[2019] JMSC Civ 20

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013 HCV01350

BETWEEN	**DESMOND KINLOCK**	**CLAIMANT**
AND	**DENNY MCFARLANE**	**1ST DEFENDANT**
AND	**PATRICK CAMPBELL**	**2ND DEFENDANT**
AND	**ATTORNEY GENERAL**	**3RD DEFENDANT**
AND	**COMMISSIONER OF POLICE**	**4TH DEFENDANT**
AND	**COMMISSIONER OF CORRECTIONS**	**5TH DEFENDANT**
AND	**JUNE SPENCE-JARRETT**	**6TH DEFENDANT**
AND	**HECTOR SMITH**	**7TH DEFENDANT**

IN CHAMBERS

Paul Beswick, Angel Beswick-Reid and N. Cotterell instructed by Ballentyne, Beswick & Company for the Claimant.

Carla Thomas instructed by the Director of State Proceedings for the Defendants

Heard: January 26, 2017, March 17, 2017 and May 10, 2017 and February 11 and 15 2019.

Application for extension of time to file defence – Application to strike out of statement of case for being prolix – Application to strike out the case against the other Defendants as the Attorney General is the proper party to the claim – Application to strike out the statement of case that refers to Breach of Social contract – CPR rules 8.9, 8.9A, 26.3(1)(c), (d) and 34.2 - Crown Proceedings Act – Request for information

PALMER, J.

Background

[1] In this claim, the Claimant is seeking to recover damages for assault and battery, false imprisonment, malicious prosecution, injurious falsehood, misfeasance in public office, breach of social contract and breach of various constitutional rights arising from an incident that are alleged to have commenced with him being taken from his home on December 15, 2009 at his home, his later detention and subsequent prosecution. This application is brought before the court because of the amended Particulars of Claim dated March 28, 2013 filed by the Claimant which the Defendants have alleged is prolix and repetitive. The statement of case contains 30 pages and 57 paragraphs which the Defendants/Applicants assert include certain paragraphs which offend the rule of pleadings which is that only material facts relevant to the claim must be pleaded.

The Applications

[2] By their further amended Notice of Application for Court Orders filed on November 8, 2013 the Defendants/Applicants sought orders as follows:

(i) That the parts of the Claimant's Amended Particulars of Claim identified in the Affidavit filed on behalf of the 3rd Defendant on May 2013 in support of this application be struck out as being prolix pursuant to Rule 26.3 (1) (d) of the Civil Procedure Rules 2002;

(ii) That the Claimant's claim for breach of social contract be struck out as disclosing no reasonable ground for bringing the claim pursuant to Rule 26.3 (1) (c) of the CPR;

(iii) That the claim be struck out in its entirety as against the 1st, 2nd, 4th, 5th, 6th and 7th Defendants pursuant to Rule 26.3 (i) (c) of the Civil Procedure Rules;

(iv) In the alternative, that the Defendants be permitted to file and serve a Defence out of time and within fourteen (14) days of the hearing of this Application.

[3] The grounds on which the application were made:

(i) The Amended Particulars of Claim filed and served on behalf of the Claimant is prolix;

(ii) Social contract, on which the Claimant seeks relief, is not a cause of action known to law in this jurisdiction;

(iii) Pursuant to the Crown Proceedings Act, the only proper party to the claim is the 3rd Defendant;

(iv) That in the alternative the Applicants rely on Rules 26.1 (2) (c)

[4] The Claimant's Notice of Application for Court Orders filed on May 13, 2013 sought orders for a default judgment against the 4th and 5th Defendants on the following grounds:

(i) Pursuant to CPR rule 12.3 (6) the Claimant requires permission from the Court to make an application for default judgment against arms or agents of the Jamaican State and/or agents of the Crown;

(ii) On the 5th of March 2013 both the 4th and 5th Defendants were served with copies of the Amended Claim Form and Amended Particulars of Claim;

(iii) On the 2nd April, 2013 both the 4th and 5th Defendants were served with copies of the Amended Claim Form and Amended Particulars of Claim;

(iv) On the 19th March, 2013, the 3rd Defendant filed an Acknowledgment of Service wherein they stated that they are acting for and behalf of the 3rd Defendant alone;

(v) As a result, the 4th and 5th Defendants have failed to file an Acknowledgement of Service on either the 19th March, 2013 in relation to the original Claim Form and Particulars of Claim or on the 16th April, 2013 in relation to the Amended Claim Form and Amended Particulars of Claim.

[5] In the Notice of application for Court Orders filed on August 14, 2013 judgment in default was sought against the 3rd Defendant for judgment in default of filing a defence. A similar chronology was outlined save that the original Claim was said to have been served on March 4, 2013. Orders were also sought by the Claimant

regarding a request for information from the 4th and 5th Defendants regarding the identity of several of their servants and/or agents. By the Notice of application for Court Orders filed on April 4, 2014 the Claimant sought the following:

> *(i) That the 4th Defendant, the Commissioner of Police is hereby ordered to provide to the Applicants Attorneys-at-Law, the names and ranks of the Police officers from the Elleston Road Police station who interrogated the Applicant on or about the 15th December, 2009;*
>
> *(ii) That the 5th Defendant, the Commissioner of Corrections, is hereby ordered to provide the Applicant's Attorneys-at-Law, the names of the remaining members of the management team, Supervisors and Corrections officers who were on duty at the Horizon Remand Centre over the course of the 'food riot' in February 2010;*

Submissions

Defendant's submissions

[6] The Defendants listed a number of paragraphs that they were of the view ought to be struck out as either being prolix or as disclosing no reasonable grounds for bringing the claim. The Court, it was submitted, is empowered pursuant to Rule 26.3 (1) (d) of the Civil Procedure Rules 2002 ('the CPR") to strike out the stated portions of the statement of case because it is prolix. Reliance was placed on the Court of Appeal case of ***Davey v Garrett*** [1878] 7 Ch. D. 473 in which the decision of the first instance judge not to strike out the statement of claim for prolixity was overturned. Baggallay LJ defined prolix by stating that that it may refer to two different things: too lengthy statement of necessary facts, or to the statement of facts unnecessary to be stated. This, the learned judge opined was because:

> *"… the statement of necessary facts tends to embarrass the Defendant. Here I think that the statement is embarrassing, both from the excessive length at which the statements of necessary facts are set out, and from the statement of unnecessary facts"*

[7] It was submitted that a statement of case ought not to contain evidence, submissions and irrelevant material calculated to unduly occupy the resources of the other party in responding to same or to embarrass the other party. It was proposed by the Claimant that the instant pleadings are replete with prolix and that the offending sections ought to be struck out and the pleadings amended before the Defendants are called upon to answer.

[8] On the claim for breach of social contract it was submitted that there is no such claim known to the civil law in Jamaica and accordingly is not one that is justiciable before this Court. The portions of the Claim that make reference to that cause of action ought therefore, it was submitted, to be struck out. Reliance was placed on the authorities of ***Sebol Limited and another v Ken Tomlinson et al*** SCCA no. 115/2007, unreported judgment delivered December 12, 2008 and ***Bentley Rose v City of Kingston Co-operative credit Union Limited*** Claim no. 2008HCV02180, unreported judgment delivered January 15, 2010. In ***Sebol Limited*** the first instance decision of Sykes J was affirmed that it was not sufficient for there to be a cause of action pleaded that was known to law, no matter how loosely the facts pleaded supported the existence of the cause of action against the Defendant but also that there needs to be a reasonable ground for bringing the claim in keeping with the overriding objective. It was therefore submitted that in the circumstance of this application that a claim for breach of social contract ought not to have been brought against the Defendants and therefore that paragraphs 50 – 56 and 57 (j) ought to be struck out.

[9] It was submitted further that the claim is brought against Crown servants in their personal capacity, whilst it alleged that they were at all material times acting on the course of their duties as such. Where a party is not being alleged to have gone on a frolic of his own but was acting in the course of his duties as a Crown servant, the only proper party to the claim for damages arising from the alleged commission of a tort is the Attorney General.

[10] The *Crown Proceedings Act* 1959 it was submitted at sections 3 (1) and 13 (2) stated how such claims ought to be treated and is an issue settled in ***Attorney General v Gladstone Miller*** SCCSA no. 95 of 1997 unreported judgment delivered May 24, 2000. In that case the Court of Appeal held that default judgments entered against the Crown servant was irregular and that in keeping with the provisions of the *Crown Proceedings Act*, the proper party was the Attorney General. The position in ***Gladstone Miller*** was affirmed in ***Peter Kavanaugh v The Attorney General and Det. Insp. Carey Lawes*** [2012] JMSC Civ. 154. Accordingly, it was submitted that the claim out to be struck out as against the, 1st, 2nd, 4th, 5th, 6th and 7th Defendants.

[11] Further in relation to the 4th and 5th Defendants in particular, it was submitted that as confirmed in the decision of ***Lewis v Minister of Labour and National Insurance et al*** (1966) 9 WIR 549 the advent of the *Crown Proceedings Act* did not allow for Crown servants who could previously only have been sued in their private capacity to now be sued in their official capacity. Per Graham-Perkins J it was held that:

> *"An examination of the Crown Proceedings Law does not reveal any intention in the legislature to attach liability to a servant of the Crown in his official capacity in respect of his official acts. In my view, there is no warrant for holding otherwise."*

Claimant's submission

[12] On the ground of prolixity of portions of the Claim the Claimant's Counsel submitted while he agreed with the definition of prolixity as defined by Baggallay LJ in ***Davy***, that the Amended particulars of Claim as filed did not include lengthy statements of immaterial facts or documents that are only material as evidence. However, it was submitted, the Defendants sought to rely on an outdated authority that predated the United Kingdom's Civil Procedure Rules as well as Jamaica's.

[13] Reliance was placed on the authority of ***Biguzzi v Rank Leisure PLC*** [1999] 4 All ER 934 where Lord Woolf MR stated that while the judge was given the power to

strike out a statement of case, the advantage of the CPR was that it gave to the Court alternatives which enable the case to be dealt with justly without taking this draconian step. ***Davy*** would not have taken into consideration the approach to be taken under the CPR. The ***Biguzzi*** position has been affirmed and expounded upon in several authorities to include ***Branch Development Limited v the BNS*** [2014] JMSC Civ. 3 decision of McDonald-Bishop J (as she then was) and ***The Attorney General of Jamaica v Western Regional Health Authority and Rakasha Brooks Jr.*** [2013] JMCA civ. 16, a decision of Brooks, JA.

[14] Also in ***Fairbank v Care Management Group; Evans v Svenska Handelsbanken AB (Publ)*** UKEAT/1039/12/JOJ, a decision of Slade J sitting in the Employment Appeal Tribunal it was stated that it is for a Claimant to determine how he will proceed with his claim. He acknowledged that a prolix claim may result in a conclusion that the Claim has been conducted unreasonably which may later lead to an order in costs. This, it was submitted, demonstrated the difference in approaches since ***Davey***. It was further submitted that the Claimant has a duty under Rule 8.9 and 8.9A of the CPR to set out his case, and that with the fact that he sought compensation for what he alleges are acts of numerous agents of the State over a two-year period, that the lengthy recounting of the events was necessary and was not correctly characterised as being prolix. The said rules required that the Claimant must outline all facts he intends to rely on and must identify any and all documents that he considers necessary for his case. It was submitted that that was what the Claimant has done in this case. The Claimant submitted that none of the paragraphs were prolix because they succinctly outlined the circumstances of the entry of the police to his premises

[15] In the submissions for the Claimant, the following explanations where offered as to why such detail was employed in describing the series of events:

(i) Paragraph 9, 11, 12, gives background information leading to how the joint security task force entered his home, awoke him and

found him in bed. It was submitted that the background facts have been stated as succinctly as possible;

(ii) Paragraph 15 was the basis for his claim for Injurious Falsehood and states that what the 1st and 2nd Defendants said in their statement differed dramatically from their sworn evidence;

(iii) Paragraph 17 stated the Claimant's belief as to why he was left unaccompanied in his home;

(iv) Paragraph 18 sought to outline the Claimant's state of mind and understanding of what was taking place at the time as well as to explain his understanding of a Jamaican colloquialism.

(v) Paragraph 19 sought to outline the height at which the illegal firearm and other contraband were stored and the ease of access by visitors and trespassers to that area, which also demonstrated the contrasts between the Claimant's view, the evidence of the 1st and 2nd Defendants and their respective statements;

(vi) Paragraphs 21, 22, 23 and 24 relate to the allegation that he was assaulted by members of the joint security task force. Paragraph 24 also gave his view as to why he was left alive;

(vii) Paragraph 25 relates to the assault and battery he said he suffered and ground his claim for exemplary and aggravated damages;

(viii) Paragraph 26 speaks to the severity of the actions of the security task force and their scant regard to the manner and form of their actions. It seeks to justify why the Claimant is entitled to an award of exemplary and aggravated damages as well as vindicatory damages for the inhumane and usual punishment meted out on the Claimant with the intention to disgrace before his family and neighbours;

(ix) Paragraph 27 sought to explain the Claimant's explanation of the term "rat patrol". It grounds his claim for exemplary and aggravated damages as well as breach of his Constitutional rights in compliance with Rules 8 and 8.9A of the CPR;

(x) Paragraph 28 speak to the further assaults meted out on the Claimant and form part of the basis for his claim for aggravated and exemplary damages;

(xi) Paragraph 29 speaks to his treatment while in the custody of the police and speak specifically to the acts of torture meted out on him by the police. They form a part of the matrix of facts which support his claim for breaches of his Constitutional rights;

(xii) Paragraph 33 seek to support his claim for damages for injurious falsehood. They are also relevant as the Claimants claims for malicious procurement of arrest and malicious prosecution;

(xiii) Paragraph 35 and 37 sought to support the claim for injurious falsehood and misfeasance in public office. Reliance was placed on ***Bentley Rose v City of Kingston CCU Ltd*** Claim No 2008 HCV 02180 in which the Claimant's claim for damages for injurious falsehood failed because while the remedy was sought, the Claimant failed to set out the language or words used. Setting out excerpts of the 1st Defendants sworn statement is an essential ingredient of bringing the claim for injurious falsehood and should not be struck out as they form the foundation for the claim and are in compliance with Rules 8.9 and 8.9A;

(xiv) Paragraph 38 and 39 outlined that the officers were acting outside the force police for the JCF and are the basis for the view that the 1st and 2nd Defendants are personally liable for the particulars of assault and battery set out;

(xv) Paragraphs 50, 51 and 52 were intended to comprise a novel breach of contract pleading which the Claimant intended to have far reaching implications. This is because of the allegation that agents of the state have breached a citizen's rights in such an egregious fashion.

[16] On the submissions for the Defendants for the portions of the Claim that refer to the cause of action for breach of social contract to be struck out, it was submitted for the Claimant that ***Sebol Ltd*** does not assist the Applicant as the facts are starkly different from the facts of the case at bar. In ***Sebol Ltd.*** the Court of Appeal affirmed Sykes J's decision to strike out the claim on the basis that it was unreasonable for the claim to have been brought against the Defendant as all their rights had been assigned to another entity. As such it was unreasonable for the Appellant to have brought the claim against it as they had not remaining legal or equitable interest in the mortgage and should not have been made a party to the proceedings.

[17] Breach of contract however it was submitted, is a cause of action known to Jamaica, and the contract on which the Claimant seeks to rely is a social contract. The social contract referred according to Counsel's submission was the fundamental basis of the relationship between citizens and the Government and has been the bedrock of legal studies for centuries. Evidence of this social contract, it was submitted, is contained in the Constitution of Jamaica. The bringing a claim for breach of the social contract is tantamount to claim for breaches of the Constitutional rights of the citizen. The remedy being sought, it was submitted, is for the citizen to be returned to the position he would have been in had the social contract not been breached. It was submitted that continued breaches of their constitutional rights are so common place that citizens of Jamaica are now sick and tired of such breaches, and that the bringing of this claim is designed to bring home in a clear fashion that their actions are unacceptable. It was submitted therefore on the strength of ***Biguzzi***, ***Rashaka Brooks*** and ***Branch Development*** that the recourse of striking out should be the last option that a Court should

consider and rather that the option of costs is always open to the Court, should the Claimant be unable to prove the allegations as pleaded.

[18] On the issue of whether the Claim ought to be struck out against all the Defendant except the Attorney General, it was submitted that the Defendants have misinterpreted the Crown Proceedings Act and that Claimants are not precluded from bringing claims against Crown servants in their personal capacity. Reliance was placed on that authority of ***M v Home Office*** [1994] 1 AC 377, for the submission that the litigant still has the right to sue a tortfeasor who is a Crown servant.

[19] The position of Lord Woolf was accepted in the Jamaican case of ***Alton Washington Brown v The Gleaner Company and Ors*** CLB 166/2000 and ***Alton Washington Brown v the Jamaica Herald an Ors*** CLB249/2000 where the Court determined that the Crown Proceedings Act permitted the aggrieved party in certain circumstances to sue the Crown in certain instances whereas before there existed no such right. The section, it was submitted was not authority for the premise that an individual servant or agent ought not to be sued. To have all the Defendants added did not result in an abuse of the processes of the Court.

[20] It was also submitted that there was no principle in law that prohibited him from asserting, through his pleadings, that the Crown servants were on a frolic of their own. While it was acknowledged that this is usually a position reserved for a defendant employer who wished to disavow liability, that in the circumstances it was proper for the Claimant to aver through is pleadings that the Defendants were on a frolic of their own. The 1st and 2nd Defendant police officers and the other police officers could not say they were undertaking their acts as part and parcel of their duties as members of the Jamaica Constabulary Force, neither could the correctional officers who left him and the other inmates without food. It was also argued that the police officer and correctional officers in their respective capacities can each be found liable in their personal capacity as well as the Crown for the

same tort. It was also submitted for the Claimant that the Court should not exercise its discretion in extending time for the filing of a defence.

[21] On the issue of whether the information sought ought to be given, by the 4th and 5th Defendants, it was submitted that the request for information was made to them in writing on September 14, 2012 and the information has not been provided. The Application for the Court to compel compliance with the request was made on March 4, 2013. It was submitted that rule 34.2 (2) provides that the order for the request for information may not be made unless necessary in order to dispose fairly of the claim or to save costs.

[22] It was submitted that the requests are necessary because the Claimant would otherwise find it impossible to deal with the allegations set out in the Particulars of Claim fairly or to join all the parties alleged to be responsible for the Claimant's injury and damage. The officer who interrogated and tortured him should not be allowed to hide behind the Attorney General and have his potential liability absorbed by the people of Jamaica. Similarly, for the persons involved in the food riots they too should not be allowed to hide.

[23] It was submitted that in accordance with rule 34.2 (3) the Claimant would benefit from the orders being made as the persons responsible for his suffering could be held accountable. Secondly the information could be provided without significant cost to the relevant Defendants. Thirdly that the parties required to provide the information have the financial resources to comply with the order.

[24] Reliance was placed on the conjoined cases of ***Beveley Salu v Worldwise Partners Limited*** Claim no 2008/HCV05028 and ***Icolyn Chong v Worldwise Partners Limited*** Claim no. 2008/HCV05087. There is was submitted that the learned judges Brown J, decided that the relevant request for information should be complied with on the basis that at no point in time had the Defendant stated that it would be impossible, onerous, expensive or beyond their financial resources

to comply with the order. Therefore, it was submitted that the order for the request for the information ought to be made.

[25] The Defendants were permitted to respond to this Application for the request and submitted that the names of the officers were unnecessary to the fair disposal of the Claim and none of the causes of action would be assisted by having those names. The pleadings raised no issues as to names of officers of either the 4th or 5th Defendants and based on the provisions of the Crown Proceedings Act, there was no need ot have the names disclosed.

Discussion

Application to portions of statement of case as prolix

[26] The Defendants relied on Rule 26.3(i) (d) of the Civil Procedure Rules, ("CPR") which states –

> *"26.3 (1) In addition to any other powers 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 –*
>
> *…*
>
> *(d) That 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."*

The Defendants are relying on the proposition that the statement of case is prolix. Whilst the Court does have the power to strike out, it must be exercised sparingly and only in the most obvious cases. In ***Biguzzi v Rank Leisure Plc [1999] 4 All E.R. 934***, the English Court of Appeal noted that the English Rules of Civil Procedure, 1999 confer a very wide discretion upon judges to strike out statements of case. According to Lord Woolfe, M.R.:

> *"The fact that a judge has the power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of the case. The advantage of the CPR over the previous rules is that the Court's powers are much broader than they were. In*

many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."

[27] Counsel for the Defendants/Applicants is of the view that the Claimant/Respondent's statement of case is to be struck out since they contain evidence, submissions and material that are not properly pleadings. The Defendants/Applicants rely on ***Davey v Garrett [1878]*** 7 Ch D 473 to support their basis on when pleadings ought to be struck out for being prolix. The Defendants/Applicants also rely on the authority of ***Akbar Limited v Citibank [2014] JMCA Civ 43*** where Phillips JA stated at paragraphs 63-64 that there was no longer a need for extensive pleadings since witness statements, when exchanged, may supply a particulars of claim. The learned judge, in her decision, relied on the judgment of Harris JA in ***Grace Kennedy Remittance Services Ltd v Paymaster (Jamaica) Limited and Paul Lowe SCCA No 5/2009 delivered 2 July 2009*** which endorsed Lord Woolf's dicta in ***McPhilemy v Times Newspaper [199] 3 All ER 775*** which stated that one is still required to mark out the parameters of the case of each party and to identify the issues in dispute but the witness statements and other documents will detail and make obvious the nature of the case the other party has to meet.

[28] Further, in ***Eastern Caribbean Flour Mills v Ormiston St Vincent and the Grenadines*** Civil Appeal No 12/2006 delivered 16 July 2007, Barrow JA at paragraphs 43 and 44 also endorsed the principles laid out by Lord Woolf –

"[43] ...to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand pleadings to mean with a n extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader's case.

[44] It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings. "

[29] Pleadings should not be approached in an untailored manner. The central point is that the material facts must be pleaded. This is in an effort for the opposing side to adequately respond to the claims. In ***Boake Allen Ltd et al v HMRC*** [2006] EWCA Civ 25, Mummery LJ stated:

> *"[131] While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for good reason – so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. "*

[30] The most fundamental rule is that pleadings must contain the statement of the material facts upon which the claim rests but not the evidence which is to be relied upon. Therefore, it can be discerned that only relevant facts must be pleaded. The Bahamian case of ***Mitchell et al v Finance Corporation of the Bahamas Limited*** (RBC FINCO) et al BS 2014 SC 036, which is distinguished by the fact that they are not governed by Civil Procedure Rules but very similar rules under the Rules of the Supreme Court, states –

> *"Every pleading must contain, and contain only, a statement in a summary form of material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the claim admits."*

[31] Counsel in the instant case also relied on the English authority of ***North Western Salt Co. Ltd v Electrode Alkali Co. Ltd.*** [1913] 3K.B. 422 at 425, per Farewell J and submitted that the pleader must plead facts, not law and must not plead the evidence in support of his facts. Further, counsel submitted that it is a fundamental principle of the pleading that a party know what allegations are made against him with precision so that he can decide how to respond to him. Counsel relied on ***William v. Wilcox*** (1838) 8 A and E 314 at 331 where Lord Denman, C.J. stated:

> *"It is an elementary rule in pleading, that when a state of fact is relied on, it is enough to allege it simply without setting out the subordinate fact which are the means of producing it, or the evidence sustaining the allegation... The certainty or particularity of pleadings is directed not to the disclosure of the case of the party, but to the informing of the court, the jury and the opponent, of the specific proposition for which he contends, and a scarcely less important object is the bringing the parties to issue on a single and certain point, avoiding that prolixity and uncertainty which would very probably arise from the stating all the steps which leads up to that point."*

[32] Therefore, the purpose is to set out the case in sufficient detail but it should not be so extensive as to lead to prolixity but comprehensive enough to allow the opposing party to answer the case. Counsel for the Defendants/Applicants in the case at bar relied on the dictum in ***Davey v Garrett*** where Lord Justice Baggallay stated that the statement of unnecessary facts tends to embarrass the defendants. In that case, Baggallay LJ found that the statement of claim presented was embarrassing both from the excessive length at which the statements of necessary facts were set out and from the statement of unnecessary facts. Counsel for the Applicants submitted that the statement of case presented by the Claimant/Respondent contained irrelevant material which are prolix and they should not be required to answer such pleadings

[33] Therefore, in assessing the paragraphs which are the source of contention in this case, it is necessary to bear in mind the principles laid down in the authorities above. The Claimant's claim is against Seven (7) Defendants with various causes of action. Counsel for the Claimant/Respondent submitted that the pleadings are not prolix but in an attempt to comply with Rule 8.9 of the CPR. To have a fulsome understanding, it is necessary to also look at Rule 8.9 which states –

> *"8.9 (1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.*
>
> *(2) Such statement must be as short as practicable."*

> *"8.9A The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission."*

[34] Further, the Clamant refers to the case of ***Fairbank v Care Management Group*** UKEAT/0139/12/JOJ where they rely on the approach taken by Slade J that it is for the claimant to decide how to present their case. The Claimant also submitted that it is because of their compliance with the rules of the Civil Procedure Rules which state that the Claimant must set out all the facts that he intends to rely on and therefore they should not be punished for being in compliance.

[35] I find that the Claimant's submission, in trying to maintain the spirit of the Rules as they say, has led to a bulky presentation of the alleged facts. The Particulars are riddled with generalities, assumptions and conclusions which violate the fundamental rules of pleadings. Furthermore, the Claimant/Respondents seem to have overlooked Rule 8.9 (2) which states that the statement must be as short as practicable.

[36] The Defendants/Applicants have specifically challenged the following paragraphs as being prolix and invite the court to exercise its power under Rule 26.3 to strike out these paragraphs as prolix. The following paragraphs have been submitted by the Applicants as not being properly pleaded whether in part or whole:

> *Paragraph 9 – From the words following '2009' to the end of the Paragraph.*
>
> *Paragraph 11*
>
> *Paragraph 12 – The 3rd and 4th sentences.*
>
> *Paragraph 15*
>
> *Paragraph 17 – The words 'presumably, to continue the search'*

Paragraph 18 – The words in parentheses contained in the 1st sentence and 2nd sentence of the Paragraph.

Paragraph 19 – The last sentence.

Paragraph 21

Paragraph 22

Paragraph 23

Paragraph 24 – Beginning in the 2nd line from the words 'at which point' to the end of the paragraph.

Paragraph 25

Paragraph 26

Paragraph 27 – Beginning at line 3 from the words 'rat patrol' to the end of line 5 and line 6 from the words 'to be exposed' to the end of the paragraph

Paragraph 28

Paragraph 29 – Beginning at line 3 from the words 'During this' to line 5 ending at the words 'did not like' as well as 4th, 5th and 6th sentence in the said paragraph.

Paragraph 33 – Beginning at line 3 from the words 'due to conflicting' to the end of the paragraph.

Paragraph 35

Paragraph 37

Paragraph 38

Paragraph 39

Paragraph 50

Paragraph 51

Paragraph 52

[37] As stated in the case of ***Davey v Garrett***, prolix refers to "too lengthy statement of necessary facts or to the statement of facts unnecessary to be stated." Further, in ***Hilarie v Flavius LC 2015 HC 2***, the learned judge stated that:

> *"Claims are prolix when they contain long recitations that render the scope of the claim undecipherable. A claim prolix in verbiage, renders it liable to be struck out under CPR 26.3."*

[38] In order to assess the substance of the pleadings, this must be borne in mind. As it regards paragraphs 9, 11, 12 I am in agreement with Counsel for the Defendants/Applicants that this is prolix as it contains no material relevant to the instant claim. I disagree with the Defendants/Applicants submission with respect to paragraph 15 as it is relevant to the claim set out by the Claimant/Respondent. Concerning paragraph 17, the Claimant alleges that he was unsure of the reason and he is simply advancing what he believes. This is pleading evidence and therefore is unnecessary. In paragraph 18, the offending sentence is an exaggeration of the natural and ordinary meaning of the word and is therefore prejudicial. I am in agreement with the Defendants/Applicants.

[39] I am in agreement regarding paragraph 19 of the claim as it is too wordy and gives no indication of the significance of the action to the substantive claim. I agree with the Defendants/Applicants' submission that paragraphs 21, 22, 23 are prolix in so far as it speaks to hearsay of what another might have perceived which the Claimant cannot plead. I disagree with the contention that paragraph 25 is prolix as it relevantly pleads the circumstances of the claim.

[40] Regarding paragraph 26, 27 and 28 as worded, they are more prejudicial than probative as they describe nothing more than circumstances which are intended to inflame the character of the Defendants. Paragraph 29 as it stands from "During" to "did not like" is too wordy, imprecise and calls for speculation however I take no issue with the remaining sentences contained within the paragraph.

[41] Paragraph 33 is relevant to the substantive claim. Paragraphs 35, 37 and 38 make unnecessary reference to the statement as this need not be the subject of

pleadings in the statement of case. Paragraph 39 is calculated to offend and embarrass the Defendants in the advancement of their case.

[42] Paragraphs 50, 51, and 52 are struck out since they disclose no cause of action. In ***Baptiste v Attorney General GD 2014 HC 15***, the case of Mitchell, J.A. in ***Tawney Assets Limited v. East Pine Management Limited and Ors*** Civ Appeal HCVAP 2012/007 at paragraph 22 stated: -

> *"The striking out of a party's statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases…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 case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial. "*

Application to strike out statement of case that claims breach of Social Contract

[43] The Claimants have prayed for a breach of social contract. The Defendants/Applicants submit that breach of social contract is not a claim known to civil law. The Defendants have relied on ***Sebol Limited v Ken Tomlinson SCCA No 115/2007***, ***unreported (delivered January 15, 2010)*** and submit that where there is no cause of action known to law there can be no reasonable justification for bringing the claim and therefore it should be struck out.

[44] Based on my perusal of authorities, I find that breach of social contract is not a cause of action known to law., it is a fundamental consideration in the determination of issues concerning constitutional law. Therefore, the Claimant cannot rely on this ground and the claim, insofar as it relates to this ground, is struck out.

Application to strike out claim against the 1st, 2nd, 4th, 5th, 6th and 7th Defendants

[45] In the Claimant's Particulars of Claim, it was alleged that the police personnel entered the Claimant's home and assaulted him causing him to apprehend fear

and beat and kicked him for several mutes. It was also contended that the subsequent arrest was without reasonable and probable cause and the remand, which was in violation of his constitution rights led to his unlawful detention at the Horizon Remand Centre. During which time, he alleges that he was unable to financially support himself or his family and was forced to use all his savings to pay for his legal expenses. The Claimant/Respondent submitted that the acts of all personnel during the incident was outside the scope or ambit of their duties and therefore the Defendants should be held jointly or severally liable for the actions of their servants/agents.

[46] The Claimant/Respondent submits that they have added all the proper parties to the claim. The Crown is sued and it is alleged that the Crown, represented by the Attorney General, is vicariously liable for the allegedly unlawful actions of the remaining defendants. However, the Defendants/Applicants contend that the Claimant is wrong in seeking an award of damages against Crown servants since at the material times, they were acting in the course of their duties.

[47] Section 13 (2) of Crown Proceedings Act states that, 'Civil Proceedings against the Crown shall be instituted against the Attorney General.' Where a claim is brought against the Crown, the only proper defendant, is the Attorney General, as the Attorney General is the Crown's legal representative for the purposes of any such claim. See: ***The Attorney General v Gladstone Miller – Supr. Ct. Civil Appeal No. 95 of 1997,*** esp. at p.14, per Bingham, J.A.

[48] The claim against the 1st, 2nd, 4th, 5th, 6th and 7th Defendants cannot succeed. The claim is against the Crown arising from the allegedly tortious actions of Crown servant or agent, that being committed in the execution of his duty as a Crown servant or agent. In the circumstances, the only proper defendant, is the 3rd Defendant, that being the Attorney General.

[49] The claimant has alleged that, at all material times, the 1st and 2nd Defendants were functioning as Crown servants or agents and has pleaded that the

Defendants were acting outside of their duties prescribed by the Constabulary Force Act. However, what the pleadings lack is any allegation of how the Defendants were acting in any personal or private capacity. Counsel on behalf of the 3rd Defendant/Applicant has submitted that the allegations and as pleaded were done while the Defendants were in the employ of the Crown. I find that the claim could not succeed unless the Claimant/Respondent can show that the acts alleged were not closely connected to their duties as Crown servants. If the Defendants are able to present evidence that they were authorised to conduct their duties, no matter how improper it may have been alleged to have been, then I find that close connection to their duties has been established.

Application for request for information

[50] Rule 34.1 of the CPR provides:

> *(1) Where a party does not give information which another party has requested under rule 34.1 within a reasonable time, the party who served the request may apply for an order compelling the other party to do so.*
>
> *(2) An order may not be made under this rule unless it is necessary in order to dispose fairly of the claim or to save costs.*
>
> *(3) When considering whether to make an order the court must have regard to -*
>
> *(a) the likely benefit which will result if the information is given;*
>
> *(b) the likely cost of giving it; and*
>
> *(c) whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with the order.*

[51] The decision of Brown J in ***Beverley Chong*** is instructive on how such applications are treated. In that case the learned judge stated:

> *…The Court will not make an order for particulars which the party cannot give, nor will particulars be exacted where it would be offensive or unreasonable to make such an order, where the information in the possession of either party could only be attained with great difficulty or expense or labourious research or exhaustive inquiry.*
>
> *… The Defendant made no allegation that to obtain the information requested was impossible, onerous and expensive or beyond their financial resources which would have effectively denied the order. I was therefore of the opinion that the Claimants have satisfied the conditions set out in Rule 34…*

[52] In the case at bar, the Claimants allege that there are different individuals who were engaged in ill-treatment of him; from his being taken into custody to when he was detained and later prosecuted. He has named particular individuals that he claims had done certain acts while the identity of others was unknown. In particular where he alleged that a particular individual for the 4th Defendant interrogated and tortured him, and that other agents and/or servants of the 5th Defendants were party to him being left unfed or otherwise ill-treated, that is information that I regard as beneficial to the Claimant in the pursuit and presentation of his Claim.

[53] There has also been nothing to suggest that the providing of this information would require onerous research or great cost or is not information reasonably within the knowledge of the 4th and 5th Defendants. While I have already concluded that the Defendants application for certain Defendants to be struck from the claim, the remaining Defendant is still in a position as the Crown's representative to comply with the request.

[54] Therefore, based on my foregoing findings, my orders are as follows:

i. Paragraphs 9, 11, 12, 17, 18, 19, 21, 22, 23, 26, 27, 28, 35, 37, 38, 39, 50, 51, 52 of the Claimant's statement of case are be struck out for the reasons stated herein;
ii. Paragraph 29 to be amended for reasons stated herein;

iii. The claim for breach of social contract is struck out as it discloses no cause of action known to civil law in Jamaica;

iv. The claim against the 1st, 2nd, 4th, 5th, 6th and 7th Defendants is struck out;

v. The Claimant shall filed an amended Claim and Particulars of Claim within Twenty-eight days of the receipt of the written judgment;

vi. The time for filing of the 3rd Defendant's defence shall be Forty-two (42) days from the service of the said Amended Claim and Particulars of Claim;

vii. The Claimant's requests for default judgment are not granted;

viii. The Claimant's request for information is granted as against the 3rd Defendant;

ix. Costs to be Defendants/Applicants on the Defendants Application to be taxed if not agreed;

x. Costs to the Claimants on the Application for request for information to be taxed if not agreed;

xi. No Order as to Costs on other Application;

xii. Leave to appeal granted to the parties;

xiii. Defendant/Applicant's Attorneys at Law to prepare, file and serve the order herein.