



[2022] JMSC Civ 134

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2020CV05081**

<b>BETWEEN</b>	<b>ANDRE DE LA MOTTA</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>RADIO JAMAICA LIMITED</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>RADIO JAMAICANEWSONLINE.COM</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN CHAMBERS**

**Representation: Miss Stephanie Williams instructed by Henlin-Gibson, Henlin for the Applicant**

**Mr. Cedric Brown of counsel for the Respondent**

**Heard: June 29, 2022, July 29, 2022**

**Civil Procedure: Application to Strike Out – Claim for Constitutional Relief when alternative remedy Available-Breach of reasonable expectation of Fairness- Abuse of the Constitutional Protection of Freedom of Expression-Negligence-Defamation Act –Application of Section 33 and 33(5)(a) of the Defamation Act, 2013-Limitation of Actions Act -**

## O. SMITH, J (Ag)

### Background

[1] The Claimant, Mr. Andre De La Motto, is a Builder and Real Estate Developer. He filed a Claim Form and Particulars of Claim on December 23, 2020. He named as the 1<sup>st</sup> Defendant, Radio Jamaica Limited, a media company and as the 2<sup>nd</sup> Defendant, a media company, a subsidiary of the 1<sup>st</sup> Defendant both duly incorporated under the laws of Jamaica.

[2] This is essentially, a claim for defamation in which Mr. De La Motta claims that the second defendant published an online article entitled “Constable in Car Stealing Ring Could Be Charged” on November 3, 2007. In the article, despite an indication that several persons were involved, only the claimant was named. This is in circumstances where Mr. De La Motta claims that he has never been arrested, questioned or named by the police for involvement in a car stealing ring.

[3] He says that the Defendants have maintained the article on the website since November 3, 2007 to date resulting in:

- “1. A breach of the Claimant’s reasonable expectation to fairness arising from section A (iii) of the Code of Practice for Jamaican Journalist and Media Organizations, ratified August 2011, which provides that: those (rights of journalists and media organizations) carry obligations that require media organizations to represent and reflect the public interest at all times and journalists to perform their professional duties with intelligence objectivity accuracy and fairness*
- 2. An abuse of the legal safeguards enjoyed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants under the constitutional provisions of Freedom of Expression by acting in a manner that unconscionably, unjustly and unfairly puts the Claimant in a vulnerable and helpless position whereby the continuous publication of the relevant article has exposed the Claimant to continuous loss and damage and the continuous baseless disparagement of his good name; and*
- 3. The Commission of negligence by the 1<sup>st</sup> and 2<sup>nd</sup> defendants on account of the breach of the duty of care owned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to act fairly in their publication of news and the proximate losses suffered by the Claimant.*

**[4]** In response, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Notice of Application to Strike Out Claim on February 12, 2021. The application is seeking the following orders

1. The Claim Form and Particulars of Claims filed on 23<sup>rd</sup> December 2020 and being Claim # SU2020 CV 05081 and against the 1<sup>st</sup> Defendant is struck out
2. Judgment is entered against the Claimant
3. Alternatively, permission is granted to the 1<sup>st</sup> Defendant to file its Defence within 42 days of any order refusing the application...”

**[5]** The grounds on which the applicant is seeking the orders are pursuant to;

1. Rule 26.3 (1) (b) and 1(c) of the Civil Procedure Rules, 2002, as Amended,
2. The Limitation of Actions Act, in that the claim for negligence brought by the claimant is statute barred as it was filed more than six years after the alleged incident.
3. That there has been significant delay in bringing the claim.
4. That the Claim is an abuse of process and the Claimant has disclosed no reasonable grounds for bringing the Claim.
5. The 2<sup>nd</sup> Defendant is not legal person. The 1<sup>st</sup> Defendant is not in breach of any of the Claimant’s constitutional rights, nor any duty of care owed to the Claimant.”

**[6]** Two Affidavits in Support of the application was sworn to by Stacey-Ann Steele. In her first affidavit, filed on February 12, 2021, Ms. Steele deponed that she is an attorney-at-law and legal advisor to the Gleaner Company. Her Affidavit, in the main, repeats the grounds on which the orders are being sought. She expounded on subparagraph 5 above and deponed that the 2<sup>nd</sup> Defendant is not a subsidiary of the 1<sup>st</sup> Defendant and is not a legal entity.

- [7] The second affidavit was filed on March 23, 2021. She indicated that the information contained in her affidavit is based on an article on Radio Jamaica Limited's website and also on discussions had with Mr. Milton Walker, Group Head of News at Radio Jamaica Ltd. She went on to state that the 2<sup>nd</sup> Defendant is RJR's news online platform, currently known as Radio Jamaica News Online. The article mentioned and referred to in the Claimant's Particulars of Claim was produced by a staff reporter.
- [8] She was informed by Mr. Walker that it is not the policy of the 1<sup>st</sup> Defendant to include the names of reporters on the website. She went on to state that approximately three years ago the Newsroom changed its software data and that after the change of software the 1<sup>st</sup> Defendant made several attempts to access its old data scripts but was unable to do so. As a result, the 1<sup>st</sup> Defendant is unable to identify the reporter who wrote the news report the subject of this claim. Accordingly, this severely impairs the 1<sup>st</sup> Defendant's ability to defend the claim as it is not in a position to retrieve the relevant information needed to prepare a defence or defend an action at trial. The delay in bringing the claim is prejudicial to the 1<sup>st</sup> Defendant as it is not able to adduce sufficient evidence to defend the Claim.

### **Response of Mr. De La Motta**

- [9] Mr. De La Motta filed an affidavit in response to the notice of application for court orders to strike or claim. In this affidavit, filed on April 6, 2022, he indicated that the main issue that he is asking the court to settle does not arise exclusively from the news article in question but the continued posting of the said article as at today's date. He further deponed that the primary order he is seeking from the court is to have the article which was posted on November 3, 2007 taken down from the radiojamaicanewsonline.com website. As such, he stated that taking down the article is not predicated on the first defendant's access to old data or to any scripts or the name of any reporter who wrote the article.

- [10] He also deponed that the affidavits filed on February 12, 2021 and March 23, 2021 by the 1<sup>st</sup> Defendant has unequivocally claimed the article as its own and now the only thing that needs to be satisfied is to provide *“the court with a cogent legal reason why the 1<sup>st</sup> Defendant ought to desist from continuing to carry the article on its website.”*
- [11] In his affidavit Mr. De La Motta indicated that the first defendant’s right to publish the article is grounded in sections 13 (2) (c) and 13 (2) (d) of the **Charter of Fundamental Rights and Freedoms**, (The Charter). The right is not an absolute right but is subject to section 13 (1)(c) of The Charter. He went to state, that a continuous breach of his constitutional rights is not subject to or barred by any statutes of limitation. As such he is willing to forgo every aspect of his claim that is subject to the **Limitation of Actions Act, LAA** and proceed only on the breach of his constitutional rights.
- [12] Mr. De La Motta further stated that he is an architect and a developer by profession. Architects and developers are subject to due diligence searches by persons interested in retaining their services. Persons in his profession are entrusted with large amounts of money by the people who retain their services. A simple google search of his name brings the subject article to the fore. The article paints him as a dishonest and criminal person who by extension should not be trusted. The result of which has been that he has lost out on several profitable business opportunities.

### **Submissions on Behalf of the Applicant**

- [13] The main thrust of counsel’s submission in support of her application to strike out is that the claim is statute barred. She placed reliance on section 33(1)(a) of the **Defamation Act, 2013** which provides a limitation period of *“two years from the date upon which the defamatory statement is first published on the Internet or the date upon which it is first capable of being viewed or listened to through the Internet.”* She also submitted that the limitation in Jamaica for bringing any claim

arising out of tort is six years. For this she relied on the case of **Clinton Smith v Jamaica Public Service Company Limited** [2021] JMSC Civ. 94.

- [14] Counsel also relied on the case of **Ronex Properties Limited v John Laing Construction Ltd and Others** [1983] Q.B. 398 in which Donaldson LJ indicated that;

*“Where it is thought to be clear that there is a defence under the Limitation Act, 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 on the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence.”*

- [15] Counsel submitted that since the Respondent’s cause of action of defamation arose on November 3, 2007 when the article was posted on line and the Claim which was filed in 2020, thirteen years have passed since the right to commence a claim accrued. Having regard to the length of time she argued that it was also an abuse of process.

- [16] In relation to the Respondent abandoning his claim in defamation for a constitutional claim she relied on **A.G v Ramanoop** [2005] UKPC 15 and **Blehein v Minister of Health and Children and Anor** [2019] IESC 53 to ground her submission that *“where an existing tort provides an adequate remedy for breach of constitutional rights, the affected person must pursue his grievance within the parameters of that tort, and in so doing will be subject to the limitations and restrictions.”*

- [17] In relation to the constitutional claim she submitted that the Respondent is relying on the Code of Practice for Jamaican Journalists and Media Organizations which reads;

*“Those rights (rights of journalists and media organizations) carry obligations to represent and reflect the public interest at all times and journalists to perform their professional duties with intelligence, objectivity, accuracy and fairness.”*

However, the Code of Practice does not provide a legal basis for any cause of action. Additionally, the respondent no provided no evidence and or

documentation to substantiate his assertion that the 1<sup>st</sup> Defendant breached his right to equal protection under the law as such his Claim is not made out.

- [18] In relation to the Respondent's claim that his right to equal protection under the law was breached by the 1<sup>st</sup> Defendant when they failed to act with fairness by publishing the article in which only the Respondent's name was mentioned, counsel submitted that equal protection under the law is often given the same definition as equality before the law found in section 13(3)(g) of The Charter, counsel also relied on ***Blehein, Dale Virgo v Board of Management of Kensington Primary School et al*** [2020]JMFC Full 6.
- [19] In relation to the issue of delay reliance was placed on ***Alcan Jamaica Ltd v Herbert Johnson & Idel Thompson Clarke*** SCCA No. 20 of 2003, Suit No. C.L. 420 of 1996 and ***MSB Ltd v Finsac Limited & Joycelyn Thomas*** [2020] JMCA Civ. 4

#### **Submissions on behalf of the Respondent**

- [20] Counsel on behalf of Mr. De La Motta recounted the contents of the Respondent's Particulars of Claim and affidavit in response to the Application to Strike Out. In relation to when the publication was placed on line, the content of the article and the effect it has on Mr. De La Motta's ability to obtain work, he submitted that the continuous hosting of the article has continued to diminish the Respondent's ability to pursue a livelihood.
- [21] He invoked the right to freedom of expression under sections 13(2)(c) and 13(2)(d) and argued that although the 1<sup>st</sup> Defendant enjoys protection under the sections it was in the context of section 13(1)(c) of the Charter, which provides that, "*all persons are under a responsibility to respect and uphold the recognized rights of others.*" The Charter, he continued, protects the rights and freedoms of persons only to "*the extent that the rights and freedoms do not prejudice the rights and freedoms of others.*" He submitted that the provision imposes on the 1<sup>st</sup>

Defendant “*the duty to recognize where the boundary of tis rights begin and ends and where the boundary of other person’s rights begins and ends.*”

- [22] Based on the continued ‘adverse impact’ of the continued publication on Mr. De La Motta’s reputation, any claim by the 1<sup>st</sup> Defendant to protection under section 13(2)(c) would “create a disproportionate protection of rights in favour of RJR and to the prejudice of the Claimant.” A disproportionate protection of rights under section 13(2)(c) and (d) of the Charter. This would contravene section 13(2)(g) of the Charter which provides that every citizen of Jamaica is equal before the law and is entitled to protection under the law. The rights and freedoms of one person or group cannot be enforced to the prejudice of the rights and freedoms of others.
- [23] The court is therefore duty bound in its inherent jurisdiction and under sections 12(2)(c) and (d), 13(1)(c) and 13(2)(g) of the Charter to create a judicially acceptable atmosphere where both the 1<sup>st</sup> Defendant and the Claimant can enjoy equal protection under the law.
- [24] In relation to the application to strike out the claim, counsel argued that striking out is that draconian power that is used by the court in only exceptional circumstances. He relied on the case of *Haji-Ioannou v Mark Dixon Group Plc* [2009] EWHC 178 (QB) 30. In this regard he submitted that the respondent has set out what he considers to be a breach of his constitutional rights and as such has established that he has grounds for bringing the claim.
- [25] In the circumstances, he submitted that the court has the option to exercise its discretion to cure a defect by ordering an amendment rather than striking out a claim. He relied on the case of *Her Royal Highness the Duchess of Sussex v Associated Newspapers Limited* [2021] EWHC 273. In this regard he argued that the Respondent is willing to amend his claim so that the court can consider solely the breach of his constitutional rights thereby forgoing all other aspects of his claim that are statute barred.

**[26]** He further argued that it was not appropriate to strike out a claim in an area of developing jurisprudence. He relied on the case of *Kim v Lee (Rev. 1)* [2021] EWHC, where on an application to strike out the Claimant's claim the trial judge opined that,

*"... it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact."*

Counsel submitted that the jurisprudence surrounding the Internet and social media and their impact on constitutionally protected rights is a developing area of jurisprudence and as such the preferred course of action is for the court to make an allowance for the discussion of novel points of law emerging in this area of jurisprudence rather than striking out the claim.

## **ISSUES**

**[27]** I have identified five issues in the application before me

1. Whether a Claim in Defamation is statute barred
2. Whether a Claim in negligence is statute barred
3. Whether a constitutional remedy can be commenced via Claim Form and Particulars of Claim?
4. Whether this is a fit and proper claim for constitutional relief.
5. Whether the Claim is an abuse of process and as such should be struck out

## **THE LAW**

**[28]** I have extracted the sections of the Defamation Act that refer to the news media and publications online, to demonstrate that the framers of the legislation were quite aware of the impact that social media and the internet could have on the law concerning defamation. I believe that it is necessary in this case as is it the

continued existence of the article on the online platform that has brought Mr. De La Motta here.

**[29]** Section 2 of The Defamation Act states that;

*“defamatory matter” means any matter published by a person that is, may be, or is alleged to be, defamatory of another person...*

*“matter” includes-*

- (a) An article, report, advertisement or other thing communicated by means of newspaper, magazine or other periodical;*
- (b) A programme, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication;*
- (c) ...*
- (d) ...*
- (e) ...*
- (f) Any other method of communicating information;*

*“news medium” means-*

- (a) Any newspaper, magazine or other periodical, whether in print or electronic format, issued at regular intervals and having a general circulation;*
- (h) Any person whose business, or part of whose business, consists of-*
  - (i) The gathering of news, or the preparation or compiling of articles or programmes of or concerning news, observations on news or current affairs, for the purposes of dissemination to the public or any section of the public; or*
  - (ii) the dissemination, to the public or any section of the public, of any article or programme of or concerning news, observations on news or current affairs; and*
  - (iii) All forms of publication not specified in the preceding paragraph, including by means of electronic communication;”*

**[30]** Section 33 of the Defamation Act provides the limitation for a cause of action in tort:

*“(1) An action for defamation shall be brought*

*In the case of defamatory matter published on the Internet, within two years from the date upon which the defamatory statement is first published on the Internet or the date upon which it is first capable of being viewed or listened to through the Internet whichever is later; or*

*(b) In the case of any other defamatory matter, within two years from the date that the defamatory matter was first published,*

*hereinafter referred to as the “limitation period”.*

*(2) A person claiming to have a cause of action for defamation may apply to a court for an order extending the limitation period.”*

**[31]** Under section 33(5)(a);

(5) If a court orders the extension of the limitation period-

(a) the limitation period shall not be more than four years from the date on which the cause of action arose; and

**[32]** In relation to the powers of the Court to Strike out a statement of Case or part thereof

Rule 26.3 (1) states that,

“(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 –

(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;

- (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
- (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or
- (d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10”.

### **Whether a Claim in Defamation is statute barred.**

**[33]** The **LAA** provides the time limit within which actions for breach of contract and tort can be commenced in Jamaica. The Act provides that the limitation period for all matters in tort is six years. The legislature has since passed various legislation that specify a limitation period in relation to actions that may arise under a particular statute. The **Defamation Act 2013**, (the Defamation Act) is one such piece of legislation.

**[34]** Section 33 of the Defamation Act gives a person who perceives that he/she has been defamed a period of two years from the date of publication or the date from which the matter can be viewed or listened to on the internet, within which to bring a claim. If a person fails to bring a claim within the two years, the claim is potentially statute barred.

**[35]** Section 33(2) provides a small window for persons who do not utilize the two-year period, to make an application to the court for an extension of time. If this application is not made, the claim is statute barred after two years. If the application is made and refused the claim is statute barred after the passage of two years. ***Saddler v Saddler*** [2013] JMCA Civ 11, ***The Administrator General of Jamaica v Gamal Essor (Administrator Ad Litem for the Estate of Errol Essor, deceased)*** [2019] JMCA Civ. 83. If the application is made after two years from the time the cause of action arose, “the court in extending the period of

limitation must do so within an absolute period of four years after the cause of action arose.” The court has no discretion to extend time beyond that period. See ***Andrew Gordon v Radio Jamaica Limited and The Gleaner Company Limited and Television Jamaica Ltd and Jamaica Observer Limited AND Michael Dixon v Radio Jamaica Limited and The Gleaner Company Limited and Television Jamaica Ltd and Jamaica Observer Limited*** [2022] JMSC Civ. 05

[36] The defamatory article in this matter was first published on radiojamaicanewsonline.com on November 3, 2007. Mr. De La Motta therefore had until the November 2, 2009 within which to file a claim in defamation. He did not do so. He has now filed a Claim on December 23, 2020 in circumstances where no application to the court for an extension of time has been made. In any event, based on section 33(5)(a) an application for an extension of time to file a claim under the Defamation Act is no longer available to him. In the premises any Claim for defamation is statute barred. See **Ronex Properties v John Laing Construction Ltd.**

#### **Whether a Claim in negligence is statute barred**

[37] In claims of negligence the Limitation of Actions Act gives six years from the date the cause of action arose within which to file a Claim. Unlike the Defamation Act there is no discretion to extend time once it has expired. In relation to any claim in negligence for the article published on November 3, 2007 time expired on November 2, 2013. The claim in negligence is therefore is statute barred.

[38] In the circumstances, there is merit to the Application to Strike Out the Respondents Statement of case by reason that it is statute barred and as such is an abuse of process.

#### **Whether a constitutional remedy be commenced via Claim Form and Particulars of Claim?**

[39] Rule 56.9(1) of the CPR states that:

**1. An application for an administrative order must be made by a fixed date claim in form 2 identifying whether the application is for –**

**(a) judicial review;**

**(b) relief under the Constitution;**

**(c) a declaration; or**

**(d) some other administrative order (naming it),**

**and must identify the nature of any relief sought.**

**2. The claimant must file with the claim form evidence on affidavit.**

**[40]** It is therefore clear that an application for constitutional relief should not be brought by way of Claim Form and Particulars of Claim. The rules go further, by virtue of Rule 56.11(1) of the **CPR**, an application for relief under the constitution must be supported by affidavit evidence, served on all persons directly affected and by Rule 56.11(3), also on the Attorney General. The Respondent commenced this action by way of Claim Form and Particulars of Claim, this is a clear breach of Rule 56.9. In my view however, this is not fatal to his Claim. Under Rule 26.9(3) of the **CPR**, the court has the general power to rectify matters where there has been a procedural error. Specifically, Rule 26.9(1) states, that the rule only applies where the consequence of failure to comply with a rule or practice direction has not been specified.

**[41]** Rules 56.9 and 56.11 do not state a consequence for failure to comply with them. Consequently, the court has the power to rectify the procedural errors in a claim filed in contravention of these rules. This power is found under Rule 26.9(4) which empowers the court to make things right without an application being made. In the circumstances, the fact that Mr. De La Motta brought his Claim for constitutional

relief by way of Claim Form and Particulars of Claim is not detrimental and can be rectified by an order of the Court.

**Whether this is a fit and proper claim for constitutional relief.**

[42] The Respondent filed a Claim Form and Particulars in which he is seeking damages for negligence, a breach of his reasonable expectation to fairness and constitutional redress pursuant to section 13(2) (c) and 13 (2) (d) of The Charter. In his affidavit in response he abandoned his claim in defamation and negligence or better yet, in his words, “all and any aspect of my claim that are subject to the statutes of limitations” and hung his hat on the constitutional claim.

[43] The Claim for constitutional relief also did not find favour with counsel representing the Applicant. See paragraph 16 supra. In **Brandt v Commissioner of Police and Others** [2021] UKPC 12, the Judicial Committee of the Privy Council had to consider an appeal from Montserrat where the applicant, who was facing several charges in the criminal court, filed a claim for constitutional relief arising out of the search of his premises and the seizure of his cellular phones which when searched, led to charges for separate offences other than those which had brought the officers to his premises, Lord Stephens in giving his judgment on behalf of the Board opined that;

*“First, to seek constitutional relief where there is a parallel legal remedy will be an abuse of the court’s process in the absence of some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate”.*

[44] The cases underscore that a constitutional remedy should not be approached lightly but should only be undertaken when a claimant has exhausted all avenues available to him. In the recent case of **Deborah Chen v The University of the West Indies** [2021] JMSC Civ. 1, at paragraph 35, Henry-McKenzie J, after examining a raft of cases on the issue concluded that;

*“A constitutional remedy is one of last resort and not to be used when there is available an adequate alternative remedy”*

See also **Attorney General of Trinidad and Tobago v Ramanoop** [2006] 1 AC 328, **Rohan Fisher v The Attorney General of Jamaica and The Assets Recovery Agency** [2021] JMFC Full 04.

[45] The cases I have relied on all indicate that constitutional relief should be sought as a last resort. Where there is an alternative remedy, constitutional redress should only be sought where there is some special or cogent reason to indicate that the alternative remedy would not be adequate. Further, the fact that the alternative remedy is no longer available does not suffice as a special feature. In the result, an application for constitutional relief would be a misuse and abuse of the court's process.

[46] In the case at bar the offending article was published online on November 3, 2007. At that time the Respondent could have filed a claim under the Defamation Act. The Defamation Act at section 28 allows a claimant to seek an order from the court that the defendant, "*publish or cause to be published a correction of the matter that is the subject of the proceedings.*" However, that is not the only remedy available to a Claimant in an Action for Defamation, an order can also be made for the offending matter to be removed. The Respondent took no steps to take advantage of the remedies available to him under the Defamation Act, nor did he seek to file a Claim in negligence. Instead, some thirteen years later, he has sought to bring a Claim for Constitutional relief. The Defamation Act makes specific reference to matters arising online/on the Internet as being statute barred after two years. Therefore, the continued presence of the offending article online would, in my estimation, not qualify as a special feature. I am of the view that it must have been in the contemplation of the drafters that if a person failed to pursue a Claim within the requisite period then despite the continued presence of the defamatory material on line, a Claimant would be closed out once the limitation period expired. The Particulars of Claim and Affidavits filed in response to the application do not disclose any cogent explanation or special reason why Mr. De La Motta failed to file the relevant claims before they became statute barred. This, in circumstances

where the alternative remedy that was available to him was more than sufficient to address the wrong committed against him.

[47] In addition, not only did Mr. De La Motta not make use of the alternative remedy available to him, he took no action for thirteen years after the article was posted on line. In *Durity v The Attorney General of Trinidad and Tobago* [2002] UKPC 20, the Privy Council at paragraph 35 in a judgment delivered by Lord Nicholls of Birkenhead stated that:

*“When a court is exercising its jurisdiction under s 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant’s constitutional motion is a misuse of the court’s constitutional jurisdiction. This principle is well established.”*

[48] It appears therefore, that this is not a fit and proper case for an application for constitutional relief. In the foregoing, I do not believe it is necessary for me to embark on an examination of whether or not the Respondents rights, if any, under The Charter has been trampled on by the Applicant.

#### **Whether the Claim is an abuse of process and as such should be struck out**

[49] Under either Rule 26.3(1)(b) or Rule 26.3(1)(c) if the court finds that the claim is statute barred, then the Claim may be struck out as an abuse of process. In the case at bar, the 1<sup>st</sup> Defendant has also based its application for the Respondent’s Statement of case to be struck out on delay. The delay arose as a result of the length of time that transpired from when any cause of action may have arisen as a result of the posting online of the article and the filing of the Claim in 2020.

[50] An application under Rule 26.3(1)(c) is predicated on the assertion that the statement of case discloses no reasonable grounds for bringing the Claim. In **Blackstone’s, Civil Practice 2002, 3<sup>rd</sup> Edition**, at paragraph 33.6, the learned authors opined that; *“a statement of case ought to be struck out if the facts set out*

*do not constitute the cause of action or defence alleged.*” In the case at bar, Mr. De La Motta is claiming damages for breach of Reasonable Expectation of fairness based on section A (iii) of the Code of Practice for Jamaican Journalist and Media Organizations, hereinafter, The Code. An examination of the Code will reveal that it does not give rise to any cause of action in law but rather, the Code makes provision for aggrieved persons to file a complaint with the Media Complaints Council. Section 16 of the Code, under remedies, states,

*“b. Members of the public, including companies and organisations, that feel aggrieved by breaches of the code by media houses and/or media practitioners have a right to appeal to the Media Complaints Council for redress.”*

[51] This cause of action is therefore unknown in law and that portion of the statement of case ought to be struck out. However, I am cautious in this regard because while a claim may be struck out on the basis that it is statute barred and as such an abuse of process, that claim cannot be struck out on the ground that it discloses no reasonable cause of action. See **Blackstone’s** paragraph 33.8

[52] The courts have long held that delay can be a basis upon which a case may struck out, albeit, it is not the only consideration. In this case Mr. De La Motta waited thirteen years after the claim became statute barred before filing a claim. I bear in mind that the Applicants would have already considered themselves to be in safe harbor, cloaked in the protection of a statutory defence. In **Charmaine Bowen v Island Victoria Bank Limited, Union Bank Limited et al** [2014] JMCA App 14, Phillips JA itemized the factors that a Court ought to take into consideration when considering an application to strike out a statement of case. She identified them as: (a) the length of the delay; (b) the reasons for the delay; (c) the merit of the case; and (d) whether any prejudice may be suffered by the respondent.

### **Length of the delay**

[53] The Applicant has argued that there has been significant delay in bringing this claim. I cannot fault counsel for her submissions in this regard. As has been

repeatedly stated throughout this judgment, the article was placed online in November 2007. The respondents therefore had every right to believe that they would no longer have to face any claims with regards to that article, whether the limitation period be six years or two. I find, that to wait for a period for thirteen years before taking action is inordinate and inexcusable.

### **Reasons for the delay**

**[54]** Having read the affidavit of Mr. De La Motta filed in response to the application to strike out, I see no explanation offered for the late filing of a Claim. His complaint it seems, lies in the continued presence of the article online and its continued availability to anyone who should research his name on line. While I agree with Mr. De La Motta that the content of the article, in circumstances where he was never questioned by the police, never arrested or prosecuted in regard to a car stealing ring, can be and perhaps is deleterious to his reputation and as a consequence, may affect his ability to earn a living, that in my mind is the very reason a Claim ought to have been filed years ago. Having not done so an explanation is expected and none has been provided.

### **The merit of the case**

**[55]** There is no doubt that had a Claim been brought for Defamation before the expiration of the limitation period, Mr. De La Motta would have been in good standing. However, this is a claim for constitutional relief, all torts having been abandoned. I have addressed the merits of his application for constitutional relief supra. There is no need to repeat them here.

### **Whether any prejudice may be suffered by the respondent.**

**[56]** Clearly there is significant prejudice suffered by the Respondent. The affidavits of Ms. Steele outline that the newsroom changed its software data about three years ago and as a consequence the previous software still houses all the information in relation to old data, including the scripts for the article in question. Additionally, the 1st Defendant is not able to identify the reporter who wrote the article and as

such would not be able to mount a proper defence to a claim in defamation, negligence or one for constitutional redress. I am of the view that all considerations under length of delay would be applicable in considering the prejudice to the Applicant, who would now have to embark upon the uphill task of trying to identify and find a reporter who wrote an article some thirteen years ago in order to mount a defence. To place any party in such a position is untenable.

### **Disposition**

- [57]** I accept that the power to strike out a statement of case must be used sparingly and as a last resort. However, in this instance, bearing in mind the overriding objectives of the court to deal with all cases justly, I find that this is case that based on the forgoing cannot and should not be allowed to go any further.
- [58]** The Application to Strike out is granted.
- [59]** Costs to the Applicant to be taxed if not agreed.