



THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

MONTSERRAT

CLAIM NO. MNIHCV 2012/0036 (2012/33 and 2012/34 consolidated)

BETWEEN:

- (1) CLEO CASSELL
- (2) WARREN CASSELL
- (3) CASSELL & LEWIS

Claimants

AND

- (1) POLICE COMMISSIONER
- (2) JESSICA SWEENEY
- (3) TYRONE FENTON
- (4) ATTORNEY GENERAL
- (5) DIRECTOR OF PUBLIC PROSECUTIONS

Defendants

Appearances:

1st and 2nd Claimants in person
 Ms. Lovetta Silcott for the 3rd Claimant
 Mr. Fitzroy Buffonge assisted by Ms. Cedricia Shiell and Mr. Oris Sullivan - Acting Director of Public Prosecutions for the defendants

2016: May 13th 2015
 May 5th 2016

JUDGMENT

[1] **COMBIE MARTYR, J. (Ag.):** On February 16th 2012, the 2nd and 3rd named claimants were convicted in the High Court of two counts of conspiracy to defraud, nine counts of procuring a valuable security contrary to Section 225 (2) of the Penal Code and one count of Money Laundering, contrary to Section 118 (1) of the Proceeds of Crime Act 2010. The claimants were sentenced on February 23rd 2012 and the 2nd claimant was incarcerated at Her Majesty's Prison in Brades Montserrat.

- [2] The defendants state in their submissions filed May 20th 2015, that on the date of sentencing - the 23rd February 2012, an application for a Confiscation Order was made to the court by the prosecution, the hearing of which application was adjourned.
- [3] An application was made to a Judge of the High Court by the 2nd defendant a Detective Sergeant of the Royal Montserrat Police Service, for a Search and Seizure warrant which was issued by the court on the 9th March 2012, for the purpose of ascertaining the assets owned by the 2nd and 3rd claimants.
- [4] The warrant was executed on the premises of the claimants on the 12th March 2012 and certain items owned by the 2nd and 3rd claimants were seized to wit: (1) One Apple I Pad (2) one Nikon Camera (3) one external Hard Drive (4) one Apple Mac Book Pro Computer and (5) accessories. Additionally, in respect of law books, a list was taken.
- [5] On the 24th September 2012 at the hearing of the claimants' application for leave to file the Originating Motion for an Administrative Order, the items seized by the police were returned by the defendants to the claimants with consent of the parties, by order of the court.
- [6] By Fixed date claim filed on the 5th October 2012, the claimants sought redress for alleged contravention of their fundamental and other rights guaranteed under Section 9 and 17 and the false Imprisonment or unlawful detention of the 1st claimant under Section 6 of the Montserrat Constitution Order 2010. In support thereof, the affidavits of the 1st and 2nd claimants, Warren Cassell sole Director of the 3rd claimant and Warren Cassell Jr. filed on the 5th October 2012, 8th October 2012 and 10th March 2015.
- [7] In response, affidavits of the 1st, 2nd and 3rd defendants were filed on the 14th November 2012 and 31st March 2014.

Preliminary Issue with respect to the 5th defendant

- [8] At the trial, the claimants raised a preliminary issue regarding the failure of the 5th defendant to file an Acknowledgement of Service and/or a Defence. Mr. Warren Cassell submitted that the Acknowledgement of Service filed by the Chambers of the Attorney General on the 16th October 2012, affidavits in response and previous representation by Mr. Buffong were on behalf of the 1st to 4th defendants. Mr. Cassell stated further that as a consequence, the claimants are entitled to Judgment being entered against the 5th defendant.
- [9] In response, Mr. Buffong asserted that he as counsel for the Attorney General appears and represents the 5th defendant before this court. Counsel stated that the claim was never served on the 5th defendant or the office of the 5th

defendant. Counsel argued that in any event pursuant to the Crown Proceedings Act Cap 2.06 Revised Edition of the Laws of Montserrat, the Attorney General and not the 5th defendant is the proper party in this claim and that the affidavits were filed on behalf of the Attorney General and the defendants.

- [10] In the instant case as it relates specifically to the 5th defendant, the claimants seek 'a declaration that *the 5th defendant was negligent and/or reckless in advising the 1st to 3rd defendants or either of them, that they could proceed with the search*'. Whilst the Crown Proceedings Act may well be applicable as the allegation relates to the alleged tortious act of the 5th defendant for which the Declaration is sought, and in accordance with CPR 56.9 (2) a claim form seeking constitutional redress must be served on the Attorney General.
- [11] This does not however preclude other persons and in the case at bar, the Director of Public Prosecutions, from being joined as a defendant and on whom the Fixed date claim must be served in accordance with CPR 56.9 (1).
- [12] The court's attention is drawn to the mandatory provisions contained in *CPR 56.9 (2)* for service on the Attorney General and *CPR 56.9 (4)* which require the claimants to file an affidavit not less than seven days **before** the date fixed for the first hearing, setting out the names and addresses of all defendants served, with details of the dates and places of service, as well as a statement regarding any defendants not served and the reason for lack of service.
- [13] The court noted that the claimants themselves failed to comply with that provision and that the affidavit of service of the claim on the 5th defendant was only filed on the 13th May 2015, the date of trial, which probably led to the insistence by counsel for the defendants that the 5th defendant was not in fact served with the claim.
- [14] The claim before this court, an originating motion seeking constitutional redress and declaratory orders, made by way of a Fixed date claim, does not permit the entry of a judgment in default of acknowledgment of service or of defence against the 5th defendant.¹ At the Case Management Conference/Pre trial review on the 19th December 2014, the defendants' (**all five**, my emphasis) were represented by Ms. Sheree Jemmotte-Rodney, Counsel from the Attorney General's chambers.
- [15] Furthermore at that hearing, no attempt was made by the claimants or at any subsequent hearing before the trial, which should have been done, to raise that preliminary issue, nor was an application made for the court to treat any such hearing as a trial, if the claimants considered that the case against the 5th defendant was not defended and for the claim to be dealt with summarily in accordance with CPR 27.2 (3).

¹ CPR 12.2

