appropriate minute of Order giving effect to the Court's decision.

52. I will hear submissions from the parties on costs.

Klein J.

28 February 2025