



[2016] JMSC Civ. 229

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 04167

BETWEEN	CAREIF LTD	1ST CLAIMANT
A N D	ANTHONY THARPE	2ND CLAIMANT
A N D	THE FINANCIAL SERVICES COMMISSION	1ST DEFENDANT
A N D	BRIAN WYNTER	2ND DEFENDANT
A N D	GEORGE ROPER	3RD DEFENDANT

IN CHAMBERS

Anthony Tharpe appears in person and as a representative of the 1st claimant

Carla Thomas and Andre Moulton, instructed by the Director of State Proceedings, appear for the defendants

Heard: May 31 and November 18, 2016

APPLICATION TO STRIKE OUT – APPLICABLE LEGAL PRINCIPLES – SEVERAL CLAIMS – WHETHER SOME OF THE CLAIMS BEING PURSUED ARE UNKNOWN IN LAW – HOW COURT SHOULD APPROACH QUESTION AS TO WHETHER THERE EXISTS REASONABLE GROUNDS FOR BRINGING CLAIM – WHETHER THE 2ND AND 3RD DEFENDANTS ARE IMMUNE FROM LIABILITY – ALLEGATION THAT DEFAMATION CLAIM IS STATUTE-BARRED – PROCEDURAL DEFENCE – NEED TO ASSERT PROCEDURAL DEFENCE IN FILED DEFENCE – FAILURE TO PROVIDE SUFFICIENT PERTINENT PARTICULARS IN STATEMENT OF CASE – APPLICATION FOR CONSTITUTIONAL REDRESS – ADEQUATE ALTERNATIVE MEANS OF REDRESS AVAILABLE – NEED TO SPECIFY COURT ORDERS SOUGHT WHEN APPLYING FOR COURT ORDERS – DEFAULT JUDGMENT NOT AVAILABLE AGAINST CROWN WITHOUT THE COURT’S PERMISSION – CLAIMANTS’ REQUEST FOR DEFAULT JUDGMENT

ANDERSON, K. J

The background

- [1]** The claimants in this claim, are unrepresented by counsel, for the purposes thereof. They instituted this claim and have proceeded at all times, in respect of this claim, without an attorney. The fact that they do not have an attorney though, has clearly not left them daunted. They were also undaunted when they filed a prior claim, intituled as Claim No. 2010 HCV 05419, against three (3) of the persons, who are also the three (3) named defendants in respect of this claim, which is intituled as Claim No. 2013 HCV 04167. The claimants also acted without an attorney, when they filed Claim No. 2010 HCV 05419.
- [2]** The 2nd claimant is the principal officer of the 1st claimant and it was he who appeared in chambers at the hearing which I had then presided over, concerning the defendants' application for court orders, which is what these written reasons for ruling, pertain to. He has vigorously opposed, on the claimants' behalf, the reliefs as sought by the defendants, pursuant to that application.
- [3]** Claim No. 2010 HCV 05419, was, along with particulars of claim, filed on November 11, 2010. Claim No. 2013 HCV 04167 was, along with particulars of claim, filed on July 18, 2013. No affidavit of service has been filed by the claimants in respect of Claim No. 2013 HCV 04167. Each of the defendants though, in response to Claim No. 2013 HCV 04167, have filed acknowledgements of service and in each of those documents (three (3) in total), they have each set out therein, separate dates of service upon them, of the claim form and particulars of claim. As such, the 3rd defendant's acknowledgement of service reflects that he was served with same, on March 11, 2014, whilst the 2nd defendant's own, reflects that he was served on January 28, 2014 and the 1st defendant's own, reflects that they were served on April 1, 2014.
- [4]** The defendants have, for reasons unknown to this court, not yet filed any defence to this claim. At this time, each of the defendants are out of time for the

filing of a single, or three (3) separate defences to this claim, if they were to be minded to file such. The defendants, it should be noted, are all represented by the office of the Director of State Proceedings.

- [5] The defendants' failure to file any defence to this claim, is of significance, not only in respect of the defendants' application for court orders which was filed on July 21, 2014, but also generally, as regards how this claim, may ultimately be resolved.
- [6] It is also important to note that the defendants' aforementioned acknowledgements of service, were each filed out of time. The same should have been filed, by or before 14 clear days after service of same had been effected, on each of the defendants. In that regard, **see rule 9.3 (1) of the Civil Procedure Rules (C.P.R)**. Most importantly though, **rule 9.3 (4) of the C.P.R** provides that, '*A defendant may file an acknowledgment of service at any time before a request for default judgment is received at the registry out of which the claim form was issued.*'
- [7] **Rule 9.2 (6)** provides that, '*where a defendant fails to file either an acknowledgment of service or a defence, judgment may be entered against that defendant if Part 12 allows it.*'
- [8] **Rule 10.3 (1) of the C.P.R** provides that – '*The general rule is that the period for filing a defence is the period of 42 days, after the service of the claim form.*' The parties have not filed any agreement extending the time for the filing of a defence, or defences, by the defendants. In any event though, the maximum total extension of time that could lawfully have been agreed to, by the parties' counsel, for the filing of a defence/defences, would have been 56 clear days, subsequent to the service of the claim form and particulars of claim. In respect of each of the defendants, more than 56 clear days has passed since the service upon each of them, of the claim form and particulars of claim. Equally, none of the other exceptions to the aforementioned general rule as to the time period

within which a defence is to be filed, are of any applicability to the present claim. Those exceptions are set out in **rule 10.3 (4) – (9) of the C.P.R.**

- [9] The claimants have filed a request for default judgment against the defendants, in lieu of the defendants having filed a defence or defences to this claim. That was filed on July 3, 2014, but even as of now, the Registrar of the Supreme Court has apparently not yet adjudicated upon that request.
- [10] The defendants have not filed an application for an extension of time to file defence. The claimants' request for default judgment was filed pursuant to the provisions of **rule 12.7 of the C.P.R.**, which simply states that, '*A claimant applies for default judgment by filing a request in form 8.*' The claimants have complied with that particular rule of court.
- [11] The Registrar of this court should have, by now, adjudicated upon that request for default judgment, either by making an order granting default judgment, or alternatively, an order denying that request for default judgment. It is unacceptable that such a request for default judgment, should not have been made, over two (2) years after it was filed, the subject of an order of this court, via the Registrar of this court.
- [12] The request for default judgment which has been filed by the claimants has sought judgment solely on the basis of the defendants' failure to file a defence/defences, in response to this claim. Clearly, in view of the provisions of **rule 9.3 (4) of the C.P.R.** (as were earlier referred to) the claimants would no longer be entitled at this stage, to obtain default judgment against the defendants arising from their having filed their respective acknowledgements of service, late in time. Having each filed same, prior to the claimants' request for default judgment having been filed, **rule 9.3 (4) of the C.P.R.** would have served to have precluded the claimants from obtaining a default judgment against them, pursuant to their request for default judgment, if that request for same, had been based upon the defendants' filing of their respective acknowledgements of

service, out of time. As that though, was not the basis upon which the claimants have made request for default judgment, that particular point need not be considered any further, for present purposes.

[13] For present purposes, it must be stated that the claimants' request for default judgment cannot properly result in a default judgment being entered against the defendants, either collectively or individually, if they or any of them are sued as Crown servants and/or agents. That is so because of the provisions of **rule 12.3 (1) read along with rule 12.3 (6) of the C.P.R.** It is my considered view that the claimants' claim against the defendants is one which has been brought against them, in their capacity as Crown servants and/or agents.

[14] **Rule 12.3 (1)** provides that:

'A claimant who wishes to obtain a default judgment on any claim which is (a) a claim against a state, or (b) a claim against a minor or patient as defined in rule 2.4, must obtain the court's permission.' Rule 12.3 (a) of the C.P.R defines the term – 'State', but that definition is of no relevance for present purposes. Suffice it to state that, for the avoidance of doubt, it is specifically provided in rule 12.3 (6) of the C.P.R, that rule 12.3 (1), 'shall apply to proceedings against the Crown.'

[15] As such, it must follow that if the defendants, or either of them are Crown servants who are being sued in that capacity, then it is only with the court's permission, that a default judgment can be obtained against them or any of them who is being sued in that capacity. The term '*court*' is defined in the said rules of court, as meaning – '*the Supreme Court.*' The Supreme Court carries out its functions in adjudicating on various matters, via Puisne Judges, Masters-in-Chambers and Registrars. **The Judicature (Supreme Court) Act**, makes provisions for that.

[16] **Rule 12.5 of the C.P.R** sets out the circumstances in which the registry must enter default judgment, arising from a defendant's failure to defend a claim. That is an administrative function which is expected to be carried out specifically, by a

Registrar. Where however, it has been stated in **rules 12.3 (1) and (6) of the C.P.R.**, that a claimant who wishes to obtain a default judgment against the Crown must obtain the court's permission, it is clear that such permission cannot be granted by a Registrar. It must, if it is to lawfully be granted, be granted pursuant to an application for court orders which is to be heard by a Judge in Chambers, subject of course though, to the Judge having discretion as to how that 'hearing' is to be conducted.

- [17] A Registrar of the Supreme Court cannot properly grant default judgment against the Crown, either pursuant to an application for the court orders, or a request for default judgment. If our rules of court had so intended, than it would have been so provided for, in **rule 12.3 (1) of the C.P.R.**, as it has been, in respect of requests for default judgment filed pursuant to either **rule 12.4, or rule 12.5**. The Registrar therefore, ought to have made an order denying the claimants' request for default judgment. This court will direct the Registrar to act accordingly.

The nature of the claimants' claim and particulars of claim

- [18] The claimants have framed their claim form, in a somewhat similar manner, to that which would have been expected in respect of a party's particulars of claim. In view of the fact though, that the claimants have filed a separate document intituled as 'particulars of claim,' it would have been unnecessary for the claimants to have set out in as much detail as they did, in their claim form, their particulars of claim. In fairness to the claimants though, it must be made known that their particulars of claim is far lengthier than their claim form. Their particulars of claim is in excess of 125 paragraphs in length, whereas their claim form, is 20 paragraphs in length.

- [19] The claimants have, in their claim form, claimed for damages for defamation – slander and libel and '*character assassination*' – which can, for the purposes of these reasons, be subsumed under the claim for damages for defamation. They

have also claimed for damages for, '*fraudulent and illegal misrepresentation*' and for, '*illegal interference for both business and personal activities.*'

- [20] Interestingly, the claimants' particulars of claim, has set out therein, claims for damages founded on other causes of action then were referred to, in the claimants' claim form, such as: '*damages for the violation of the claimants' principal, joint venture partners and staff's civil rights*' and '*a declaration by the defendants that the claimant is not a dealer of securities as contemplated by the Securities Act*' and damages for loss of future business prospect of JA\$ equivalent converted to and payable in to US\$14.6 billion.
- [21] It is undoubtedly a procedural error, to refer in one's particulars of claim, to claims being made against a defendant, which were not at all referred to, in one's claim form. The primary objective underlying the need for particulars of claim, is to set out therein, a statement of all the facts on which the claimant relies. See: **Rule 8.9 (1) of the C.P.R** in that regard. On the other hand, the primary objective underlying the need for a claim form, is to make clear to all who may thereafter be privy to that document, the identities of the parties to that claim and to set out therein, a short description of the nature of the claim and any remedy which the claimant is seeking. See: **Rule 8.7 (1) of the C.P.R** in that regard. Whilst, in certain circumstances, such as, for instance, wherein, there has been included within the claim form, all of the particulars required **by rules 8.6 to 8.10 of the C.P.R**, particulars of claim, need not be filed and served, that procedure is, in practice, utilized extremely rarely. See: **Rule 8.1 (1) (a) and (b) of the C.P.R** in that regard. Accordingly, the claim form and particulars of claim are to be formulated in a manner designed to achieve the requisite purposes.
- [22] Since the claimants are not legally represented, it is unsurprising that their claim form and particulars of claim, in respect to the setting out of the claims, are not quite in agreement with each other. That though is a procedural error, which can easily be rectified by this court, even if necessary, by this court acting on its own motion. See: **Rules 26.9 and 26.2 of the C.P.R**. That can be done at a case

management conference, if possible and necessary. For the time being though, these reasons for ruling, will address all of the claims and reliefs as sought by the claimants, in both their claim form and their particulars of claim.

Defendants' application for court orders which was filed on July 21, 2014

[23] The defendants have applied, by means of their application for court orders which was filed on July 21, 2014, to strike out the entire claim, or alternatively, the claim against the 1st defendant, unless the claimants file and serve an amended claim form and amended particulars of claim, within 14 days of the date of the court's order, the claim against the 1st defendant should stand as struck out. The defendants are also seeking, by means of that application, the costs of same and any other order which this court may deem fit.

[24] The defendants have, in their said application, set out numerous grounds for same, in fact, 17 in total. It will not be necessary for the purposes of these reasons, to recite each of those grounds at this juncture, or perhaps, any at all. Those that need to be referred to, will be summarized and referred to, herein, using sub-headings, as set out, commencing immediately hereafter.

The claim for character assassination is not known to law

[25] Suffice it to state, that this contention has already been addressed, in sufficient detail, earlier in these reasons, in that this court has simply stated that it can be addressed as being subsumed under the claim for damages for defamation.

The claim for defamation is statute-barred

[26] The defendants have contended that the claim for damages for defamation, is statute-barred, since same was not filed within six (6) years of the date(s) when such defamation allegedly took place. Under the **Limitation Act** which is applicable to Jamaica at present and which is in fact, the **English Limitation Act**, 1623, the limitation period for claims in tort, is six (6) years for the date when the tort was committed. Defamation is legally classified as a tort.

[27] Suffice it to state, in response to the defendants' contention that the defamation claim is statute-barred and should accordingly, be struck out, that said contention is misguided and cannot properly be pursued by either of the defendants at this time, since the defendants have neither collectively, nor separately, as yet filed a defence or defences. Additionally, the defendants have not filed any application pursuant to **rule 9.6 of the C.P.R.**, disputing this court's jurisdiction to try the claimants' defamation claim.

[28] A claim can be struck out if it is statute-barred. Such a claim, if being pursued and a defence to it, has been filed, in which it had been contended by the defendant, that the claim is statute-barred, can be struck out on the ground that the said claim constitutes an abuse of process. A limitation defence though, is legally categorized as a procedural defence and can only apply in a circumstance wherein the defendant has distinctly raised same in his/her, or its defence. That is so because, the existence of a limitation defence, does not prevent there being a cause of action. See: **Ronex Properties v John Laing Construction Ltd.** – [1983] QB 398 at pp 404 A-405 B and **Toussant Tucker and Inez Bogues** – Claim No. 2012 HCV 02698. In addition, it is always open to a defendant, to waive a procedural defence.

[29] In the case at hand, since none of the defendants have filed a defence, it follows that the defendants have acted prematurely in seeking to strike out the claim, on the basis that the same is statute-barred. On that basis, said application cannot and will not be granted by this court, on the ground that this claim, or any part of it, is statute-barred.

Various paragraphs of the claimants' particulars of claim are prolix

[30] The defendants have contended, in their application to strike out this claim, that various paragraphs of the claimants' very lengthy particulars of claim are, 'prolix.' The term 'prolix' as defined in the **Concise Oxford English Dictionary Revised tenth (10th) edition**, defines the quoted word ('prolix') as an adjective used to

describe speech or writing as being – tediously lengthy. The definition of the word ‘prolix’ is – ‘tediously lengthy.’

[31] Rule 26.3 (1) (d) of the C.P.R provides that:

‘In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court – (d) ‘that the statement of case or part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10’.

[32] The defendants are contending that several paragraphs are prolix, in that they are either not a concise statement of the facts on which the claimants rely and/or contain material that is irrelevant, or relate to legal submissions and/or legal opinion.

[33] Those paragraphs that are being so challenged are the following: 6-8, 10-26, 29, 32-34, 37-39, 42-44, 46-48, 50, 53, 58-70, 73, 75, 80, 84, 89-98, 108-111, 113-115, 117-118, 122 and 124.

[34] In addition as the claimants have chosen to and actually published as part and parcel of their particulars of claim, an extract of the case: **Edward Seaga v Leslie Harper** – Privy Council Appeal No. 90 of 2006, the claimants are also contending that the said extracts are prolix, in so far as same constitutes a submission on the law and/or legal opinion.

[35] This court has carefully considered these submissions as to alleged prolixity of numerous paragraphs and/or aspects of the claimants’ particulars of claim. For the sake of brevity, this court will not recite the wording of any of the paragraphs which the defendants wish to have this court strike out, on that basis.

[36] Suffice it to state, at this juncture, as a matter of law that as per **rule 8.9 (1) – (3) of the C.P.R** – (1) *‘The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.’* (2) *‘Such statement must be as short as practicable.* (3) *‘The claim form or the*

particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.'

- [37] The claimants have appended to their particulars of claim, what appears to be an extract from a Judgment of the Privy Council, in the case: **Edward Seaga and Leslie Harper** – Privy Council Appeal No. 90 of 2006. The appeal in that case, addressed the law *vis-a-vis* qualified privilege, in respect of a defamation claim.
- [38] No doubt, the claimants consider that judgment extract to be necessary to their case/claim. It is undoubtedly unusual, to append to one's particulars of claim, any judgment extract, or reported judgment being relied upon. The rule of court though, **rule 8.9 (3) of the C.P.R** does permit that to be done. This is a claim for various reliefs, based on various alleged torts, one of which is: Defamation. In the circumstances, this court will not strike out that aspect of the particulars of claim.
- [39] It is correct to state that the particulars of claim has set out propositions of law made by someone who is, admittedly, not an attorney-at-law, namely, the 2nd claimant.
- [40] The particulars of claim should set out matters of fact, as distinct from propositions of law. Paragraphs 8, 15, 17, 20, 26, 34, 43, 44, 89 and 90 of the claimants' particulars of claim, undoubtedly offend against the rules of court in that regard and will therefore be struck out.
- [41] In paragraph 117 of the particulars of claim, the claimants have alleged that the defendants have made certain statements in respect of them, maliciously. That allegation pertains to the claim for relief arising from alleged defamation. Equally, in paragraph 104 of the claimants' particulars of claim, malice has also there been alleged, in the same context. Also, in paragraph 124 of the claimants' particulars of claim, it has been alleged that the defendants are engaged in a campaign of malicious behavior, against, 'the claimant.'

[42] It is important for claimants and their counsel (if any) to recognize and appreciate the importance of providing particulars of malice, in all circumstances wherein malice is being alleged. That is important because, 'malice' can arise from a wide variety and indeed, sometimes, even a combination of, circumstances. As such, the setting out of particulars of malice is necessary, so as to properly enable the defendant, or defendants (as the case may be), to properly be able to respond to same and also, to assist the parties themselves and also, the court, in properly preparing for and conducting and facilitating the efficient conduct of the trial.

[43] The claimants have, in their particulars of claim, provided the requisite particulars of malice, pursuant to **rule 69.2 (c) of the C.P.R.**, which requires that the particulars of claim in a defamation claim must, in circumstances wherein the claimant alleges that the defendant maliciously published the words or matters, give particulars in support of the allegation.

[44] Paragraphs 10, 21 24 and the portions of paragraph 33, after the words – '**tax certificates,**' the portion of paragraph 38, after the word and symbols – '**exhibit No. 3**' and paragraphs 39, 42, 63, 84, 96-98, 110-111, are prolix and not in reality, setting out a short statement, 'of facts,' on which the claimants are relying. Those paragraphs and portions of paragraphs 33 and 38, will be struck out. The other paragraphs which the defendants have applied to have struck out, will remain in place. Those other paragraphs are not prolix, and thus, the defendants' contentions as regards those other paragraphs are unmeritorious.

The defendants' contention that two (2) of the claims being made, are claims unknown to the law

[45] The defendants are contending that, in particular, two (2) other claims being made, as part and parcel of Claim No. 2013 HCV 04167, are claims which are unknown to the law. This court has also addressed its mind to the claim for reliefs based on, 'character assassination' and therefore, will not again address it. What will now be dealt with, is the defendants' contention, that the claim for

illegal interference with both business and personal activities is not known to law and that the claim for illegal misrepresentation is not known to law.

- [46] Whilst inelegant and/or imprecise drafting of one's statement of case, is generally, neither encouraged by this court, nor acceptable, this does not mean that an improperly named nature of claim, should be struck out. The important and over-arching consideration of this court, in deciding on an application to strike out parts of or an entire statement of case, is the overall interests of justice. A party's claim form is part and parcel of that party's statement of case. In that regard, see the definition of the phrase – '*statement of case*' as set out in **rule 2.4 of the C.P.R.** There is no doubt though, that where a party's statement of case does not raise a valid claim or defence, as a matter of law, the striking out of that statement of case, will be appropriate. See: **Price Meats Ltd. v Barclays Bank Plc.** – [2000] 2 All ER (Comm) 346.
- [47] The claim form should, amongst other things, include a short description of the nature of the claim and also, specify any remedy that the claimant seeks. See: **Rule 8.7 (1) of the C.P.R.**, in that regard.
- [48] If a claim is made, which is unknown to the law, then clearly, that must be a claim which is invalid, unless it is intended to seek a declaration that such claim ought to be recognized by the law. That is, after all, how it is that the common law had developed through the ages, which is, by having been made by Judges. In this Claim No. 2013 HCV 04167, no such declaratory relief is being sought by the claimants.
- [49] It follows therefore, that if claims are being made herein, which are unknown to the law, then all details provided, either in the particulars of claim, or in the claim form itself, whether it be only as to the nature of that claim, or, further details pertaining to that claim, must all be struck out, pursuant to the provisions of **rule 26.3 (1) (c) of the C.P.R.**, which, to summarize, provides that a statement of case or part of a statement of case may be struck out by this court, if that statement of

case, or part to be struck out, discloses no reasonable ground for bringing, or defending a claim.

[50] There can never exist a reasonable ground for bringing a claim before this court, which is unknown to the law, unless it is the case, that pursuant to that claim, a declaratory statement as to that claim being one which the law will and does recognize, is being sought as the sole relief. That is not what the claimants have done, in pursuing in this overall claim, claims for: Illegal misrepresentation and illegal interference with both business and personal activities.

[51] It is indeed correct to state that claims so named, do not constitute, as per those names, claims known to the law in Jamaica. It ought not to be forgotten though, that the claimants are not, for the purposes of this claim, being represented by an attorney-at-law. As such, one should not expect that, for the purposes of their formulation of this claim form and particulars of claim, the claimants would have formulated same in the manner that would have been expected of an attorney-at-law.

[52] Misrepresentation is deemed by the law at present, to be illegal, such that a court can grant reliefs to someone who has been subjected to it, in appropriate circumstances, provided that it is duly proven, as having been committed either negligently or fraudulently. 'Illegal misrepresentation' is therefore a tort, albeit that, for legal purposes, it is typically termed as either, 'negligent misrepresentation,' or 'fraudulent misrepresentation.'

[53] Since a defendant needs to know the case to be met, it is required that the claimants be precise as to the nature of the alleged, 'illegal misrepresentation.' The claimants must, if they allege negligent or fraudulent misrepresentation, provide either particulars of the negligent misrepresentation and/or particulars of the fraudulent misrepresentation. If ordered to do so and the claimants fail to do so, then the part of the claimant's statement of case, which pertain to the claim for, 'illegal misrepresentation,' must then stand as struck out as a matter of

course and thus, without the need for any further court action to be taken by the defendants, in respect thereof.

[54] 'Illegal interference with business and personal interests,' although not precisely so termed in common legal parlance, is nonetheless, a, 'tort,' or in other words, a wrong, which the law recognizes and in respect of which, the law will provide, via the courts, compensation for. The correct name of the tort is: '*Unlawful interference with economic and other interests.*' In the case – **OBG Ltd. v Allan** [2008] 1 A.C. 1, the **House of Lords in England**, confirmed the existence of that tort. That **House of Lords** case is highly persuasive authority for Jamaica and in any event, that tort is one which has been recognized in Jamaica. See: **Akbar Ltd. v Citibank** – [2014] JMCA Civ. 43.

[55] The essence of the tort is deliberate interference with the claimant's interests by unlawful means and the intention to injure must be a contributing cause of the claimant's loss. That aspect of the claimants' overall claim, will therefore, not be struck out.

The claim for constitutional relief

[56] The claimants have, by means of their particulars of claim, sought damages, 'for the violation of the claimants principal, joint venture partners and staff's civil rights in particular,

'1. The right to privacy.

2. The right to peaceful assembly.

3. The right to become members of any association for the protection of its interest (freedom of choice).

4. The right of conscience.

5. Equal treatment under the law in specific regard to discrimination, not to be discriminated against by the state, state agency, by an individual, or by any individual whether private or public entities.'

- [57] The claimants did not though, in their claim form, seek any relief for anyone, with respect to alleged violations of constitutional rights. In that context, it was inappropriate for the claimants to have set out particulars of a claim for breaches of constitutional rights. That was inappropriate, because, in the first instance, that claim should have been made in the claimants' claim form. That though, is nothing more than a relatively minor procedural error, in respect of which, this court can make orders, pursuant to **rule 26.9 (3) of the C.P.R**, to, '*put matters right.*'
- [58] Within the body of the several grounds advanced by the defendants, in support of their present application, this court was only able to discern that there were two (2) grounds advanced by the defendants in support of their application to strike out the claimants' claim for constitutional redress, arising from the alleged violation by the defendants of the claimants' constitutional rights.
- [59] One of those grounds is that the claimants' statement of case discloses no reasonable grounds for bringing a claim. Since the claim has been brought against the defendants, for all reliefs, inclusive of the claim for constitutional redress/reliefs, it follows inexorably that it is the defendants' contention that the claimants' statement of case has disclosed no reasonable grounds for bringing a claim against either of the defendants for constitutional redress/reliefs.
- [60] Jamaica's rules of court provide via **rule 26.3 (1) (c) of the C.P.R**, that this court may strike out a statement of case, or part of it, if it appears to the court, '*that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim.*'
- [61] The claimants' statement of case has disclosed no basis whatsoever, upon which the claimants would, in law, be able to pursue a claim in which they are the only claimants, as against the defendants, for violation of the constitutional rights, either of their, 'joint venture partners, or their, 'staff's civil rights.' A claim to be made on behalf of either or all of those other parties, either would have had to be

made in person by them, or at the very least, by a party who has been duly authorized to act on their behalf, for that purpose.

- [62] The claimants' statement of case has not disclosed that the claimants are entitled to pursue a claim for breaches of constitutional rights, on behalf of either their joint venture partners, or, members of the 1st claimant's staff. In the circumstances, the claimants' statement of case has disclosed no reasonable grounds for bringing a claim for redress/reliefs, in respect of alleged breaches of constitutional rights that occurred in relation to the claimants' staff members, or their joint venture partners.
- [63] As a matter of law, the 1st claimant is a separate legal entity from either its shareholders, or its staff members, or its principal, or its joint venture partners. That is so because, by law, a limited company is a separate legal entity with limited liability. See: **Salomon v Salomon** – [1896] UKHL1.
- [64] It must be recalled at this stage though, that the 2nd claimant is the principal of 1st claimant and he is pursuing the claim for constitutional redress/reliefs, on his own behalf, also.
- [65] The next question therefore, which this court must ask itself, and then proceed to answer is: Has the 2nd claimant's statement of case disclosed reasonable grounds for bringing a claim for constitutional redress/reliefs as against all of, or either of the defendants? The simple answer to this question is, 'No.'
- [66] That is so because, all of the specific matters in respect of which the 2nd claimant has founded his claim for constitutional relief/redress, are all matters in respect of which, he can and should properly seek redress, via the law of tort, as he has in fact done. Alternatively, he could and should have sought redress by means of judicial review.
- [67] The Court of Appeal of Jamaica, has, on more than one occasion, in various cases, concluded that even though there appears to have been a breach or

breaches by Crown servants and/or agents, of the provisions of the Jamaican constitution which safeguard persons' fundamental human rights, nonetheless, applications for constitutional redress are to be refused, on the ground that adequate means of redress were available to the applicants/appellants, under other law. See for instance, **Director of Public Prosecutions (D.P.P) for Jamaica v Fuertado** – [1979] 30 W.I.R 206.

[68] That is an approach which has also been adopted by the Privy Council – Jamaica's highest court. Thus, Lord Diplock, in delivering the opinion of their Lordships' Board in **Kemrajh Harrikissoon v Attorney General** – [1979] 31 W.I.R 348, at 349, said: *'The right to apply to the High Court under S.6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for invoking judicial control of administrative action.'* See also: **The Charter of Fundamental Rights and Freedom (Constitutional Amendment) Act 2011, at S.19 (4).'**

[69] That therefore being this court's conclusion as regards the claimant's claim for constitutional redress/relief, it is unnecessary to address in any detail, the defence's additional submission, that the claimant's claim for constitutional redress ought to be struck out, on the ground that such a claim cannot be and ought not to have been pursued by means of claim form proceedings, as that would not be in compliance with **rules 55.9 (1) (a) and 56.9 (2) of the C.P.R.**

Statement of case – reasonable grounds for bringing the claim – alleged interference with the business and personal activities of the 2nd claimant

[70] The defendants are contending, in one of their grounds as filed in support of their application to strike out the claimant's claim, that since the 1st claimant is a separate and distinct legal personality, as a company, from the 2nd defendant, the particulars of claim needed to have set out as allegations, circumstances constituting the defendants having interfered with the business or personal

activities of the 2nd claimant. It is the defendants' contention, that the claimants' statement of case has made no such allegation which would or could be applicable in respect of the 2nd claimant.

[71] To put it as simply as possible, this court disagrees with that contention. Accordingly, the 2nd claimant's claim for damages for interference with his business and personal activities, will not be struck out, on that basis.

Whether some of the reliefs sought by the claimant are known to the law in respect of causes of action pleaded

[72] The defendants have alleged, in their grounds for their application to strike out the claimants' statement of case, that some of the reliefs sought by the claimants are unknown to the law, in respect of the causes of action pleaded.

[73] The reliefs sought by the claimants are set out and designated as 5 (a) – (o), respectively. The defendants have specifically sought to strike out the reliefs set out and designated as 5 (f), (k), (l), (m), (n) and (o). Surprisingly, the defendants did not seek, on the same basis, to strike out reliefs designated as 5 (i) and (j).

[74] This court accepts the defence's submission that the remedies sought as 5 (k) – (o) must be struck out, as those are not remedies which this court can properly award to the claimants, even if all of their claims were determined, after trial in this court, as having been duly proven.

[75] Since no application was made to strike 5 (i) and (j), this court will not act on its own motion and seek to strike out same. If an appropriate application is later made to this court, in the event that this entire claim is not struck out as the defendants desire, then it will be open to this court, should that application request for those particular reliefs to be struck out, to decide said application on its merits. No consideration has been given by this court, for the purposes of these reasons, as to whether same should be struck out.

[76] The claimants have also sought by means of this claim, declaratory relief. They are seeking – (f) ‘A declaration by the defendants that the claimant is not a dealer of securities as contemplated by the Securities Act.’ This court is unable to grant any such relief. Whilst this court can grant declaratory relief, by making its own declaration on matters of law, it is not properly open to this court to force a defendant to make a declaration concerning an issue of law.

Whether the claim should be struck out because sufficient particulars surrounding the defamation claim have not been set out in the claimants’ statement of case

[77] Grounds 14, 15 and 16 of the defendants’ application for court orders, in summary, are each contending, that in respect of paragraphs 112 (ground 14) and 121 (ground 15) and 77, 83 and 87 (ground 16), sufficient particulars have not been provided and therefore, those paragraphs should be struck out. In the alternative though, the defendant have applied for an unless order, requiring the claimants to provide the requisite further and better particulars within 14 days of this court’s order on their application, failing which, the claimants’ claim shall stand as struck out.

[78] This court will not in any event, strike out the allegedly defective paragraphs of the claimants’ statement of case, arising from the alleged shortage of particulars in those paragraphs. Equally, this court will not make an unless order, in respect thereof, since the claimants do not have a history, either of non-compliance with rules of court, or court orders. What this court would instead do, if sufficient particulars have not been provided in respect of those paragraphs is make the appropriate order for the requisite particulars to be provided by within a certain time-frame.

[79] Suffice it to state though, in response to grounds 14, 15 and 16 of the defendants’ application for court orders that it is this court’s considered view that the claimants need not further particularize paragraph 112 of their particulars of claim, since it has been alleged by the claimants in that paragraph, that the

defendants published, 'subsequent' and 'current ads,' which are/were, essentially, defamatory of them. If those 'ads' or advertisements were published at all, by the defendants, then surely, they would be aware of same. That would be equally true, as regards their awareness, if they did not publish those advertisements. As such, the defendants do not need to know the date or dates of publication, in order to be able to properly respond to paragraph 112 of the particulars of claim.

- [80]** The same reasoning would apply in respect of the failure of the claimants to specify, in relation to paragraph 121 of their particulars of claim, either the content of the alleged 'public presentations in the United States' by the 3rd defendant, or the date or dates, when such presentations were allegedly made.
- [81]** Paragraphs 77 and 83 of the claimants' particulars of claim refer to letters which were purportedly transmitted by the claimants' attorneys, to the 1st defendant or prepared by the 1st defendant. For the same reasons, it follows that no further particulars need be provided in respect of those letters.
- [82]** All of those documents referred to in paragraphs 77 and 83 of the claimants' particulars of claim will, it should be noted, if this application is unsuccessful and this matter proceeds to a case management conference, in all likelihood, subsequently have to be disclosed by the claimants, failing which, their statement of case may be struck out.
- [83]** As regards paragraph 87 of the claimant's particulars of claim, it has been noted by this court and referred to by the defendants in ground 16 of their application to strike out, that, 'the claimant issued its own public advisory in the Gleaner newspaper.' That averment can be responded to, without the need for any further particulars thereof, to be provided to the defendants by the claimants. The defendants can simply make no admission to same if the alleged publication of that public advisory, is not within their knowledge.

Whether the 2nd and 3rd defendants are immune from liability

- [84] The 2nd and 3rd defendants are contending as part and parcel of their application to strike out, that as the 2nd and 3rd defendant were at all material times, the Executive Director and Deputy Executive Director of the 1st defendant, they are immune from liability, pursuant to the provisions of Section 22 of the **Financial Services Commission Act, 2001**.
- [85] Section 22 of that Act, reads as follows – *‘No liability is incurred by the Commission or any person specified in section 15 (1) as a result of anything done by him bona fide in the exercise of any power, or the performance of any function or duty, conferred or imposed by or under this Act.’*
- [86] The only person specified in Section 15 (1) of that Act, is, *‘every person having an official duty or being employed in the administration of this Act...’*
- [87] The claimant’s particulars of claim has alleged that the Financial Securities Commission came into existence on August 2, 2001, *‘by virtue of the Financial Services Commission Act and is a government agency which supervises and regulates certain and not all securities but with direct jurisdiction over the regulated securities, insurance and private pensions industries.’*
- [88] The particulars of claim has alleged that the 2nd defendant was the former executive director of the 1st defendant and that the 3rd defendant was, at material times, the Deputy Executive Director and authorized servant/agent of the **Financial Services Commission**.
- [89] There is no doubt that this claim concerns alleged unlawful action taken by the defendants, in relation to the claimants. The claimants have not averred that in carrying out such allegedly unlawful action, the defendants were acting *bone fide*, in exercise of their functions and/or duties, conferred or imposed by or under the **Financial Services Commission Act**.

- [90] Since the defendants have not filed a defence, they have not yet put forward any court document, in defence of the claim, this as distinct from the court documents pertaining to their application to strike out the claim. They have, in direct response to the claim filed against them, responded by filing and serving an acknowledgment of service.
- [91] Accordingly, it is not now properly open to this court, to conclude that what the claimants have alleged as constituting the unlawful action taken by the defendants in relation to them, was carried out by the 1st and 2nd defendants *bona fide* in pursuit of the carrying out of their functions under the **Financial Services Commission Act**. That issue may properly arise, upon an application for summary judgment, once the defendants have filed their defence. For the purpose of such an application, this court will properly be able to assess whether or not the claimant's statement of case has any realistic prospect of success at trial.
- [92] For the purpose of the defendants' application to strike out though, what this court has to carefully consider is whether the claimants' statement of case discloses reasonable grounds for bringing the claim.
- [93] The immunity issue therefore, does not properly arise for consideration on the claimants' statement of case, because the essence of the claimants' statement of case is that the defendants were acting outside of the ambit of their functions under the **Financial Services Commission Act**, and not acting *bona fide* in carrying out their functions under the **Financial Services Commission Act**, when they carried out certain actions in relation to the claimants, which the claimants have alleged, in their claim, are unlawful.
- [94] For the distinction between what should be the approach of a court in Jamaica, when faced with an application for summary judgment as against an application to strike out on the ground that the claimant's statement of case discloses no

reasonable ground for bringing a claim, see: **Gordon Stewart and John Issa** – Supr. Ct. Civil Appeal No. 16/2009, esp. at (130 and (14).

[95] Since the immunity issue does not arise from within the claimants' statement of case, the claimant's claim cannot be struck out based on same, as it is not the case, that the claimant's statement of case discloses no reasonable ground for bringing the claim, since the defendants are immune from liability.

[96] Interestingly enough, the application to strike out the claim, as has been filed by the defendants, having contended that the claim should be struck out against the 1st and 2nd defendants, because they are immune from liability, pursuant to the provisions of **section 22 of the Financial Services Commission Act**, did not equally so contend on behalf of the 3rd defendant. This court would only wish to remark at this stage, that that approach was rather surprising, since surely, the claimants' statement of case has alleged inferentially, that the 3rd defendant purported to be carrying out functions mandated by the **Financial Services Commission Act**, in having taken certain action in relation to the claimants. It matters not at this stage though, for the purpose of the defendants' application to strike out, since the immunity ground of that application, has been determined as being unmeritorious.

Failure to provide particulars required as regards alleged defamation, publications, public presentations in the United States and letters and/or public advisory

[97] **The C.P.R, at rule 69.2** states that, in a defamation claim, the particulars of claim must, in addition to matters set out in Part 8, give sufficient particulars of the publications in respect of which the claim is brought, to enable them to be identified.

[98] The defendants have alleged that no, or at least, no sufficient particulars have been provided by the claimants, in their statement of case, in respect of the

various types of alleged publications of the defendant, as referred to, in paragraphs 77, 83, 87, 112 and 121 of the claimant's particulars of claim.

- [99] That contention of the defendants is entirely misplaced. None of those paragraphs refer to any types of publications which have not been particularized, save and except that paragraph 87 refers to a public advisory issued by the claimants. That paragraph though, can readily be responded to by the defendants, if they have no knowledge of any such public advisory having been issued. If the defendants wish, it may be open to them to request information from the claimants as to when that public advisory, as referred to in that paragraph of the claimants' particulars of claim, was issued. There may very well, ensue for the claimants, seriously adverse consequences for their statement of case, if they refuse to provide that information. **Part 34 of the C.P.R** addresses that issue fulsomely.
- [100] This court will not strike out the claimants' claim, because the claimants have not provided information as to when it was that they published the public advisory which they have, referred to in paragraph 87 of the particulars of claim. Equally, this court will not require that such information be provided, failing which, the claimants' statement of case will be struck out.
- [101] Those are the primary reliefs which the defendants are seeking by means of their application to strike out. Other orders could perhaps, have been applied for and may perhaps have been granted, but no application was specifically made for any other orders, other than an order for costs. A general application for – 'Any other order which this Honourable Court deems fit,' cannot serve that purpose, for if that were so, than an applicant could simply ask the court, in an application for court orders, for, 'any order that this honourable court deems fit.'
- [102] There must be specificity in that regard, since otherwise, **rule 11.13 of the C.P.R** will have no useful effect. That rule provides that – '*An applicant may not ask at*

any hearing for an order which was not sought in the application unless the court gives permission.'

Whether the claim form and particulars of claim contain any averments that indicate that defamatory words were used by the defendants in respect of the 2nd claimant

[103] The defendants have contended that the claimants' claim form and particulars of claim, do not contain any averments that indicate that defamatory words were used by the defendants in respect of the 2nd claimant. To put it simply, this court agrees with that submission.

[104] This court therefore, will now make the following orders in respect of this claim, following on this court having heard and determined the defendants' application for court orders which was filed on July 21, 2014. Prior to doing so though, it must be stated that this court is concerned that this claim may be in large measure, a regurgitation of a claim that was previously before this court namely, Claim No. 2010 HCV 05419, that being a claim which was struck out by this court. If that be the case and that is a matter upon which, at this time, this court is making no pronouncement, then it may very well be that this claim constitutes an abuse of process, solely on the basis that it is, in large measure, being proceeded with by the claimants, against the same defendants, once more.

[105] This court hopes that such is not the case, but is not yet convinced that that is not so. Since such has not been the subject of opposing contentions for the purposes of the defendants' present application for court orders, this court is not now making any pronouncement as to same. Sufficient unto the day, if that day, ever comes.

[106] One final note, which could have been mentioned earlier on in these reasons, but nonetheless, must be mentioned, is that there was affidavit evidence deponed to by the Solicitor General – Attorney Nicole Foster-Pusey, in support of the defendants' application. That affidavit was filed on July 21, 2014. This court has

read and considered that affidavit evidence, for the purposes of adjudicating on the defendants' application to strike out the claimants' claim, even though, other than in this paragraph of these reasons, no other mention has been made of same. Suffice it to state that it was not necessary to do so.

Orders

1. The Registrar of this court shall order that the claimants' request for default judgment, is denied.
2. Paragraphs 8, 15, 17, 20, 26, 34, 43, 44, 89 and 90 of the claimants' particulars of claim, are struck out, on the ground that said paragraphs set out legal contentions, rather than matters of fact.
3. Paragraphs 10, 21, 24, 39, 42, 63, 84, 96, 97, 98, 110 and 111 and the portion of paragraph 33, after the words - 'tax certificates' and the portion of paragraph 38, after the word and symbols - 'exhibit 3,' are prolix and are struck out, on that basis.
4. The claimant shall file, by or before December 9, 2016, an amended particulars of claim, specifying therein, particulars of the alleged illegal misrepresentation referred to in their particulars of claim which was filed on July 18, 2013 and in particular, the claimants shall specify whether their allegation is that the defendants committed fraudulent and/or negligent misrepresentation and must also provide particulars of the fraud and/or negligence underlying such alleged 'illegal misrepresentation.'
5. If the claimants shall fail to comply with Order No. 4 above, then the claimants' claim for reliefs founded upon, 'illegal misrepresentation,' shall stand as struck out, without the need for further court order.
6. The claimants' claim for constitutional redress/reliefs, is struck out, on the ground that the claimants have adequate, alternative means of redress and on the ground that said claim could only, in any event, have been pursued on the claimants' own behalf.
7. Under the heading -'AND THE CLAIMANT CLAIMS.' The reliefs sought by the claimants and designated as '5, (k), (l), (m), (n) and (o)' are struck out on the basis that those reliefs cannot properly be granted by this court, even if the claimants' claims are all duly proven.
8. In all other respects, the defendants' application for court orders which was filed on July 21, 2014, is denied.

9. The defendants are awarded 30% of the costs of their said application for court orders and such costs shall be limited to the costs related to one counsel and such costs shall be taxed, if not sooner agreed.
10. The defendants shall file and serve this order.

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Hon. K. Anderson, J.