In The Supreme Court of Bermuda

CIVIL JURISDICTION
2023: 29

BETWEEN:-

(1) DANTAE WILLIAMS
(2) TESHAE TROTT

Plaintiffs

- and -

(1) CHIEF INSPECTOR PETER STABLEFORD
(of the Bermuda Police Service)
(2) THE ATTORNEY GENERAL OF BERMUDA
(as the relevant entity under the Crown Proceedings Act 1966)

Defendants

VIA ZOOM

Date of hearing: 11 April 2024
Ruling delivered: 10 May 2024

Appearances: Mr. Delroy Duncan KC and Mr. Ryan Hawthorne, Trott & Duncan Limited, for the Plaintiffs
Mr. Nicholas Howard, Walkers (Bermuda) Limited, for the First Defendant
Mr. Brian Myrie, Attorney-General's Chambers, for the Second Defendant

HEADNOTE

Application to strike out claim for malicious prosecution without reasonable and probable cause- whether pleaded allegations of malice and dishonesty disclose no reasonable cause of action and are vexatious and an abuse of process-whether the pleaded claims seek to avoid immunity afforded to witnesses and are vexatious and an abuse of process-whether the Attorney General is properly named as a party to the proceedings

RULING

Introduction

1. On 28 February 2023 the first Defendant in these proceedings applied by summons for an order that the writ of summons in these proceedings be struck out. Following the issue of that summons, the specially endorsed writ of summons was amended so that, among other matters, the second Defendant was added as a party ('the amended writ'). On 17 January 2024 the second Defendant applied for an order that the amended writ in these proceedings be struck out.

2. On 11 April 2024 I heard oral submissions from the parties regarding the 2 strike out applications. I thank the parties for their helpful and comprehensive written and oral submissions. This is my judgment on the 2 strike out applications.

Factual background

3. The amended writ summarises the proceedings that have resulted in the strike out applications in the following terms:

> *The Plaintiffs contend that they were maliciously prosecuted by Cl Stableford without reasonable and probable cause.*

4. It is clear from the amended writ that the allegation of malicious prosecution arises from a prosecution that was brought for an alleged breach of the Public

Health (COVID-19 Emergency Powers) (Stay at Home) Regulations 2021 (BR 50/2021) ('the COVID Regulations'). It is essentially pleaded that there was no basis for such a prosecution. The prosecution had alleged that the second Plaintiff unlawfully mixed households with the first Plaintiff. The Plaintiffs essentially allege that the first Defendant was aware that in fact the Plaintiffs lived together. Reliance is placed on the fact that the first Defendant denied in evidence in chief during the trial that the second Plaintiff lived with the first Plaintiff. However, when confronted with a tape of a conversation that was said to show that the first Defendant knew that the second Plaintiff lived with the first Plaintiff, the first Defendant's evidence changed. He accepted that the second Plaintiff lived at 2 addresses including one that she shared with the first Plaintiff. It is pleaded that the prosecution was then abandoned in light of this change of evidence. That occurred on or about 31 May 2022.

5. The Plaintiffs made submissions highlighting a number of aspects of the pleaded case including that:

    a. There are clear allegations in the amended writ at paragraphs 51 and 54 that the first Defendant had provided a false witness statement and false evidence under oath. The first Defendant was said to have known that the statement and evidence was false because he lived in the same apartment complex as the Plaintiffs. The first Defendant's knowledge that statements were false was said to have been demonstrated by an audio recording of a conversation between the first Plaintiff and the first Defendant on 13 May 2021. That is the audio recording that was put to the first Defendant during cross-examination.

    b. Malice is alleged in the amended writ at paragraph 44 (read with paragraph 45), where it is said that:

> *Cl Stableford knowingly gave false testimony in Court and knowingly gave false testimony for the purpose of instituting judicial proceedings against Mr Williams and Ms Trott. Alternatively, Cl Stableford wilfully gave testimony in Court which he did not believe to be true and which touched on a matters material to questions concerning the Criminal Charge.*

c. The Deputy Director of Public Prosecutions had made it clear, after the prosecution had been abandoned, that the case centred on whether the Plaintiffs lived together. The first Defendant's evidence when cross-examined, that the Plaintiffs lived together, undermined the prosecution case regarding this. The decision of the magistrate on costs also demonstrated that the prosecution had been abandoned because the first Defendant lacked credibility following cross-examination.

6. The first Defendant made a number of submissions highlighting aspects of the amended writ that were intended to demonstrate that it was uncontested that there was evidence to support a prosecution that did not depend upon him and/or that his role in the prosecution was limited. The submissions included that:

   a. Paragraph 18 of the amended writ described an initial 'malicious allegation' that was made by a neighbour of the Plaintiffs who is not a party to these proceedings.
   b. It was unclear why the prosecution was discontinued after the first Defendant changed his evidence. There was other evidence available to the prosecution that would have potentially alerted the prosecution to the possibility that the second Plaintiff was living in 2 places. The prosecution could have been continued on the basis that the second Plaintiff had no legal basis to move between her 2 living places.
   c. The amended writ essentially raises a complaint about a poorly run prosecution. The first Defendant was not responsible for that.

7. Both parties made other submissions about the factual background to the prosecution that I will address when I come to the detail of the strike out application.

Strike out application

8. The skeleton argument filed in support of the first Defendant's application for strike out states that the application is made on 3 grounds summarised in the following terms:

> *(a) The Plaintiffs' Writ makes bare allegations of malice and dishonesty, which fail to disclose a reasonable cause of action, which are contrary to Order 18, rule 12(1) of the RSC and which are abusive as it prevents the First Defendant from knowing the case he must meet;*
> *(b) The allegations of malice and dishonesty in the Writ are incapable of proof and therefore disclose no reasonable cause of action, are vexatious, and are an abuse of process; and*
> *(c) The claims in the Writ are pleaded and framed in an attempt to avoid the immunity afforded to witnesses and are therefore vexatious and an abuse of process.*

9. The skeleton argument filed by the second Defendant relies on the submissions of the first Defendant. It also argues that the second Defendant is not properly named as a party.

Obligations in relation to pleadings

10. Rule 12(1) of order 18 of the Rules of the Supreme Court 1985 (GN470/1985) ('RSC') states that:

> *Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words—*
> *(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and*
> *(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.*

11. In *Robert Sofer v Swissindependent Trustees SA* [2020] EWCA Civ 699 Arnold LJ identified the following principles as governing the pleading of dishonesty:

> *(i) Fraud or dishonesty must be specifically alleged and sufficiently particularized, and will not be sufficiently particularized if the facts alleged are consistent with innocence ...*

> *(ii) Dishonesty can be inferred from primary facts, provided that those primary facts are themselves pleaded. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be pleaded …*
> *(iii) The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence …*
> *(iv) Particulars of dishonesty must be read as a whole and in context …* [23]

Arnold LJ also made the following general points about pleadings:

> *(i) The purpose of giving particulars is to allow the defendant to know the case he has to meet …*
> *(ii) When giving particulars, no more than a concise statement of the facts relied upon is required …*
> *(iii) Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged …* [24]

12. I have applied the judgment of Arnold LJ in *Sofer* when determining these strike out applications.

Approach to strike out applications

13. Rule 19 of order 18 of the RSC states, among other matters, that:

> *(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-*
> *(a) it discloses no reasonable cause of action or defence, as the case may be;*
> *(b) it is scandalous, frivolous or vexatious; or*
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
> *(d) it is otherwise an abuse of the process of the court;*
> *and may order the action to be stayed or dismissed or judgment to be entered accordingly,*
> *as the case may be.*
> *(2) No evidence shall be admissible on an application under paragraph (1)(a).*

14. In *Tucker v Hamilton Properties Limited* [2017] Bda LR 136 Subair Williams J held that:

> *… strike out applications ought not to be misused as an alternative mode of trial. It is not a witness credibility or fact*

> *finding venture and for good reason. The evidence before the Court at this stage is not oral and has not yet been tested through cross-examination. A strike out application, in reality, is a component of good case management. Where the pleadings are so bad on its face and so obviously bound for failure, the Court should strike it out.* [11] [Emphasis added]

15. In *Pedro v Department of Child and Family Services* [2019] SC (Bda) 85 Civ Alexandra Wheatley AJ cited (with apparent approval) the *White Book* (1999 Edition) which states that:

> *A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered ... So long as the statement of claim or the particulars ... disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out ...* [18/19/10] [Emphasis added]

16. In *Calvin Simons v The Minister of Public Works* 2019 No. 483 Jeffrey Elkinson AJ held that:

> *There have been various expressions used in the case law concerning Order 18, rule 19 as to when the court should exercise its power to strike out a claim. The language used is a variation on the proposition that it should be exercised in either plain and obvious cases, where there is no realistic possibility of the Plaintiff establishing a cause of action consistent with his pleading and the possible facts of the matter when they are known, or where the evidence relied upon by the Plaintiff can properly be characterised as shadowy or where the story told in the pleadings is a myth and has no substantial foundation. It is clear that the power to strike out is a draconian remedy and should only be employed in clear and obvious cases where it is possible to say at an interlocutory stage and before full discovery that a particular allegation is incapable of proof.* [8] [Emphasis added]

17. It appears to me that the case law that I have cited demonstrates that any strike out application must be reviewed with care to ensure that the draconian step of denying a party a trial is only used in clear cases where an action is bound to fail. In considering whether an action is bound to fail, it is necessary for me to remind myself that I have not heard oral evidence and so am not in a position to make findings regarding disputed issues of fact.

COVID Regulations

18. Regulation 3 of the COVID Regulations states, among other matters, that:

> *(1) Except as permitted by these Regulations, no person shall be away from his home at any time of the day or night from 5am on 13 April 2021 until these Regulations cease to have effect.*
> *(2) A person may leave his home during the curfew for the following purposes only, and provided appropriate physical distancing is maintained at all times—*
> *(a) essential visits to a permitted business, during the hours of 7am to 7pm only;*
> *(b) essential medical appointments, during the hours of 7am to 7pm only (except for an emergency situation or scheduled appointment outside that period);*
> *(c) for a walk or run, alone or with one other member of the same household, for a maximum period of sixty minutes per day during the hours of 7am to 7pm only, remaining at all times within a distance of one kilometre from his home;*
> *(d) to assist elderly or vulnerable relatives or neighbours, during the hours of 7am to 7pm only (except for an emergency situation);*
> *(e) to attend an appointment at a COVID-19 testing centre or vaccination centre;*
> *(f) to embark a flight leaving Bermuda.*

Regulation 2 provides that:

> *"home", in relation to a person, means the place in Bermuda where he is living ... on commencement ...*

19. The first Defendant points to the fact that there is no provision that enables a person to have more than one home or travel between homes. It is said that this demonstrates that a prosecution could have continued despite the evidence that the Plaintiffs were living together. However, I have concluded that I need not determine whether it was an offence contrary to the COVID Regulations for a person to have more than one home and travel between homes. For the reasons set out below, it appears to me that these arguments do not assist the first Defendant.

1st Defendant's Ground 1: The Plaintiff's pleading is deficient on its face and warrants the exercise of the Court's case management discretion to strike the claim out

20. The first Defendant alleges that the amended writ fails to sufficiently particularise malice and fails to properly particularise the basis for the alleged lack of reasonable and probable cause for the prosecution. It is said that the facts as pleaded present a narrative that is inconsistent with dishonesty. The first Defendant points to the fact that the Director of Public Prosecutions concluded that there was sufficient evidence to bring a prosecution. It is also alleged that amended writ fails to ascribe any motive to the actions of the first Defendant. It also fails to seek to plead any facts indicating an "improper or wrongful motive" [27].

21. There are 5 discrete elements to the tort of malicious prosecution:
    a. The Plaintiff was prosecuted by the Defendant, i.e. proceedings on a criminal charge were instituted or continued by the defendant against him. In other words, it must be established that the Defendant was a prosecutor.
    b. The proceedings were terminated in the Plaintiff's favour. That is not in dispute and is plainly pleaded in the amended writ.
    c. The proceedings were instituted without reasonable and probable cause.
    d. The Defendant instituted the proceedings maliciously. This an additional requirement to the requirement that proceedings were instituted without reasonable and probable cause (*Willers v Joyce* [2018] AC 779 at [55]).
    e. The Plaintiff suffered loss and damage as a result. That does not appear to be an issue in the context of this strike out.

22. I will consider the particularisation of issues a, c and d separately below. In assessing whether the amended writ has been adequately particularised, I have reminded myself that I am not concerned with the credibility of the claim. I have heard no evidence and cannot by reason of rule 19(2) of order 18 of the RSC. The issue is whether the amended writ is bad on its face (*Tucker*).

The prosecutor

23. As I understand the oral submissions made on his behalf, the first Defendant does not seek to argue that this action should be struck out on the basis that he was not a prosecutor. It is accepted that is a matter for evidence. However, in any event, I will consider this issue because it appears to me that the potential findings regarding this issue have implications for other issues that are the subject of the strike out. This issue is also relevant as the issue of the role played by the first Defendant in the prosecution formed part of his submissions regarding ground 3. Finally, I will address this issue as it appeared to me during the oral hearing that the submissions of the first Defendant came close to arguing that he was not a prosecutor despite the concession about what was in issue.

24. In *Martin v Watson* [1996] AC 74 the House of Lords held that:

> *Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was the position here, then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant.*

25. In *Rees v Commissioner of Police for the Metropolis* [2018] EWCA Civ 1587 the English Court of Appeal accepted that the mere provision of false information to a prosecuting authority leading to a prosecution does not make the provider of that information a prosecutor [59]. Instead the court endorsed the test identified in *AH(unt) v AB* [2009] EWCA Civ 1092 that:

> *It would have been necessary to establish that [the defendant] had deliberately manipulated [the prosecution service] into taking a course which they would not otherwise had taken if … she was to be regarded in law as the prosecutor.* (*AH* at [47]).

26. In *Rees* the key aspect of the factual background that led to a finding that the senior investigating officer ('the SIO') was a prosecutor was the fact that he had compromised the de-briefing of a key witness [8]. There was no suggestion that the prosecution service was aware of this. In light of this, the

approach of the Court of Appeal was to consider whether the prosecution would have happened had the prosecution service been aware of the truth. The Court of Appeal directed itself that:

> *In assessing whether the [prosecuting authorities] were able to exercise a truly independent judgment, it is necessary to stand back from the printed word and, postulating the reverse of the facts as they were, to ask what effect it would have had on their judgment if they had been told that the SIO had deliberately presented to them a case in which the evidence of the only supposed eyewitness had been improperly procured by that officer by acts intended by him to pervert the course of justice.*

27. In this case it appears to me that the following findings would be open to the trial judge on the basis of the facts alleged in the amended writ:

    a. The evidence of the first Defendant was key evidence. The matters relied upon in the amended writ include the claim that the prosecution contacted the first Defendant on 3 occasions to clarify his evidence. That suggests he was regarded by the prosecution as being a key witness. More significantly, the amended writ identifies what happened when the first Defendant's evidence changed following cross-examination. The prosecution concluded that a prosecution was 'futile'. Further, the magistrate who conducted the trial commented that the prosecution case 'collapsed' when the first Defendant was confronted during cross-examination by the tape-recorded conversation. These matters mean that it would be open to the trial judge to conclude that the evidence of the first Defendant was key to the prosecution.

    b. The first Defendant was dishonest. Based on the matters alleged in the amended writ, it would be open to the trial judge to conclude that the first Defendant's evidence was false because he subsequently contradicted it. In simple terms it is alleged that the first Defendant lied. He was aware of the truth because he changed his evidence when confronted with the tape-recorded conversation during cross-examination. In addition, the amended writ makes it clear that the first Defendant was aware of the truth as he lived in the same apartment complex as the Plaintiffs. In reaching the conclusion that

it would be open to the trial judge to make a finding of dishonesty, I have considered the first Defendant's argument that there was a narrative that was inconsistent with dishonesty. I accept that the issue is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence (*Robert Sofer*). It appears to me that the immediate change of evidence when confronted with a tape-recorded conversation is more consistent with dishonesty than anything else. It should be noted that it is pleaded that the trial magistrate (who heard the evidence) concluded that the first Defendant had been 'playing both sides'. That suggests a conclusion that the first Defendant had not made an innocent error. The findings of the trial magistrate are particularly important as he saw the first Defendant give oral evidence and so was in a good position to assess his credibility.

c. The process had been deliberately manipulated by the first Defendant. A basis for such a finding would be a finding that the first Defendant was dishonest, which I have already found is a finding open to the trial judge on the pleaded case. It is difficult to understand why the first Defendant lied if that was not to cause prosecutors to commence a prosecution. *Martin* suggests that this approach would be open to the trial judge. Further, *Rees* demonstrates that it is relevant to consider the counter factual. In other words, the trial judge can consider what would have happened had the prosecutor known the truth. In this case the amended writ points to the fact that the prosecutor discontinued the prosecution once the truth was known. That suggests that no prosecution would have been brought had the truth been known before the prosecution was commenced.

28. The first Defendant argues that there is no issue of the prosecution being unable to exercise independent judgment. That is because aside from the first Defendant's evidence, there was other evidence that supported a prosecution. In addition, it would have been possible to prosecute the second Plaintiff on

the basis that there was no legal basis for her to be outside her home. However, it appears to me that *Rees* and *Martin* demonstrate that it would be open to the trial judge to rely on a finding that the first Defendant was lying and that his evidence was key to conclude that the prosecution was unable to exercise independent judgment.

29. In light of my findings above that reflect the submissions of the Plaintiffs, it appears to me that the matters set out in the paragraph above demonstrate that the issue of whether the first Defendant was a prosecutor for the purpose of malicious prosecution is properly pleaded. The factual findings that would be open to the judge are sufficient to enable a finding that the first Defendant was a prosecutor.

Reasonable and probable cause

30. The first Defendant alleges that the amended writ fails to properly particularise the basis for the alleged lack of reasonable and probable cause. In that context, it is said that a person who merely reports an allegation to the police cannot be expected to conduct a fulsome investigation or consider potential defences. It is also said that the narrative is inconsistent with dishonesty.

31. In *Hicks v Faulkner* [1878] 8 QBD 167 Hawkins J held that for there to be a reasonable and probable cause, there must be:

> *An honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of the state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.*

This was upheld by the House of Lords in *Herniman v Smith* [1938] AC 305.

32. In *Rees* the Court of Appeal concluded that there was not a reasonable and probable cause. That was because the case presented to the prosecuting authority:

> *... included (and relied strongly upon) evidence ... procured by [the prosecutor's] own acts which were intended by him to pervert the course of justice. There is no evidence that he gave any thought to the question whether there was a fit or proper case to be laid before the court absent that tainted evidence. In such circumstances, I cannot see that [the prosecutor] could be found to have honestly believed that there was a "proper" case to lay before a court.* [75]

It appears to me that *Rees* is important because it demonstrates that the subjective belief in guilt must be based on the evidence other than any evidence that the prosecutor knows to be false.

33. The first Defendant places significant weight on *Qema v News Group Newspapers Limited* [2012] EWHC 1146 (QB). It appears to me that *Qema* does not assist for 2 reasons:

    a. It was decided before *Rees* and so does not undermine it. *Rees* is closer to the pleaded facts of this case because it was concerned with wrongdoing by the person who was alleged to have been a prosecutor.

    b. The alleged failures in *Qema* were those of the state rather than the private individual who was the defendant in the malicious prosecution claim [76]. In this case the allegations in the amended writ that I have focused on are allegations against the first Defendant.

34. The first Defendant's submissions argue at length that the amended writ is not consistent with a finding of dishonesty. I have set out above why it appears to me that a finding of dishonesty would be open to the trial judge. If dishonesty is found, it appears to me that it would then be open to the trial judge to find no reasonable and probable cause. The judgment in *Rees* demonstrates that at least one route by which a lack of a reasonable and probable cause could be found is a finding that the first Defendant gave no thought to guilt if the false evidence was not relied upon. It may also be open to the trial judge to conclude that the reason for dishonesty was a lack of belief in the merits of the prosecution.

35. I do not accept that my findings in the paragraph above imply or depend upon a duty on witnesses and/or complainants to carry out an investigation. The approach in the paragraph above depends upon the potential for the trial judge to conclude that the first Defendant was dishonest. A finding of dishonesty does not depend upon a duty to investigate.

36. One matter that the first Defendant placed particular weight on was a submission that it would have been possible to prosecute the second Plaintiff without reliance on his evidence that she did not reside with the first Plaintiff. For example, it might be argued that she had no basis for being outside of her home. The obvious problem with that argument is that is not how the prosecution was brought according to the amended writ. The writ alleges that the prosecution in this case was brought on the basis that there was unlawful household mixing in the first Plaintiff's home. The pleaded reasons given for discontinuing the prosecution and the findings of the trial magistrate would allow the trial judge to conclude that the prosecution was put on the basis that the Plaintiffs lived in different homes. It appears to me that the way in which it is alleged that the prosecution advanced the case could allow the trial judge to find the absence of the necessary subjective element of the reasonable and probable cause. Following the approach in *Rees* it would be open to the trial judge to conclude that no thought was given to an alternative way of prosecuting the case.

37. In light of my findings in the paragraph above regarding the manner in which the prosecution was put, it appears to me that I do not need to consider the issues raised about the interpretation of the COVID Regulations. The issues about the interpretation of the COVID Regulations do not change the alleged way in which the prosecution was advanced in this case.

38. I have focused on the subjective element of reasonable and probable cause because it appears to me that there are clear issues that arise with the first Defendant's honest belief in guilt if he deliberately lied. I am less convinced that the objective element is pleaded. The Plaintiffs rely on the discontinuation of the prosecution. However, it appears to me that that fact

does not necessarily mean that there was not a reasonable basis for the prosecution. It may have been possible to prosecute the second Plaintiff on a basis that did not depend upon the first Defendant's evidence. However, I need not decide this issue at this stage in light of my overall conclusions regarding strike out. This is an issue that can be determined at trial.

39. In light of the matters above, it appears to me that the issue of reasonable and probable cause is adequately pleaded. It provides no basis for striking out the action.

Malice

40. In *Willers v Joyce* [2018] AC 779 Lord Toulson held:

> *As applied to malicious prosecution, [malice] requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the clamant can prove that the defendant brought the proceedings in the knowledge that they were without foundation (as in Hobart CJ's formulation). But the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right. The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court's process.* [55]

41. In *Stuart v AG of Trinidad* [2023] 4 WLR 21 the Privy Council held that:

> *… Charles J assessed PC Phillips as being an untruthful witness and as having made up some aspects of his evidence. And in the light of this, she found that he did not have the required honest belief for the purposes of the "lack of reasonable and probable cause" element of the tort of malicious prosecution. She also concluded from the lies and inconsistencies in PC Phillips' evidence that the prosecution was malicious (ie that the "malice" element of the tort had been proved) in the sense that there was an improper motive for prosecuting the claimant. An improper motive is a motive other than bringing the claimant to justice. Charles J was in effect inferring malice from her finding that PC Phillips lacked the relevant honest belief. That malice can be inferred from a lack of reasonable and probable cause in a proper case was recognised in, eg, Williamson v Attorney General of Trinidad and Tobago [2014] UKPC 29 at para 13: see also, eg, Clerk and Lindsell on Torts at para 15-57. Moreover, it was not*

disputed – and counsel for the defendant accepted this point in answer to a question from the Board – that, on the facts of this case, it was justifiable for Charles J to have drawn the inference of malice once she had found that PC Phillips lacked the required honest belief. It was not incumbent on the claimant to specify and prove the precise motive for the prosecution because, on the facts of this case, given the lack of honest belief, the motive could not have been a proper one. [16] [Emphasis added]

42. In *Rees* McCombe LJ stated that:

> *Can it be the law, as assumed by the judge, that because a prosecutor believes a person is guilty of an offence, he prosecutes that person without malice (in the sense of dishonesty), even if the case which he presents to prove guilt is heavily reliant on the evidence of a witness which he has procured by subornation amounting to a criminal intention to pervert justice? In my judgment, that is not the law. Before probing the matter more, I would hold that bringing a prosecution in that manner is not "bringing a criminal to justice" at all.* [81]

McCombe LJ then concluded that:

> *For these reasons, I consider that [the SIO's] belief (as found by the judge) that the appellants were guilty … cannot prevent the prosecution having been malicious. He knowingly put before the decision-maker a case which he knew was significantly tainted by his own wrongdoing and which he knew could not be properly presented in that form to a court. To find that the element of malice was not satisfied in this case, to my mind, would be, quite simply, a negation of the rule of law. [91]* [Emphasis added]

43. The first Defendant places significant weight on *Farmer v Attorney General* [2008] Bda LR 57 in which it was held that:

> *Malice covers, as stated by Lord Devlin in Glinski v McIver [1962] AC 726, HL at 766, "not only spite and ill-will but also any motive other than a desire to bring a criminal to justice". Pursuant to RSC 0 18, r12(1)(b), it is not enough simply to allege malice; the claim must contain particulars of the facts and matters relevant to it on which the claimant relies. It is true that in certain circumstances it may be inferred from facts and matters relied on in support of the allegation of want of reasonable and probable cause, as Viscount Simonds made clear in that case at 744. However, none of those states of mind can ordinarily be derived or identified simply from an allegation that a prosecution was commenced or continued without reasonable and probable cause.* [18]

44. *Farmer* was decided without reference to *Stuart* and *Rees*. It might be said that there is a tension between the approach in *Farmer* and that in *Stuart* and *Rees.* However, it appears to me that I need not decide that issue in this case. That is because it appears to me that *Farmer* does not prevent a finding of malice being based on findings regarding a lack of reasonable and probable cause if the circumstances justify that. All *Farmer* establishes is that a finding of malice does not flow automatically from a lack of reasonable and probable cause. That is not surprising. If subjective belief is established, there may still be no reasonable and probable cause in light of the absence of objective justification. However, the subjective belief may demonstrate no malice. In contrast, in both *Stuart* and *Rees* it appears that the findings regarding malice followed findings of a lack of a subjective belief. The findings of malice were fact specific findings based on the specific circumstances in which a lack of reasonable and probable cause was found.

45. In this case it appears to me that the trial judge could approach the issue of malice in the following manner based on the facts alleged in the amended writ:

    a. I have already concluded that it would be open to the trial judge to conclude that there was no reasonable and probable cause. The *Stuart* judgment demonstrates how that could allow the trial judge to infer malice in the circumstances of this case. That is because the lack of an honest belief in the merits of the prosecution could be relied upon to find malice. The first Defendant seeks to distinguish *Stuart* on the basis that the factual background in *Stuart* made it easier to draw inferences. *Stuart* followed oral evidence and so there were clear factual findings for the judge to apply. However, it appears to me that there is no reason why a trial judge could not adopt a similar approach depending upon the facts found at trial. I have found that the trial judge might find the absence of a subjective belief in guilt based on a finding that the first Defendant lied. A finding of deliberate lies would appear to me to make it relatively easy to find malice.

b. The possibility of the trial judge concluding that the first Defendant deliberately lied is potentially relevant for a second reason. If such a finding was made, it would be open to the trial judge to infer that he put a case before prosecutors 'which he knew was significantly tainted by his own wrongdoing and which he knew could not be properly presented in that form to a court' (*Rees*).
c. I accept that there is no allegation of any particular motive for the actions of the first Defendant. However, the approach in *Stuart* and *Rees* demonstrates that there is no need for a motive to be alleged. Malice can be inferred where dishonesty is established. *Stuart* demonstrates that it would be open to the trial judge to conclude that dishonesty demonstrated that there was no proper motive.

46. In light of my findings above that reflect the submissions of the Plaintiffs, it appears to me that the matters set out in the paragraph above demonstrate that the issue of whether the first Defendant had the necessary malice for the purpose of malicious prosecution is properly pleaded. The factual findings that would be open to the judge based on the pleaded case are sufficient to enable a finding that the first Defendant had necessary malice.

Concluding remarks about ground 1

I hope that it is clear that I have considered the details of the first Defendant's arguments with care when concluding that they lack merit. The first Defendant can have little doubt of the case that he needs to meet (*Robert Sofer*). It is unfortunate that time has been taken up with arguments about pleading when the key issue is what the evidence demonstrates. In *Worrell v DPP* [2022] SC (Bda) 82 it was noted that the issue of whether the defendants were prosecutors was fact sensitive and best left to trial [31]. It appears to me that the pleading points raised in this strike out application relate to issues that are fact sensitive and best left to trial. I note, for example, how the Privy Council in *Stuart* noted the value of oral evidence when assessing the issue of dishonesty [14]. **1st Defendant's Ground 2: The allegations of malice and dishonesty in the Writ are incapable of proof and therefore disclose no reasonable cause of action, are vexatious, and are an abuse of process**

47. The first Defendant's skeleton argument argues that:

> *... the Plaintiffs have no realistic possibility of establishing a cause of action consistent with their pleading. Even if, however, the Court were to determine that the pleading is somehow sufficient on its face to present a cause of action of malicious prosecution, it is open to the Court to examine the evidence now before it to determine whether the action would constitute an abuse of process and to strike it out on that basis.* [36]

Later it is said that:

> *The Amended Writ attempts to contort the documentary evidence to create a mythical narrative that Mr Stableford somehow misled the BPS and DPP into proceeding with a prosecution.* [45]

48. In *Fidelity National Title Insurance Company v Trott & Duncan Ltd* [2019] SC Bda 10 Civ Subair Williams J cited with approval *Lawrance v Lord Norreys* (1890) 15 HL 210, in which it was held that a case can be struck out where:

> *... the case has not a solid basis capable of proof, but that the story told in the pleadings is a myth* (*Fidelity* at [57]).

Such cases were said to 'very exceptional'.

49. As noted above, strike out is a draconian remedy and should only be employed in clear and obvious cases where it is possible to say at an interlocutory stage and before full discovery that a particular allegation is incapable of proof (*Simons*). I need to take account of the fact that I am not properly equipped to make findings of fact when I have not heard oral evidence (*Tucker*).

50. During oral submissions the first Defendant highlighted evidence that was said to support his arguments. I am not going to comment on all of the evidence at this stage. I will merely highlight the reasons why it appears to me that this not a very exceptional case where I can conclude the allegations are mythical. Obviously I am not saying that the evidence relied upon by the first Defendant will be rejected at trial or that the trial judge will not make the findings sought by the first Defendant. However, it appears to me that the following matters justify a conclusion that the second strike out ground should be rejected:

a. I have already explained why it appears to me that the pleaded case would enable a trial judge to find that there was a malicious prosecution. That is significant because the first Defendant's skeleton argument accepts that there is heavy reliance on evidence in the pleaded case [38]. My findings regarding the pleaded case imply that there is an evidential basis for the Plaintiffs' action succeeding. For me to strike out this action on the basis that the action is mythical, I would need to be satisfied other material would prevent a trial judge relying on evidence relied upon by the Plaintiffs in the manner suggested in the amended writ. That requires me to reach findings of fact rejecting the pleaded reliance on evidence. It appears to me that it would be difficult to reach a conclusion that the action is mythical when I have not heard oral evidence addressing the pleaded case.

b. The first Defendant points to evidence that is said to show no dishonesty. I have addressed above why it appears to me that the amended writ does demonstrate that it would be open to the trial judge to find dishonesty. The evidence that was highlighted by the first Defendant does not mean that such a finding will not be open to the trial judge. The trial judge will need to take account of the evidence highlighted by the first Defendant but he will also need to take account of the matters pleaded in the amended writ. The most important of those appears to me to be the alleged sudden, unexplained change of evidence when the first Defendant was cross-examined about the recorded conversation. The context of that change of evidence includes the fact that it appears not to be disputed that the first Defendant was sent an e-mail on 9 June 2021 expressly asking whether the second Plaintiff lived at the first Plaintiff's address. The fact of the express question might be said to mean that the first Defendant would have been well aware of the significance of the whether the second Plaintiff lived at the first Plaintiff's address. The e-mail resulted in a formal witness statement from the first Defendant dated 28 June 2021 denying that the second Plaintiff lived at the first Plaintiff's address. It would be open to the trial judge

to conclude that was inconsistent with what is said to have been said following cross-examination.

c. The first Defendant argues that the position is more nuanced than suggested above and that there was not 'a complete reversal' of his evidence (Reply skeleton at [15]). Obviously the trial judge will need to consider the evidence and determine the extent to which there was a change in evidence and whether that can be explained. However, it appears to me that I cannot say at this stage that a trial judge would be unable to find that the change was significant enough to demonstrate dishonesty. The best evidence of the significance of the change in the evidence was the reaction of the prosecution and the trial magistrate. It is pleaded that both regarded the change as undermining the prosecution case. At this stage when I have not heard oral evidence, it appears to me that it is not open to me to reject what is said to have been the reaction of prosecution and the trial magistrate. They were in a better position to assess the significance of the alleged change of evidence as they heard oral evidence.

d. The fact that there was evidence available to the prosecution before the trial that suggested that the second Plaintiff lived at the first Plaintiff's address does not undermine the analysis above. That is because the prosecution continued despite that evidence. It appears that it was only discontinued when the first Defendant changed his evidence.

e. If, as I have found, the evidence does not prevent a finding of dishonesty then the analysis above demonstrates that it would be possible for the trial judge to infer other disputed aspects of this action. In particular, it demonstrates that it could be inferred that there was a lack of a reasonable and probable cause and malice.

51. In light of the matters above, I reject the second ground that is relied on in support of strike out. It is important that I do not conduct a mini-trial at this stage. However, that is what I believe that the first Defendant is essentially asking me to undertake at this stage. It appears to me that the first Defendant is inviting me to make findings about the evidence when I do not have the full

picture because I have not heard oral evidence. It appears to me that the evidence available to me does not allow me to conclude that this action is mythical. Whether the first Defendant was in fact the prosecutor is a matter to be determined at trial.

1st Defendant's Ground 3: The claims in the Writ are pleaded and framed in an attempt to avoid the immunity afforded to witnesses and are therefore vexatious and an abuse of process.

52. The reply skeleton argument of the first Defendant states that:

> *The parties appear to be agreed that witness immunity does not extend to genuine claims of malicious prosecution. However, it is the First Defendant's position that the present claims are, in substance, claims arising from incompetent or inattentive preparation of evidence and/or preparation of the case.* [20] [emphasis added]

53. In essence I have already concluded that:
    a. The pleaded case is sufficient to mean that the allegation of malicious prosecution can proceed to trial.
    b. It cannot be said that the pleaded case is incapable of proof.

54. The conclusions summarised in the paragraph above mean that I cannot see how I can strike out this action on the basis that it is an improper attempt to avoid witness immunity. The passage of the first Defendant's skeleton cited above makes it clear that it is accepted that witness immunity is not available in genuine cases of malicious prosecution. The matters in the paragraph above demonstrate that it would be open to the trial judge to find that this is a genuine case of malicious prosecution. That implies that this ground must be dismissed. To be fair to the first Defendant, he accepted orally that this ground is essentially an elaboration and so a different way of framing the second strike out ground. As a consequence, the first Defendant appeared to accept that this ground must fail if the first 2 grounds failed.

55. In reaching the conclusion that I reached in the paragraph above, I have considered the submissions of the first Defendant arguing that he was not the

state agent charged with prosecuting the Plaintiffs. It appears to me that argument does not assist the first Defendant at this stage. I have already found that it would be open to the trial judge to conclude that the first Defendant was the effective prosecutor.

2nd Defendant's strike out application: 2nd Defendant is not properly named as a party

56. The second Defendant argues that the first Defendant would have to be acting as a servant or agent of the crown for her to be liable. However, the action should be struck out as the first Defendant was acting as a member of the public.

57. Section 1 of the Crown Proceedings Act 1966 provides that:

> *"the Crown" includes a Minister, Government Department and a Government Board; ...*
> *"servant of the Crown" means any person whose remuneration is derived either directly or indirectly from the Consolidated Fund of Bermuda in relation to any functions, duties or responsibilities the performance or discharge of which may form the subject of proceedings under this Act;*

It does not appear to be in dispute that the first Defendant is a servant of the Crown as a police officer. His salary in that role is derived from the Consolidated Fund of Bermuda. Certainly there is no basis for me to strike out on the basis that the first Defendant is not a servant of the Crown.

58. Section 3(1) of the Crown Proceedings Act 1966 provides that:

> *(1) Subject to this Act, the Crown shall be subject to all those liabilities in tort to which it would be subject if it were a private person of full age and capacity—*
> *(a) in respect of torts committed by its servants or agents; ...*
> *Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act of a servant or agent of the Crown unless that act would, apart from this Act, have given rise to a cause of action in tort against that servant or agent or his estate.*

59. Section 3(3) of the Crown Proceedings Act 1966 provides that:

Where any functions or duties are conferred or imposed upon a servant of the Crown as such either by a rule of the common [sic] or by statute, and that servant commits a tort while performing or purporting to perform those functions or duties, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions or duties had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.

60. Section 14(1) of the Crown Proceedings Act 1966 provides that:

> *Proceedings against the Crown under this Act shall be instituted against the appropriate Minister in his style as such or, as the case may be, against the appropriate Government Board, in the corporate name of the Government Board, or if none of the Ministers or Government Boards is appropriate or the person instituting the proceedings has any reasonable doubt whether and if so which Minister or Government Board is appropriate, then against the Attorney-General in his title as such.* [Emphasis added]

There appears to be no dispute that the Attorney General is the correct defendant if liability can be established under the 1966 Act.

61. Section 4 of the Police Act 1974 provides, among other things, that:

> *(1) The functions of the Service shall be to take lawful measures for— ...*
> *(c) preventing and detecting crimes;*

62. Section 5 of the Police Act 1974 provides that:

> *(1) A member of the Service, unless duly excused or interdicted from duty—*
> *(a) shall at all times have all the powers and immunities conferred upon police officers by any statutory provision; and*
> *(b) shall at all times be bound to discharge any of the duties imposed upon police officers by or under any statutory provision.*
> *(2) Every member of the Service shall for the purposes of this Act or any other statutory provision be deemed always to be on duty when required to act as such.*

Section 1(1) of the 1974 Act provides that:

> *"Service" means—*
> *the Bermuda Police Service; ...*

63. It appears to me that:

a. My findings in relation to the strike out application brought by the first Defendant demonstrates that the Plaintiffs have a properly

arguable case for malicious prosecution directed at the first Defendant.

b. Section 3(1)(a) of the Crown Proceedings Act 1966 provides that the Crown is liable for acts of its servants. In principle, that includes the first Defendant. Section 14 appears to mean that the Attorney General should be named as a defendant if the Crown is liable for the actions of first Defendant.

c. It might be argued that section 3(3) of the 1966 Act means that liability depends upon whether the first Defendant was 'performing or purporting to perform [his] functions or duties' conferred on him by law (particularly when read with section 1). This argument is not necessarily accepted by the Plaintiffs. However, it is unclear what purpose section 3(3) serves if it is not to limit Crown liability to circumstances in which a state agent is performing its public functions. Further, it would be surprising if the state could be liable for all actions of a police officer no matter how unrelated they are to the officers' duties. However, I have concluded that I need not reach a final decision as to whether it is necessary for the first Defendant to be performing his functions or duties because, for the reasons set out below, it appears to me that it would be open to the trial judge to conclude that the first Defendant was performing his functions or duties.

d. Section 5(2) of the Police Act 1974 makes it clear that a police officer can be performing 'functions or duties' at any time. The fact that an officer is not formally on duty does not change that. An officer can be performing his police functions at any stage if he is required to act as a police officer.

e. I accept that there is an issue as to whether the first Defendant was required to act as a police officer. However, I don't think I can conclude at this stage he was not required to act as a police officer. It appears to me that that is a matter for trial after oral evidence in light of what follows.

f. The argument of the second Defendant is that the first Defendant reported the second Plaintiff to the police in his role as the first

Plaintiff's landlord rather than as a police officer. However, it appears to me that the position of the first Defendant is potentially more complex. In the affidavit submitted in support of his strike out application, the first Defendant states that:

> *After the conversation with Ms Bell and after reviewing the camera footage, I was extremely conflicted. As an off-duty police officer and landlord of the property, I felt I had to relay the information provided to me by a tenant. Police officers are subject to standards of conduct even when off-duty and even when not acting as a police officer.*

That implies that the first Defendant believed that he was acting as a police officer when he reported the second Plaintiff for an offence under the COVID Regulations. He was seeking to act in accordance with his duties. The trial judge will be in the best position to assess the role that the first Defendant was performing after he has heard oral evidence.

g. It is also relevant that the actions of the first Defendant related to a prosecution. That is significant because section 4(1)(c) makes it clear that police functions include 'detecting crimes'. In other words, they include ensuring that people are prosecuted for their offences. It appears to me that any finding at trial that the first Defendant was acting as a prosecutor might well support the argument that he was performing police functions and so support arguments that the second Defendant was liable.

h. The second Defendant places weight on *Farmer v Attorney General* [2007] SC (Bda) 14 Civ. It appears to me that that judgment does not assist. The *Farmer* judgment records that:

> *In relation to the joining of the Attorney-General in the proceedings, [counsel for the Plaintiff] indicated that this had been done out of an abundance of caution, and did not press the point, saying that he had no difficulty with the Attorney-General being taken out of the proceedings.* [14]

As a consequence, it is not surprising that there was little consideration of the details of the statutory regime.

64. In light of the matters above, it appears to me that it would be inappropriate to strike out the claim against the second Defendant. It may be that the second Defendant is not liable but that would be better assessed after oral evidence and further argument.

Concluding remarks

65. In light of the matters above, the 2 applications for strike out are dismissed. It has been said that a strike out is a draconian remedy that should only be used in a clear and obvious case (*Calvin Simons*). It appears to me that this is not such a case. Instead it is a case where fairness requires discovery and oral evidence to be heard to resolve the disputed issues of fact.

66. This action relates to a prosecution in May 2022. That suggests that a prompt trial is desirable to limit the extent to which memories fade. I will seek to make directions progressing this matter to trial.

Dated the 10th day of May 2024

THE SEAL OF THE SUPREME COURT OF BERMUDA
SIGNED

HUGH SOUTHEY KC
ASSISTANT JUSTICE