



[2020] JMSC Civ 4

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2018 HCV 03371**

<b>BETWEEN</b>	<b>GRANT'S WELDING AND MACHINE SHOP LTD</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE FIREARM LICENCING AUTHORITY</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**HEARD TOGETHER WITH**

**CLAIM NO. 2018 HCV 00370**

<b>BETWEEN</b>	<b>EVAN GRANT</b>	<b>1<sup>ST</sup> CLAIMANT</b>
<b>AND</b>	<b>GRANT'S WELDING AND MACHINE SHOP LTD</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>AND</b>	<b>SHANE DALLING</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>FIREARM LICENSING AUTHORITY</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND</b>	<b>NATIONWIDE NEWS NETWORK LIMITED</b>	<b>4<sup>TH</sup> DEFENDANT</b>
<b>AND</b>	<b>TREND MEDIA LIMITED T/A LOOP NEWS</b>	<b>5<sup>TH</sup> DEFENDANT</b>
<b>AND</b>	<b>RADIO JAMAICA LIMITED</b>	<b>6<sup>TH</sup> DEFENDANT</b>

**IN CHAMBERS**

**Mr Aon Stewart instructed by Knight Junor Samuels Attorneys-at-law for the Claimant/Respondent**

**Ms Carla Thomas, Ms Christine McNeil and Mr Carson Hamilton instructed by the Director of State Proceedings Attorney-at-law for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants in Claim No 2018 HCV 03371 and for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants in the Claim No 2018 HCV 00370**

**Ms Elizabeth Salmon Attorney-at-law for the 4<sup>th</sup> Defendant**

**Heard: October 9, 2019 and January 15, 2020**

**Civil Procedure – Application for permission to file and serve defence out of time - application for 3rd Defendant to be removed as a party in the Claim – CPR 10.3(5) and CPR 21 and CPR 22 – Whether the Firearm Licensing Authority has legal personality - Whether the Firearm Licensing Authority is a servant and/or agent of the Crown**

**MASTER T. MOTT TULLOCH-REID**

**[1]** In both applications, the Attorney General of Jamaica has applied to the court for three things:

- (a) The removal of the Firearms Licencing Authority (“FLA”) as a party in the claim because it is not a proper party;
- (b) The removal of the Attorney General of Jamaica as a party in both claims; and
- (c) Permission to file its Defence out of time if The Attorney General is not removed as a party in both claims.

**[2]** I note that the Director of State Proceedings is representing the FLA in making the applications, albeit that one limb of their argument is that the FLA is not a servant or agent of the Crown. In addition, the Acknowledgment of Service and Amended Acknowledgment of Service filed in each claim by the Director of State Proceedings, indicate that the documents are filed by the Director of State Proceedings, attorney-at-law on behalf of the FLA and the Attorney General for Jamaica. To then raise an argument in which it is trying to separate the FLA from the Attorney General for Jamaica is somewhat peculiar.

[3] In the submissions filed by the attorneys-at-law for the Attorney General of Jamaica with respect to Claim # 2018HCV 03371, it was stated that the order sought with respect to striking out the claim against the Attorney General was not being pursued. This was a sensible course of action since the Amended Particulars of Claim filed on October 22, 2018 alleges that servants of the Crown, including members of the Jamaica Constabulary Force and/or Island Special Constabulary Force were present on site during the occurrence of the incident and as such in those circumstances, the Attorney General for Jamaica is properly named as a party in claim 2018HCV03371.

[4] I am therefore left with the task of making two determinations:

(a) Whether the FLA is a party which can sue or be sued in its own name in both claims; and

(b) Whether the FLA is a servant and/or agent of the Crown so that for the purposes of Claim number 2018HCV03370 the Attorney General of Jamaica has been properly named as a party.

#### **Whether the FLA is a party that can sue or be sued in its own name**

[5] The Claimants argue that the FLA is a party that can sue or be sued in its own name. Mr Stewart invited me to consider paragraphs 6, 7 and 8 of his submissions filed on October 9, 2019 in which he raised the whole issue of statutory interpretation and the requirement for judges to give words their ordinary meaning when interpreting statute. He quotes from the dicta of the Brooks JA in the case of **Jamaica Public Service Company Limited v Dennis Meadows and ors; The Attorney General of Jamaica v Dennis Meadows [2015] JMCA Civ 1** emphasizing in particular the following:

*“The judge may read words which he considers to be necessarily implied by words which are already in the statute; and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally*

*unreasonable, unworkable, or totally irreconcilable with the rest of the statute.”*

- [6] Mr Stewart goes on to say that where Parliament intended to establish a body corporate the statute that governed the body expressly referred to the body as being a body corporate and made it subject to Section 28 of the **Interpretation Act** which allows for such bodies to sue or be sued in their own name. See for example section 3(1) of the **Transport Authority Act** which reads as follows:

*“There is hereby established a body to be called the Establishment of Transport Authority which shall be a body corporate, to which the provisions of section 28 of the Interpretation Act shall apply.*

- [7] I have perused the **Firearms Act** and I have found no reference to the FLA as being a body corporate. Section 26(1)(A) of the Firearms Act simply reads

*“There is hereby established for the purposes of this Act, a body known as the Firearm Licensing Authority.”*

It appears then, that the FLA is a creature of statute, a statutory body set up by an Act of Parliament for the purpose of considering issues related to the regulation of firearm licences, certificates or permits. There is nothing in the Act or the Regulations which gives the FLA the power to sue or be sued in its own its own name. For the purposes of comparison, I considered the Southern Regional Establishment Health Authority, another creature of statute. The Southern Regional Establishment Health Authority was created by section 3 of the **National Health Services Regulations**. Section 3 provides as follows:

*“There is hereby established a body to be called the Southern Regional Establishment Health Authority which shall be a body corporate with perpetual succession and a common seal and with power to acquire, hold and dispose of property, to enter into contracts, to sue and be sued in its said name and to do all things*

*necessary for the purposes of this Scheme: Provided that such power may only be exercised with the approval of the Minister.*

No similar wording appears in the **Firearms Act** or the **Firearms Regulations**.

[8] I am mindful of the fact that Mr Stewart has directed my attention to the power of the FLA to summon witnesses, call for and examine documents and do all such other things as it considers necessary or expedient for the purposes of carrying out its functions under this Act (section 26B(2) of the **Firearms Act** refers. I do not however, form the view that those powers are akin to the powers of the Assets Recovery Agency in the **Andrew Hamilton case**. In that case, the Assets Recovery Agency was given certain powers by the Proceeds of Crimes Act which powers included “*the power to apply or initiate court proceedings for forfeiture orders, restraint orders, civil recovery orders and to take and defend proceedings in respect of property vested in it as a result of a recovery order* (paragraph 56 of the judgment of Morrison JA, as he then was, refers). Morrison JA then went on to say that those powers were

*“... clear indicators that Parliament must necessarily have intended that it should enjoy legal status for these purposes.”*

[9] I do not believe that in giving the FLA the power to call for documents and summon witnesses, Parliament intended to endow the FLA with legal personality. I believe it was simply to carry out in particular its function as set out in section 26B(1)(e) of the statute, which is to “*receive and investigate any complaint regarding the breach of a firearm licence, certificate or permit.*”

[10] I agree with Mr Stewart when he says that where the words of a statute are unambiguous there is no reason to go outside of its specific wording. The **Firearms Act** is clear. It has not created a body corporate or a statutory corporation in its establishment of the FLA and as such it would appear then the FLA is not a statutory corporation (like the Southern Regional Establishment Health Authority or a body corporation (like the Transport Board Authority) which

can sue or be sued in its own name. It appears to be a statutory body which cannot sue or be sued in its own name.

### **Whether the FLA is a servant and/or agent of the Crown**

[11] What or who is a servant and/or agent? I will start from the general position. According to Black's Law Dictionary, 9<sup>th</sup> edition, a servant is

*“a person who is employed by another to do work under the control and direction of the employer”.*

An agent is defined as

*“one who is authorised to act for or in the place of another”.*

The question then is,

- a. is the FLA under the control of the Crown? or
- b. is the FLA acting on behalf of the Crown?

If the answer to any of these two questions is yes, then the Attorney General is properly named as a party in the claim. If the answer is no, then she is not.

[12] Counsel for The Attorney General of Jamaica says the FLA is neither a servant nor agent of the Crown. She argues that the FLA is not under the control of the Minister. This in spite of the fact that the Minister appoints the members of the Authority (see section 2 of the Third Schedule), determines the remuneration its members are paid (see section 6 of the Third Schedule) and is funded partly by monies determined by Parliament (see section 11 of the Third Schedule). In support of her position, I was referred to the case of **Metropolitan Meat Industry Board v Sheedy and ors** a decision of the Privy Council reported at [1929] AC 899. Ms Thomas, argues that in that case, the Board made its own decisions with very little input from the Crown. At page 902 of the decision of Viscount Haldane, he set out the wide powers of the Board. At page 905 of the decision, the learned Judge held that the Board could not be seen as servant or agent of the Crown,

because although the Governor could exercise its veto powers over actions of the Board and appointed the members of the Board, because of the wide discretionary powers the Board had, which powers it could exercise without having to consult with the direct representatives of the Crown, as well as the fact that the Board did not pay its receipts into the general revenue, the Board could not be seen as acting as servants of the Crown.

[13] In arguing his position, Mr Stewart directed me to the FLA's functions, which are set out in Section 26B of the **Firearms Act**. They are as follows:

- (a) to receive and consider applications for firearm licences, certificates or permits;*
- (b) to grant or renew firearm licences, certificates or permits;*
- (c) to revoke any firearm licence, certificate or permit granted under this Act;*
- (d) to amend the terms of a firearm licence, certificate or permit;*
- (e) to receive and investigate any complaint regarding a breach of firearm licence, certificate or permit."*

In summary, the functions of the FLA are to consider the applications for licences grant the licences, renew them, amend the terms and investigate. These functions, says Mr Stewart, are being carried out on behalf of the Crown. He goes on to say, that another basis for saying that the FLA is a servant or agent of the Crown, is that if a decision of the FLA is under review, it is the Minister who has the final say. The review process follows this sequence:

- (a) If an aggrieved party does not like the decision of the FLA, then they can appeal to the Review Board (section 37 of the Firearms Act refers).
- (b) After meeting, the Review Board, shall submit to the Minister, for his determination, a written report of its findings (section 37A (2)(b) of the Firearms Act refers).

(c) Having considered the report of the Review Board, the Minister will direct the FLA as he sees fit (section 37A(3) of the Firearms Act refers).

[14] Mr Stewart further argues since it is the Minister who must approve the person selected to be the CEO of the FLA (see section 12(1) of the Third Schedule of the Firearms Act as amended) then it must be that FLA is a servant or agent of the Crown. He argues that the purpose of the FLA is to regulate the issuance of fire arm licences which is the role of government and by issuing the licences itself, the FLA is carrying out its role on behalf of the government and so is therefore a government agency.

[15] I note that the Ministry of National Security's website lists the FLA as one of its agencies and departments. The Ministry's website sets out the functions of the FLA as including:

*(a) "Implementing a transparent and accountable system for the issue of Firearm Licenses.*

*(b) Ensuring proper and standardized Training Certification in the Safe Use and Care of firearms.*

*(c) Developing and maintaining a modern computerized Ballistic Identification Database.*

*(d) Finally, the Police Force and its specialized divisions will still have vital and important investigative, monitoring and enforcement roles."*

It then also says that

*"The FLA is responsible for standardizing the process for the granting, renewal and revocation of firearm licences. This serves to modernize and regulate the licensing of firearms in Jamaica in keeping with worldwide standards. The Firearm Licensing Authority*

*will also act as a centralized administrative body and database repository. Attorney at Law, Shane Dalling is the CEO of the FLA.”*

I have perused the **Firearms Act**, but I have not seen where any of those functions noted on the Ministry’s website are akin to those that are specifically set out in the statute which governs the FLA and so I attach no weight to that which posted on the website.

[16] In response to Mr Stewart’s submissions on the point, Ms Thomas says those things are not sufficient to determine whether the relationship of servant or agent exists between the FLA and the Ministry of National Security and by extension the Crown. Her argument rests on the **Metropolitan Meat Board** decision and I might suggest that there is also a similarity between that case and the case at bar in that, like the Metropolitan Meat Board, the FLA has control over its own funds as any receipts collected by the Collector of Taxes are paid to the authority. There is a difference though. The Metropolitan Meat Board was incorporated. The FLA is not.

[17] Ms Thomas also argues that because Justice Fraser at paragraph 184 of his decision in **Gorstew Limited v Hon Gordon Stewart OJ and The Contractor General [2013] JMSC Civ 10** only referenced “*central government, ministries or government departments*” in his interpretation of the definition of “Crown” as set out in section 1 of the **Crown Proceedings Act**, the FLA should not be considered a servant or agent of the Crown because it did not fall into any of those categories. I do not agree with Ms Thomas on this point as if one refers to paragraph 182 of the judgment, those were the submissions of Mr Braham QC, which the learned Judge appeared to have merely adopted. I do not find that he was setting out an exhaustive list of what statutory bodies fell within or under the auspices of the Crown. He merely listed three categories relevant to the case he was considering and said that the Contractor General did not fall into any of those categories, especially in circumstances where the Act that governed the Contractor General specifically said that “*a Contractor General shall not be subject to the direction or*

*control of any person or authority (see section 5(1))*” (paragraph 185 of the judgment refers).

[18] The case of **Tamlin v Hannaford [1950]1 KB 18** provides some assistance. The case concerned the British Transport Commission and the question for the determination was whether the Commission was a servant or agent of the Crown. Lord Justice Denning in delivering the judgment of the Court of Appeal highlighted the fact that the Minister of Transport appointed the directors and fixed their compensation, they had to provide him with any information he wanted and he could give them directions which they were bound to obey. Denning LJ was of the view that although the powers of the Minister were great, the Commission, could not be seen as an agent of the Minister. It was however, a public authority and its purposes were public purposes. It was not a government department and its powers did not fall within the province of government. Denning LJ went on to say that

*“The only fact in this case which can be said to make the British Transport Commission is a servant or agent of the Crown is the control over it which is exercised by the Minister of Transport; but there is ample authority both in this Court and in the House of Lords for saying that such control as he exercises is insufficient for the purpose... When Parliament intends that a new corporation should act on behalf of the Crown, it as a rule says so expressly... In the absence of any such express provision, the proper inference, in the case, at any rate, of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department.”*

Would the result have been different if the Transport Commission was not a commercial entity and was a public body? I do not believe so. I understand Denning LJ to be simply saying that Parliament will expressly indicate whether an entity created by statute is to be act on behalf of the Crown. Where Parliament

does not expressly say so, then the entity acts for itself even though controlled by a Government department.

[19] In the **Tamlin case**, the British Transport Commission was established as a body corporate under the governing statute. This is not the case in the matter before me. In the **Tamlin case**, Denning LJ referred to the UK Town and Country Planning Act, 1947 which specifically named the Central Land Board as the servant or agent of the Minister (section 3(3) of the statute refers) even though it was a body corporate, with perpetual succession and had a common seal (section 2(1) of the statute refers). For the sake of comparison, I considered the Jamaican **Town and Country Planning Act** to see if there was a similar wording. There was none. Section 3(1) of the Town and Country Planning Act reads as follows:

*“For the purposes of this Act the Minister shall appoint a person or persons to be the Town and Country Planning Authority...”*

Section 4(1) establishes “a body to be known as the Advisory Planning Committee...”

Section 4(2) sets out the duty of the Committee. It reads as follows:

*“It shall be the duty of the Committee with a view to the proper carrying out of the provisions and objects of this Act, to advise the Minister on any matter within its knowledge or on which the Minister may seek advice.”*

No such wording appears in the **Firearms Act**. My interpretation of section 4(2) of the **Town and Country Planning Act** is that the Advisory Planning Committee is a servant or agent of the Crown, given its role. It was created not to make decisions itself but to advise the Minister as to how he is to decide. The final decision rests with the Minister. The comparable body in the **Firearms Act** would be the Review Board, which reports directly to the Minister and whose report, is submitted to the Minister for his determination. The Review Board does not seem to be able to decide for itself how the issue under review is to be resolved. It

collects the information for the Minister, puts its findings into a report, submits the report and then the Minister makes the final decision.

[20] I considered whether it would be correct to say that a state entity which does not have a separate legal identity (i.e. a body corporate which could sue or be sued in its own name) should properly be seen as falling under the auspices of the Crown but I have concluded that that would be too huge of a leap to make and I again found myself constrained by the wording of the statute.

[21] If the statute is meant to establish a servant/agent relationship between the Minister and the statutory body, it appears that it will say so (see again for example section 3 of the **National Health Services Regulation** which specifically makes the Health Authority a servant of the Crown). The absence of that specific wording as it relates to the FLA in the **Firearms Act** would suggest that it is not to be seen as a servant or agent of the Crown. In the absence of similar wording in the **Firearms Act** and in circumstances where generally speaking the FLA does not seem to be under the control and direction of the Minister (although the Minister does play a critical role in its functioning), it cannot be correctly seen to be a servant or agent of the Crown. It is a public body with public purposes.

[22] The starting point in statutory interpretation is the ordinary linguistic meaning of the word used. Diggery Bailey and Luke Norbury in Bennion on Statutory Interpretation 7th edition, page 267 cited Lord Reid in **Jones v DPP**. Lord Reid said

*“It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the word of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between those meanings, but beyond that you must not go.”*

The learned authors went on to say that the cases are clear that grammatical meaning must be followed irrespective of the consequences, even in cases of absurdity and that the Court has no power to read words into statute.

I agree. If there is ambiguity the Court may use any other rule of statutory interpretation, usually the purposive rule, to correct the ambiguity. There is nothing ambiguous in the sections of the **Firearms Act** which are before me and so I am not at liberty to extend myself outside of the ordinary linguistic meaning of the text of the statute. If Parliament had intended the FLA to be a body corporate or the servant or agent of the Crown, Parliament must say so. If there is a gap, Parliament must fix it – not the Court. The Court interprets the law it is not the law maker.

[23] As an additional step in seeking to interpret the legislation, I also considered the Jamaica **Hansard, Proceedings of the House of Representatives, Session 2005/2006 March 31, 2005 to July 27, 2005 Vol 31 No 1** which set out the discussion that took place in Parliament when the establishment of the FLA was being considered. Dr Peter Phillips in addressing the Ministers said the following:

*“...this Bill has as its purpose the introduction of a revised policy and procedures with respect to the issuance of firearm licences. It provides for the establishment of an **independent central authority** (my emphasis) and sets out procedures for the granting of licences, certificates and permits under the Firearms Act (see page 642). ...The Bill establishes a Firearm Licensing Authority that will be responsible for granting, renewing and revoking licences, certificates and permits. This new independent licensing body will centralise the licensing process and exercise greater control over the issuance and renewal of relevant documents. Its membership will comprise persons of established high integrity, able to exercise sound judgment in fulfilling their responsibilities (see page 643). It [the Bill] will ultimately, Mr Speaker, centralise the process of grant in the hands of an authority which will be directed by persons of high reputation, who themselves can be subject to audit and an oversight, by not only the Ministry of National Security but by this Parliament by extension (see page 644)”*

It is clear to me that the FLA was intended to be run by its members – persons of high reputation in an independent central body. The extent of oversight by the Ministry and Parliament was not so much as to control or oversee the FLA but really to operate as a check and balance to prevent the FLA from acting outside of its mandate. I am satisfied that the FLA is not a servant or agent of the Crown.

**[24]** If the FLA is neither a body corporate nor a servant or agent of the Crown, then what is it? We know it is a statutory body. We know that not all bodies created by statute have their own legal personality. When the Crown wants them to have their own legal personality, there is a specific reference to section 28 of the Interpretation Act. We also know from the **Tamlin case** and the case of **Andrew Hamilton and ors v The Assets Recovery Agency [2017] JMCA Civ 46** that even statutory bodies corporate are not necessarily considered servants or agents of the Crown and that in order to make a true determination of what the body is, the statute that governs it must be carefully examined (paragraph 56 of the judgment refers).

### **Conclusion on the status of the FLA**

**[25]** Where does this leave us? Since I have decided that the FLA is not a body corporate it cannot be sued in its own name. It has no legal personality. If the Claimant/Claimants wishes/wish to bring a claim against it, then it/they must follow the principles set out in the case of **Junior Doctors Association v the Central Executive of the Junior Doctors Association and the Attorney General For Jamaica Motion No 21/2000 heard on June 19 and July 12, 2000**. Mr Stewart argued that if I so found, the Board of the FLA could be substituted in its stead. I do not agree. The Board is not a legal entity that can sue or be sued in its own name. Individual members of the FLA would have to be named and they would be sued on behalf of the FLA in a representative capacity, pursuant to CPR 21.

I have also decided that the FLA is not a servant or agent of the Crown. It does not take directions from the Minister for its day-to-day operations. It appears to only take instructions from the Minister in instances where its decisions are being

reviewed. Although it issues and revokes licences, I do not form the view that it is a regulatory body as its duties do not include: imposing requirements, conditions or restrictions, setting the standard for activities or enforcing or obtaining compliance, which are the basic functions of regulatory bodies. It is not a department of government. It is not to my mind an agent of the Minister, making decisions on behalf of the Minister. It is its own body which was set up to issue firearm licences, certificates and permits and perform functions which affect the issuance of the licences, certificates and permits

### **Extension of time to file Defence of the Attorney General of Jamaica**

[26] As it relates to Claim No 2018 HCV 03370, I am directed to a Further Amended Notice of Application for Court Orders filed June 5, 2019. There is no Affidavit in Support of this Further Amended Notice, however, there is an Affidavit of Mr Carson Hamilton filed on November 27, 2018 in support of the Notice of Application seeking an extension of time to file defence, which notice was also filed on November 27, 2018. As the FLA has been removed as a party in the claim, there is no need for it to file a Defence at this time. However, under normal circumstances, the Attorney General for Jamaica would be required to file a Defence. I have examined the Particulars of Claim filed on September 5, 2018. Paragraph 3 particularises why the Attorney General is being sued. She is being sued because of the acts or omissions of the FLA pursuant to section 3 of the **Crown Proceedings Act**. I have already stated my position that the FLA is not a servant or agent of the Crown and as such, there can be no claim against the Attorney General in this instance.

[27] As it relates to Claim No 2018 HCV 03371, the Amended Notice of Application for Extension of Time to file Defence was filed on June 5, 2019. It is supported by an Affidavit of Mr Carson Hamilton. The Affidavit does not have exhibited to it a draft Defence nor does the affidavit itself set out any merit. The case law is clear – in circumstances where an applicant is seeking permission to file a defence out of time the Court should consider the following:

- a. The length of the delay;
- b. the reason for the failure to comply with the prescribed time;
- c. the prejudice that the Claimant will suffer because of the delay;
- d. the effect of the delay on public administration;
- e. the merits of the appeal (in this case I would say the merits of the defence);
- f. the importance of complying with time limits; and
- g. the resources of the parties.

These principles were set out in the case of **Fiesta Jamaica Ltd. v National Water Commission [2010] JMCA Civ 4**, in which the the Court of Appeal adopted the decision of Lightman J in **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Limited and ors [All England Official Transcripts (1997-2008) delivered 19 January 2000]**.

[28] Mr Hamilton, in his supporting affidavit, says at paragraph 4 that the Claim Form and Amended Particulars of Claim were served on the Director of State Proceedings on November 19, 2018. The Defence should have been filed on January 1, 2019 but as that would have been a public holiday, then January 2, 2019 would be the last date on which the Defence could be filed without the consent of the Claimant or the Court's permission. The application for permission to file defence out of time was made on December 19, 2018 – well before the time to file had elapsed. There was therefore no delay in making the application. The explanation given by Mr Hamilton at paragraph 5 and 6 is also a good. The Director of State Proceedings would have to take instructions from the Commissioner of Police in order to put forward a defence. The Attorney General was not on site (as far as I am aware) and is being sued only because members of the Jamaica Constabulary Force or the Island Special Constabulary Force, servants and/or agents of the Crown were allegedly on site and participated in carrying out the tort against the Claimant. In order to put forward a proper defence, she would have to find out who those officers were and interview them to obtain their perspective on what happened on the day in question. She will have to get

assistance from the Commissioner of Police to find the persons. It is clear that she will need additional time.

[29] The issue left to be determined is how to deal with the absence of the Affidavit of Merit and Draft Defence, which Mr Stewart rightly says are missing. **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Senior (his father and next friend) [2013] JMCA Civ 16** is instructive. In that case, the Honourable Mr Justice Brooks at paragraph 14 indicated that although the CPR do not provide any guidelines that should assist the Judge in making that decision, the court is to have regard to the overriding objective, which enables the court to deal with the cases justly. In that case, the Defendant had no affidavit of merit before the Court nor was there a draft defence exhibited. The Honourable Mr Justice Brooks held that despite the absence of these items which generally speaking are required, an extension of time should be given to the Defendant to file her defence in circumstances where the defendant can satisfy the court that

- (a) the application is made within a reasonable time;
- (b) there are good reasons for the delay;
- (c) there is a good reason why the extension should be granted; and
- (d) there would be no undue prejudice to the Claimant.

(see paragraph 17 of the judgment)

[30] Brooks JA went on to say in paragraphs 18 and 19 of the judgment that there could be a number of reasons a defendant is unable to file his defence in time. In the case before him, he recognised the fact that the state entity is large with many departments. He said that a defendant who expected to file a defence but is unable to do so in time should not be shut out as a matter of course from being able to apply successfully for an extension of time. He said that

*“A defendant who has not produced evidence of merit should only be successful if he were able to convince the court that it would be just to extend the time. The decision should lie within the discretion of the judicial officer hearing the application.”*

**[31]** This application was first before the Court on June 5, 2019. It was then adjourned to July 24, 2019, then to September 25, 2019 and then to October 9, 2019. Paragraph 6 of Mr Hamilton’s affidavit states that he believes that the instructions that are being awaited will be forwarded to the Director of State Proceedings. He does not say when those are expected and up to the date of the hearing, that is, October 9, 2019 it does not appear that those instructions were forthcoming as no supplemental affidavit to which a draft defence was exhibited was filed. That would mean that over a period of approximately ten months the Director of State Proceedings was not able to obtain instructions from the Commissioner of Police as to what in fact happened on March 20, 2018 so that a Defence could be filed. It certainly cannot be expected that the Claimant is to wait for an extended period of time to pursue its claim while the Attorney General and her attorney-at-law get their ducks in a row. Mr Hamilton’s statement at paragraph 7 that the failure to file the defence is not intentional act on the defendants’ part to disregard the claimant’s interest in having her claim dealt with expeditiously may have been sincere at the time that it was made, but that cannot be true now, over ten months later.

**[32]** The allegations that have been brought by the Claimant are serious. I am mindful of the difficulties that the Director of State Proceedings have in obtaining instructions. I take into consideration that from December 2018 today, a year would have passed and so I am of the view that if the Attorney General is not able to obtain their instructions within two weeks of the delivery of this judgment, then it is not likely that those instructions will be forthcoming and I am not of the view that the Claimant should be asked to wait beyond that period to proceed with its claim.

## Consolidation of the Claims

[33] The Attorneys-at-law for the Attorney General of Jamaica raised the issue of having the claims consolidated. The Claimants and the 4<sup>th</sup> Defendants' attorneys-at-law were not prepared to respond to that issue as they informed me that they would have to take their respective clients' instructions. I am however of the view that the two claims should not be consolidated but that they should be heard together at the same time as the evidence out of which the allegedly defamatory statements were made, arose out of the incident that took place on March 20, 2018 which gave rise to claim no 2018 HCV 03371. It is my view that it would be a better use of the Court's time and resources if both claims were to be tried together on the same occasion pursuant to CPR 26.2(h).

[34] I now order as follows:

- a. Service of the Further Amended Notice of Application for Court Orders filed on June 5, 2019 in respect of HCV of Claim No 03370 on the 1<sup>st</sup> and 2<sup>nd</sup> Claimant's attorneys-at-law on June 6, 2019 is allowed to stand.
- b. The Firearm Licensing Authority is removed as a party in both Claims 2018 HCV 03370 and 2018 HCV 03371.
- c. The Attorney General of Jamaica is removed as a party in Claim No 2018 HCV 03370.
- d. The Attorney General of Jamaica is to file and serve a Defence to Claim No 2018 HCV 03371 on or before January 28, 2020 failing which the Registrar is to enter Default Judgment for Failure to File a Defence against the Attorney General of Jamaica, the Defendant which remains.
- e. Claim No 2018 HCV 03371 and Claim No 2018 HCV 03370 are to be tried together on the same occasion.
- f. The parties in both claims are to attend mediation on or before April 30, 2020.
- g. Should mediation be unsuccessful the parties are to attend Case Management Conference on May 21, 2020 at 11:00pm for half (½) hour.
- h. Each party is bear his own costs.
- i. The Director of State Proceedings is to file and serve the Formal Order.