COMMONWEALTH OF THE BAHAMAS **2021/CLE/gen/00943**

IN THE SUPREME COURT

Common Law and Equity Division

B E T W E E N

ANDREW HUYLER

Claimant

AND

THE HONORABLE CARL BETHEL

(in his capacity as Attorney General of The Commonwealth of The Bahamas)

First Defendant

AND

PAUL ROLLE

(in his capacity as Commissioner of Police of the Royal Bahamas Police Force)

Second Defendant

Before:	**The Honorable Madam Justice Carla Card-Stubbs**
Appearances:	Mr. Ian Cargill, Jr of Counsel for the Claimant Mr. Patrick Sweeting of Counsel for the First and Second Defendants
Hearing date:	Hearing on written representations submitted by the parties: Defendants' arguments submitted August 5, 2023 Claimant's arguments submitted September 29, 2023; October 27, 2023

Civil Procedure and Practice- Defendant's Application to strike out Claimant's statement of case — Claimant's Application to strike out the Defendant's affidavit – Contents of an affidavit - Court's power to strike out - Rule 26.3 CPR- Rule 30.3 CPR- Court's inherent jurisdiction to prevent misuse of process – The Overriding Objective requiring compliance with rules - Whether Claim is statute-barred – Whether the Defendants may rely on statute of limitation in a strike out application where limitation is not pleaded as a defence – Duty of Defendants to set out case

The Claimant instituted action alleging tortious conduct of the Defendants and breaches of the Constitution. The Defendants filed an application to strike out the Statements of Case on several grounds premised on the submission that the claims were statute-barred. The Claimant filed an application to strike out the whole or part of the affidavit relied on by the Defendant. The Claimant applied for judgment on liability.

HELD:

1. The Defendants' application is dismissed. In this case, the Defendants did not plead a defence of limitation and

therefore could not rely on the limitation defence to strike out the statements of case. In the absence of the Limitation period being pleaded as a Defence, the Defendants are not entitled to raise it.
2. The opinion evidence and legal submissions reflected in the affidavit relied on by the Defendants are struck out.
3. The proceedings do not amount to a determination of a preliminary issue concerning the merits of the claim. There is no basis for a judgment on liability. In the circumstances, the request for "Judgment on Liability" or a "judgment on the claim" is refused.

RULING

Introduction

[1.] Before this court are two substantive applications to strike out.

[2.] The Defendants seek to strike out the Claimant's Statement of case and Reply on several grounds pursuant to Rule 26.3 (a), (b), & (c) of the Supreme Court Civil Procedure Rules 2022, as amended ('CPR'). For the reasons that follow, that application is dismissed.

[3.] By way of response, the Claimant mounted an application to strike out the whole or part of the affidavit of Antoine Thompson, which affidavit was filed in support of the Defendants' application. For the reasons that follow, that application is acceded to. The Claimant also sought judgment on liability. That application is refused.

Background

[4.] The suit against the Defendants stem from the detention of the Claimant by members of the Royal Bahamas Police Force on March 5, 2019.

[5.] On August 19, 2021 the Claimant brought an action against the Defendants by way of a Writ of Summons alleging unlawful arrest, assault, battery, false imprisonment and Malicious prosecution, breaches constitutional rights under, *inter alia*, *Articles 15* (life, liberty and security), 17 (inhumane treatment), 19 (arbitrary arrest and detention), 20 (protection of the law), 21 (protection of privacy of home and other property) and 25 (freedom of movement) of the Constitution of the Commonwealth of The Bahamas and breach of duty of care. The Claimant alleges that as a result he suffered loss and damage.

[6.] In claiming interest, the Writ of Summons identifies March 5, 2019 as "the date from which the Plaintiff's cause of action arose".

[7.] The Statement of Claim was filed on December 23, 2021.

[8.] The Defendants filed a Memorandum of Appearance and a Notice of Appearance on December 3, 2021.

[9.] The Defendants, by Order of the Registrar, received an extension of time within which to file their Defence. A Defence was filed on January 21, 2022.

[10.] The Defendants, by way of Defence, admit that the Claimant was arrested (paragraph 57) and was released on police bail (paragraph 6) and that the Claimant was acquitted of the charges which he faced in the Magistrate's court (paragraph 8). The filed Defence generally denies the assertions made by the Claimant, and specifically denies the causes of action pleaded and the heads of damages.

[11.] The Claimants filed a Reply on February 4, 2022.

[12.] At a Case Management Conference held on May 31, 2023, the Defendants gave notice of their intention to file an application to strike out the Claimant's action.

[13.] On June 9, 2023 the Defendants filed a notice of application to strike out the Claimant's Statement of case and Reply.

[14.] On July 7, 2023, the Claimant filed an application to strike out the affidavit in support of the Defendants' application. The Claimant's application also purports to seek leave to enter judgment against the Defendants.

[15.] The parties agreed to have the matter heard on the papers.

[16.] The Claimant's application is best understood in the context of a response to the Defendants' application. Therefore this ruling will consider the applications together.

THE DEFENDANTS' APPLICATION

[17.] The Defendants' application filed 9 June 2023 is made pursuant to Part 26.3 (a) (b) (c) of the CPR, Section 12 (2) of the Limitation Act and the Court's inherent jurisdiction on the following grounds:

a. The Claimant's Statement of Case did not commence action against the Defendants within the statutory period of twelve (12) months after the act complained of as provided by, and in compliance with, section 12 (2) of the Limitation Act and this matter is statute-barred.
b. The Statement of Case and Reply be struck out as failing to disclose any reasonable ground for bringing or defending a claim; and

c. The statement of case or the part be struck out is frivolous, vexatious, an abuse of process of the Court or is likely to obstruct the just disposal of the proceedings.

[18.] The Application is supported by the Affidavit of Antoine Thompson filed 9th June 2023. The Affiant purports to depone to facts relevant to the action brought. The Affidavit is said to be made in support of the ground that the action is statute-barred and the Affiant makes certain averments and "submissions" in relation to same.

THE CLAIMANT'S APPLICATION

[19.] The Claimant's application seeks this court's order to strike out the affidavit relied on by the Defendants in support of the Defendants' application. The Claimant's application is for the striking out of the affidavit in whole or in part.

[20.] The Claimant's application was filed on July 7 2023 pursuant to Parts 26.1 (i), 26.1(v), 30.3 (1), 30.3 (2), 30.3 (3) and 32.6 (1) of Supreme Court Civil Procedure Rules ('CPR') and/or the Court's inherent jurisdiction to strike out of the Affidavit of Antoine Thompson in whole or, alternatively, paragraphs 8-11 of the Affidavit on several grounds including:

> 2.4 Pursuant to the CPR, the whole or parts of an Affidavit:
>
> 2.4.1 May contain only such facts as is able to be proven from the deponent's own knowledge (*see Part 30.3(1)*);
>
> 2.4.2 May contain statements of information and belief if allowed by the CPR (*see Part 30.3(2)*; and
>
> 2.4.3 May be stricken out if it contains any scandalous, irrelevant or otherwise oppressive matter (*see Part 30.3(3)*).
>
> 2.5 In addition, under the CPR the Court has the power to:
>
> 2.5.1 Dismiss or give judgment on a claim after a decision on a preliminary issue and
>
> 2.5.2 Take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective (*see CPR Part 26.1(v)*).
>
> 2.6 Crucially, under CPR Part 32.6 of the CPR, a party may not call an expert witness or put in the report of an expert witness without the Court's permission.

SUBMISSIONS OF THE PARTIES

Defendants' Submissions

[21.] The Defendants' submissions stem from two main bases - (1) that the Claimants' action is statute-barred and (2) that the Constitutional claims should not be entertained. The submissions may be summarized as follows:

> 1. The action is statute-barred by operation of section 12 of the Limitation Act Ch. 83. Neither the Writ of Summons, nor Statement of Claim plead the relevant period of limitation and the Plaintiff bears the burden of proving his cause of action accrued within the relevant period of the Statute of Limitation: ***Cartledge and others v. Jopling & Sons Ltd. [1963] AC 758*** The Claimant has not advanced any reasonable or satisfactory explanation for the prolonged and inordinate delay in filing a claim. The cause of action, if any, arose on March 5th 2019. The Claimant appeared before the Magistrate and was represented by counsel. It is submitted, that at all material times the Claimant, certainly had the means and the opportunity to retain counsel to safeguard his rights.
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> 2. The onus is on the Claimant to bring the claim within the statutory period of one year and to prove the allegations contained in his claim. The claimant has a duty to not delay the process. The action is an abuse of process and the case is "obviously unsustainable" and bound to fail. The Claimant admits to the operative date being March 5 2019 and on that basis the court is invited to Strike Out this claim. **B.E. Holdings Limited v. Piao Lianji [2014/CLE/gen/01472]**; **Ronex Properties Limited v John Laing Construction Limited [1983] QB 398**
>
> 3. There would be prejudice to the parties in the conduct of the trial because there was no expectation by the Defendants that an action would be filed once the Statutory period for filing had passed. Further, the lapse of could "adversely affect a witnesses' ability to clearly recount events in a way that would properly assist the court in arriving at a decision. This could also affect the Claimant who would be subject to the rigors of cross examination. It is indeed mandatory, that these matters be brought within the Limitation period against the Crown."
>
> 4. By submissions, the Defendants introduced an alternative ground for striking out the Claimant's action as: "Alternatively, that the action be struck out pursuant to Article 28(1) of the Bahamas Constitution". In relation to that ground, the Defendants argue that The Claimant's resort to Constitutional remedy where alternative remedies were available and never sought is an abuse of the process of the court. Further, the acts complained of do not rise to the level of Constitutional claims and the Claimant has adduced no proof to substantiate the allegations made during his time in custody at the police station. The onus lies with the Claimant to prove his claim to the requisite standard of proof.
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> 5. The Claimant's resort to Constitutional remedy where alternative remedies were available and never sought is an abuse of the process of the court. **Harrikissoon v Attorney-General of Trinidad and Tobago [1980] AC 265; Malcolm Johnatty v. A.G. for T & T (2008) UK PC 55; Durity v. Attorney-General of Trinidad**

& Tobago (2002) UK PC 20; **The Right Honourable Hubert Ingraham MP et al v. Maurice O. Glinton and Leandra A. Esfakis Appeal No. 53 of 2005**

6. The court can strike out a party's case either on the application of a party or on its own initiative. In **B.E. Holdings Limited v. Piao Lianji [2014/CLE/gen/01472]** A court may strike out a claim as frivolous and vexatious and an abuse of the process of the court on the ground that it is statute barred: **Ronex Properties Limited v John Laing Construction Limited [1983] QB 398**; **Riches v. Director of Public Prosecutions [1973] 1 WLR 1019: Neilly v Federal Management Systems (Bahamas) Ltd [2011] 2 BHS J No 21.**

Claimant's Submissions

[22.] The Claimant's submissions may also be summarized by reference to two prongs: (1) the Affidavit of Antoine Thompson does not comply with the CPR and should be struck out and (2) the action is not statute-barred and the Defendants cannot raise that objection where it was not pleaded.

[23.] The submissions may be summarized as follows:

1. The Affidavit of Antoine Thompson infringes Part 30.3 of the CPR by failing to indicate which of its statements are made from the deponent's own knowledge and which are matters of information or belief which are not permissible by law; and by failing to identify the source of any matters of information and belief.
2. The Defendants have not been given leave to call an expert witness. By the Affidavit, the Affiant sought to give an opinion where not permissible by law and the affidavit is replete with submissions and opinion which are outside of the scope of what is permissible.
3. The issues between the parties remain live issues. 4. The Claimant maintains that the Statement of Claim was filed within 12 months of his acquittal and discharge. The Claimant was acquitted and discharged on 21 January, 2021 and his Writ of Summons was filed 19 August, 2021 and Statement of Claim was filed on 23 December, 2021.
4. The Claimant contends that section 12 of the Limitation Act does not apply to constitutional claims: **Durity v Attorney General of Trinidad and Tobago** [2002] UKPC 20 .The provisions of Chapter III of The Constitution do not impose any time limitation on the bringing of proceedings to vindicate those rights and freedoms. No provision has been enacted pursuant to Article 28(5) to impose a time limit for the bringing on an action under Article 28(2). It is submitted that it is clear that the general provisions in the Limitation Act cannot apply without express wording to that effect.
5. The Court should not accede to the Claimants strike out application on reliance on the affidavit evidence of Antoine Thompson which purports to give evidence of law and fact, expressions of opinion and make submissions.
6. The issues raised in the Defendant's application remain live issues between the parties. **Michael Russel v AG** et al SCCivApp. No 83 of 2016
7. The allegations set out in the Statement of Claim show that the Claimants constitutional right were breached, namely under **Articles 17 (1), 19 (1), 19 (2), 19(4), and 25 (1)** of the Constitution.

8. The Defence of Limitation cannot be used by the Defendants to Strike Out a Statement of Case on the Ground of Failing to Disclose any Reasonable Ground for Bringing or Defending a Claim, and therefore their Strike Out Application should be Denied: **Ronex Properties Ltd. v John Laing Construction Ltd. and Others.**

9. The Defendants are required to plead a defence of Limitation and have failed to do so, and therefore their Strike Out Application should be denied. **CPR Part 10.5, Ketteman and Others v Hansel Properties Ltd. and Others [1987] A.C. 189; W. Gregory Dawkins v The Right Hon. Baron Penrhyn [1878] 4 App Case 51** Contrary to **CPR Part 10.5**, the Defendants did not plead in their Defence any defence of limitation. Notwithstanding having failed to do so, they purport to, without any lawful basis, now, unlawfully raise the defence of limitation in their Strike Out Application. Given that the Defendants have failed to plead a defence of limitation in their Defence as required by the law, their strike out application, which is based on the defence of limitation, should be denied. In accordance with CPR Part 10.7, the Defendants should not be allowed to rely on allegations or factual arguments that they have not set out in their Defence, including being allowed to advance any evidence in support of such allegations or arguments.

Issues

[24.] The central issues to be determined in this instance in considering whether to make the orders as sought are:

a. Whether the Affidavit of Antoine Thompson in whole or part should be struck out;
b. Whether the Claimant's action is to be struck out on the ground that it is statute-barred.
c. Whether the Claimant's action for constitutional redress is an abuse of process.

Jurisdiction to strike out

[25.] The Court may strike out a statement of case under **Rule 26.3 CPR . Rule 26.3(1)** provides:

> (1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that —
>
> (a) there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;
>
> (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
>
> (c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings; or

(d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

[26.] Notably Rule 26.3 CPR is "in addition to any other power under these Rules".

[27.] A Court may strike out a statement of case or part of a statement of case on a party's application or *suo moto*: Rule 26.2 CPR. This is an exceptional power of the Court and a Court ought to exercise this discretion only in clear and obvious cases.

[28.] In ***B.E. Holdings Limited v. Piao Linji*** **[2014/CLE/gen/01472** Justice Charles stated:

> "7. As a general rule, the court has the power to strike out a party's case either on the application of a party or on its own initiative. Striking out is often describes as a draconian step as it usually means that either the whole or part of that party's case is at an end. Therefore it should only be taken in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this discretion deprives a party of his right to a trial and his ability to fortify his case through the process of disclosure and other procedures such as request for better and further particulars".

[29.] A *statement of case* is defined in Part 2, Rule 2.1 provides

> "statement of case" means —
>
> (a) a claim form, statement of claim, defence, counterclaim, additional claim form or defence and a reply; and
>
> (b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the Court.

[30.] **Part 30 CPR** deals with Affidavits. A court may receive evidence orally or by affidavit: Rule 30.1(1). Rule 30.3 makes provisions for the contents of an affidavit. The relevant rule for the exercise of the court's jurisdiction to strike out an affidavit is Rule 30.3 (3). A court may strike out the whole or parts of an affidavit which is comprised of "scandalous, irrelevant or otherwise oppressive" content. Rule 30.3 CPR provides:

> 30. 3 Contents of affidavits.
>
> (1)The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.
>
> (2) An affidavit may contain statements of information and belief —
>
> (a) if any of these Rules so allows; and
>
> (b) if the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates —
>
> (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information orbelief; and
>
> (ii) the source of any matters of information and belief.
>
> (3) The Court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit.

(4) An affidavit containing any alteration may not be used in evidence unless all such alterations have been initialled both by the deponent and the person before whom the affidavit is sworn.

[31.] **Part 32 CPR** deals with the evidence of Experts and Assessors and "deals with the provision of expert evidence to assist the court (Rule 32.1). A party must receive the court's permission to put in expert evidence. The rules serve to govern when and how a party may put in, and rely on, expert evidence. Two such rules are Rule 32.6 and Rule 32.7. They provide:

32.6 Court's power to restrict expert evidence.
(1) A party may not call an expert witness or put in the report of an expert witness without the Court's permission.
(2) The general rule is that the Court's permission is to be given at a case management conference.
(3) When a party applies for permission under this rule —

(a) that party must name the expert witness and identify the nature of his or her expertise; and
(b) any permission granted shall be in relation to that expert witness only.

(4) The expert witness' oral or written evidence may not be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the expert witness intends to give.
(5) The Court must direct by what date the report must be served.
(6) The Court may direct that part only of an expert witness' report be disclosed.

32.7 General requirement for expert evidence to be given in written report.
(1) Expert evidence is to be given in a written report unless the Court directs otherwise.
(2) This rule is subject to any enactment restricting the use of hearsay evidence.

[32.] A court has wide powers to control evidence under the rules, and by its residual inherent jurisdiction, to prevent an abuse of its process. The court's discretion under the rules is guided by the overriding objective of dealing with cases justly, which includes, "so far as is practicable, enforcing compliance with rules…." . A court ought to exercise its discretion to prevent a misuse of the court's process. It goes without saying that evidence by way of affidavit is subject to the rules of evidence. It seems to me therefore that, in addition to the explicit iteration under Rule 30.3, a court retains the power to exclude improper or prejudicial material under its inherent jurisdiction and in keeping with the rules of evidence.

[33.] The Claimant submits that the content of the affidavit fails to comply with Rule 30.3 CPR because the Affiant fails to state which of the statements are made from the Affiant's own knowledge and which are matters of information and belief. The Claimant further submits that the Affiant fails to state his source of information.

[34.] I note that the Affiant declares himself to be an attorney concerned with the matter. It is not unusual for attorneys to speak to matters of instruction without specifically referring to the source of that instruction. The same style is adopted by the Claimant in the Second Affidavit of Doneth Cartwright in response. There are clearly matters in the Claimant's affidavit which would have come to the attorney by way of a source such as the conduct of a hearing which did not involve the attorney (paragraph 16). No source of the information is identified in that paragraph.

[35.] What is evident is that it can be problematic where a party adopts the practice of having an attorney as a deponent in circumstances such as this. Be that as it may, in this case, I find that the failure to name the source of information in respect of facts that have already been pleaded does not warrant striking out on that ground. This is particularly so where the allegations are in keeping with the pleadings.

[36.] The Claimant also submits that by the Affidavit, the Affiant offers opinion evidence, not having sought leave to give expert evidence. The Claimant also submits that there is opinion evidence of the intention of the Claimant, which, it is submitted, is also impermissible.

[37.] Paragraphs 8 to 11 of the affidavit read as follows

> 8. That more than twelve months has transpired between charges being laid, the Claimant's discharge and acquittal and the filing of the Statement of Claim in this case.
>
> 9. That I am informed and verily believe that section 12 of the Limitation Act prohibits the prosecution of a matter if it is outside the statutory period of twelve months.
>
> 10. That it is humbly submitted that this case is statute barred and the Claimant have sought to circumvent the twelve- month time period prescribed by the Limitation Act s.12 by bringing this case under the disguise of breaches of the Constitution as outlined in its Statement of Claim (paragraph 20). This is especially true and the alleged actions of the Defendants claimed by the Claimant does not rise to the minimum standard the Honorable Court has and would adjudicate as being breaches of the Constitution, that even if proven would not be able to be remedied in tort.
>
> 11. That we therefore humbly seek an Order from this Honorable Court that the Statement of Claim and the entire action of the Claimant be struck out as the Claimant did not commence action against the Defendants within the Statutory period of twelve (12) months after the act complained of as ascribed by and in

compliance with S. 12(2) of the Limitation Act and that the matter is statute barred.

[38.] Paragraph 8 is in the context of facts rehearsed in previous paragraphs and, in those circumstances, I find nothing objectionable with a deponent calculating or indicating the length of time that has elapsed between one event and another.

[39.] The interpretation and representation of what a statute provides is a matter for a person with expertise in that area. This is what the Affiant purports to give evidence of in paragraph 9. Such evidence, where allowed, is to be given by an expert in the field. The Affiant has not been deemed an expert by the court in this case.

[40.] Paragraph 10 contains a legal submission as to whether the action is statute-barred and as to whether "the alleged actions of the Defendants…rise to the minimum standard" and which "would not be able to be remedied in tort". That paragraph commences with the words "That it is humbly submitted'. Paragraph 10 also contains what can only be an opinion and conclusion that "the Claimant have sought to circumvent the twelve- month time period prescribed by the Limitation Act s.12 by bringing this case under the disguise of breaches of the Constitution".

[41.] It is clear from a review of Paragraph 10 that the Affiant, an attorney-at-law, makes, and intends to make, a legal submission. This is not the purpose of an affidavit. Too often lawyers fall into the trap of making submissions ill-disguised as evidence. The same is evident in the affidavit relied upon by the Claimant where the Affiant, also an attorney-at-law, avers the following:

> 18. I am advised and verily believe that the Claimant('s) :
>
> a. Was *inter alia* assaulted, battered, unlawfully arrested, falsely arrested imprisoned and had his constitutional rights infringed by the Defendants on 5 March, 2019; and
>
> b. Claim was filed on 19 August, 2021 and within the time prescribed by the Limitation Act.
>
> …
>
> 20. I am advised and verily believe that paragraphs [8] to [11] of the Defendant's Affidavit constitutes opinions and submissions which are inconsistent with Part 30.3 of the CPR and the relevant provisions relating to the contents of an Affidavit.

[42.] Affidavits serve the purpose of providing a court with relevant evidence to be taken into account when exercising its jurisdiction and discretion. It is not the forum for attorneys-at-law to bolster, supplement, or repeat submissions. Submissions are to be made in argument by the oral and written advocacy of counsel. To include submissions on the law in an affidavit in this fashion is an incorrect practice and it ought not to be entertained. Submissions on law as apparent in the affidavit of Antoine Thompson are struck out.

[43.] Further, drawing inferences and making conclusions is a judicial function on an assessment of facts. Subject to a few exceptions, the opinion of a witness is inadmissible. In an appropriate case, a court will admit the evidence of a qualified expert to render an opinion in matters that require special expertise. A party may provide such evidence with the leave of the court. Whether a matter is statute-barred in this jurisdiction is not a matter requiring the admission of evidence of an expert with specialized expertise. No leave been given to adduce expert evidence in this matter. The opinion evidence as apparent in the affidavit of Antoine Thompson is struck out.

[44.] I note a reference to "statute-barred" in Paragraph 11 but I consider that to be a reference to the nature of the application that the affidavit supports.

[45.] I hereby determine that Paragraphs 9 and 10 of the Affidavit of Antoine Thompson be struck out.

[46.] What largely remains is the Defendants' allegation of facts. What is germane for present purposes is whether the causes of action by examination of the accrual date and the filing date are statute-barred. I note that this much ought to be apparent from the statements of case. The striking out of the several parts of the affidavit relied on by the Defendants is not fatal to the Defendants' application which is largely grounded in arguments in law.

Issue 2

[47.] The issue of whether the court ought to strike out the Claimant's statement of case because it is statute-barred must be dealt with in 2 stages. (i) The first stage deals with the procedural point of whether the Defendant is entitled to raise the objection. (ii) If so, then the second stage will deal with the substantive point as to whether the action is statute-barred.

[48.] The Defendants argue that the Limitation Act imposes a twelve (12) month limitation on causes of action against the Defendants.

[49.] Section 12 of the **Limitation Act** provides:

> "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."

Issue 2 a – Stage 1: Whether the Defendant may raise the issue of limitation as a defence and for the purpose of striking out the Claimant's statement of case.

[50.] The Claimant asserts that the Defendants did not plead a Defence of Limitation. This is not contradicted on by the Defendants and it is evident from a perusal of the Defence that there is no defence pleaded which raises the issue of whether the causes of action are statute-barred.

[51.] The Claimant submits that the Defendants "are Required to Plead a Defence of Limitation and have Failed to do so, and therefore their Strike Out Application should be Denied". The Claimant relies on **Rules 10.5 and 10.7 CPR**, and the cases of **Ketteman and Others v Hansel Properties Ltd. and Others** [1987] A.C. 189 **W. Gregory Dawkins v The Right Hon. Baron Penrhyn** [1878] 4 App Case 51 in support of their submissions.

[52.] **Part 10 CPR** makes provisions concerning a Defence. Rule 10.5 CPR sets out the Defendant's duty to set out case. It provides:

> 10.5 Defendant's duty to set out case.
> (1) The defence must set out all the facts on which the defendant relies to dispute the claim.
> (2) The statement of facts referred to in paragraph (1) must be as short as practicable.
> (3) In the defence the defendant must say which, if any, allegations in the claim form or statement of claim —
> (a) are admitted;
> (b) are denied; and
> (c) are neither admitted nor denied, because the defendant does not know whether they are true;
> (d) the defendant wishes the claimant to prove.
> (4) If the defendant denies any of the allegations in the claim form or statement of claim —
> (a) the defendant must state the reasons for doing so; and
> (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.
> (5) If, in relation to any allegation in the claim form or statement of claim, the defendant does not —
> (a) admit it; or
> (b) deny it and put forward a different version of events, the defendant must state the reasons for resisting the allegation.
> (6) The defendant must identify in or annex to the defence any document known to the defendant which is considered to be necessary to the defence.
> (7) A defendant who defends in a representative capacity, must say —
> (a) what that capacity is; and
> (b) whom the defendant represents.

(8) The defendant must verify the facts set out in the defence by a certificate of truth in accordance with rule 3.8.

[53.] Rule 10.7 CPR provides for the consequences of not setting out a defence and provides:

> 10.7 Consequences of not setting out defence.
> The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the Court gives permission or the parties agree.

[54.] The case of **Ketteman and Others and Hansel Properties Ltd. and others [1987] A.C. 189** concerned an action in negligence resulting in defective houses. One of the issues for determination by The House of Lords was whether the appellants ought to have been allowed to amend their Defence to plead the statute of limitation. By a majority decision that ground of appeal was dismissed and the House of Lords reaffirmed that a defence of limitation ought to be pleaded. At pages 218 – 219, Lord Griffiths opined:

> By the time they were joined, namely on 6 October 1982, over six years had elapsed since the date upon which it was pleaded that the plaintiffs first discovered the defects in their houses. But the third and fourth defendants did not plead by their defences that the claims were statute-barred. Whether this was deliberate or inadvertent, I do not know. The weight of authority at that time was in favour of the view that the joinder would relate back to the date of the original writ for the purpose of limitation and on that view of the law there would be no purpose in pleading the statute of limitations. On the other hand if they had wished to pursue the defence that the claims were time-barred because time ran until the date of joinder then they had all the information necessary to enable them to do so. I cannot accept that they were in any way misled by the plaintiffs' failure to act as quickly as they might have done after they had obtained the order to join them as defendants on 25 June.
>
> I will pause here to consider what would have been the fate of this application if the *Pirelli* decision had not been published during the course of the hearing. I have never in my experience at the Bar or on the Bench heard of an application to amend to plead a limitation defence during the course of the final speeches. Such an application would, in my view, inevitably have been rejected as far too late. **A defence of limitation permits a defendant to raise a procedural bar which prevents the plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim which may all lie with the plaintiff; but as a matter of public policy Parliament has provided that a defendant should have the opportunity to avoid meeting a stale claim. The choice lies with the defendant and if he wishes to avail himself of the statutory defence it must be pleaded. A defendant does not invariably wish to rely on a defence of limitation and may prefer to contest the issue on the merits. If, therefore, no plea of limitation is raised in the defence the plaintiff is entitled to assume that the defendant does not wish to rely upon a time bar but prefers the court to adjudicate on the issues raised in the dispute between the parties. If both**

> **parties on this assumption prepare their cases to contest the factual and legal issues arising in the dispute and they are litigated to the point of judgment, the issues will by this time have been fully investigated and a plea of limitation no longer serves its purpose as a procedural bar.**
>
> If a defendant decides not to plead a limitation defence and to fight the case on the merits he should not be permitted to fall back upon a plea of limitation as a second line of defence at the end of the trial when it is apparent that he is likely to lose on the merits. Equally, in my view, if a defence of limitation is not pleaded because the defendant's lawyers have overlooked the defence the defendant should ordinarily expect to bear the consequences of that carelessness and look to his lawyers for compensation if he is so minded.
>
> [Emphasis supplied]

[55.] In **W. Gregory Dawkins and The Right Hon. Baron Penrhyn(1878) 4 App. Cas. 5**, a legal dispute concerning a will and the creation of a trust, the court considered that a defence of the Statute of Limitation must be pleaded. In that case, the court held that the words used were sufficient to raise the defence.

[56.] In the case of **Ronex Properties Ltd. V. John Laing Construction Ltd. And Others [1978 R. No. 1479] [1983] Q.B. 398**, the Court of Appeal heard an appeal from a dismissal of an application to strike out the claim on the ground, inter alia, that it disclosed no cause of action because it was statute-barred. In explaining that a right of action is not barred by the statute of limitation, Lord Justice Donaldson reaffirmed that the Defendant must plead the defence in order to rely on it. Lord Justice Donaldson at page 404, paragraphs D to E opined:

> Authority apart, I would have thought that it was absurd to contend that a writ or third party notice could be struck out as disclosing no cause of action, merely because the defendant may have a defence under the Limitation Acts. Whilst it is possible to have a contractual provision whereby the effluxion of time eliminates a cause of action - and there are some provisions of foreign law which can have that effect **- it is trite law that the English Limitation Acts bar the remedy and not the right; and, furthermore, that they do not even have this effect unless and until pleaded.** Even when pleaded, they are subject to various exceptions, such as acknowledgment of a debt or concealed fraud, which can be raised by way of reply. Concealed fraud has, we are told, been pleaded by the plaintiffs in this case as against the defendants, but whether the personal representatives will or can adopt a similar attitude vis-à-vis Clarkes can only really emerge if ever they get to the stage of delivering a reply in the third party proceedings. Accordingly, authority apart, I would have unhesitatingly dismissed the application to strike out upon this ground...
>
> [Emphasis supplied]

[57.] On the issue of pleading limitation as a defence, Lord Justice Donaldson at page 405, paragraph A, concluded:

> Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence. But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed.

[58.] The applicable principles of law as affirmed by the foregoing authorities are:

1. A Defendant has a duty to set out its case in its Defence

2. A Defendant must set out any allegation or factual argument it wishes to rely on.

3. A Defendant may not, without the consent of the parties or the leave of the court, rely on any allegation or factual argument not set out in the Defence.

4. A Defendant must plead a Limitation Defence in order to raise it.

5. A Limitation Defence is a procedural issue and technical defence. It does not go the merit of the claim.

[59.] Those principles of law reflect the law of this jurisdiction and this court need only reiterate its own determination in **Patrice R. Moxey v. Bahamas First General Insurance Company Limited 2022/CLE/gen/00618.** In that case, at paragraphs 43 to 45, this court reiterated that a Defendant must plead the defence of limitation in order to rely on it:

> [43.] A Defendant who wishes to raise the Limitation Act as a defence must plead same. In **Amber Anderson-Thomas v. Deepak Bhatnagar and The Airport Authority** [2018] 2 BHS J No. 8, a case relied upon the Defendant, Justice Charles, as she then was, cited with approval the statement of law as set out in **Ronex Properties Ltd v John Laing Construction Ltd** [1893] Q.B. 398. At paragraphs 64 – 65 of **Amber Anderson-Thomas v. Deepak Bhatnagar and The Airport Authority,** Justice Charles opined:
>
> > [64] The law is that where a defendant pleads a defence under the Limitation Act he can either seek trial of a preliminary issue or in a very clear case, apply to strike out the claim on the ground that it is frivolous, vexatious and an abuse of the process of the Court: **Ronex Properties Ltd v John Laing Construction Ltd** [1893] Q.B. 398, per Donaldson, L.J.
> >
> > [65] The learned authors of **The Supreme Court Practice 1999** stated at 18/19/11:
> >
> > > **"Where it appeared from the statement of claim that the cause of action arose outside the statutory period of limitation, it was held that the statement of claim would not be struck out unless the case was one to which the Real Property Limitation Acts applied (see *Price v Phillips [1894] W.N. 213).* <u>However, if the defendant does plead a defence under the</u> <u>Limitation Act, he can seek the trial of a preliminary issue, or in a very clear</u> <u>case, he can seek to strike out the claim upon the ground that it is</u>**

> **frivolous, vexatious and an abuse of the process of the Court (see, *per* Donaldson L.J. in *Ronex Properties Ltd v John Laing Construction Ltd* [1983] Q.B. 398). Thus, where the statement of claim discloses that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the Limitation Act and there is nothing before the Court to suggest that the plaintiff could escape from that defence, the claim will be struck out as being frivolous, vexatious and an abuse of the process of the Court (*Riches v Director of Public Prosecutions* [1973] W.L.R. 1019; [1973] 2 All ER 935, CA, as explained in *Ronex Properties Ltd v John Laing Construction Ltd*, above)."**

> [44.] In the present case, the Defendant by paragraph 1 of its Defence filed on August 29, 2022, pleaded:
>
> > 1. This Defence is pleading on behalf of the Defendant without prejudice to the Defendant's contention that the Plaintiff's action is statute barred and contravenes the relevant provisions of the Limitation Act, Chapter 83 of the Statue Laws of The Bahamas. The Defendant also pleads that the Plaintiff's Statement of Claim is an abuse of the process of the Court. For the aforementioned reasons the Statement of Claim should be struck out in respect of the Allegations and/or claims made against the Defendant.
>
> [45.] The Defendant in this case is therefore entitled to make the current application under consideration.

[60.] In the present case, the Claimant argues that

> "Contrary to CPR **Part 10.5**, the Defendants did not plead in their Defence any defence of limitation. Notwithstanding having failed to do so, they purport to, without any lawful basis, now, unlawfully raise the defence of limitation in their Strike Out Application. Given that the Defendants have failed to plead a defence of limitation in their Defence as required by the law, their strike out application, which is based on the defence of limitation, should be denied. In accordance with CPR **Part 10.7**, the Defendants should not be allowed to rely on allegations or factual arguments that they have not set out in their Defence, including being allowed to advance any evidence in support of such allegations or arguments."

[61.] There is force in the Claimant's argument which is premised on what I deem to be a correct statement of the law. The reported cases confirm that limitation is a procedural defence and must be pleaded if the Defendants are to rely on it.

[62.] In this case, the Defendants have not pleaded a defence of limitation. Therefore the Defendant cannot rely on the limitation defence to strike out the statements of case on any of the grounds in the filed Notice of Application. My determination is that in the absence of Limitation being pleaded as a Defence, the Defendants are not entitled to raise it. They have done so at the Case management stage, after pleadings are closed, after a filed Reply

by the Claimants. The Claimants had no notice or opportunity to respond to a limitation defence in their filed Reply. By Rule 10.5 CPR, a Defendant has a duty to set out its case. If its case is that the claim is statute-barred, that ought to be pleaded so that the Claimant knows what issues it must respond to. Here, the Defendants made no application for leave to amend the Defence. The Defendants must therefore be taken as proceeding to a trial on its merit and on the matters pleaded.

[63.] I note that the Defendants have included as a ground:

> "that the statement of case or the part to be struck out is frivolous, vexatious, an abuse of process of the court or is likely to obstruct the just disposal of the proceedings."

The Defendants have not put forward any supporting material by way of affidavit or submission to support this ground. The Defendants argue that the Claimant ought not to be allowed to circumvent the limitation period by claiming breaches of the Constitution and that the constitutional claims brought do "not warrant invoking the constitutional courts". For reasons already given, the Defendants cannot rely on a ground that would invoke a limitation defence.

[64.] Having failed at the procedural stage, it is unnecessary for this court to determine whether the claim is statute-barred.

Issue 3. Whether the Claimant's action for constitutional redress is an abuse of process.

[65.] This issue can be dealt with succinctly.

[66.] The Defendants also submit that the Constitutional redress is an abuse of process. I find no merit in that ground. The allegations relate to the conduct of officers of the Royal Bahamas Police Force as it relates to the arrest, detention and prosecution of the Claimant. The cases relied on by the Defendants are easily distinguishable. To my mind, this case is not similar to a breach of employment terms masquerading as a constitutional breach. Whether the Claimant can make out the allegations of constitutional breaches is a matter of proof. It is inappropriate at this interlocutory stage to determine whether the allegations "rise to that standard'. In any event, the Defendants have given no plausible explanation for that submission.

[67.] The Defendants, in their submission, sought to rely on the ground that "the action be struck out pursuant to Article 28(1) of the Bahamas Constitution." That ground does not appear in the Notice of Application. It may be useful to issue words of caution in this regard: the parties agreed to have the Defendants' interlocutory application determined on the papers. There was no amended notice of application filed and served. In instances where the matter is to be determined "on the papers", the parties must be scrupulous to

ensure that the applications contain the issues to be determined by the judge. The parties should also ensure that the written submission reflect those grounds because the responding party can only be expected to address the matters that appear on the face of the Notice of Application filed.

[68.] In the circumstances, this court will not entertain the ground added by way of submission.

Claimant's application for Judgment on liability

[69.] I note the Claimant's application for Judgment on liability pursuant to Rule 26(1)(i). That rule provides:

> 26.1 Court's general powers of management.
> (1). The list of powers in this rule is in addition to any powers given to the Court by any other rule, practice directions or any enactment.
> (2) Except where these rules provide otherwise, the Court may —
> (i) dismiss or give judgment on a claim after a decision on a preliminary issue;
> …

[70.] It is my determination that the application for Judgment on liability is misconceived. Firstly, the striking out of parts of the Defendants' affidavit does not amount to the striking out of the Defendants' statement of case. There is a filed Defence which joins issue with the Claimant's statement of case. As was submitted by the Claimant, there are "live issues" between the parties. Secondly, the present proceedings, and the rulings that flow, do not amount to a determination of a preliminary issue concerning the merits of the suit. There is no basis for a judgment on liability. In the circumstances, the request for "Judgment on Liability" or a "judgment on the claim" is refused.

CONCLUSION

[71.] The Defendant's Application to strike out the Claimant's statements of case is dismissed.

[72.] The Claimant's Application to strike out part of the affidavit of Antoine Thompson is acceded to and paragraphs 9 to 10 of the said affidavit is struck out.

[73.] The Claimant's application for judgment on liability is dismissed.

COSTS

[74.] The Defendants have been unsuccessful in their application to strike out the Claimant's statements of case. The Claimant successfully resisted the application. The Claimant was successful in their application to strike out a part of the Affidavit of Antoine Thompson.

[75.] Taking into account the provisions of Part 71, CPR and in particular the provisions of Part 71, Rule 71.6, I find no reason to depart from the general rule that the unsuccessful party should pay the costs of the successful party. Therefore, in this matter, the Defendants shall pay the Claimant's costs, to be assessed if not agreed.

[76.] I direct the parties to lodge with the court written submissions on costs, if the parties are unable to agree. The written submissions should not exceed 2 pages and should be lodged with the court within 21 days of the date of this ruling.

ORDER

[77.] The ORDER and directions of this Court are as follows.

(i) The Claimant's Application to strike out the Defendants' Affidavit of Antoine Thompson in part is granted. Paragraphs 9 and 10 of the Affidavit of Antoine Thompson filed on June 9, 2023 are struck out.

(ii) The Defendants' Application to strike out the Claimant's action is refused.

(iii) Costs of the Applications are awarded to the Claimant to be assessed if not agreed.

Dated this 25th day of August 2025

Carla D. Card-Stubbs, J

Justice