[2025] JMCA Civ 39

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2024CV00030

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**APPELLANT**
AND	**PETER JENNINGS**	**1ST RESPONDENT**
AND	**DETECTIVE CORPORAL KADIAN SMITH**	**2ND RESPONDENT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**3RD RESPONDENT**

Written submissions filed by Myers, Fletcher & Gordon for the appellant

Written submissions filed by Henlin Gibson Henlin for the 1st respondent

2nd and 3rd respondents not participating

19 December 2025

Civil law – Tort – Malicious prosecution – Claim for damages for malicious prosecution – Elements of the tort of malicious prosecution – The prosecutor in law for the purposes of a claim for malicious prosecution – Evidence required to determine who procured the prosecution of the claimant

Civil procedure – Application to strike out the claim – Pleadings in the statement of case – Purpose of pleadings – Deficiencies in pleadings – Abuse of the process of the court – No reasonable grounds for bringing the claim disclosed in statement of case – Principles to be considered in determining an application to strike out – Whether the pleadings establish the cause of action – Rule 26.3 of the Civil Procedure Rules

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MCDONALD-BISHOP P

[1] I have read the draft judgment of my sister V Harris JA. I agree with her reasoning and conclusion and have nothing further to add.

STRAW JA

[2] I, too, have read the draft judgment of my sister V Harris JA and agree with her reasoning and conclusion.

V HARRIS JA

[3] This is an appeal against the decision of Wolfe-Reece J ('the learned judge') made on 27 February 2024 in the Supreme Court, whereby she refused the application of the appellant, National Commercial Bank Jamaica Limited ('NCB'), to strike out a claim filed by the 1st respondent, Mr Peter Jennings.

Factual background

[4] Mr Jennings, who was employed by NCB from 1979 in various roles, became the manager of the NCB branch located at St James Street, Montego Bay, in the parish of Saint James, in 2011. At that time, branch managers had the discretion to approve credit facilities. However, in 2012, NCB centralised its credit assessment operations, effectively divesting managers of that authority. It was alleged that, notwithstanding, during the period from February to June 2012, Mr Jennings approved eight loan facilities totalling $82,000,000.00. NCB subsequently identified those loans as being "non-performing" or "delinquent".

[5] Later that year, in November 2012, NCB laid disciplinary charges against Mr Jennings for "acting contrary to NCB's policies, failing to conduct his duties with due diligence, negligence and engaging in behaviour that caused NCB to question his honesty

and integrity". After a disciplinary hearing, his employment was terminated on 19 November 2012, and his appeal against that decision was dismissed on 12 December 2012.

[6] Mr Jennings lodged a complaint with the then Minister of Labour and Social Security, asserting that his dismissal was unjustified. In June 2013, the dispute was referred to the Industrial Disputes Tribunal ('the IDT') for settlement.

[7] On 2 July 2013, Mr Jennings attended a question and answer interview with the 2nd respondent, Detective Corporal Kadian Smith of the Organised Crime Division ('Det Cpl Smith'). After the interview, he was arrested and charged with the offences of causing money to be paid out by forged documents and conspiracy to defraud. The allegation against him was that he, with intent to defraud, unlawfully caused NCB to pay out the sum of $82,000,000.00 contrary to section 10 of the Forgery Act.

[8] After numerous sittings between 30 April 2013 and 29 January 2015, the IDT found in favour of Mr Jennings on 6 May 2015. On 7 December 2016, Mr Jennings also succeeded in the criminal proceedings, as the charges preferred against him were dismissed on account of the prosecution offering no evidence.

[9] Aggrieved by the course of events that led to his arrest and charge, on 27 August 2020, Mr Jennings initiated proceedings in the court below, by way of claim form and particulars of claim, against NCB, Det Cpl Smith and the 3rd respondent, the Attorney General of Jamaica. He claimed that NCB's agents and/or servants and Det Cpl Smith "maliciously and without reasonable and/or probable cause instituted and pursued criminal proceedings" against him for fraud and conspiracy to defraud. He also claimed that Det Cpl Smith falsely imprisoned him in relation to those offences, which were subsequently dismissed in his favour. A consequence of those proceedings was that Mr Jennings was put to considerable expense, loss and damage, for which he is seeking damages.

[10] NCB acknowledged service of the claim form and particulars of claim on 31 August 2020, and then filed its defence on 21 October 2020. Approximately three months later, on 29 January 2021, NCB filed a notice of application for court orders to strike out the claim or, in the alternative, for summary judgment. The application, which was supported by an affidavit deponed by Mr Richard Hines, a manager of NCB's Fraud Prevention Unit, was made pursuant to rules 26.3(1)(b) and (c) and rule 15.2(a) of the Civil Procedure Rules, 2002 ('the CPR').

[11] The application came on for hearing on 25 January 2024 and, on 27 February 2024, the learned judge made the following orders:

> "1. The Court refuses the application to strike out [the] claim against [NCB];
>
> 2. The Cost [sic] of this application is awarded to [Mr Jennings] to be taxed, if not agreed;
>
> 3. Leave to appeal is granted;
>
> 4. The parties are to proceed to mediation which is to be completed on or before the **30th June 2024**;
>
> 5. The Case Management Conference is set for the **24th July 2024 at 11:00 a.m. for 1 hour**;
>
> 6. [Mr Jennings'] Attorneys-at-Law is [sic] to prepare, file and serve these orders." (Emphasis as in the original)

The appeal

[12] The notice and grounds of appeal, filed on 5 March 2024, set out the following grounds:

> "I. The learned judge below failed to properly apply the correct legal principles relative to an application to strike out a claim for malicious prosecution.
>
> II. The learned judge below was plainly wrong in finding that there were reasonable grounds for bringing the claim against [NCB]."

[13] NCB has asked this court to allow the appeal, set aside orders 1 and 2 and substitute therefor the following:

> "1. [Mr Jennings'] claim against [NCB] is struck out.
>
> 2. Costs of the claim are awarded to [NCB] to be taxed if not agreed."

Discussion

The standard of review

[14] The application sought to persuade the learned judge to strike out Mr Jennings' statement of case on the basis that it is an abuse of the court's process (pursuant to rule 26.3(1)(b) of the CPR), or alternatively, because it discloses no reasonable ground for bringing the claim (pursuant to rule 26.3(1)(c) of the CPR). The application for summary judgment was not pursued, more likely than not because, by virtue of rule 15.3(d)(ii) of the CPR, summary judgment is not available in proceedings for malicious prosecution.

[15] The appropriate standard to be applied in reviewing the decision of a judge on an application to strike out a claim for abuse of process is discussed in the case of **Aldi Stores Ltd v WSP Group plc and others** [2007] EWCA Civ 1260 ('**Aldi Stores**'). In that case, Thomas LJ stated that arriving at such a decision is not the exercise of a discretion, but rather, it involves an "assessment of a large number of factors" which can only result in one correct answer. This court, in adopting that principle in **Bengal Development Company Limited v Wendy A Lee et al** [2025] JMCA Civ 9 ('**Bengal Development**'), cited Longmore LJ's "profound observation" that:

> "38. … the question of abuse or no [sic] is not a matter of the court's discretion in the normal sense of the word. … It would be troubling if two different judges could come to different conclusions on whether the same facts constituted an abuse of process and yet both be right."

[16] That reasoning can also be applied to the decision as to whether the claim should be struck out for failing to disclose any reasonable ground, since it is a question of law. There can only be one correct conclusion: either the claim discloses a cause of action in

law, or it does not. This court will only interfere with the decision of the learned judge regarding an application of this nature where she has "taken into account immaterial factors, omitted to take account of material factors, erred in principle, or come to a conclusion that was impermissible or not open to him" (see para. [47] of **Bengal Development** and para. 16 of **Aldi Stores**).

[17] In the light of the foregoing principle and the submissions advanced by counsel for the parties, I am of the view that the issues raised can be resolved under the overarching question of whether, in the circumstances of this case, the learned judge erred in refusing to strike out the claim against NCB for malicious prosecution. This, in turn, depends upon the characterisation of NCB's alleged role as a prosecutor in the criminal proceedings and the purported deficiencies in the pleadings.

The learned judge's findings

[18] The learned judge delivered her decision orally, and no written reasons were provided. Counsel Mr Gavin Goffe, appearing for NCB, has, however, supplied his notes of the learned judge's reasons, referred to as "Counsel's note of Oral Judgment" (exhibited to the notice and grounds of appeal).

[19] According to those notes, the question for the learned judge's consideration was whether the pleadings disclosed reasonable grounds for bringing the claim for malicious prosecution against NCB. She directed her mind to the relevant authorities, such as **Martin v Watson** [1996] 1 AC 74 and **Warrick Lattibeaudiere v The Jamaica National Building Society Limited and Others** [2010] JMCA Civ 28 ('**Lattibeaudiere v JNBS**'). Having also considered the elements of the tort of malicious prosecution as well as the documents before her (namely, the claim form, particulars of claim, defence, and affidavits in support of the application), she determined that Mr Jennings' statement of case sufficiently particularised and grounded his claim.

[20] Additionally, she found that the issue of whether, on a balance of probabilities, NCB is the prosecutor for the purposes of the claim needed to be distilled at trial upon

review of the witness statements and evidence. In the final analysis, the learned judge decided that it was not a suitable case for her to strike out Mr Jennings' statement of case either in part or whole.

Submissions on behalf of NCB

[21] Mr Goffe submitted that Mr Jennings' statement of case disclosed no reasonable grounds for bringing the claim for malicious prosecution. We were directed to the case of **Mahon and another v Rahn and Others (No 2)** [2000] 4 All ER 41 ('**Mahon v Rahn**') in support of NCB's case.

[22] Counsel challenged NCB's involvement as a party to the claim on the basis that, in law, it could not be considered a prosecutor in relation to the charge of malicious prosecution. Citing **Martin v Watson** [1996] 1 AC 74, Mr Goffe accepted that where the police lay charges, the complainant can technically be considered the prosecutor in circumstances where the complainant falsely and maliciously gave the police information indicating that some person is guilty of a criminal offence, that information was only within the complainant's knowledge and it was virtually impossible for the police officer to exercise any independent judgment or discretion.

[23] Mr Goffe noted, however, that Mr Jennings' statement of case did not allege that the relevant facts that led to the prosecution were exclusively within the knowledge of the servant or agent of NCB, and as such, Det Cpl Smith could not exercise independent judgment or discretion. He argued that the statement of case needed to specify the facts supporting the finding that a servant or agent of NCB overrode Det Cpl Smith's will or manipulated the investigation to procure the prosecution. Counsel submitted that, conversely, the pleadings disclosed certain facts that supported the application to strike out, such as the question and answer interview conducted by Det Cpl Smith. Even if the learned judge accepted the facts as pleaded by Mr Jennings, it still would not establish that NCB was his prosecutor, counsel argued.

[24] Counsel relied on **Hunt v AB** [2009] EWCA Civ 1092 in submitting that where the pleadings refer to evidence that does not support the conclusion that NCB was the prosecutor, there is no need to wait for trial. The question as to "whether the prosecuting authorities were able to exercise independent judgment can often be determined without trespassing on other issues that may require a trial". **Daly v Independent Office for Police Conduct** [2023] EWHC 2236 (KB) ('**Daly v Independent Office**') was cited as a case where the claim for malicious prosecution was struck out on account of the pleadings alone.

[25] It was also contended that the learned judge erred in finding that the claim was sufficiently particularised. Counsel posited that the statement of case failed to identify the servants or agents of NCB who made the report, as well as the alleged "false" facts given to Det Cpl Smith. In circumstances where the claim for malicious prosecution was pursued against a company, Mr Goffe submitted, the individuals who made the report should have been identified in the pleadings or named as the defendants. Reliance was placed on **Lattibeaudiere v JNBS** and the Privy Council case of **Bank of New South Wales v Owston** [1874-80] All ER Rep 1092 in support of this proposition. He further observed that despite the disclosure in Mr Hines' affidavit of the identities of the NCB employees who provided the reports, Mr Jennings did not amend the particulars of claim.

[26] Furthermore, counsel asserted, no argument was advanced before the learned judge that any identified employees of NCB had made false reports in the course of, or closely connected with, their employment. This, Mr Goffe contended, was necessary to establish NCB's vicarious liability for the alleged malicious prosecution by its employees. It is, therefore, NCB's position that those deficiencies are fatal to the claim.

Submissions on behalf of Mr Jennings

[27] Miss Stephanie Williams advanced, on Mr Jennings' behalf, that the failure to identify the servant or agent for whom NCB is alleged to be vicariously liable is not fatal to the claim (citing **Lister and others v Hesley Hall Ltd** [2002] 1 AC 215). In any event, that irregularity can be cured by an amendment pursuant to rule 26.9 of the CPR

since the case management conference has not yet taken place, or it can be remedied during standard disclosure.

[28] Also relying on **Bank of New South Wales v Owston,** Miss Williams further submitted that whether NCB was a prosecutor in respect of the malicious prosecution charge is a question of mixed law and fact to be determined at trial. She, too, relied on **Lattibeaudiere v JNBS** to argue that, in the circumstances of this matter, it is possible for NCB to be a prosecutor. This line of enquiry, counsel stated, would have to take place after disclosure, witness statements, and the testing of relevant witnesses. Counsel submitted that, in accordance with **Hunt v AB**, whether the complaint to the police was made honestly, as well as the issues of malice and reasonable and probable cause, are questions of fact to be determined after receiving all the relevant evidence. The case of **Trevor Williamson v The Attorney General of Trinidad and Tobago** [2014] UKPC 29 was also cited in support of this submission.

[29] It was Mr Jennings' position, therefore, that NCB's application required an interlocutory assessment (which is inconsistent with the authorities), and at this point of the proceedings, there are substantial disputes of fact that could only be resolved at trial. Accordingly, the learned judge, having recognised that need, did not err in her finding that the case ought to proceed to trial.

Law and analysis

[30] The procedural basis for NCB's application to strike out Mr Jennings' claim is pursuant to rule 26.3(1)(b) and (c) of the CPR, which stipulates as follows:

> "26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
>
> (a) …
>
> (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; …"

[31] The court is, therefore, empowered to strike out a statement of case where it would further the overriding objective of dealing with cases justly. However, that power should be used sparingly, and the court must proceed with caution to ensure that prospective litigants are not unjustly deprived of the opportunity to have their viable causes heard and determined on their merits: **Gordon Stewart v John Issa** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 16/2009, judgment delivered 25 September 2009. It is generally accepted that if an application to strike out involves a prolonged and serious argument, it should be refused: **Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd** [1986] AC 368.

[32] The law recognises that striking out a party's statement of case is a draconian measure (see **Sally Ann Fulton v Chas E Ramson Limited** [2022] JMCA Civ 21 at para. [32] and **Biguzzi v Rank Leisure Plc** [1999] 1 WLR 1926). In **S & T Distributors Limited & Anor v CIBC Jamaica Limited & Anor** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 112/2004, judgment delivered 31 July 2007, Harris JA pronounced (at para. 29):

> "… A court when considering an application to strike out, is obliged to take into consideration the probable implications of striking out and balance them carefully against the principles as prescribed by the particular cause of action which is sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases."

See also **Drummond-Jackson v British Medical Association and Others** [1970] 1 WLR 688, 695.

[33] In determining whether it is plain and obvious that Mr Jennings' case should be struck out, I have considered NCB's contention that the statement of case constitutes an abuse of the process of the court or, alternatively, failed to disclose any reasonable grounds for bringing the claim. In support of this argument, NCB has objected to being

designated as a "prosecutor" for the purposes of establishing the malicious prosecution claim against it and has also identified purported deficiencies in the pleadings.

NCB's involvement as a prosecutor

[34] To ground his claim for malicious prosecution, Mr Jennings will have to prove that (i) the law was set in motion against him on a criminal charge; (ii) the prosecution of the criminal charge was determined in his favour; (iii) the prosecution was without reasonable and probable cause; (iv) the prosecution was motivated by malice; and (v) he suffered damages as a result of the prosecution (see the oft-cited House of Lords decision in **Martin v Watson**).

[35] Mr Jennings must also establish that NCB ought to be regarded as his prosecutor, though not necessarily the sole prosecutor; otherwise, the claim for malicious prosecution cannot stand against it (**Rees and Others v Commissioner of Police for the Metropolis** [2018] EWCA Civ 1587 and **Daly v Independent Office**). In determining who the prosecutor is, the court in **Lattibeaudiere v JNBS** held (at para. [12]):

> "…It is perfectly true that, in a case of malicious prosecution, liability may be imposed on a complainant who is a private citizen. However, such liability can only be ascribed to him where it is proved that he falsely made a report against a claimant or created a situation which he, fully knowing to be untrue, caused the claimant to be arrested and charged for an offence."

[36] The issue is, however, more complex, as it has been established in cases like **Martin v Watson**, **Mahon v Rahn**, and **Hunt v AB** that a person who makes a false accusation to the police with malicious intent will not automatically be treated as a "prosecutor" for a claim for malicious prosecution if the police independently decided to act on that information. Nonetheless, if the facts relating to the alleged offence are solely or predominantly within the complainant's knowledge, to the extent that the police could not exercise any independent discretion or judgment, the complainant may be held liable for malicious prosecution.

[37] It is worth citing the comprehensive exposition of this principle by Brooke LJ in **Martin v Watson** (pages 86G-87A):

> "… 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."

[38] This court in **Lattibeaudiere v JNBS** also considered whether the bank's employee initiated the prosecution of the appellant. The appellant was employed at JNBS when another employee reported him to the police, leading to his arrest and charge. Upon the charges against him being dismissed, the appellant filed a claim against JNBS for malicious prosecution. In its defence, JNBS denied that the reports were false, malicious or without reasonable and probable cause.

[39] Harris JA, following an examination of several authorities, including **Martin v Watson**, outlined the following principles:

> "[19] … Where a civilian gives information to the police which he honestly believes to be true and as a consequence, the police, employing their own independent discretion, initiate criminal proceedings, even if the information proves to be false, no liability can be attributed to the citizen. If however, he deliberately supplies the police with information which he knows to be untrue, then, liability as a prosecutor may be ascribed to him. He may also be said to be the prosecutor where he withholds information which if disclosed, the police would not have prosecuted; or where he suborns witnesses; or where, he, by some other dishonest means brings about the prosecution of a claimant. As shown, an essential feature of the tort is that the informant engaged in some act which rendered the prosecution of a claimant an unwarranted exercise.

> [20] Where a private citizen gives information to the police which results in charges being brought against a claimant, this does not in itself make the informer a prosecutor. But, if it is proven that he intentionally brought about the prosecution as a result of his own misdeed, then he cannot escape liability. In determining the question as to who was actively instrumental in commencing the prosecution, it is not sufficient to say that the law was set in motion by the police. Although it is true to say that all criminal offences are initiated and prosecuted by the police, this too is not enough. In assessing liability, the court is required to adopt a close analytical approach to the circumstances of each particular case. The cases show that in so doing, consideration should first be given to all the circumstances surrounding the issuing of the information to the police. Thereafter, the question for the court should be whether in all the circumstances of a particular case, the defendant ought properly to be regarded as being instrumental in setting the law in motion against the claimant. The conduct of a defendant must be such that it is shown to have influenced the police in their decision to prosecute. The test therefore is whether the defendant wrongfully set the law in motion by resorting to the use of the power of the Crown to cause damage to the claimant."

[40] It was held that there was no evidence that the circumstances which led to the arrest of the appellant were peculiarly within the knowledge of the employee who made the report, making it impossible for the police to have relied on her own judgment in preferring the charge. As observed by Miss Williams, that determination occurred after a trial when all the evidence was before the court. The evidence comprised a chronological account of the events leading up to the prosecution, enabling the court to properly determine the question before it.

[41] **Hunt v AB** is demonstrative of the principle that the answer to the question of who is the prosecutor is substantially contingent on the circumstances that led to the prosecution. The brief facts are that the complainant, a married woman, invited a work colleague into her home for a cup of tea. They had sexual intercourse. She confided in a colleague that it was not consensual. Eventually, it was reported to the police, not by her. The police approached the complainant and persuaded her to give evidence. The appellant was convicted of rape, and after serving two years, his conviction was

overturned. He had always asserted that the sexual intercourse was consensual, so he initiated proceedings against the complainant for malicious prosecution.

[42] The Court of Appeal of England and Wales upheld the trial judge's finding that AB had neither approached the police nor sought the prosecution of the appellant; therefore, she was not the prosecutor and could not be sued for malicious prosecution even though she was the key witness. The court also found that even if she had initially reported it to the police and made it clear that she wanted the appellant to be prosecuted, the independent intervention of the police (which included an interview under caution), and the Crown Prosecution Service would make the latter the prosecutor, unless there was also evidence that the prosecution was her doing.

[43] A differently constituted panel of that court distinguished the case of **The Ministry of Justice (sued as the Home Office) v Jason Samuel Scott** [2009] EWCA Civ 1215 ('**Home Office v Scott**') that it was considering, from **Hunt v AB**. The respondent in that matter was a serving prisoner who was prosecuted on charges of assault and affray arising from an incident with prison officers. He was subsequently acquitted on both charges, and he initiated a claim for damages against the Home Office for, among other things, malicious prosecution by the prison officers for whom the Home Office would have been vicariously liable. The Home Office applied to strike out Mr Scott's claim or, alternatively, for summary judgment on the basis that the prison officers were not, in law, the prosecutors in relation to the malicious prosecution claim.

[44] Pill LJ, delivering the court's decision, noted that **Hunt v AB** was ultimately decided on the finding that the complainant could not be regarded as the prosecutor, since she neither approached the police nor sought the appellant's prosecution. Whereas, in **Home Office v Scott**, it was not in dispute that the prison officer who reported the assault (supported by statements of the other officers involved) desired and intended the respondent's prosecution.

[45] Pill LJ further observed as follows:

> "32. I also agree with Moore-Bick LJ's statement at paragraph 77 of [**Hunt v AB**]:
>
> > '**However, cases vary and each case must be considered on its own facts. The question will always be whether the defendant actively procured the prosecution of the plaintiff**.'
>
> That involved, as Moore-Bick LJ stated at paragraph 69:
>
> > '. . . active steps of some kind to ensure that a prosecution ensues (what Richardson J in [**Commercial Union Assurance Co of NZ Ltd v Lamont** [1989] 3 NZLR 187] described as 'procuring the use of the power of the state').'
>
> It may involve 'deliberate manipulation', as contemplated by Sedley LJ at paragraph 47 in [**Hunt v AB**], or the decision of the [Criminal Prosecution Service] being 'overborne or perverted in some way by the complainant', as contemplated by Wall LJ at paragraph 59. But the circumstances in which it can be concluded that a complainant has procured a prosecution are not limited to these." (Emphasis supplied)

[46] The court upheld the refusal to grant the application but acknowledged the possibility of further arguments at trial regarding the prison officers' expectations of the Criminal Prosecution Service's investigation before deciding on the prosecution.

[47] The circumstances surrounding the present case suggest that NCB intended and desired Mr Jennings' prosecution. While, due to the inconsistencies in the material before the court (the pleadings and the application), I am uncertain of the exact date the report was made, NCB has pleaded that, on account of its suspicion, based on its internal investigations, it reported to the police that Mr Jennings had engaged in fraudulent conduct. Mr Hines averred (in his affidavit in support of the application) that the report was supported by fraudulent documents. Accordingly, it cannot be said, as it was in **Hunt v AB**, that NCB "neither approached the police nor sought the prosecution" of Mr Jennings. Nevertheless, such a finding will not, without more, make NCB the prosecutor.

[48] Consistent with the principles in **Martin v Watson,** the question that remains to be ascertained is whether NCB had procured the prosecution. The following excerpt (from **Home Office v Scott**) is instructive:

> "12. In *Commercial Union Assurance Co. of NZ Ltd v Lamont* … [which was applied in **Martin v Watson**], Richardson J, in the Court of Appeal of New Zealand, stated, at page 196: '**a defendant who has procured the institution of criminal proceedings by the police is regarded as responsible in law for the initiation of the prosecution . . . that requires close analysis of the particular circumstances**'. Richardson J added, at page 199:
>
> > 'It does not follow that there is any call for modifying the test which has been developed in the decisions of this court for determining whether a third party is responsible in an action for malicious prosecution for criminal proceedings instituted by the police. What is required is a cautious application of that test where the police have conducted an investigation and decided to prosecute. The core requirement is that the defendant actually procured the use of the power of the State to hurt the plaintiff. One should never assume that tainted evidence persuaded the police to prosecute. In some very special cases, however, the prosecutor may in practical terms have been obliged to act on apparently reliable and damning evidence supplied to the police. The onus properly rests on the plaintiff to establish that it was the false evidence tendered by a third party which led the police to prosecute before that party may be characterised as having procured the prosecution.' " (Emphasis supplied)

[49] The decisions in the referenced cases turned on their specific facts. Applying that guidance, the sequence of events culminating in the prosecution must not only be pleaded but also be substantially made out in the evidence at trial and, if necessary, subjected to cross-examination. In the present case, certain material facts essential to resolving this issue are entirely absent from the pleadings, particularly with regard to the extent of the respective roles played by NCB and Det Cpl Smith in the prosecution, which have not yet been disclosed.

[50] It is undisputed that a complaint concerning Mr Jennings in connection with his duties at NCB was lodged with the police. According to Mr Hines, on account of NCB's internal investigations, a report supported by fraudulent documents was made to the police, following which the police investigated and requested statements from the relevant employees. That initial "report" was not put before the court. Mr Hines, however, identified and exhibited the employees' statements, dated 12, 16 and 31 October 2012 (all prior to the internal hearing on 6 November 2012), as being the statements requested by the police. Beyond a general reference to the police's investigation, only a question and answer interview was expressly mentioned. It is, therefore, unclear whether the allegations against Mr Jennings were solely or predominantly within the knowledge of NCB or if Det Cpl Smith exercised independent discretion or judgment in proceeding with the prosecution. Considering that the relevant events occurred within the confines of NCB, questions arise concerning the sequence and conduct of the reporting, investigation, and subsequent prosecution.

[51] Bearing in mind the present record, I find that the extent of NCB's role, if any, in procuring the prosecution against Mr Jennings, is yet to be ventilated. Correspondingly, this court cannot, based on the bare assertions before it, conclude that NCB is not a prosecutor with respect to the claim for malicious prosecution. Therefore, as the learned judge correctly determined, the claim could not be struck out on this basis.

Deficiencies in the pleadings

[52] The position advanced by NCB is predicated upon Mr Jennings' duty to set out his case in accordance with rule 8.9 of the CPR. He was required to include a statement of all the facts on which he sought to rely (rule 8.9(1) of the CPR). That statement should be as short as practicable (rule 8.9(2) of the CPR). Moreover, he cannot, without the court's permission, rely on any allegation or factual argument that was not set out, but could have been, in the particulars of claim (rule 8.9A of the CPR).

[53] The purpose of the statement of case is to inform the other party of the case against him (see para. 38 of **Conticorp SA v The Central Bank of Ecuador & Others**

(The Bahamas) [2007] UKPC 40). If any element of the tort of malicious prosecution (set out at para. [34] above) is not clearly pleaded in the statement of case, it will be amenable to being struck out (**Bruce v Odhams Press Limited** [1936] 1 KB 697). Where the statement of case is found to be inadequate, the burden rests on the party seeking to rely on the allegation to amend or, if necessary, seek permission to amend (**Lombard North Central plc v Automobile World (UK) Ltd** [2010] EWCA Civ 20).

[54] As stated earlier, NCB has contended that the pleadings fail to specify the agent or servant who made the report which led to the prosecution, and further, that the pleadings do not set out with particularity how the prosecution was instituted without reasonable and probable cause or was actuated by malice. In evaluating the veracity of that complaint, I am mindful of Cooke JA's dictum in **Gordon Stewart v John Issa**:

> "14. … At this stage, the genesis of the proceedings, the consideration under Rule 26.3(1)(c) is whether or not the claim as pleaded satisfies the legal requirements for the prosecution of its alleged cause. A trial judge ought not to attempt to divine what will be the outcome of a properly filed claim. …"

[55] When assessing an application to strike out a claim, only the pleadings must be examined; no evidence is admissible (see page 314B of **Morgan Crucible Co PLC v Hill Samuel & Co Ltd** [1991] Ch 295). Additionally, what is of relevance is not only the particulars of claim as they stand, but also as they might stand after amendment (see para. 5 of **Daly v Independent Office**).

[56] It is acknowledged that Mr Jennings' statement of case does not identify the employees of NCB who reported him to the police. Nevertheless, for the reasons set out below, I am of the view that the claim is not undermined by that omission.

[57] Firstly, it is a general rule that a claim will not fail because a person who should have been made a party to the proceedings was not (see rule 8.4(1)(b) of the CPR). In the absence of any authority requiring that the employees in cases of vicarious liability be specifically identified in the statement of case, I see no reason why an amendment

would not suffice. Mr Jennings could, without the court's permission, at any time before the case management conference, either add the employees as defendants to the claim (in accordance with rule 19.2 of the CPR) or amend the statement of case to identify them (pursuant to rule 20.1 of the CPR).

[58] Secondly, if NCB is alleged to be vicariously liable for the acts of its employees, then it would be the proper party to the claim. The Privy Council case of **Bank of New South Wales v Owston** also involved an action for malicious prosecution brought against a bank. The facts of the case were considered by their Lordships in determining whether the bank was responsible for the actions of its employee, the acting manager. The acting manager had instituted criminal proceedings against the respondent for the charge of stealing a bill of exchange. That report was groundless. The trial judge held that the prosecution was malicious. The two questions for the Board were whether the criminal proceedings were authorised by the acting manager on the bank's behalf and whether the bank was responsible for his actions. Seeking to answer those questions, the Board considered the authority bestowed upon the acting manager pursuant to his role and found as follows (at page 1097):

> "…But the arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and when the question of a manager's authority in such a case arises, it is essential to inquire carefully into his position and duties. …"

[59] Their Lordships concluded that the acting manager's position alone did not give rise to a presumption of general authority to prosecute on behalf of the bank; and evidence was required to demonstrate that such authority was within the scope of his duties and the acts he was authorised to perform. However, the evidence of the managers negated his claim to such authority. Ultimately, the conclusion that the bank was not liable for the actions of the acting manager was based on the findings that he lacked the general authority to prosecute and that the power to prosecute was outside the scope of his duties, among other things.

[60] Mr Goffe contended that no authority could be found in which a claim for malicious prosecution was pursued against a company or the State, and the individual who made the report to the police was neither identified in the pleadings nor joined as a defendant. He directed our attention to **Lattibeaudiere v JNBS**, in which the employees who reported the appellant were defendants. The evidence in that case indicated that the branch manager, upon receiving certain complaints about the appellant (who was a clerk), conducted an internal investigation and subsequently reported him to the compliance manager. The compliance manager then reported the appellant to the police, which resulted in charges being instituted against him. There is no indication that JNBS commissioned the report. I also note, for the record, that it does not appear that, in either **Bank of New South Wales v Owston** or **Home Office v Scott**, the individuals who made the reports were named as defendants to the claim.

[61] At this stage of the proceedings, there is insufficient evidence concerning the role and/or authority of the employees who prepared the statements. Although NCB identified those employees in its defence, no further particulars were given as to their authority or, notably, any lack thereof. It is, however, apparent from the statements that the employees who prepared them do not hold managerial capacities vested with the necessary authority. Nonetheless, NCB has made no assertion distancing itself from the statements its employees made to the police, nor has it suggested that they were made without proper authority. In fact, NCB has assumed responsibility for reporting Mr Jennings, having asserted the following in its defence:

> "17. … At all material times, **[NCB] suspected that [Mr Jennings] had committed fraud**, however, that was not the reason that he was dismissed. **The suspicion as to fraud is what led [NCB] to report the matter to the police** for them to investigate and prosecute if they saw reasonable cause for so doing." (Emphasis added)

[62] Bearing in mind the chronology provided by Mr Hines in his affidavit that:

> "5. Given [NCB's] findings from its internal investigations, a report was made to the police citing sixteen (16) suspicious loans which had

> been approved by [Mr Jennings] supported by fraudulent documents. The police investigated and requested statements from employees of the … Branch. …"

[63] Those requested statements were exhibited to his affidavit. Considering the sequence of events given by Mr Hines (detailed in the paragraph above), along with my earlier observation that the statements are all dated in October 2012, it would appear that NCB's report to the police, which was supported by fraudulent documents, was separate from the employees' statements. Although it remains unknown who reported the matter to the police, it is clear that it was done on NCB's instructions, and so vicarious liability could not genuinely be denied.

[64] Thirdly, it is well known that sufficient particulars of the cause of action enable the defendant to admit or deny the allegations or otherwise plead an appropriate defence (**Bruce v Odhams Press Limited**). While it may have been beneficial to identify the employees to enable NCB to ascertain the precise nature of the claim made against it, it does not appear that the omission has disadvantaged NCB. NCB is clearly aware of the case it must meet, having filed a defence addressing all allegations and identifying (in the affidavit supporting its application) the employees whose statements were provided to Det Cpl Smith. So, NCB is fully aware of this information. In the context of this case, I am not persuaded that an argument can properly be made that the pleadings, which name NCB as a party without identifying the employees who made the report, are so inadequate and incurable as to justify striking out the claim.

[65] As it relates to the "falsity" of the report, that is, the failure to particularise how the prosecution was instituted without reasonable and probable cause and was actuated by malice, Mr Jennings pleaded as follows at para. 19 of the particulars of claim:

> "19. This arrest and charge were intentionally and/or maliciously instituted and/or pursued by the servants and/or agents of [NCB] who did not have any reasonable basis to believe or find and did not believe or find that [Mr Jennings] had committed the said offences. The said offences were reported and pursued by [NCB] in order to support their chances of succeeding at the IDT and not based on

their own admitted internal investigations as set out by Mr. Richard Hines at the tribunal.

PARTICULARS OF MALICIOUS PROSECUTION OF [NCB]

a. instituting prosecution against [Mr Jennings] knowing that the allegations made against him were not criminal offences. The basis of the allegations against [Mr Jennings] was gross negligence, unethical and unprofessional conduct.

b. instituting prosecution against [Mr Jennings] knowing that the allegations made against him were false.

c. instituting prosecution and/or prosecuting [Mr Jennings] knowing that there was no evidence of fraud or that he benefitted from the proceeds of any of the eight (8) loans.

d. instituting prosecution and/or prosecuting [Mr Jennings] knowing that the said loans were substantially performing."

[66] In its defence, NCB responded to those allegations of falsity, stating:

> "22. Paragraph 19 of the Particulars of Claim and the particulars of [NCB]'s malicious prosecution are denied, [NCB] will say that it had reasonable basis for suspecting fraud, and that it was fulfilling its obligations under law by reporting the suspicious activity to law enforcement."

[67] Although the statement of case does not identify each specific allegation it claims to be false, once the general nature of the claim is pleaded, that is, the pleadings mark out the parameters of each party's case and identify the issues in dispute, the witness statements and other documents will provide further particulars (para. [64] **Akbar Limited v Citibank NA** [2014] JMCA Civ 43). Lord Woolf MR's dicta on pleadings in **McPhilemy v Times Newspapers Ltd and others** [1999] 3 All ER 775 provides additional guidance. He stated (at page 793):

> "…Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear

> the general nature of the case of the pleader. This is true both under the old rules and the new rules. …"

This principle was endorsed by this court in **Grace Kennedy Remittance Services Ltd v Paymaster (Jamaica) Limited and Paul Lowe**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 5/2009, judgment delivered 2 July 2009.

[68] I am of the view that any further evidence in support of Mr Jennings' claim would emerge through disclosure, witness statements and at trial. Should further particulars be necessary before that point, there are other procedural steps, such as filing a request for further information, that can be taken to obtain them. In any case, at this very early stage of the proceedings, Mr Jennings could amend his statement of case to include those particulars at any time before the case management conference without the court's permission (pursuant to rule 20.1 of the CPR). If required, he could also seek the court's permission to do so at the case management conference by virtue of rule 20.4(1) of the CPR. This would facilitate the just disposal of the case, in keeping with the overriding objective, by enabling the real matters in controversy between the parties to be determined.

[69] I can find no fault in the learned judge's assessment of the material facts that needed to be alleged in the statement of case to establish the cause of action against NCB. Accordingly, the alleged deficiencies raised by NCB do not warrant the striking out of the claim.

Conclusion

[70] It is my judgment, for the reasons set out above, that this is not a plain and obvious case for striking out. The question of whether NCB is a prosecutor for the purposes of the claim for malicious prosecution is best determined at trial. The alleged deficiencies in the pleadings raised by NCB, in my view, are not well-founded. Nevertheless, they can be remedied by amendment without the court's permission prior to the case management conference. I can find no basis to interfere with the learned judge's decision since she has not taken into account any immaterial factors, failed to

consider material factors, or erred in principle. Her conclusion was permissible and properly within her remit. Therefore, both grounds of appeal must fail. Having assessed the numerous factors, the only correct conclusion in these circumstances is that the application to strike out should be refused.

[71] Given the manner in which this matter is resolved, there is no reason for this court to depart from the general rule that the unsuccessful party should pay the costs of the successful party. I also take into account rule 65.8(3)(a) of the CPR, which provides that where the application to strike out could have reasonably been made at a case management conference or pre-trial review, the court must order the applicant to pay the respondent's costs unless there are special circumstances, of which there are none. I would, therefore, dismiss the appeal and order that the costs of the appeal be paid to Mr Jennings to be taxed if not agreed.

MCDONALD-BISHOP P

ORDER

1. The appeal is dismissed.

2. The orders of Wolfe-Reece J made on 27 February 2024 are affirmed.

3. Costs of the appeal to the 1st respondent, Mr Peter Jennings, to be agreed or taxed.