[2023] JMSC Civ 8

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2020 CV 04527

IN THE MATTER of the Intestates' Estates and Property Charges Act, section 2.

AND

IN THE MATTER of an application for a Declaration of a Common Law Spouse that the relationship of Husband and Wife existed between the Applicant **JULIANA DAWKINS** and **DALPHYNE JACKSON** (now deceased).

AND

IN THE ESTATE OF DALPHYNE JACKSON late of 6D Rockhampton Drive, Kingston 8 in the parish of Saint Andrew, deceased, intestate.

AND

IN THE MATTER of an application by **JULIANA DAWKINS** for a **Grant Ad Colligenda Bona** pursuant to Part 68.46 of the Civil Procedure Rules 2002 (as amended 2006).

BETWEEN	**JULIANA DAWKINS**	**CLAIMANT/RESPONDENT**
AND	**JACQUELINE ONEDIA JACKSON**	**OBJECTOR/APPLICANT**

AND	**MATTROSS EGBERT JACKSON**	**OBJECTOR/APPLICANT**
AND	**ALISON CHANTEL JACKSON**	**OBJECTOR/APPLICANT**

IN CHAMBERS (by Video Conference)

Mr Neco Pagon for the Claimant/Respondent

Mrs Pauline Brown Rose for the Objectors/Applicants

31 OCTOBER 2022, 1 FEBRUARY, 9 & 30 MARCH 2023

Evidence – Evidence Act – section 31G – whether the requirements of section 31G have been met- whether evidence of expert required to satisfy the requirements of that section; section 22 – whether hearsay documents from Firearm Licensing Authority are public documents – section 31E – whether hearsay documents admissible under section 31E; Civil Procedure - Failure to file affidavits in time - application to extend time to file affidavits – whether appropriate application is application for relief from sanctions; Civil Procedure Rule 27.9 – Application to vary order of court – whether there has been a material change of circumstances – whether additional affidavits should be allowed

MASTER C. THOMAS

Introduction

[1] By way of notice of application filed on 12 May 2022, the applicants are challenging the inclusion of an audio recording and transcript of audio recording as part of the evidence that the claimant is seeking to rely on in pursuit of the orders she has sought in her fixed date claim form. The application has been brought by Jacqueline Oneida Jackson, Mattross Egbert Jackson and Alison Chantel Jackson. They are all children of the late Dalphyne Jackson ("the deceased") who died intestate on 11 September 2020 ("the deceased") and are all objecting to the orders sought by the claimant in her fixed date claim form. For ease of reference and without intending any disrespect, Jacqueline Oneida Jackson, Mattross Egbert Jackson and Alison Chantel Jackson shall hereafter individually be referred to by their Christian names and collectively as "the objectors". The objectors are contending in their application that the audio

recording and transcript are inadmissible as they do not satisfy the conditions under section 31G of the Evidence Act. They are also seeking an extension of time for the filing of additional affidavits.

[2] Also before the court is an application filed on 16 September 2022 by the claimant seeking to vary orders made by Nembhard J limiting the number of witnesses the claimant is entitled to call and seeking to file an additional affidavit in support of her claim.

[3] I propose to deal with the applications in the order in which they were filed but before I do so I will briefly outline the background to aid in an appreciation of the applications.

Background

[4] On 20 November 2020, the claimant, Ms Juliana Dawkins filed a fixed date claim form seeking an order to be appointed Administrator Ad Colligenda Bona for the estate of the deceased. She also sought declaratory relief, specifically, a declaration that the deceased was her spouse at the time of his death pursuant to section 2 of the Intestates' Estates and Property Charges Act.

[5] The claimant's evidence, in brief, as contained in her affidavit in support of the fixed date claim form is that she and the deceased shared a common law relationship, living as husband and wife for over 20 years immediately preceding his death. They shared five (5) children, namely: Richard Rodney, Douran Williams, Jacqueline, Mattross and Alison. Two of these children are not the deceased's biological children and Jacqueline is not the biological child of the claimant.

[6] The claimant's evidence is also that the deceased accumulated assets inclusive of but not limited to properties and businesses[1] and that she and the deceased operated the businesses together, including Jacko's Bar and Lounge.[2]

[7] Affidavits sworn to by Jacqueline, Mattross and Alison as well as Juliet Veronica Fields (the sister of the deceased) and Neville Anthony Parry (a friend of the

[1] See – Paragraph 15 of the Affidavit of Juliana Dawkins, which was filed on 20 November 2020.
[2] See – Ibid, paragraph 10

deceased), have been filed disputing the claim. The affidavits challenge, among other things, the claimant's assertion that she and the deceased lived together as husband and wife up to the date of his death. Jacqueline asserts that the intimate relationship between her father and the claimant was terminated in or around 2012.[3] She asserts that after the deceased's funeral, she had indicated to her siblings that she would take on the responsibility of handling the administration of their father's estate. She maintains that neither sibling objected and she proceeded to obtain legal counsel to wind up her father's estate.[4]

[8] The first hearing came before the court on three occasions, the last of which being 6 April 2022 before Nembhard J. On that date the learned judge made several orders, including orders regularising documents which were previously filed and for service of these documents and for the filing of further affidavits. The orders of relevance to this application are set out below:

> 3. The applicant's[5] attorney-at-law is to serve the following documents no later than April 7, 2022-
>
> i. The applicant's List of Documents filed on 6 April 2022
>
> ii. Affidavits of Hermin Dixon and Peter Russell each filed on 20 December 2021.
>
> 4. The objectors are at liberty to file and serve affidavits in response to the affidavits of Hermin Dixon and Peter Russell, each filed on 20 December 2021. All such affidavits are to be filed and served on or before the 29 April 2022.
>
> 5. No further or additional affidavits is or are to be filed or served after May 6, 2022 without the prior permission of the court.

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[3] See – Paragraph 5 of the Affidavit of Jacqueline Onedia Jackson in Response to the Affidavit of Juliana Dawkins, which was filed on 28 July 2021. In paragraph 5 of the Affidavit of Mattross Egbert Jackson in response to the Affidavit of Juliana Dawkins, Mattross also states that the relationship between his father and mother ended in or around 2012.

[4] See – Ibid, paragraph 15

[5] The reference to the applicant is to the claimant herein

6. Ordinary witnesses are limited to 3 for the applicant and 5 for the objectors.

THE OBJECTORS' APPLICATION

The claimant's impugned evidence

[9] Of relevance to the objectors' application are paragraphs 4 to 6 of the 3rd affidavit of the claimant, which was filed on 6 May 2022. These paragraphs read: -

> *"4. Further to paragraph 6(xii),* ***Jacqueline Jackson had contacted me on November 1, 2020 and I recorded that conversation using my cellular phone. My phone was at the time and remains to date to be in good working condition. I supplied a copy of that conversation to my Counsel, Mr Neco Pagon. That conversation which I have studied for myself was copied to a CD-R which is exhibited hereto and forms part of exhibit JD-1****. Details of the audio recording is also exhibited to this affidavit and marked* ***JD-1*** *for identification.*
>
> *5. The said recorded conversation was transcribed for ease of reference and contains approximately 111 paragraphs. The said transcript of the conversation I had with Jacqueline is exhibited hereto marked* ***JD-1*** *for identification.*
>
> *6. I have already by court order disclosed this recording and the transcript to the objectors and they were allowed the opportunity to inspect."*[6]
>
> ***(emphasis supplied)***

[10] Paragraph 6(xii) of the claimant's previous affidavit had been made in response to an assertion by Julia Fields that she was surprised that the claimant had asserted in her affidavit that the objectors and herself (the claimant) could not agree on the way forward to administer the estate as she (Julia Fields) had met with the claimant and the objectors and they were all agreed; and that she was

[6]See – List of Documents, which was filed on 6 April 2022.

surprised that the claimant would bring the claim that the claimant was involved in a common law relationship with the deceased before he died. Specifically, the claimant deponed*:*

> In answer to paragraph 21, I will say that Jacqueline contacted me to advise me that she spoke with a lawyer and that he advised her I am Jacko's spouse and that I am entitled to 50% of his estate. She said further that she wanted all of us to use the same attorney and that [sic] smoother for me to sign over my interest to the children and for them to do the administration and that they would give me "what I am to get". In fact, I was supplied with a copy of an Estate Questionnaire from Mattross. I decided to consult with an independent attorney-at-law on what I was told by Jacqueline. A copy of this is exhibited to Jacqueline's affidavit.

[11] Also of relevance are paragraphs 3-5 of the claimant's 4th affidavit[7], in which she deponed thus: -

> "3. I give this affidavit further to my 3rd affidavit filed herein on May 6, 2022 and in response to the Notice of Application filed on May 12, 2022 and Affidavit of Jacqueline Jackson filed on May 17, 2022.
>
> 4. To my certain knowledge, Jacqueline Jackson called me on November 1, 2020 on a phone which was previously owned by Dalphyne Jackson (Jacko). I used my phone to record the conversation that I had with Jacqueline Jackson. A copy of the details of the recording extracted from my phone is attached hereto marked "**JD-1**" for identification and it contains information regarding, among other things, the date and duration of the conversation between Jacqueline Jackson and myself.
>
> 5. I wish to make it categorically clear that further to the evidence I already gave in this matter to the effect that I studied the

[7] See – 4th Affidavit of Juliana Dawkins, which was filed on 31 May 2022 herein.

recording and distinctively recall the conversation I had with Jacqueline Jackson, I state as follows that:

i. The recordings as is on the CD-R supplied to this Honourable Court is identical to the original recording of the conversation between Jacqueline Jackson and me captured on my phone;

ii. The transcript (in so far as the words are audible) is identical to the original recordings of the conversation between Jacqueline Jackson and me; and

iii. I have no reason to believe that the recording and the transcript is inaccurate because of any improper use of my phone used to do the record and the making of the copies onto the CD-R.

6. …

7. I have maintained and still have possession of my phone which I safe keep. I confirm that the said phone remains, as at all material times, in good working condition." (Emphasis supplied)

[12] The objectors by way of their notice of application for court orders seek the following orders: -

1. That the 3rd Affidavit of Juliana Dawkins sworn to and filed on the 6th May 2022 with transcript and Audio of recording of telephone conversation between Juliana Dawkins and Jacqueline Jackson be struck out as inadmissible under section 31G(1)(a) & (b) of the Evidence (Amendment) Act.
2. That the instrument allegedly used to secretly record the said telephone conversation be produced for inspection and assessment by a technical expert.
3. That permission be granted for the Affidavits of Mattross Egbert Jackson in response to the Affidavit of Peter Russell and Hermin Dixon dated the 5th May 2022 and filed on the 9th May 2022 and the Affidavit of Alison Chantal Jackson dated the 7th May 2022 and filed on the 10th May 2022 to be allowed to stand as filed on time.

4. That costs of this Application be to the costs in the Claim.
5. There be such further or other relief as the Court may seem fit.

[13] The application is grounded on the following bases: -

a) That the Claimant has not discharged the burden imposed by Section 31G (1) paragraphs (a) & (b) of the Evidence (Amendment) Act.
b) That the recording was done without the knowledge and consent of the third party and thereby in breach of her Constitutional right to privacy.
c) That the probative value of the contents of the recording is substantially outweighed by the danger that the contents of the recording may be unfairly prejudicial, confusing and or misleading.
d) That various sections of the recording [are] unclear, and inaudible.
e) Pursuant to Rule 26.3(1)(c).
f) Pursuant to the overriding objective of enabling the Court to deal with cases justly Rule 1.1(1).

The evidence in support of the application

[14] The application is supported by an affidavit sworn to by Jacqueline. At paragraphs 5 -9 of her affidavit [8] Jacqueline states the following: -

> "5) That in response to paragraph 4 of the said affidavit, I categorically deny that I contacted and spoke to the Claimant Juliana Dawkins directly by telephone on the 1st November 2020. I do not recall ever having a direct telephone conversation with Juliana Dawkins about my father's estate. The conversations about my consultation with an Attorney-at-Law was via WhatsApp conference call with my siblings, where I explained the Attorney's advice regarding my father's estate. I did not consent to the recording of any of these WhatsApp group conference calls and I was not aware that the calls were being recorded by Juliana Dawkins.

[8]See – See Affidavit of Jacqueline Oneida Jackson filed on 17 May 2022

6) That my only phone number is (321) 557-3448. I have had that phone number of (321) 557-3448 for over 14 years. The phone number is included in a registered family cellular account on the Sprint/ T-Mobile network. The account holder is Martin Williams, my mother's husband, and my stepfather. I attached hereto marked "**JOJ-A**" a copy of the official billing statement and call/text log directly from the cellular phone provider Sprint/T-Mobile for all numbers on the family plan account. Document title "410731069-2020-11-06" account number 410731069, billing period Oct 06- Nov 05, 2020, page 41, for a complete list of all outbound and incoming call log activity for November 1st 2020, from my phone number (321) 557-3448.

7) That I distinctly recognized bits and pieces of conversations I would have had with my siblings in a family WhatsApp group conference call with my siblings, Mattross Jackson and Alison Jackson. Juliana Dawkins was a part of that WhatsApp group. The said WhatsApp Group was formed to facilitate discussion to prepare and plan for funeral arrangements and service for our deceased father Dalphyne Jackson. Although Juliana Dawkins was included in the group conference calls as the mother of my siblings not as his spouse or as a beneficiary under my father's estate. Except for Juliana Dawkins all the previous participants have left the WhatsApp group. However, I have searched my chat history/call log with Juliana and the group chat, and I am unable to trace where I would have used the WhatsApp call application to call Juliana Dawkins on the 1st November, 2020 as alleged. I attached hereto a screen shot showing the WhatsApp activities from the 1st October 2020 to 23rd November 2020 between my phone and that of Juliana Dawkins' marked **JOJ-B** for identity.

8) That in addition, I have screen recorded and produced a transcript of the WhatsApp Call Log History from two days prior to my father. [sic] Dalphyne Jackson's Death (September 11th

2020) Dates September 9, 2020, to March 22, 2021). I attached hereto a copy of the transcript of activities and screen recording between September 9, 2020, to March 22, 2021, marked **JOJ-C** for identity.

9) That I verily believe that the recording and transcript attached to the 3rd affidavit of Juliana Dawkins sworn to and filed on the 6th May 2022 is not a genuine recording made using reliable methods as specific conversations had with my siblings, which included that Juliana Dawkins using the WhatsApp call/chat application was altered and or digitally manipulated and could be taken out of context, and That Juliana Dawkins' reliance on this secret recording is misleading and unfairly prejudicial to me and my siblings."

THE SUBMISSIONS

Submissions advanced on behalf of Objectors/Applicants

[15] Learned Counsel Mrs Brown Rose submitted that the claimant has not shown that the conditions of section 31G(1)(a) and (b) have been satisfied. Mrs Brown Rose contended that it is not sufficient for the claimant to simply state that she contacted Jacqueline using her cellular phone; or that her cellular phone was in good working condition at the time and remains in good working condition. Mrs Brown Rose further contended that the claimant did not say how the conversation was copied or who made the copy, or who prepared the transcript, nor that the phone in question was submitted for inspection by a phone technician. Mrs Brown Rose argued that the claimant has not furnished the court with a report from a qualified phone technician to confirm her assertion that the phone was in good working condition.

[16] Mrs Brown Rose submitted that in **Regina v Andre Bryan** [2022] JMSC Civ 02, the court had an independent technical expert who had vouchsafed that the recordings were genuine and without tampering in any manner. In the present circumstances, all the claimant has is an assertion that her phone was working properly. Mrs Brown Rose maintained that this would not be enough, as the claimant would be required to go further to satisfy the court that the phone used

to record the disputed conversation had been checked and verified by a technical expert.

[17] It was argued that the phone records, particularly the WhatsApp records of Ms Jackson do not show a recording of a WhatsApp call between the claimant and Jacqueline that purportedly took place on 1 November 2022. On this basis, Mrs Brown Rose urged the court to approach and treat with the disputed recording and by extension the transcript of same with caution, as she asserted, digitized information can be manipulated, altered or created. She submitted that the claimant should not be allowed to rely on the purported recording.

Submissions advanced on behalf of the Claimant/Respondent

[18] In response, learned counsel Mr Pagon submitted that the matter of admissibility ought properly to be left to the trial judge. He asserted that the affidavit of the claimant has satisfied section 31G of the Evidence Act, and that the evidence is directly relevant to a fact in issue and would not qualify as a hearsay statement.

[19] Mr Pagon submitted that the fact that the conversation was "secretly record[ed]" does not affect the admissibility of the evidence. To support this submission, he referenced the authority of **Jamaica Teachers' Association v Marlon Francis & Ors** [2015] JMSC Civ 92.

[20] Mr Pagon maintained that the matter of weight to be placed on the evidence is a matter for the trial judge. At trial, Jacqueline would be allowed to comment on the evidence and to cross examine the claimant on the said evidence. Mr Pagon also asserted that Jacqueline sought to speak directly to the evidence and make comments. In any event, it was submitted, issues of credibility and weight are for the trial judge.

[21] With respect to the extension of time sought by the objectors, relying on rule 26.8 of the Civil Procedure Rules ("CPR") and **Eval Walcott v Shawn Walters & anor** [2018] JMSC Civ 65, Mr Pagon also submitted that Jacqueline did not offer any affidavit evidence to allow the affidavits filed out of time to stand. He submitted that there was no late filing of the affidavits of Peter Russell and Hermin Dixon which could have caused the objectors to file their affidavits late.

He submitted further that the application and the affidavits seeking an extension of time would not have met the requirements of the CPR as the order of Nembhard J contained a sanction by virtue of the wording of the orders as well as the nature of the proceeding in that the evidence to be relied upon by the parties would need to be contained in an affidavit. They would therefore be akin to witness statements and by virtue of that, it was incumbent on the objectors to demonstrate that they satisfied the requirements of rule 26.8 of the CPR. The objectors would therefore be required to seek relief from sanctions, the sanction being that they are precluded from relying on the affidavits.

THE ISSUES:

[22] The following issues arise for determination**:**

(i) Is the issue of the admissibility of the evidence in question solely within the remit of the trial judge?

(ii) Can the claimant be permitted to rely on the evidence if it was illegally obtained, that is, in breach of the law?

(iii) Has the claimant complied with the requirements of section 31G(1)(a) and (b) of the Evidence Act with respect to the CD-R, which purportedly contains an audio recording of a telephone conversation between herself and Jacqueline?

(iv) Should the affidavits filed by the objectors out of time be allowed to stand?

DISCUSSION AND ANALYSIS

Is the issue as to the admissibility of the evidence in question solely within the remit of the trial judge?

[23] It is my view that the court is empowered at any stage of the proceedings to deal with the admissibility of evidence as part of its duty to ensure that the overriding objective to ensure the expeditious resolution of cases is being observed. This being a pre-trial review, rule 38.6 of the CPR, which states that the parties must come prepared to deal with any matter that may promote the fair, expeditious and economical disposition of a claim is apposite. It seems to me that to have matters in relation to the admissibility of evidence dealt with

prior to trial may shorten the time spent in trial by eliminating the need for the trial court to deal with the admissibility of evidence which involves pure questions of law and which may involve lengthy submissions, thereby allowing the court at trial to focus on the taking of the evidence and determining issues of the weight of evidence. This, I think was the intent of paragraph 18(a) and (b) of Practice Direction 20 of 2001 which empowers the court at a pre-trial review to deal with issues having to with the admissibility of evidence under the Evidence Act and the admissibility of parts of a witness statement. Of course, where the issue of admissibility is to be determined based solely on credibility, this is a matter that ought properly to be left for the trial judge.

[24] Mr Pagon has submitted that the issue as to the admissibility of the audio recording is a matter of weight to be left to the trial judge. It is true that a court has to consider what weight to give to any piece of evidence that is admitted at trial, but surely, that must be in circumstances where it is found firstly that the evidence is admissible. In this case, the audio recording is being relied on in support of the claimant's assertion that Jacqueline had made certain utterances. Jacqueline, by way of her affidavit, does not appear to be denying that the conversation may have taken place but is raising issues as to whether the conversation actually took place by the same medium, in the manner and having the same content as alleged by the claimant.

[25] The issue of whether the conversation between Jacqueline and the claimant took place as alleged by the claimant in paragraph 6Xiii of her affidavit is one of fact to be determined based on credibility and one which the audio recording may assist the court in determining. In that regard, the court would have to determine what weight to give to the audio recording. However, it is separate from the issue of whether the audio recording itself meets the requirement of section 31G of the Evidence Act. In other words, while the audio recording may aid the court in determining whether the conversation took place, the issue of whether the conversation took place can be determined without considering the audio recording. The audio recording only becomes relevant to determining the issue of whether the conversation took place if the audio recording can properly be admitted into evidence, that is whether it satisfies the requirements under section 31G. If the audio recording does not satisfy admissibility under section

31G, that would be the end of the audio recording and the issue of whether the conversation took place would have to be determined without the aid of the audio recording. It therefore seems to me that the admissibility of the audio recording is a pure question of law to be determined solely by examining whether the provisions of section 31G of the Evidence Act have been satisfied and therefore, it is an issue that can and ought to be determined prior to trial.

[26] I am of the view that the **Bank of Nova Scotia** case relied on by Mr Pagon is not supportive of his submission. In that case, the issue was whether the defendant having agreed for certain computer-generated evidence contained in the witness statement of the claimant's witness to go into evidence without objection, the statement could retroactively be found to be inadmissible under section 31G of the Evidence Act.

[27] The impugned evidence in the **Bank of Nova Scotia** case comprised loan amounts that were claimed to be owed to the claimant by the defendant. It was in cross-examination that it was revealed that the sums stated in the witness statement were derived from a computer and were not actually calculated by the witness. It was argued on behalf of the defendant that the claimant ought to have sought the leave of the court to comply with the requirements of the Evidence Act. However, the Court of Appeal found that having elicited the evidence that the loan amounts were computer-generated evidence during cross-examination, counsel for the defendant ought to have put to the witness that his evidence fell within the definition of "computer" as defined by subsection 31G(7) of the Act and if the answer was in the affirmative, counsel ought to have objected to the admission of the relevant parts of his evidence which failed to comply with the requirements of section 31G of the Evidence Act. Having failed to do this, the defendant's counsel could not during closing submissions, properly object to the admission of the evidence retrospectively, it having already been admitted for its full content.[9] It was in this context that the court stated the general rule that a party intending to challenge the admission of evidence on a particular point, ought to cross-examine the witness through whom the evidence is adduced.[10] So, if the defendant's counsel were objecting

[9] Paragraphs [75] of judgment
[10] Paragraph [74] of judgment

to the admission of the statement, it had to be put to the witness and could not therefore be left to be challenged during closing submission. I am of the view that the court of appeal did not state any general rule that questions of admissibility of evidence must be dealt with at a trial. In addition, I agree with Mrs Brown Rose that in this case, there does not appear to be any dispute by the claimant that the audio recording is one that falls within the definition of computer-generated evidence and counsel for the objectors has objected to its admission.

Can the claimant be permitted to rely on the evidence if it was illegally obtained, that is, in breach of the law?

[28] Without deciding whether the evidence in question was obtained in breach of Jacqueline's constitutional right to privacy, I think the authorities on this issue are clear that the court can consider evidence that has been illegally obtained. This issue was considered by Sykes J (as he was then) in **Jamaica Teachers' Association v Marlon Francis and Ors** where the illegally-obtained evidence was a video. Sykes J stated that there is no automatic rule that unlawfully obtained evidence is not admissible. It is a matter of discretion for the court balancing the public interest in discouraging conduct that obtains evidence wrongly on the one hand and the public interest in having all the relevant evidence before the court. In that case, it was found that the circumstances of the acquisition of the evidence were not egregious and did not rise to the level where it could be said that it brought the administration of justice into disrepute.

[29] The issue was also considered by the Court of Appeal in **Symbiote Investments v Minister of Science and Technology and Office of Utilities Regulations** [2019] JMCA App 8 where it was contended on behalf of the applicant that documents used by the Office of Utilities Regulations to revoke the telecommunications licence of the applicant had been illegally obtained and could not have been utilised by the court. Brooks JA, with whom the other judges agreed, stated[11]:

[11] See paragraph [57]

In the matter of the Baronetcy of Pringle of Stichill [2016] UKPC 16, the Privy Council relied on the principle of admissibility in respect of a complaint about a DNA sample, which was said to have been wrongfully used to challenge an entitlement to a baronetcy. The Board said, in part, at paragraph 79: "…

> The English common law does not normally concern itself with the way evidence was obtained; improperly obtained evidence is admissible, although the court has a discretion to refuse to admit such evidence: **Imerman v Tchenguiz** [[2010] EWCA Civ 908; [2011] Fam 116], paras 170 and 171 per Lord Neuberger MR….The Board does not consider that in this case a breach of the [the Data Protection Act 1998] would be a proper basis for excluding the DNA evidence, which is of central importance to the question which the Board must answer." (Emphasis supplied)

[30] Therefore, while it is not correct to say, as Mr Pagon has contended, that the fact that the conversation was secretly recorded does not affect the admissibility of the evidence, I am certainly of the view that the fact of it being illegally obtained would not result in the evidence being automatically excluded. Therefore, even if it could be said that the evidence was obtained in breach of Jacqueline's right to privacy, which I am not prepared to make a determination on without full arguments on that issue, I think that the evidence is certainly relevant and, provided that it passes the admissibility threshold of section 31G. the circumstances in which it was obtained do not appear to be of an egregious nature so as to require that it be excluded.

Has the Claimant, complied with the requirements of section 31G(1)(a) and (b) of the Evidence (Amendment) Act, 2015 with respect to the CD Rom which purportedly contains an audio recording of a telephone conversation between herself and Jacqueline?

[31] There appears to be no dispute between the parties as to whether the cellular telephone purportedly utilized by the claimant to record the conversation between herself and Jacqueline is a computer as defined by section 31(G)(7) of the Evidence Act.

[32] It is now therefore necessary to set out the provisions of section 31G which govern the admissibility of computer-generated evidence. It reads as follows: -

> "31G. – (1) Subject to the provisions of this section, in any proceedings, a statement in a document or other information produced by a computer shall not be admissible as evidence of any fact stated or comprised therein unless it is shown that –
>
> (a) **there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer**; and
>
> (b) **at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents**.
>
> (2) Subject to subsection (3), in any proceedings where it is desired to have a statement or other information admitted in evidence in accordance with subsection (1) above, a certificate –
>
> (a) dealing with any of the matters mentioned in subsection (1); and
>
> (b) purporting to be signed by a person occupying a responsible position in relation to the operation of the computer,

shall give rise to a presumption, in the absence of evidence to the contrary, that the matters stated in the certificate are accurate, and for the purposes of this paragraph it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(3) Where a party intends to rely on a certificate referred to in subsection (2), that party shall, at least thirty days before commencement of the trial, serve on the other party (or, in the case of an accused, his attorney-at-law) written notice of such intention, together with a copy of the certificate.

(4) Any person who in a certificate tendered which he knows to be false or does not believe to be true commits an offence and shall be liable –

(a) on conviction, on indictment in the Circuit Court to a fine or to imprisonment for a term not exceeding two years, or to both such fine and imprisonment; or

(b) on summary conviction in a Resident Magistrate's Court to a fine not exceeding one million dollars or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment;

(5) Where the circumstances of the case are such that, on the application of either party, the court considers that the prejudicial effect of enabling a party to benefit from the presumption under subsection (2) in relation to the matters stated in a certificate would outweigh the probative value of the certificate, the court may require the party who is seeking to rely on the statement in a document or other information produced by the computer to prove the matters referred to in paragraphs (a) and (b) of subsection (1) adducing evidence thereof.

(6) Nothing in subsection (1) shall affect the admissibility of an admission or a confession by an accused.

> (7) In this section, "computer" means any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data, and includes any data storage facility or electronic communications system directly connected to or operating in conjunction with such device or group of such interconnected or related devices."
>
> **(emphasis supplied)**

[33] Pursuant to section 31(G)(1)(a) and (b), a document produced by a computer, will be admissible if it is borne out on the evidence that there are no reasonable grounds for believing that there are inaccuracies attributable to improper use of the computer and that at all material times the computer was operating properly, or if it was not operating properly, this malfunction was not of such as to affect the document or the accuracy of its contents.

[34] In **Regina v Andre Bryan** Sykes CJ had to consider the provisions of section 31G. In that case, Andre Bryan and other accused persons allegedly affiliated with the Klansman One Don Gang were indicted for a plethora of criminal offences. The prosecution sought to adduce evidence, including but not limited to audio recordings, made on three (3) mobile phones by a witness. The mobile phones were purportedly used by the witness to record conversations between himself and persons alleged to be members of the gang. The central issue to be determined was whether the telephone recordings of the conversations were admissible under section 31G of the Evidence Act.

[35] The witness had given evidence that he had downloaded an application called 'Call Recorder'. This application operated in a manner that recorded and saved telephone conversations each time the witness received a call and alternatively, each time an incoming call was made; it was automatically done. After the application was configured to function in this manner, then there was nothing further for the witness to do, other than send the recordings to the investigating officer.

[36] Subsequently, transcripts produced by police officers who listened to the recordings were produced. This was done with the witness hearing the

recorded conversation while it was transcribed by police officers. During this process, the witness would identify various voices on the recordings.

[37] A forensic expert, attached to the Communications Forensics and Cybercrime Division (CFCD) of the police force, was tasked with the extraction of the required information from the mobile devices. His skill, competence, expertise and ability to communicate technical information in ordinary language, solidified him as a more than capable expert. In giving his testimony, the forensic expert detailed the procedure that he followed during the extraction process and what happened after he had completed the process. With regard to the process of transcription, it was asserted that the witness was present on all the occasions that the recording was played and transcribed. The actual transcripts were produced by the police officers tasked with such duties and not the witness, which provided further authenticity to the final prepared document.

[38] Sykes CJ carried out a comprehensive analysis of the relevant House of Lords' authorities of **DPP v Shephard**[12] and **DPP v McKeown**[13], which were decided on section 69 of the United Kingdom Act, which is in *par materi* to section 31G of our Evidence Act. From his judgment and these authorities, I have distilled the following principles:

(i) In terms of the nature and quality of the evidence required, all that section 69 requires as a condition of the admissibility of computer-generated statement is positive evidence that the computer has properly processed, stored and reproduced whatever information it received. It is concerned with the way in which the computer has dealt with the information to generate the statement which is being tendered as evidence of a fact which it states.[14] A malfunction is relevant if it affects the way in which the computer processes, stores or retrieves the information used to generate the statement tendered into evidence.[15]

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[12] [1993] AC 380

[13][1997] 2 Cr App R 155

[14] Per Lord Hoffman at page 69 of **DPP v McKeon**, which was referred to by Sykes CJ at paragraph 27 of **Regina v Andre Bryan**

[15] Per Lord Hoffman at pages 163-164 of **DPP v McKeon**, which was referred to by Sykes CJ in **Regina v Andre Bryan** at paragraph 29

(ii) In making this determination, the court must consider not just whether the computer was working properly but more particularly whether there was any malfunctioning of any programme or installed software that was used to process the information. In **DPP v Shephard**, the evidence sought to be relied on were till rolls from a computer in circumstances where the accused was charged with theft of items of food and clothing from a store for which she had no receipts. The evidence as to the functioning of the computer involved evidence as to how the tills operated, what the computer did and that the till rolls were examined which showed no evidence of malfunction of either the till rolls or the computer. In **Regina v Andre Bryan**, the evidence given was focused on whether the phone was working properly and more so on whether the application that was downloaded to the phone was operating properly. From that it could be ascertained whether the telephone conversations that were being received by the telephone were being processed properly by the phone.

(iii) There must be evidence that the computer was working properly at the time and this evidence cannot be supplied by the application of the *omnia praesumuntur presumption acta (all acts are presumed to have been done rightly)*. This evidence must be supplied by the party seeking to rely on the computer-generated evidence.

(iv) As to the appropriate source of this evidence, it need not be given by an expert. In the vast majority of cases, it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly.[16] In **DPP v Shephard**, the evidence was given by a store detective and in **Andre Bryan**, it was given by a lay witness who had downloaded the software for recording the telephone conversation. It is significant that in **Regina v Andre Bryan**, even though an expert witness had been called, his evidence was as to the extraction of the information from the phone and not as to

[16] See paragraph [33] of **Andre Bryan**

the working of the phone. In fact, it was his evidence that he had not been asked to make the determination as to whether the software that was installed malfunctioned at the material time or was malfunctioning.

[39] The standard of proof that was applied by Sykes CJ was the criminal standard of proof *beyond a reasonable doubt'*. This being a civil matter I think the civil standard of proof on a balance of probabilities should apply.

[40] It seems to me that though an expert is not required to give the evidence as to whether the computer was working properly or there was a malfunction of the computer including its software, or that the evidence is not inaccurate because of improper use of the computer including its software, the requirements of section 31G are not satisfied by a mere assertion that these conditions existed. It is incumbent on the party seeking to rely on the computer-generated evidence to adduce evidence as to the workings of the computer and any programme installed and utilised in the processing of the information being relied on. It is then for the court to determine whether this evidence meets the requirements of section 31G of the Evidence Act. If this were not so, anyone could seek to satisfy the requirements of the section by a mere assertion that the computer was working properly.

[41] In **Regina v Andre Bryan,** the lay witness gave evidence as to the downloading of the recording application and that he had configured it to record automatically. Further, the court found that by the witness' evidence that the recordings were done consistently leading to the memory being full, that the inescapable inference was that the programme did what it was expected to do. Sykes CJ found that the combined effect of memory of the first two devices being filled with recordings and recording being done on a third phone along with the transcript showed that the application was working without malfunction.

[42] With respect to section 31G(1)(a), Sykes CJ found that the evidence that the recording was done automatically once the call was made or received; that the recording process did not require any further human input; and the intensive use made of the device and the application in the time during which the recordings were made and the absence of any evidence of failure or

malfunction established beyond reasonable doubt that there was no reason to think that the recordings were inaccurate because of improper use.[17]

[43] In the instant case, I do not agree with Mrs Brown Rose that the claimant needed to have provided evidence that the phone was checked and verified by a technical expert. However, I agree that a mere assertion that the phone was working properly is not sufficient.

[44] The evidence of the claimant consists primarily of bald assertions that her mobile device was operational at the material time. There is no evidence from the claimant as to how the programme that was used to record the conversation was obtained. In other words, there is no indication as to whether she downloaded an application or it was part of the inbuilt mechanisms of the phone. In addition, if it was an application that was downloaded, there was no evidence of how it was downloaded or how or whether it was configured. Further, there was no evidence as to her familiarity with the programme and how it operated; whether it automatically recorded every call or whether she was required to engage some feature on the phone in order to record a call. There is no evidence as to whether she had actually used the programme before so as to show that the programme operated in the manner it was expected to. So that, there is no evidence to establish that the computer properly processed and stored the information.

[45] In addition, there was no evidence as to whether the programme allowed her to change, manipulate, alter, or otherwise interfere with any of the recordings. All that has been stated by the claimant thus far, is that the conversation was recorded on her phone. In other words, there is no evidence as to whether the computer properly reproduced the information it received. The evidence is devoid as to who did the extraction of the audio recordings from her device, or alternatively, how she extracted the audio recordings from her device. In her affidavit evidence, she asserts that she had supplied a copy of the purported conversation to her counsel, but no other information has been provided to the

[17] Paragraph [49] of judgment

court. With regard to transcription, Ms Dawkins' evidence does not indicate who prepared the transcript of the audio.

[46] I am of the view that even though the evidence to satisfy section 31G need not have been given by an expert, the evidence adduced by the claimant falls short of establishing that the programme or mechanism used on the phone to record the information was functioning properly, that it was used properly or that if it was not used properly this did not affect the accuracy of the statement. I think that the claimant's own words in her 4th affidavit that "the transcript in so far as the words are audible" are quite telling as they underscore the possibility of there being a malfunction of the cellular telephone. I find that the evidence adduced does not satisfy the requirements of section 31(G)(1)(a) and (b) of the Evidence Act.

[47] Having come to the conclusion that the requirements of section 31(G)(1)(a) and (b) of the Evidence Act have not been met, then it would follow that the 3rd Affidavit of Juliana Dawkins, which was solely concerned with the audio recording and transcript should be struck out and the claimant not be allowed to rely on it.

Should the affidavits filed by the objectors out of time be allowed to stand

[48] Based on the submissions of counsel, it seems to me that a principal question to be answered at the outset is whether the application for extension of time was the appropriate application or whether it ought to have been an application for relief from sanctions. In order to answer this question, it must first be determined whether any sanction was imposed for the failure to file the affidavits as relief from sanction need not be sought if no sanction was imposed. The relevant order concerning the filing of the affidavits stated as follows:

> 3. The applicant's attorneys-at-law is to serve the following documents no later than April 7, 2022.
>
> (i) …
>
> (ii) The affidavits of Hermin Dixon as well as that of Peter Russell, each filed on December 20, 2021.

> 4. The objectors are at liberty to file and serve the affidavits in response to the affidavits of Hermin Dixon and Peter Russell, each filed on December 20, 2021. All such affidavits are to be filed and served on or before April 29, 2022.
>
> 5. No further and or additional affidavits is/are to be filed and/or served after May 6, 2022, without the prior permission of the court.

[49] I am of the view that it is clear from the very wording of the order that no sanction was imposed for the failure to file the affidavits by the date specified. This is to be contrasted with rule 29.11 of the CPR, which is intituled "Consequence of failure to serve witness statement or witness summary" and which provides that where the witness statement or summary is not served within the time specified, the witness may not be called unless the court permits. The sanction imposed by the rule is clearly that the witness will not be called. No such sanction was imposed by the order. It is however anticipated that having disregarded the deadline of the court, the claimant would seek an extension of time to file the affidavits. I therefore think that the appropriate application was filed.

[50] It is trite law that in an application for extension of time, the court ought to consider: the length of delay; the reasons for delay; the prejudice to the other party; and the merits of the case. The deadline for the filing of the affidavits was 29 April 2022. The affidavits were in fact filed on 9 and 10 May 2022 and the application for extension of time was filed on 12 May 2022. I find that the length of the delay was not inordinate and the application was filed very soon after the deadline.

[51] Where the reasons for the delay in filing the affidavits are concerned, at the time of the hearing of the application, there appeared to be no evidence in this regard. However, subsequently, upon the adjournment of the application to allow the objector's attorney to file a written response to the claimant's authorities and for the hearing of the claimant's application, counsel for the objectors used the opportunity to file an affidavit sworn to by Mattross and

another sworn to by Allison which primarily addressed the reasons for the delay. Mr Pagon objected to the court considering these affidavits. He argued that the objectors had had sufficient time to file evidence to support their application and the affidavits were filed to answer the claimant's arguments on the application for the extension of time. It was therefore unfair to the claimant.

[52] It seems to me that to allow the objectors to rely on the affidavits which were filed to address a shortcoming in their application after the application had been heard would be akin to allowing the objectors to tailor their application to meet the objection of the claimant and would be in a sense giving them a second bite at the proverbial cherry. This, I think, in the absence of special circumstances, would be a bad precedent to set. I therefore will not consider these affidavits, the effect of which is that there is no evidence before this court as to the reasons for the delay in filing the affidavits.

[53] There are authorities to the effect that though the reason for the delay need not be good, there must be some explanation which provides some material on which this court can exercise its discretion. In **Peter Haddad v Donald Silvera** SCCA No 31/2003 (delivered 31 July 2007), Smith JA stated that "the absence of a good reason for delay is not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension. But some reason must be proffered". [18] In this case, as a result of my decision not to consider the affidavits, there are no reasons for the delay, with the consequence that the objectors have failed to satisfy one of the requirements for the grant of the extension of time and accordingly, this is sufficient basis to refuse the application without considering the merits of the objectors' case.

THE CLAIMANT'S APPLICATION

[54] The claimant is seeking the following substantive orders:

1. Order numbered 6 of the order of A Nembhard J made on April 6, 2022 be varied to permit the applicant to be limited to 4 ordinary witnesses.

[18] See page 12 of judgment

2. Consequent [on] an order made in terms of paragraph 1 above, an order that the applicant be permitted to file and serve an additional affidavit being the Affidavit of Letine Allen, the Director of Compliance and Enforcement at the Firearm Licensing Authority deponed to on June 15, 2022.

[55] The affidavit of Letine Allen is exhibited to the affidavit of Tajha Barrett in support of the application and the affidavit of Ms Allen exhibits two documents from the Firearm Licensing Authority ("FLA"), one of which is an application form for the replacement of a defective firearm ("the application form") purportedly signed by the deceased as "DE Jackson" on "5/12/2019" in which the claimant is stated to be the next of kin and her relation to the deceased is stated to be "common law"; and a report from the FLA's investigator dated 30 October 2020 in which, among other things, the investigator informed the FLA that he had spoken with the deceased's "widow Mrs Jackson" and had confirmed the deceased's death.

[56] In support of the application, Mr Pagon referred to rules 26.1(7) and 29.1 of the Civil Procedure Rules ("CPR") and submitted that there are no guidelines in the CPR as to how the discretion to vary an order of the court is to be exercised and that the court should be primarily guided by the overriding objective. He also relied on the English Court of Appeal decision in **Tibbles v SIG plc t/a Asphaltic Roofing Supplies** [2012] EWCA Civ 518 in which rule 3.1(7) of the English Civil Procedure Rules, which is in *pari materi* to our rules, was considered. Mr Pagon submitted that Nembhard J's order ought to be varied as the condition for variation has been satisfied in that there has been a material change in the circumstances that existed at the time of the order, that is, that the claimant had obtained affidavit evidence from the FLA with a statement from the deceased which asserts that the applicant and he had a common law relationship and this is the very core of the issue that the court is being asked to decide.

[57] Mr Pagon also referred to the cases of **Re: Estate of Huntley James Golding** [2016] JMSC Civ 233 and **Lisa Cohen v Administrator General for Jamaica** [2020] JMSC Civ 155 in which the court examined documentary evidence as well as representations made subsequent to the death of the deceased.

Pointing to **Lisa Cohen** in which the court adopted a list of factors described as signposts to determine whether a common law spousal relationship existed between parties, he submitted that the documents produced by the FLA was relevant because they satisfied two of the "signposts", that is, the application form showed an intention and expression by the deceased that the claimant was his spouse in the year of his death; and the investigator's report showed opinion of the reasonable person with normal perceptions that the claimant was in fact the spouse of the deceased at the time of his death.

[58] Mr Pagon also submitted that the evidence that the claimant is seeking to rely on is admissible under sections 22 and 31E of the Evidence Act.

[59] In summary, Mrs Brown Rose's opposed the application on the following bases:

(i) The prejudicial effect of the evidence contained in the affidavit of the FLA which the claimant is seeking to introduce outweighs the probative value.

(ii) The onus is on the claimant to provide the court with the best evidence to prove her case from the onset of the filing of the claim. The question of whether the claimant was the deceased's spouse at the time of his death is a question of fact. She should have the requisite information in her own possession and should not have to go digging at the FLA to prove her status. It was for her to put before the court evidence to satisfy the various signposts of the spousal relationship.

(iii) The FLA is not in the business of verifying or collecting data on marital relations but is the official authority for issuing and granting firearm licences to members of the public. In addition, the affiant who is the Director of Compliance and Enforcement did not know the deceased personally and was not a witness to the document. Also, the document being handwritten could have been tampered in that the claimant's name as being the common law spouse could have been inserted at anytime.

(iv) The documents were not directly relevant as they were from a stranger to the relationship.

(v) The document prepared by the investigator was inadmissible hearsay being double hearsay and the application form did not fulfil the requirements of a public document as adumbrated by the court in **National Water Commission v VRL Operators 2016** JMCA Civ 19.

Discussion and analysis

[60] There is no doubt that the court has power to vary its order. As was pointed out by Mr Pagon, the court is empowered to do so by rule 26.1(7) of the CPR, which provides that "a power of the court under these Rules to make an order includes a power to vary or revoke that order". Mr Pagon rightly pointed out that there are no guidelines provided in the CPR for the exercise of this discretion. However, in **Norman Harley v Doreen Harley** [2010] JMCA Civ 11, H Harris JA relying on the previous Court of Appeal decision of **Mair v Mitchell & ors** SCCA No 123/2008 (delivered 16 May 2008) (which applied the English Court of Appeal decision **in Lloyd's Investment (Scandinavia Limited) v Ager-Harrisen** [2003] EWHC 1740) held that the power may only be exercised where there has been a material change of circumstances or the judge making the previous order had been misled in some way, whether innocently or otherwise as to the correct factual position in making the decision. Mr Pagon is therefore correct in his contention that the power may be exercised where there has been a material change of circumstances.

[61] The order of Nembhard J was made on 6 April 2022. Based on the dates of the documents that the claimant is seeking to rely on, they existed at the time of the order. The evidence in support of the application is that requests were made of the FLA from 16 September 2021 for "copies of application form completed by the deceased during his lifetime to obtain a licence" and that the request was renewed by letter dated 5 May 2022. There is no indication what efforts were made to follow up on the request prior to the order of Nembhard J, but the evidence is that "despite reasonable efforts, the claimant's attorneys were not able to procure the said affidavit and or information from the FLA" prior to the

orders of Nembhard J on 6 April 2022 and that the affidavit was received under cover of the FLA's letter dated 16 June 2022.[19]

[63] I am of the view that the above evidence shows that there has been a material change of the circumstances that existed at the time Nembhard J's order was made in that the claimant did not have the documents from the NLA at that time. It is not necessary for me to determine whether sufficient efforts were made to obtain this information at the time of the first hearing before Nembhard J as this is not an application for fresh evidence where it must be shown that by reasonable diligence the information could not have been unearthed at the time of the hearing. I therefore find that in these circumstances, Nembhard J's order limiting the claimant's witnesses to 3 witnesses may be varied for the claimant to rely on an additional affidavit containing information received from the FLA subsequent to Nembhard J's order.

[64] The issue that then arises is whether the affidavit sworn to by Ms Allen exhibiting the two documents should be filed as is. As I have already stated in this judgment, the court can consider issues of admissibility prior to trial. However, once the admissibility hurdle has been cleared, the question of the weight to be attached to the evidence is solely within the province of the court at trial.

[65] It is my view therefore that my consideration as to whether the claimant should be allowed to file and serve the affidavit must be limited to whether the proposed evidence is admissible. It follows that considerations as to whether this is the best evidence the claimant can adduce, whether there is evidence that the claimant "goes by the name, Mrs Jackson" and other questions as to whether the application form is authentic, which all concern the quality of the evidence are matters that are pertinent to the weight to be attached to the evidence and not as to whether the documents are inadmissible. I do not agree with Ms Brown Rose's submissions that the documents are not relevant because the contents of the documents, particularly the application form, clearly concern the issue of whether the claimant was held out by the deceased to be the person with whom he was in a common law relationship **near to or at** the time of his death.

[19] See affidavit of Tajha Barrett in support of the application filed on 16 September 2022

[66] In her affidavit, Ms Allen makes a number of statements without any clear indication as to whether she has personal knowledge of the facts contained in these statements. These include that; the deceased submitted an application dated "5 December 2019" for the replacement of his defective firearm; the application was approved; the deceased was subsequently granted a firearm user's licence; the deceased last renewed his firearm licence on 22 June 2020; information was seen in the Daily Gleaner dated 2 October 2020 in the Obituary section relating to the deceased's death; an investigation file was created and assigned to the investigator, Mr Errol Brown, to confirm the death. Mr Brown advised that he spoke with someone whom he believed to be the deceased's widow, whom Mr Brown identified in his report as "Mrs Jackson"; and she (Ms Allen) was unable to confirm whether the identity of Mrs Jackson who purported to be the deceased's widow is one and the same as the claimant. As previously mentioned, only two documents were exhibited to Ms Allen's affidavit.

[67] It seems to me that the main thrust of the objectors' challenge is to the documents and not so much as to the information that is contained in Ms Allen's affidavit except where reference is made to the report of the investigator. It is clear that the two documents are hearsay documents as Mrs Allen is not the maker of those documents. I agree with Mrs Brown-Rose that the application form is not a public document as it does not satisfy the requirements of a public document as were adumbrated by Morrison JA (as he then was) in **National Water Commission v VRL Operators**. In that case, the learned judge of appeal in canvassing the authorities on this area, referred to, with approval, Professor Peter Murphy's summarisation of the conditions of admissibility of a document as a public document as follows:

> (a) that the document must have been made and preserved for public use and must contain matters of public interest; (b) that it must be open to public inspection; (c) that the entry or record sought to be proved must have been made promptly after the events which it purports to record; and (d) that the entry or record sought to be proved must have been made by a person having the duty to inquire into and satisfy himself of the truth of the facts recorded.

It cannot be said that the personal information of a member of the public is information that is preserved for public use and is a matter of public interest nor is there any evidence that this private information would be open for the inspection of the public and I would be surprised if it were otherwise.

[68] Mr Pagon is, however, also contending that the document is admissible under section 31E of the Evidence Act. In **Fenella Kennedy-Holland and Sheila Gwendolyn Kennedy v Joan Williams & ors** Claim No 2008 HCV 01916 (30 June 2009), Sykes J (as he was then) in considering the application of section 31E of the Evidence Act stated:

> 24. Section 31E (1) is expressed in wide but not unlimited terms. To understand this provision one must have the hearsay rule in mind. Section 31E (1) makes a statement made by any person (regardless of whether that statement was orally in a document or otherwise) admissible for the truth of the contents of the statement in any civil proceedings once it is established that had the maker of the statement been in the witness box, he would have been able to give the statement in evidence.
>
> 25. It is vital to observe that what is admissible is the statement made and not the medium by which the statement is captured. This means that if the statement is in a document, the concern of the provision is not the document per se but the statement captured in the document. If the statement was made orally (and not captured in any document) or "otherwise" (ie any other medium), the statement can be repeated or given by anyone who heard it, and it can be produced from any medium that captured it….
>
> 30. Therefore in giving effect to section 31E(1) the court must ask itself, "If the maker of the statement had come into the witness box, would what he said be admissible as the truth of its contents or admissible under any

> exception to the hearsay rule or other rule of evidence? If the answer is yes, and the proposed evidence is not subject to exclusion under the discretionary power in section 31L then the proposed evidence is admissible. If the answer is no, then the evidence is inadmissible. I wish to point out that in asking the question, the court must be alert to the possibility that the proposed evidence may be admissible, even if not coming in for the truth of its contents, under an exception to the hearsay rule. Therefore, if an exception to the hearsay rule can be established then the evidence comes in; if not, it stays out.

It should be noted that section 31E of the Evidence Act was amended subsequent to the decision in **Fenella Kennedy**, but the amendment does not affect the substance of the section and so Sykes J's interpretation would be still be applicable.

[69] It seems to me that the application form from the FLA that was purportedly signed by the deceased would be admissible under section 31E because had the deceased been alive he would have been able to give this evidence from the witness box, he having had personal knowledge of whom his common law spouse was. Where the report of the investigator is concerned, the investigator could give evidence that he spoke to someone who confirmed that the deceased had died because although the latter information would be hearsay, that statement is not being relied on by the claimant for the truth of its contents but to show that this was told to the investigator regardless of whether it was true. However, the investigator could not give evidence that the person identified herself as Mrs Jackson because he had no personal knowledge of that and that statement is clearly being relied on by the claimant for the truth of its contents to assist her in establishing that she was the deceased's spouse at the time of his death by drawing the inference that she is the "Mrs Jackson" referred to in the report and she was contacted by the investigator as she was regarded as the spouse.

[70] I therefore am of the view that the application form is relevant and admissible and would assist the court in determining the sole issue in this case and that there is no basis on which it could be said that the prejudicial effect outweighs the probative value of this evidence. On the other hand, I agree with Mrs Brown-Rose that the portions of the investigator's report that the claimant is seeking to rely on amount to double hearsay and are inadmissible because they are being relied on for the truth of their contents and are not admissible as an exception under section 31E of the Evidence Act or at common law.

Conclusion

[71] In the result, I make the following orders:

(1) The 3rd affidavit of Julianna Dawkins sworn to and filed on 6 May 2022 with audio of recording of telephone conversation between Juliana Dawkins and Jacqueline Jackson is struck out as inadmissible under section 31G of the Evidence (Amendment) Act.

(2) The application for an extension of time for the objectors to file their affidavits in response to the Affidavit of Peter Russell and Hermin Dixon and for the affidavits of Mattross Egbert Jackson filed on 9 May 2022 and the affidavit of Alison Chantal Jackson filed on 10 May 2022 to stand is refused.

(3) Order numbered 6 of the order of A Nembhard J made on April 6, 2022 is varied to permit the claimant to be limited to 4 ordinary witnesses.

(4) The claimant is permitted to file and serve an additional affidavit being the Affidavit of Letine Allen, the Director of Compliance and Enforcement at the Firearm Licensing Authority without the contents of the report of Mr Errol Brown dated 30 October 2020 being referred to or the report being exhibited. Also, the evidence contained in the affidavit shall be confined to information within Ms Allen's personal knowledge as well as information not within her

personal knowledge which are not being relied on for the truth of their contents.

(5) Costs are to be costs in the claim.

(6) Leave to appeal is granted