

- [3] Where these applications are before the court, in keeping with the underlying principle of fairness and the overriding objective, the court will not usually enter judgment in default of acknowledgment of service or defence before it first hears any pending application for permission to extend the time to file a defence.

THE APPLICATION TO FILE DEFENCE OUT OF TIME

- [4] The Court's authority to extend time to file a defence is found in CPR 10.3(9). This rule is limited in its guidance as it does not set out the considerations that a court must have in exercising its discretion to extend the time to file a defence. This discretion must therefore be exercised in keeping with the overriding objective.
- [5] Guidance in exercising the discretion to extend time generally, is provided in the well-known and often relied on decisions of ***Leymon Strachan v The Gleaner Company (JA) Limited & Anor*** SCCA No. 54/97, ***Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Limited & Others*** [2001] EWHC Ch 456, ***Fiesta Jamaica Limited v National Water Commission*** [2010] JMCA Civ 4, and ***The Attorney General of Jamaica & Western Regional Health Authority v Rashaka Brooks*** [2013] JMCA Civ 16.
- [6] These cases all emphasise that in considering a Defendant's application to extend time, the court is to consider (a) any delay in making the application, (b) the explanation for failing to file the defence within the prescribed period, (c) the merits of the proposed defence, (d) any likely prejudice to the claimant where the extension is granted, and (e) the effect on the administration of justice which considers among other things, the use of the court's time and resources.
- [7] Importantly, as Brooks, JA (as he then was) sought to highlight in ***Rashaka Brooks*** (supra), the court is not to constrain itself to a rigid set of rules when considering an application to extend time to file a defence. The Court must adopt a holistic approach weighing each factor in light of the particular circumstances of each case and at the end of the day base its decision on where the justice of the case lies.

- [8] This may well mean that a Defendant who has no explanation for his delay may still be permitted to defend his claim because, on the facts before the court, he has a reasonable or good prospect of succeeding on his defence.
- [9] On the other hand, it may also mean that a Defendant whose delay is egregious and prejudicial to the Claimant, and who is unable to provide any or any justifiable explanation for his delay may not be permitted to file his defence out of time despite there being a good defence to the claim.

DELAY

- [10] There is no dispute that the applicant filed his application after acknowledging service and before the prescribed 42-day period for filing his defence expired. There was therefore no delay in filing this application.

THE EXPLANATION PROVIDED BY THE DEFENDANT

- [11] There were two affidavits filed by the Defendant in support of this application. The first affidavit filed on April 20, 2020, simply outlined that the Defendant was not in receipt of instructions to file a defence within the prescribed period and prayed for an extension.
- [12] The second affidavit filed some nearly two years later on February 10, 2022, sought to outline the Defendant's defence and exhibited the proposed draft defence and the statements that the Defendant intended to rely on to establish his proposed defence.
- [13] While this latter affidavit satisfied the requirement to file an affidavit of merit, it did not provide a detailed explanation as to the efforts the Defendant made to secure instructions, nor did it provide an explanation for the delay in receiving these instructions.

- [14] The affidavit did not provide an explanation for the period between the filing of the application to extend the time to file the defence in 2020 and the filing of the affidavit of merit exhibiting the draft defence in 2022.
- [15] It is always important to provide the court with a complete explanation for the reason for any delay in receiving instructions and the efforts made to procure these instructions to enable the court to assess whether the explanation provided is reasonable in all the circumstances.

THE PROPOSED DEFENCE

- [16] Although the court is required to consider several factors as outlined in ***Commissioner of Excise*** (supra), the proposed defence is perhaps the most important consideration.
- [17] It is undoubtedly true that an important feature of the administration of justice is that as far as possible cases are to be disposed of on their merits. The courts are loathe to close the doors on a litigant without hearing the merits of his case.
- [18] On the other hand, it is also true that the court's power of case management and the several other powers given to the courts in keeping with its mandate to properly manage cases, is to also ensure that only cases that require a determination of its issues by trial actually proceed to trial. There are a host of tools available to the court including, but not limited to mediation, which assist the court in disposing of matters without a trial.
- [19] To adopt the reasoning of Lord Briggs in ***Sagicor Jamaica Limited v Marvalyn Taylor Wright*** [2018] UKPC 12 where the court considered an application for summary judgment, but it is most relevant to applications where the court is required to consider the merits of a Defendant's proposed defence.

At paragraph (17) he said:

"There will in almost all cases be disputes about the underlying facts some of which may only be capable of resolution at trial by the forensic process"

of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense."

- [20] In considering the Defendant's proposed defence I have therefore considered the Claimant's statement of case, the Defendant's affidavits in support of the application and the exhibits attached to the latter affidavit.
- [21] The Claimant claims damages for the unlawful seizure and detention of his motor vehicle. He alleges that his motor vehicle was unlawfully seized by the police on January 28, 2019, in circumstances where his driver was never charged and placed before the court for any road traffic offences. He further alleges that despite repeated requests for the release of his vehicle it remains in the possession of the police.
- [22] In the affidavit in support of the Notice of Application to file defence out of time, counsel for the Defendant outlines the circumstances of the seizure of the Claimant's motor vehicle. Exhibited to this affidavit of merit are the statements of Constable Condappa, the investigating officer and DSP Stacy-Ann Green which the Defendant intends to rely on at trial.
- [23] Constable Condappa, in his unsigned statement, states that while on duty at about 4pm, on January 28, 2019, he observed a grey Toyota Hiace minibus bearing registration plates PH4297 parked along a section of the Total Service Station. He also observed the driver and conductor soliciting passengers and loading the bus inside the service station.
- [24] He says that after making this observation, he approached the driver and conductor of the said minibus and informed them of his observations. He also says that he pointed out the offence of operating contrary to the terms and conditions of the road licence. Importantly, he said that the driver of the bus responded that he was aware that *"the bus should not be picking up passengers however he was at the garage for the entire day so he was trying to make up the money for the boss."*

- [25]** He went on to explain further that he requested the documents for the bus but the driver was unable to produce them. He informed the driver that the bus would be seized in light of his operating contrary to the terms and conditions of his road licence. He instructed the passengers to exit the bus and the driver to drive the bus to the police station. The driver was further instructed to take the documents for the bus to the station on the next day for a summons to be issued for the said offence of operating contrary to the road licence. The driver was unable to produce the documents for the vehicle that day.
- [26]** He says that the driver did not return the following day for the summons to be prepared. He goes into detail about another individual who he only knows to be "John" who attended the police station and told him that he was in charge of the bus and that the owner was overseas. He, "John", also offered him \$10,000.00 to write the summons in his (John's) name and using his driver's licence. He says that he refused the offer and warned "John". He also told him to have the driver of the vehicle come to the station. "John" then left the station but approached Constable Condoppa a second time making the same request and the officer says that he again warned him.
- [27]** Constable Condoppa further states that he informed his supervisor Sgt Miller about this conversation. Sgt Miller he said spoke to "John" and told him that if he was in charge of the bus, he should bring the driver of the bus to the police station or get his name. He also told him that he needed to get a Power of Attorney from the owner who he says was overseas, as without the Power of Attorney he was unable to conduct any business on behalf of the owner in relation to the bus. Thereafter "John" left the station.
- [28]** DSP Stacy-Ann Green, the Administrative Officer for the St. Ann Police Division at the time of the seizure of the Claimant's vehicle also provided a statement. I have outlined the relevant sections of her statement as it too is important to this application.

- [29] DSP Green states that she received a report from Mr. Avon Griffiths on February 27, 2019 while in office at the St. Ann Divisional Police Headquarters. This report was in relation to the seizure of his 2007 grey Toyota Hiace motor truck registered PH4297 on January 28, 2019.
- [30] DSP Green says that after receiving the report, she spoke to the investigating officer, Constable Christopher Condoppa and his then immediate supervisor, Corporal Courtney Miller, both of the Ocho Rios Traffic department.

She goes on to explain in her statement that:

“Based on the account given, it was clear that the driver of the aforementioned vehicle was operating contrary to the terms of the licence. However, there was an issue with respect to the location of the documents for the vehicle. Mr Griffiths had alleged that the documents were in the possession of the police from another jurisdiction and that the police was unable to locate same. Based on this controversy, a decision was taken to give Mr. Griffiths the benefit of the doubt and he was advised to get the lost document forms done up for the replacement of the documents.

A decision was also taken for a waiver to be sought from the leadership of the Transport Authority, with respect to the fees incurred at the pound, in relation to the same vehicle. Based on my request, then Corporal Miller, got a verbal commitment from the Regional Manager. Mr. Griffiths advised me that he would have to return for the document at a later date as he did not have the fee for the wrecking company.

On March 24, 2019, Mr. Griffiths returned to my office. He however advised that he was still unable to cover the wrecking fee due to personal financial hardship that he was facing. He said that the same vehicle met in an accident shortly after him (sic) purchasing it, and the repairs had to be done out of pocket. He further stated that he had secured a loan from a loan shark which has fallen in bad debt and that if he does not pay them over three hundred thousand dollars within a matter of days, his asset will be seized, hence they must be prioritized.

Based on the utterances of Mr. Griffiths, I decided to send the document directly to the Transport Authority’s Regional Manager. This was email (sic) on the same day, and hard copy sent thereafter, with an agreement that Mr. Griffiths would receive the vehicle from the Transport Authority’s pound as soon as he was able to settle the outstanding wrecking fee.”

- [31]** Based on DSP Stacy-Ann Green's statement, after the vehicle was seized on January 28, 2019, she met with the Claimant a month later on February 27, 2019, and thereafter again on March 7, 2019 when he returned to her office.
- [32]** After speaking with the Claimant and the investigating officer and his supervisor, a decision was made to return the Claimant's vehicle to him upon his payment of the wrecker's fees, as she had secured a waiver for the storage fees that would have been incurred when the vehicle was seized and taken to the Transport Authority Pound.
- [33]** This means that all Mr. Griffiths was to do after March 7, 2019 was return and pay the wrecker fees. As I understand the proposed defence, the Defendant is saying that the Claimant never paid the wrecker fees and also failed to produce a Power of Attorney that authorised him to collect the vehicle. On this basis the Defendant argues that he has a good defence to the claim.
- [34]** Miss Campbell, for the Claimant has submitted that the real issue is whether the Claimant's vehicle was lawfully seized. She argues that the driver of the Claimant's bus was never issued with a summons to attend court and thus the Defendant's refusal to return the Claimant's bus is unlawful. She submits that there was no basis to require the Claimant to produce a Power of Attorney to claim the vehicle as the vehicle belonged to him. She says despite her several letters demanding the return of the Claimant's vehicle, it remains in the possession of the police. She argues that the Defendant has no reasonable defence to the claim and the extension should not be granted.
- [35]** After the hearing was concluded, I asked counsel to consider whether section 13 of the Transport Authority Act was relevant to the application that was before me and to provide submissions in relation to this section.
- [36]** Neither counsel seemed to be of the view that section 13 greatly impacted their submissions in relation to the proposed defence. Mr. Maddan for the Defendant in his brief submissions referenced section 13(1)(e) and 13(2) (a) and (b) and further

submitted that these provisions enhanced the Defendant's position that he had a good defence to the Claimant's claim.

ANALYSIS

- [37]** Both parties agree on their statement of cases that the vehicle which was seized by Constable Condoppa was a public passenger vehicle.
- [38]** The Transport Authority Act and the Transport Authority Regulations (1988) govern the operation of public passenger vehicles which traverse the public roadways. They guide Transport Authority Officers and Constables in performing their duties by identifying the offences under the Transport Authority Act, and also inform operators or public passenger vehicles of their obligations under the Act and the Regulations.
- [39]** The Act and the Regulations also speak to the offences which are unique to transport operators. This is not to say that these operators cannot be prosecuted by Constables under the Road Traffic Act. Rather, the Act creates special rules and penalties/fines where these rules are breached.
- [40]** Although Constable Condoppa says that he informed the driver of the Claimant's bus that he was operating contrary to his road licence, it is important to note that, that is not the actual offence, as most if not all the offences under the act are as a result of the transport operator or his driver operating contrary to the road licence issued by the Transport Authority.
- [41]** In addition, where operators or owners are successfully prosecuted, the fines imposed by the Court are based on the particular offence for which a motorist is convicted.
- [42]** Indeed, where a summons is issued by an Inspector/Constable, the summons must clearly state the offence for which the individual is charged under the Transport Authority Act. This is simply because an accused person must know of the charge which he has to answer and merely stating that an individual is

operating contrary to a road licence is insufficient to meet this requirement. Furthermore, each offence carries a particular fine.

[43] Regulation 9(1) of the Transport Authority Regulations provides that:

“A driver shall not take up or set down any passenger except at specified points indicated by signs marked –

(a) “BUS STOP” or “BUS TERMINUS”,

(b) “ROUTE TAXI” in the case of a stage carriage “B” which is a route taxi,

and passengers shall not be taken up or set down between such specified stops.

(2) Notwithstanding paragraph (1), a driver may take up or set down a passenger other than at the specified points mentioned in that paragraph

(a) where the service provided is not a stage or express carriage service, or

(b) where no such signs are provided along the route”

[44] Thus, while Constable Condoppa spoke of observing the driver of Mr. Griffith’s vehicle “operating Contrary to his Road Licence”, his further statement indicates that he would have observed the driver and conductor carrying out activities which were contrary to Regulation 9.

[45] This offence is often referred to as “dropping off or picking up a passenger at a place other than a bus stop”. The driver of the Claimant’s bus was seen loading and unloading the public passenger vehicle at a Total gas station which according to the investigating officer, the driver accepted was not the prescribed area to perform this function.

[46] Section 13 of the Transport Authority Act outlines the circumstances in which motor vehicles can be seized. The Legislature made a distinction between the seizure of public passenger vehicles and private vehicles. Public passenger vehicles can only be seized in the stated circumstances. A private motor vehicle on the other hand

can be seized where a Transport Authority Inspector/Constable is of the reasonable belief that the driver of the motor vehicle was operating as a public passenger vehicle without the requisite road licence.

[47] Section 13 provides as follows:

13(1) An Inspector or a Constable may at any time-

- (a) Stop and inspect any public passenger vehicle to ensure compliance with the terms of the road licence and any relevant traffic enactments;*
- (b) Stop and inspect any vehicle which he reasonably suspects is operating as a public passenger vehicle contrary to relevant road traffic enactments;*
- (c) Monitor the frequency of public passenger vehicles on any route*
- (d) Carry out inspection of conductors and drivers of public passenger vehicles and the licences held by these conductors and drivers*
- (e) carry out such powers or duties in relation to relevant road traffic enactments as may be prescribed.*

(2) An Inspector or Constable shall have power –

(a) to seize any vehicle which –

(i) is licensed as a stage carriage, express carriage or route taxi and is not being operated on the route for which it is licensed to operate.

(ii) is licensed as a hackney carriage and is being operated as a stage carriage, route taxi or express carriage.

(iii) is licensed as a contract carriage and is being operated as a stage carriage, route taxi or express carriage;

(iv) is licensed as an express carriage and is being operated as a stage carriage or route taxi; or

(v) is being operated or used as a public passenger vehicle without a licence issued for such operation or use; (emphasis added)

- [48]** Section 13(1) (e) is important as while it authorises Transport Authority Inspectors/Constables to at any time “carry out such powers and duties in relation to relevant road traffic enactments as may be prescribed,” it does not create wide and unfettered powers. It simply provides that where the driver of a public passenger vehicle is observed committing an offence under another enactment, for example the Road Traffic Act, the driver can also be prosecuted for breaches of this legislation.
- [49]** Importantly, these duties and powers must be carried out in keeping with the provisions of the related road traffic enactments.
- [50]** In this instance, Constable Condoppa said that he observed the driver of the Claimant’s vehicle operating contrary to his road licence which can only be an offence under the Transport Authority Act. He also described seeing the driver commit an offence under the Act- failing to pick up or drop off passengers at the designated point.
- [51]** While Constable Condoppa can prosecute the driver under all relevant road traffic enactments, in exercising his powers he must operate within the framework of the act which creates the offence which he seeks to prosecute.
- [52]** Having said that he observed the driver commit an offence under the Transport Authority Act (operating contrary to his road licence), he also determined that the Claimant’s vehicle should be seized and instructed the driver to take the vehicle to the police station.
- [53]** In exercising this purported authority to seize the vehicle, his authority must come from the legislation associated with the offence which was committed. Inspectors/Constables operating under the authority of the Transport Authority Act can only seize public passenger vehicles as prescribed by Section 13(2)(a) (i)-(v).
- [54]** Where the legislature enables the use of a specific power to seize vehicles and prescribes the circumstances under which a public passenger vehicle can be

seized, Transport Authority Inspectors and Constables are bound by the provisions of the legislation. Where they operate outside of the prescribed legislative provisions, they act ultra vires the legislation and without lawful authority.

- [55]** Constable Condoppa in his statement said that he observed the driver of the Claimant's bus operating contrary to his road licence and described circumstances which showed that the driver in his honest and reasonable belief, was loading passengers at a gas station and not at the taxi stand or other prescribed place.
- [56]** Nowhere in his statement did he say that he saw the driver's road licence and concluded that the driver was operating "off route" or more forensically put, on a route other than his assigned route on the road licence under which the bus was being operated. He did not state that he observed the driver operating in any manner as outlined in section 13(2)(a)(i)- (v) which would allow him to otherwise seize the Claimant's vehicle. He therefore had no authority to seize the bus when he did.
- [57]** If the seizure was improper, the associated fees for wrecking the Claimant's vehicle to the pound should not have been imposed on the Claimant or his driver in light of the unlawful seizure of the vehicle.
- [58]** I also wish to point out that while the proposed defence speaks to the fact that the Claimant was asked to produce a Power of Attorney in order to claim the vehicle, this is not contained in any of the statements provided by the investigating officer or his supervisor.
- [59]** It was the individual named "John" who presented himself to Constable Condoppa and indicated that he was in charge of the vehicle as the owner was overseas. He was told by Cpl Miller that he needed to present a Power of Attorney to secure the return of the vehicle.
- [60]** However, by March 7, 2019 when the Claimant spoke with DSP Green, she agreed to return the motor vehicle to him upon payment of the requisite wrecker fees.

Nowhere in her statement did she indicate that she requested a Power of Attorney for the release of the vehicle. The production of a Power of Attorney as outlined at paragraph 6 of the defence was no longer an issue after March 7, 2019 when according to DSP Green, the owner Mr. Griffiths spoke to her about the seizure of his vehicle on January 29, 2019.

[61] There would be no utility in allowing this claim to proceed to trial as on the Defendant's affidavit of merit when read with the statements from both officers and on which the Defendant relies, I cannot be satisfied that the proposed defence raises triable issues on the Claimant's statement of case or that it has a reasonable prospect of succeeding at trial.

ORDERS

[62] In the result the orders of the court are as follows:

1. The Defendant's application for permission to extend the time to file the defence and to file same out of time is refused.
2. Judgment in default of defence is entered against the Attorney General with damages to be assessed.