[2020] JMFC Full 7

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV03062

CORAM: THE HONOURABLE MR. JUSTICE EVAN BROWN
THE HONOURABLE MISS JUSTICE YVONNE BROWN
THE HONOURABLE MRS. JUSTICE SIMONE WOLFE-REECE

IN THE MATTER OF CLAIM NO. 2000HCV00289

AND

IN THE MATTER OF *SECTIONS 16(2), 19 AND 100 (1) OF THE CONSTITUTION OF JAMAICA*

BETWEEN	**ERNEST SMITH & CO (A FIRM)**	**1ST CLAIMANT**
AND	**ERNEST SMITH**	**2ND CLAIMANT**
AND	**NESTA-CLAIRE SMITH**	**3RD CLAIMANT**
AND	**MARSHA SMITH**	**4TH CLAIMANT**

CONSOLIDATED WITH

CLAIM NO. 2018HCV04791

IN THE MATTER OF Sections 16(2), 19, and 100(1) of the Constitution

BETWEEN **HUGH THOMPSON** **CLAIMANT**

AND **THE ATTORNEY GENERAL OF JAMAICA** **DEFENDANT**

IN THE FULL COURT

Mrs. Georgia Gibson-Henlin QC and Ms. Nicola Richards instructed by Henlin Gibson Henlin for the Claimants in Claim No. 2018 HCV 03062.

Mr. Bert Samuels and Ms. Ashley Zimmenis instructed by Knight, Junor & Samuels for the Claimant in Claim No. 2018 HCV 03062.

Mrs. Susan Reid-Jones and Ms. Deidre Pinnock instructed by the Director of State Proceedings for the Defendant.

Constitutional law- Right to a fair hearing within a reasonable time- Delay/impossibility of a judgment being delivered - Reasonable time guarantee- Remedies for breach of the section 16(2) right – Damages - measure of damages- Whether summary assessment of the nominate torts would be an appropriate remedy – Costs - Costs thrown away –section 16(2) the charter of fundamental rights and freedom

Heard: January 13, 14, 2020, and May 29, 2020

Evan Brown, J

[1] I have had the benefit of reading the drafts of the judgments of my learned sisters, I agree with their conclusions which they seem to have arrived at by slightly different routes. In that regard, I am constrained to say I prefer the reasoning of Wolfe Reece, J. I, however, wish to say a few words on the question of delay. This I will do without the burden of a summary of the background to the claims as this is fully set out in the judgments of my learned sisters. I will use the collective, 'the Smiths', to refer to the claimants in claim no. 2018 HCV 03062.

[2] The Constitution of Jamaica, particularly the Charter of Fundamental Rights and Freedoms, guarantees to all persons in Jamaica certain rights and freedoms. These are subject only to such limitations as are placed upon them by the Charter itself. So that, section 13 (2) of the Charter is in the following terms:

> *"Subject to sections 18 and 49, and to subjections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society –*
>
> *(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and*
>
> *(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges, or infringes those rights".*

[3] Section 16 (2) of the Charter is a near cousin of the previous section 20 (1) of the old Bill of Rights section. That is to say, as was said of section 20(1) in ***Bell v The Director of Public Prosecutions*** [1985] 1 AC 937 (***Bell v DPP***), section 16 (2) is a composite of three discrete rights: entitlement to a fair hearing; fair hearing within a reasonable time; and by an independent and impartial court or authority established by law. I quote section 16 (2):

> ***"In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law".***

So understood, I agree with the submission of learned counsel for the claimant Thompson, that section 16 (2) is a compendious statement of the fundamental right to due process. Indeed, the Charter declares this to be so in section 13 (3) (r). The subsection specifically references the right to due process as provided in section 16.

[4] This encapsulation of the fundamental right to due process is itself an invocation of that cherished concept which is the bedrock of a free and democratic society, the rule of law. Therefore, even those who are charged with the task of

interpreting and declaring what is the law, by virtue of the doctrine of the separation of powers, are themselves not above the law. The judiciary, as an organ of the State, being the third branch of government, is obliged to take no "action which abrogates, abridges or infringes" Charter rights. The inviolability of the Charter rights therefore attaches as much to the judiciary as it does to any other organ of the State.

[5] With that said, I will now consider the claimants' allegation that their right to a fair hearing within a reasonable has been breached, or engaged, in the language of learned Queen's Counsel, Mrs Gibson Henlin. To be clear, I am now considering the claimants' guarantee of a hearing within a reasonable time. I observe that although the defendant conceded that the delay in delivering the judgment was unreasonable in the circumstances, the defendant stopped short of explicitly saying the unreasonable delay amounted to breach of the claimants' constitutional right under section 16 (2).

[6] The defendant went further in its written submission to name this as the first issue for resolution by the court. In fairness to the defendant, notwithstanding its identification of the hearing within a reasonable time as the first issue, no argument was deployed in opposition to the claimants' submissions. The defendant confined its submissions to the appropriate remedy, in the event that the court finds that the claimants' right to fair hearing within a reasonable time has been breached. I will address the question of the applicable remedy below.

[7] As had been pointed out by learned counsel for the both the Smiths and Mr. Thompson, there is a dearth of authority under section 16 (2). However, its sister subsection, 16 (1), which deals with due process in the criminal arena, has seen much litigation. I will therefore draw guidance from the cases decided under section 16 (1) as both subsections are in similar terms, save for the reference to "any person charged with a criminal offence" under section 16 (1) and "the determination of a person's civil rights and obligations" under section 16 (2) .

[8] While section 16(2) makes no mention of the delivery of judgment, it is settled law that a "hearing" includes the delivery of judgment: ***Bond v Dunster Properties Ltd and others*** [2011] EWCA Civ 455 (***Bond***). Therefore, a component of the right to hearing within a reasonable time is the right to a delivery of the resultant judgment within a reasonable time. According to Arden LJ, at paragraph [3] in **Bond**, "[t]he right is not a new one or one which is alien to the common law. Clause 40 of Magna Carta provides: "To no one will we … delay … justice". I therefore find myself in agreement with the submission of learned counsel for Thompson that the underpinnings of this right are best articulated in the legal aphorism, justice delayed is justice denied.

[9] The observation of Arden LJ in ***Bond*** concerning the absence of any statutory rule laying down time for the delivery of judgments in the United Kingdom, is equally true of this jurisdiction. The pivotal question therefore is, what is the time standard beyond which it may be said that the reasonable time guarantee under section 16 (2) has been breached?

[10] The seminal authority on the question of unreasonable delay is ***Bell v DPP***, *supra*. The question is to be approached against the background that the administration of justice takes places within the peculiar socioeconomic conditions of this jurisdiction. This was elegantly captured in the judgment of Lord Templeman, at page 953, who delivered the judgment of the Privy Council:

> ***"Delays are inevitable. The solution is not necessarily to be found in an increase in the supply of legal services by the appointment of additional judges the creation of new courts and the qualification of additional lawyers. Expansion of legal services necessarily depend on the financial resources available for that purpose. Moreover an injudicious attempt to expand an existing system of courts, judges and practitioners, could lead to deterioration in the quality of the justice administered and to the conviction of the innocent and the acquittal of the guilty. The task of considering these problems falls on the legislature of Jamaica, mindful of the provisions of the Constitution and mindful of the service tendered***

> ***from time to time by the judiciary, the prosecution service and the legal profession of Jamaica. The task of deciding whether and periods of delay explicable by the burdens imposed on the courts by the weight of criminal causes sufficient to contravene the rights of a particular accused to a fair hearing within a reasonable time falls upon the courts of Jamaica and in particular upon the members of the Court of Appeal who have extensive knowledge and experience of conditions in Jamaica".***

[11] The approach of their Lordships in ***Bell v DPP***, at pages 951-952, to the question of unreasonable delay was to accept the methodology employed by the Supreme Court of the United States in ***Barker v Wingo*** (1972) 407 U.S. 514. This was a case which concerned the sixth amendment of the Constitution under which an accused was entitled to a speedy and public trial, by an impartial jury. Four factors were identified for assessment in the determination of whether that right had been breached: (1) the length of the delay; (2) the reasons given by the prosecution [the judge] to justify the delay; (3) the responsibility of the accused [parties] for asserting his [or their] rights; and (4) prejudice to the accused [the parties].

[12] Powell J elaborated on each of the above criteria. In respect of the length of delay, he said

> ***"Until there is some delay which is presumptively prejudicial, there is no necessity for enquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of the delay that will provoke such an inquiry is necessarily dependent upon the circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge".***

[13] In argument before their Lordships, the concept of presumptive delay was advanced. The meaning supplied was that the delay is so long that it is clearly unreasonable. It is assumed that the terms, presumptive delay and presumptive prejudice, are synonymous in the context of the discussions in ***Bell v DPP***. In the

instant case, judgment was reserved for two years preceding the retirement of King J in 2015. Up to the time of filing this constitutional claim in 2018 the judgment remained reserved. So then, there was a lapse of approximately five years between the date judgment was reserved and the filing of the claim. there was, therefore, presumptive delay in the delivery of the reserved judgment.

[14] Concerning the reasons given to justify the delay, Powell J said:

> *"A deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay".*

[15] In the instant case no reasons were advanced for the delay in delivering the judgment. Learned counsel for Mr. Thompson advanced the following position. After asking the court to be guided by ***Boodhoo and Another v Attorney General of Trinidad and Tobago*** [2004] UKPC 17, it was urged that it must be concluded that the delay in the delivery of the judgment of the Honourable Mr. Justice King did in fact breach the claimant's fundamental right to a fair hearing within a reasonable time. Counsel went on, however, to submit that "his failure to deliver judgment within a reasonable time must be considered calculated and a deliberate abuse of the Claimant's (sic) rights". That submission was predicated on the judge's presumed knowledge of sections 16 and 106 (2) of the Constitution and Rule 1.1 of the Civil Procedure Rules 2002.

[16] It is true that a judge is presumed to know the law. That presumption, as rebuttable as it is, extends to judges of the Court of Appeal. Indeed, the case which pre-emptively settled a point raised in this case, namely the impossibility of the delivery of this outstanding judgment, was a judgment delivered by three retired Court of Appeal judges: ***Paul Chen-Young and others v Eagle Merchant Bank and others*** [2018] JMCA App 7 (***Chen-Young***). The impugned

judgment (so characterised by the learned President) was delivered in 2017, four years after it was reserved in 2013 and in excess of one year after the last member of the three-member panel retired. There, as here, there was no evidence that the judges had asked for and received permission from the Governor General to deliver their judgment after attaining the age of retirement.

[17] Tangential to the question of delay, another is raised by ***Chen-Young.*** The decision in ***Chen-Young*** begs the question, how did this situation come about? It seems a proper and fair assumption that the retired panel of three never thought that delivering the judgment post retirement without the antecedent blessing of the Governor-General would put them in breach of the Constitution. And, a further equally fair assumption is that the status of the retired panel of three raised no eyebrows among the panel of three that delivered (the delivering panel) the judgment on behalf of the retired panel.

[18] It seems to me that somewhere along the journey to ***Chen-Young***, a heresy seeped into the adjudicatory practice of the Supreme Court and Court of Appeal that judgments could be properly delivered post retirement without more. That heresy became conventional wisdom which has not been exposed for what it truly is, a fallacy. As was said earlier, no explanation was advanced for the delay. However, a heresy at the top of the judiciary would inexorably percolate to the next layer of adjudication and King J may very well have laboured under the heresy which afflicted both the retired panel and the delivering panel of the Court of Appeal.

[19] Even if that is not acceptable, it seems to me a leap of quantum proportions to attribute to the judge a calculated and deliberate abuse of Mr. Thompson's rights. As a matter of logic, it is unsound to argue that since the judge is presumed to know the law but did not act according to the law, he was calculating and deliberate in his omission. The argument that King J was calculating and deliberate in delaying to the point of impossibility of delivery of his judgment,

surely must rest on a firmer evidentiary basis than a rebuttable presumption. Accordingly, I reject it.

[20] In relation to the responsibility of the accused for asserting his rights, the dictum was:

> ***"Whether and how a defendant asserts his rights is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain".***

It must be remembered that these signposts were developed in the context of a criminal case. However, in the context of a civil claim in which judgment was reserved, it is reasonable to expect enquiries to be made of the court about when the delivery of the judgment may be expected. Mr. Thompson, through his attorneys-at-law by letter of 23 April 2018, enquired of the present Chief Justice what he was able to do in all the circumstances. The letter referenced "[m]any attempts … to obtain the judgment of Justice King (Ret'd), without success". Thompson's attorneys-at-law were:

> *"of the view that one of the options open to [the Chief Justice] is the possibility of a rehearing of the matter in that Justice King (Ret'd) seems unable or reluctant to deliver this long outstanding judgment".*

[21] Although there was no documentary evidence of the "[m]any attempts to obtain the judgment", there is no reason to doubt this assertion. In my opinion, no more could realistically be asked of a citizen to discharge his responsibility to assert his rights. In that event, disregarding the Chief Justice's entreaty to contact the Registrar for a date is not something that can be weighed against either Mr. Thompson or the Smiths, whose attorneys-at-law were copied on the letter to the Chief Justice.

[22] Lastly, on the question of prejudice to the accused, Powell J said:

> ***"Prejudice, of course, should be assessed in light of the interests of the defendants which the speedy trial right was designed to protect. The court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last … If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory however, is not always reflected on the record because what has been forgotten can rarely be shown".***

[23] In ***Bell v DPP***, no prejudice was articulated on behalf of the accused and none was necessary to establish a breach of the trial within a reasonable time guarantee. If none was required to be shown where the liberty of the subject was in jeopardy, *a fortiori*, it is not required to establish a breach of a hearing within a reasonable time guarantee under section 16 (2).

[24] In ***Desmond Bennett v Jamaica Public Service Company Limited and Clarence Bailey*** [2013] JMCA Civ 28, the Court of Appeal accepted time standards emanating from the Caribbean Court of Justice. One of the grounds of appeal in that case was the learned trial judge's delay in delivering the judgment. The length of the delay was three years. Brooks JA characterized that delay as excessive. At para [71] Brooks JA cited ***Yolande Reid v Jerome Reid*** [2008] CCJ 8 (AJ) where the following was stated:

> ***"What is a reasonable time? In our view, as a general rule no judgment should be outstanding for more than six months and unless a case is one of unusual complexity, judgment should normally be delivered within three months at most".***

Brooks JA opined, "[t]hat stipulation is not unreasonable, even in the circumstances of stretched resources in which the courts operate".

[25] Read along with the hearing within a reasonable time guarantee, it appears there is a risk of infringing this constitutional right where judgment is delivered outside of these reasonable stipulations. In the case at bar, it was advanced that the assessment hearing posed no unusual complexity. I cannot hesitate to agree with that submission. Accepting that categorization, the judgment in the assessment hearing should have been delivered within three months of being reserved. It is therefore palpable that the failure to deliver the judgment in the assessment hearing after the passage of five years was an egregious breach of the claimants' right to a hearing within a reasonable time.

Yvonne Brown, J
Background

[26] The gravamen of this claim for constitutional relief dates back to January 2003, when searches were carried out at the law offices where the Claimants practised as attorneys-at- law. Documents were seized from those locations. The activities were executed pursuant to a search warrant bearing the signature of a then Resident Magistrate (now referred to as Parish Court Judge), and it was prompted by extradition proceedings which were being pursued against an individual named Robert Bidwell.

[27] Arising from the search, the Claimants and the Jamaican Bar Association filed a Claim in the Supreme Court challenging the constitutionality of the search warrants. This matter did not meet with success at the Supreme Court and the parties sought the intervention of the Court of Appeal where a decision was made in their favour, the ruling being that there was no lawful authority for the searches and seizures.

[28] The successful appeal inspired the Claimants along with other employees of the law firm, to file a claim on the 26th day of January 2009 against the Attorney General of Jamaica (pursuant to the Crown Proceedings Act) and the Director of

Public Prosecutions. They sought inter alia, damages generally as well as damages for breach of their constitutional rights, trespass, false imprisonment and assault. The Defendants admitted liability and the matter proceeded to an Assessment of Damages.

[29] On the 7th day of October 2013, Mr Justice King, now retired, presided over the hearing of the Assessment of Damages. Back then, he reserved the said judgment. To date, that judgment has not been delivered. It is this state of affairs which has given rise to the present application by the Claimants.

The Claimants' present claim

[30] All the Claimants are seeking the following orders:

(1) A declaration that the judge, the Honourable Mr. Justice King, who heard the assessment of damages, having retired, can no longer deliver the judgment on the assessment of damages thereby rendering the delivery of the judgment an impossibility.

(2) A declaration or order that the assessment of damages presided over by the Honourable Mr. Justice King on the 7th day of October, 2013 be vacated and declared null and void.

(3) A declaration that the delay in and/or the impossibility of rendering a judgment in this matter is a breach of the Claimants' right to a fair trial within a reasonable time.

(4) A declaration that the Claimants' right to a fair trial under section 16(2) of the Charter of Fundamental Rights and Freedoms has been breached.

(5) A declaration and/or order that in all the circumstances a new assessment of damages is unreasonable and unjust.

[31] The Claimants in Claim No. 2018 HCV 03062 also sought orders as follows:

a) *An Order that the Claimants are entitled to damages.*

b) *The costs of this claim and the costs thrown away in Claim No. 2009 HCV 0289 be the Claimants to be taxed if not agreed.*

[32] The Claimant in Claim No. 2018 HCV 04791 seeks additional orders as follows :

(i) An order that the Claimant is entitled to damages for breach of his Constitutional Rights in respect to having a matter heard before an independent and impartial tribunal within a reasonable time.

(ii) The costs of this claim and the costs thrown away in Claim No. 2009 HCV 0209 be the Claimants to be taxed if not agreed.

Law and Analysis

[33] In disposing of the first two declarations sought by the Claimants, it is useful to note that at the time of the hearing of the assessment of damages, Justice King was an appointed Puisne Judge of the Supreme Court. He retired from that position in July 2015 without delivering the judgment on the said assessment. The question therefore becomes whether having retired, Justice King is still able to deliver that judgment.

[34] This is not an issue which lends itself to any expansive debate especially when one embraces the sagacity of the pronouncement of Morrison P. in the Court of Appeal's decision in ***Paul Chen-Young et al v Eagle Merchant Bank Jamaica Limited, et al*** [2018] JMCA App 7, where at paragraphs 69 and 70, he states;

> "…*where a judge dies, resigns or retires without having rendered judgment in matters heard by him or her prior to demitting office, absent some specific permission allowing him or her to do so…*

> *any 'judicial' act subsequently done by him or her will have been done without authority*
>
> *...the only possible basis upon which a judge of appeal can continue to perform as such after he or she has attained retirement age is by virtue of permission given for the purpose by the Governor-General under section 106(2) of the Constitution. In this case, as far as the court has been able to ascertain, none was either sought or obtained. It therefore follows that, the judges all having retired before delivering judgment in this appeal, the impugned judgment handed down on 1 December 2017 must be regarded as a nullity. And it follows further that the applicants have made good their contention for an order that the appeal should be set down for a re-hearing at the earliest convenient time."*

[35] Like the judges of the Court of Appeal, the Constitution of Jamaica at section 100 (1), prescribes that a

> "…*Judge of the Supreme Court shall hold office until he attains the age of seventy years.*"

Further to that, subsection (2) provides that

> *"notwithstanding that he has attained the age at which he is required by or under the provisions of this section to vacate his office a person holding the office of Judge of the Supreme Court may, with the permission of the Governor-General, acting in accordance with the advice of the Prime Minister, continue in office for such period after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age."*

[36] So, without the permission to occupy the office of a judge beyond the age of 70, Justice King could not have been permitted to conclude that particular

Assessment of Damages which had been commenced before he had reached that age.

[37] Having been granted no permission to remain in office beyond the age of retirement, and having retired without delivering the said judgment, Justice King is now permanently unable to deliver same. In essence, were he to have handed down his decision after retiring, that ruling would have been done "*without authority*" and would therefore be invalid.

[38] In spite of the aforesaid, it is understood that the said Assessment of Damages cannot remain in limbo, but must be resolved and in seeking such a resolution, useful guidance was gleaned from the Court of Appeal's posture in ***Paul Chen-Young***, where the judgment handed down by a panel of retired judges of appeal was declared a nullity and as a result it was ordered that a rehearing of the appeal be fixed for the earliest convenient time. Notably, at the time of the hearing of that appeal, that panel was comprised of 'sitting appellate judges' thereby clothed with the requisite judicial authority to preside over that appeal. Nonetheless, their judgment was declared a nullity because it was handed down after they had retired and as such, were not legally empowered to have performed any of the duties of an appellate judge.

[39] Likewise, in the present case, the Assessment of Damages presided over by Justice King was not void ab initio, since at the time of the hearing, that judge had not been stripped of his judicial functions by virtue of age or otherwise. In other words, he had not yet attained the age of retirement and was thus legally entitled to execute the duties of a Judge of the Supreme Court of Jamaica. The Assessment of Damages was therefore properly before him. It is the non-delivery of the judgment which has now rendered that Assessment of Damages a nullity because it can no longer be determined by the retired judge. Nevertheless, in enlivening the stance that this Court is authorized to provide a solution to the issue of the outstanding Assessment of Damage, Morrison P's pronouncement in ***Paul Chen-Young*** is again instructive.

[40] At paragraph 40 of that judgment, he stated

> *"… it is necessary to distinguish between questions which relate to the jurisdiction of the court as an appellate court and questions which relate to how that jurisdiction may, or is to be exercised. In this regard, as with all superior courts of record, this court enjoys a residual jurisdiction, described variously as an inherent, implicit or implied jurisdiction, or an inherent power within its jurisdiction, to do such acts as it must have power to do, in order to maintain its character as a court of justice and to enhance public confidence in the administration of justice. It is this jurisdiction which, among other things, empowers the court to regulate its own proceedings in a way that secures convenience, expeditiousness and efficiency."*

In determining whether the circumstances of the case were appropriate for the application of its inherent jurisdiction, the Court considered whether there existed any effective alternative remedy to the appellants' motion for the Court of Appeal to vacate the hearing and set the matter down for a hearing by the court and so, paragraph 43 stated that,

> "*in this case, the applicants contend that, the judges having retired without having given a decision on the appeal, the impugned judgment is a nullity. If they are right about this, they submit, I think correctly, that this motion is their only remedy since an appeal to the Privy Council is only available in respect of 'final decisions in any civil proceedings', properly so called."*

[41] This was taken into account along with the fact that the applicant had contended that the long-running litigation had been financially ruinous to him and that he had continued to

> "…*suffer financially and otherwise with a ruined professional and business career*".

Consequently, it was expressed at paragraph 45 that

> "*taking all these factors into account, it seems to me that this is a case in which it can be fairly said that the applicants have no effective alternative remedy to asking this court to hear the motion. The matters raised by the applicants carry obvious and significant implications, not only for their own interests, but also for the wider interests of the administration of justice as whole. In these circumstances, this court must inevitably also be concerned to ensure and promote public confidence in the administration of justice. In my view, those concerns will be best served in this case by the court, in the exercise of its inherent jurisdiction, hearing and determining the motion."*

It was further indicated at paragraph 70 that

> "…*the judges all having retired before delivering judgment in this appeal, the impugned judgment handed down on 1 December 2017 must be regarded as a nullity. And it follows further that the applicants have made good their contention for an order that the*

appeal should be set down for a re-hearing at the earliest convenient time."

[42] Evidently, from the dicta in Paul Chen-Young, all superior courts of record possess what is described as an inherent jurisdiction to do such acts as may be necessary to "*maintain its character as a court of justice and to enhance public confidence in the administration of justice".* Undoubtedly, the Supreme Court is considered a superior court of record by virtue of section 27 of The Judicature (Supreme Court) Act; "*subject to subsection (2) of section 3 the Supreme Court shall be a superior Court of Record…*" This tribunal therefore, has an inherent jurisdiction to provide a solution to the outstanding Assessment of Damages in issue.

[43] The impossibility of the delivery of a judgment in the Assessment of Damages as a result of the judge's retirement, as well as the prolonged delay in bringing this matter to a finality, have moved me to accept that there is no effective alternative remedy of which the Claimants can avail themselves. It is therefore prudent to heed the guidance offered by the Court of Appeal in the **Paul Chen-Young** case and declare the Assessment of Damages, over which Justice King presided, a nullity and worthy of being set aside. Consequently, a new hearing ought to be convened within the earliest possible time.

Breach of the right to a fair trial within a reasonable time

[44] The passage of almost seven (7) years since the last hearing of the Assessment of Damages on October 8, 2013 has given credence to the Claimants' assertion that their constitutional right to a fair hearing within a reasonable time has been contravened. This position is in alignment with Section 16(2) of the Constitution which states: "*In determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."*

[45] There is a paucity of case law addressing the subject of “a reasonable time” within the context of section 16(2) of the Constitution. Flowing from this, the parties have advanced decisions in criminal cases to assist in determining the question as to what constitutes a reasonable time. I am however reluctant to pursue such an approach because the nature of civil proceedings bears little, if any symmetry with that of criminal proceedings; for instance, the centrality of the liberty of the accused in a criminal case may require the judge to take into account a multiplicity of factors in deciding on a reasonable time concerning the commencement through to the conclusion of the trial matter. Some of those considerations may include the length of time the accused has been in custody; the availability of witnesses and the number of adjournments that have been visited upon the matter.

[46] The right to a fair hearing within a reasonable time as it pertains to civil proceedings was featured in several cases brought before the European Court of Human Rights in respect of a breach of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR). One such case is ***Comingersoll S.A. v Portugal, (Application no. 35382/ 97*** where allegations pertained to an infringement of Article 6 (1) of the ECHR. Before providing a synopsis of the facts of that matter, it is imperative to state that Article 6(1) of the ECHR provides that, “*in determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”* Unquestionably, this provision harmonizes with section 16 (2) of the Constitution of Jamaica.

[47] ***Comingersoll S.A. v Portugal*** concerned an allegation by the applicant company that there was a violation of Article 6(1) of the ECHR due to the length of civil proceedings, commenced in 1982 to recover an outstanding debt. Up to November 1997 the matter was still unresolved, as, notwithstanding a hearing of the substantive claim there was an appeal which saw the decision of the first

instance court being overturned. Thereafter, there were applications for costs and appeals against the decision on costs. Eventually, the file was returned to the court of first instance to prevent delay of the recovery of the debt. A challenge to the enforcement proceedings resulted in a stay, pending the determination of the defence to the enforcement proceedings. At the time of the application to the ECHR the proceedings were still pending before the court of first instance.

[48] In coming to its decision, the ECHR advanced that:

> "*The reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case and with reference to the criteria laid down in the Court's case-law, in particular in the complexity of the case, the conduct of the applicant and of the relevant authorities, and what was at stake for the applicant in the dispute…"*

This pronouncement, I believe, offers factors which can be taken into account in arriving at a decision as to 'a reasonable time' for the determination of a civil case.

[49] This issue of 'reasonable time' was also highlighted by Brooks JA in the Court of Appeal decision of ***Desmond Bennett v Jamaica Public Service Company Limited & Clarence Bailey*** [2013] JMCA Civ 28. There the learned Judge adopted the decision of the Caribbean Court of Justice in the case ***Yolande Reid v Jerome Reid*** [2008] CCJ 8 (AJ) where in seeking to settle the question as to what is a reasonable time, it was said that; *"In our view, as a general rule no judgment should be outstanding for more than six months and unless a case is one of unusual difficulty or complexity, judgment should normally be delivered within three months at most*." In aligning with that position Brooks JA asserted, "*that stipulation is not unreasonable, even in the circumstances of stretched resources in which our courts operate."* Evidently then, from at least July 2013 (the date of delivery of the decision in Desmond Bennett) there was judicial pronouncement from the country's second highest court as to what ought to be considered a reasonable time in the context of the delivery of a judgment.

[50] There was no element of complexity associated with the Assessment of Damages which the retired judge was tasked to do especially since the Court of Appeal had already resolved the issue of liability in the substantive claim pertaining to the unlawful search and seizure carried out at the Claimants' law offices. It would seem unusual then, for a determination of the quantum of damages recoverable by Claimants to have given rise to complexities warranting either a protracted delay in the delivery of the judgment or a non-delivery of same. In the Assessment of Damages before him, this judge would have been expected to have recorded the evidence of the parties to the Claim, thereby placing himself in a position to assess whether the evidence proffered was satisfactory in proving the different headings of damages claimed. Thereafter, he would have been able to arrive at an award he deemed appropriate. In that exercise it is unlikely that complexities would have arisen to give justification to the excessive delay or non-delivery of the judgment.

[51] Taking into account another of the factors mentioned in the ***Comingersol S.A. v Portugal***, namely the conduct of the litigants, there is no evidence to suggest that the Claimants or the Defendant had handled themselves in a manner which had directly contributed to the delay which has plagued this matter. But while that is so, except for the Claimant Hugh Thompson, there is no mention of the Claimants or Defendant having done anything to have had the judgment delivered before Justice King's retirement. A letter addressed to the Chief Justice, dated April 23, 2018, was tendered in evidence on behalf of Hugh Thompson. It indicated that: "*Many attempts have made obtain the judgment of Justice King (Ret'd), without success… this letter serves to enquire of you Sir, what you are able to do in all the circumstances…"* This correspondence shows that almost five years had elapsed since the judge had reserved judgment, and also before any attempt was made to engage the Chief Justice in his capacity as head of the judiciary. Seeking an early intervention of the jurist at the helm of the judiciary would have been ideal since, by virtue of the independence of the judiciary, it is in fact the prerogative of the Chief Justice to exert the requisite

influence over judges to deliver judgments in a timely manner. Furthermore, where there is a breach of timely delivery, it also falls within the purview of the Chief Justice to address this issue with the culpable judge.

[52] It is without argument that the delay occasioned by Justice King is egregious, especially when one considers that to date there is no evidence that any reason has been offered for the non-delivery of the awards for damages. Besides that, Justice King has no legal authority at this time to deliver this judgment. In those circumstances, there can be no denial and none has been advanced by the Defendant that the right of the Claimants to a trial within a reasonable time has been infringed.

Remedy

[53] The Claimants have argued that if the Court finds that their right to a fair hearing within a reasonable time has been infringed then they should be awarded damages for that breach. It was further advanced that the Court should award damages which the Claimants would have been awarded had judgment in the Assessment of Damages been delivered.

[54] In addressing the issue of damages in this case, a useful starting point is section 19(3) of the Constitution which provides:

> "*The Supreme Court shall have original jurisdiction to hear and determine any application made by a person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.*"

Clearly, this provision empowers the Court to grant wide-ranging remedies for breaches of a citizen's constitutional rights. Therefore, a grant of damages by the Court will accord with section 19(3) of the Constitution.

[55] Of importance too, is The Privy Council's directives in ***Attorney General v Ramanoop*** [2005] 2 WLR 1324, UKPC 15 that,

> **"*when exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation… an award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be need to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches*."**

[56] The concept of vindicatory damages was also featured in the cases of ***Angella Inniss v Attorney General of St. Christopher and Nevis*** [2008] UKPC 42 and ***Merson v Cartwright and another*** [2005] ALL ER (D) 144 (Oct), respectively.

[57] In ***Inniss*** it was said that,

> "***allowance had to be made for the importance of the right and gravity of the breach in the assessment of any award... The purpose of the award, whether it was made to redress the contravention or as relief, is to vindicate the right. It is not to punish the Executive. But vindication involves an assertion that the right is a valuable one… Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is to have proper regard."***

[58] Meanwhile in ***Merson*** it was held that,

> "***if a case was one for an award of damages by way of constitutional redress, the nature of the damages awarded might be compensatory but had always to be vindicatory. Accordingly, the damages might, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award was not a punitive purpose, or to teach the executive not to misbehave, but to vindicate the right of the complainant…to carry on his life… free from unjustified executive interference mistreatment or oppression. The sum appropriate to be awarded to achieve that purpose would depend upon the particular infringement and the circumstances relating to that infringement. It would be a sum at the discretion of the trial judge."***

[59] In addition to the other remedies being sought by the Claimants regarding the constitutional breach occasioned by the excessively delayed judgment, they are also advocating for awards for exemplary and aggravated damages. As it pertains to awards for those categories of damages, the case of ***Rookes v Barnard*** [1964] 1 ALL ER 367 proves instructive. Therein it was stated that,

> "*when considering the making an award* ***of exemplary damages, three matters should be borne in mind- (a) the plaintiff cannot recover exemplary damage unless he is the victim of punishable behaviour, (b) the power to award exemplary damages should be used with restraint, and (c) the means of the parties are material in the assessment of exemplary damages."*** **It was further observed that "*English law recognised the awarding of exemplary damages, that is, damages whose object was to punish or deter…there were two categories of cases in which an award of exemplary damages could serve a useful purpose, viz, in the case of oppressive, arbitrary or unconstitutional action by the servants of the government, and in the case where the defendant's conduct had been calculated by him to make a profit for himself, which might well exceed the compensation payable to the plaintiff."***

[60] As it relates to aggravated damages, in ***Thompson v Commissioner of Police of the Metropolis; HSU v Same*** [1998] Q.B. 498 it was noted that damages under that head "*are primarily to be awarded to compensate the plaintiff for injury to his proper pride and dignity and the consequences of his being humiliated… aggravated damages can only be awarded where they are claimed by the plaintiff and where there are aggravating features about the defendant's conduct which justify the award of aggravated damages*."

[61] The Claimants herein have offered no evidence in support of their grouse that the breach of their right to a fair hearing within a reasonable time had caused injury to their pride and dignity, and had brought them humiliation. In fact, Fixed Date Claim Forms filed in this matter did not specifically claim an award for aggravated damages. So in accordance with the guidelines posited in ***Thompson (supra)***, it would not be appropriate to grant an award to the Claimants for aggravated damages.

[62] While no seductive argument can detract from the fact that the non-delivery of the specific judgment amounts to the flouting of Section 16(2) of the Constitution, there is no evidence to support a finding that this inaction by Justice King has attained the standard of oppressiveness or arbitrariness which are among the essentials for an award of exemplary damages. Neither has there been any suggestion that the retired judge's non-delivery of the judgment has enured to his benefit in any way. It is worthy to note too, that there is no precedent on which one could rely to form the view that the failure to deliver a judgment, or, an excessive delay in the delivery of same, falls within the category of punishable conduct which is one of the pre-conditions to an award for exemplary damages. For those reasons an award for exemplary damages would be ill-advised in this case.

[63] Although I am unable to identify an authority which establishes that the failure of a judge to deliver a judgment in a timely manner is a punishable behaviour, it has been observed that section 100 (4) of the Constitution makes provision for a

Judge of the Supreme Court to "*be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of subsection (5) of this section*." However, that provision does not dispel the uncertainty as to whether delay in delivery of judgment is an element of the misbehaviour. Perhaps the non-classification of misbehaviour in the said subsection may be based on expectation that Judges will avoid undue delays in the delivery of judgments as they seek to adhere to judicial ethics and responsibilities. This brings to the fore the **Bangalore Principles of Judicial Conduct, 2002** which were "*designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct*."

[64] In ***Re Levers J*** [2010] UKPC 24, The Privy Council recognised that the **Bangalore Principles of Judicial Conduct** set out the standard of behaviour to be expected of a judge. Of relevance to the case at bar, is Value 6 of the Principles which is titled Competence and Diligence. It states that, "*competence and diligence are prerequisites to the due performance of judicial office.*" It further mentions at 6.5, "*a judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness*." While this 'Value' mandates promptitude in the delivery of 'reserved decisions', a timeframe has not been incorporated and it can therefore be taken to mean that the issue of timeliness of judgment delivery would be left to the conscience of the Judge. A question that emerges regarding the **Bangalore Principles** is whether a breach of any of its ethics amounts to misbehaviour for which a judge can be removed from office. The dicta in ***Re Levers J*** is instructive. It expressed that,

> ***"these are standards that all judges should aspire to achieve but it does not follow that a failure to do so will automatically amount to misconduct … the protection of judicial independence demands that a judge shall not be removed for misbehaviour unless the judge has fallen so far short of that standard of behaviour as to***

> ***demonstrate that he or she is not fit to remain in office. The test is whether the confidence in the justice system of those appearing before the judge or the public in general, with knowledge of the material circumstances, will be undermined if the judge continues to sit."***

[65] It would seem that a very high threshold would have to be crossed before a judge's behaviour could to be deemed a misconduct; but that appears to be applicable only to a judge in office. As far as confidence in the justice system is concerned, there may be the perception that a retired judge is not subject to the same scrutiny as an incumbent, and so, the unfinished work of the retiree may not evoke the same degree of public indignation as it would for a sitting judge. Perhaps the public's belief – though erroneous- may be that the situation can be remedied by a judge in office. Nevertheless, a solution to having a judge complete his/ her outstanding matters before relinquishing judicial duties- due to the retirement age- lies in Section 100(2) of the Constitution of Jamaica.

[66] While the exemplary and aggravated damages are considered inappropriate for infringement experienced by the Claimants at bar, an award for vindicatory damages cannot be disputed because of the acknowledgment that they were entitled to a fair hearing within a reasonable time and that that right has been contravened by the retired judge. Additionally, the protracted length of the hearing, particularly the fact that the matter has persisted to date, supports the stance that a declaration is not sufficient to vindicate the Claimants' rights. Therefore, an award of damages is also applicable.

[67] In the deciding on a suitable award for vindicatory damages, this Court now finds itself in an unchartered legal landscape since it would seem that there has never been a claim in Jamaica seeking damages whether for delay or non-delivery of judgment. That being so, this jurisdiction offers no guidance on the subject of awards for that breach. Therefore, insight was gleaned from ***Daniel Forde, Ian Forde v The Attorney General*** SLUHCV2017/0276, a case emanating from the Saint Lucia High Court of Justice. Consideration was also given to the

submission of the Claimants' Counsel that this case ***(Forde v The Attorney General)*** is inapplicable for several reasons including that the charging clause in the bill of rights differed from the Jamaican Charter in respect of who is bound by the provision; the fact that liability was not in issue in the case at bar whilst the ***Forde*** decision concerned a trial; and finally, that the Attorney General being affected by the delay was a moot point and not an issue before the Court given their concession that the declaration should have been made in respect of the delay.

[68] In addressing each of those contentions, the matter of the charging clause is a convenient starting point. While the Jamaican Charter specifically imposes an obligation on the state "*to promote universal respect for, and observance of human rights and freedoms*," no such specific prescription in contained in the Saint Lucia Constitution. However, a comprehensive reading of the chapter shows that like the Jamaican Constitution, the overarching objective of Saint Lucia's is to protect the rights of its citizens and this involves making specific provisions as to how these rights are to be secured. There is therefore similarity between section 16(2) of the Jamaican Constitution and section 8(8) of the Saint Lucia Constitution, (**Provisions to secure protection of law) (8),** the latter states that,

> "*any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time (*emphasis added*)*."

Though not specifically indicating that the country has a duty to uphold the rights of its citizens, an obligation is imposed on the state to protect those rights. Were I to find resonance with Counsel's argument, I would be saying that unless an obligation is expressly imposed, it cannot arise even by necessary implication due to the other provisions of the legislation. Furthermore, were Counsel correct,

it is doubtful that the Court in ***Forde*** would have entertained the claim before it since the state would not have been a proper party to the action given that no expressed duty was imposed on it in the charging clause.

[69] It is flawed reasoning that the ***Forde*** case is inapplicable since it concerned delivery of a judgment after a trial, while the case at bar pertains to the delivery of a judgment after an Assessment of Damages. This is so, especially in light of the decision in ***Leroy Mills v Lawson and Skyers*** (1990) 27 JLR 196 (CA) where, in determining whether an Assessment of Damages was a trial, the Court said

> ***"…the party in these circumstances the plaintiff would be required to prove his claim; he must discharge the burden of proof cast upon him. he must call evidence which the judge must hear and consider. He must then decide as a matter of law whether the claim (whether it be as to liability or as to damages) has satisfied the standard of proof necessary*.**"

Therefore, an Assessment of Damages bears the features of a trial, albeit on quantum. Beyond that though, the main issue which had permeated the ***Forde*** case was whether the delivery of the judgment some three years after reserving same, had breached the applicant's right to a fair trial within a reasonable time. The defendant agreed that it had. The circumstances of that case are to a great extent on par with the matter under consideration. The fact that the present case is an Assessment of Damages, the severity of the delay will impact any award arrived at as compensation for the breach.

[70] It is a lame argument that the Defendant's admission pertinent to the delay of the judgment renders moot the assertion that it has affected them. I cannot fathom how the Defendant's agreeing with the issue of the delay conflicts with their stance of having been impacted by it. The fact remains that like the Claimants, the Attorney General, acting in the capacity of the Defendant in the substantive claim, would have also been waiting for some seven years for the judgment which was reserved by Justice King. For that period, they too would not have had

the benefit of knowing what award would have been granted by the Court against the State for the actions of the state agent; they (Attorney General) would have had the burden of paying the interest on any award granted due to the delay. Had the Attorney General not been a party to the substantive action, only then could it be said that they had not been affected by the delay.

[71] For those reasons aforementioned, I believe that the case of ***Forde*** can assist this Court in its determination of the appropriate award for damages for the breach of the right to a fair hearing within a reasonable time. A brief overview of the facts of that case reveals that the Claimants had commenced an action seeking constitutional relief following seizure and detention of their money. A trial was completed approximately 1 year and 4 months after the initial filing of the claim, and judgment was reserved. However, some 3 years and 6 months later the judgment remained undelivered. This gave rise to the institution of a second claim in which the Claimants contended that the delay in delivering the judgment was unreasonable and the total period of five years awaiting a final determination in the matter, infringed their right to a fair hearing. Subsequent to the commencement of the second claim and some 3 years 9 months after the judgment was reserved, a decision which did not favour the Claimants was delivered. At the Case Management Conference relating to the second claim, the Defendant admitted that delay in the delivery of the judgment had breached the Claimants' constitutional right to a fair hearing within a reasonable time.

[72] In coming to its decision the Court took into account the following factors:

a. The Claimants never sought to engage the Chief Justice as head of the judiciary to secure the delivery of the judgment after having not had any response from the Registrar after December 2017. That course of action would perhaps have averted the need to file a claim.

b. The State was also a party in this matter and was itself subjected to the delay in the delivery of the judgment

c. There was nothing that the State could have done to compel the delivery of the judgment on its own because of the principle of judicial independence and the doctrine of separation of powers.

d. The fiscal burden that an award of substantial damages would place on the tax payer when it has not been shown that the State did not provide the necessary facilities, or resources and this impacted on the judicial officer's ability to deliver his/her decision and this could not have been the intention.

e. The Claimants have appealed against the judgment and have asked the Court of appeal among other grounds of appeal to consider the effect of the delay on the quality of the judgment. That to my mind provides an opportunity to obtain vindication of the claimants' rights.

f. There is no public outrage which has been identified in this case.

g. The importance of the timely delivery of judgments especially in constitutional cases, which will prompt at least an award of nominal damages.

[73] When the above conditions are weighed against the circumstances of the case at bar, it is noted that the Claimant Thompson had made an attempt to have the Chief Justice's intervention in this matter although this was done subsequent to Justice King's retirement; in fact, some five years after the judgment had been reserved. Therefore, the question that looms is whether such an endeavour at

that time was purposeful. Although reference was made to several attempts made on behalf of Mr. Thompson to have the judgment delivered, except for a single letter, there was no other evidence in proof of this. Neither did the remaining Claimants nor the Defendant mention that petitions had ever been made to the relevant authorities to have had the outstanding judgment delivered.

[74] Whilst factor (c) cannot be applied extensively to the case at bar, there was no evidence as to whether Justice King had been equipped with adequate and necessary resources to have enabled his completion of the outstanding judgment prior to his retirement. This includes the utilization of Section 100(2) of the Constitution, a prerogative exercisable by the Governor General acting on advice of the Prime Minister which would have extended his time in office Thus, this judge's retirement without delivery of the judgment could very well have been obviated had the requisite procedures been observed to engage the Governor–General.

[75] Finally, there is no existing appeal in the case at bar, as such, in considering an appropriate award to vindicate the rights of the Claimants, this Court can yield no benefit from the Court of Appeal. It is something which must be done by this tribunal.

[76] As a consequence of the reasons stated in ***Forde***, nominal damages in the sum of Five Thousand Eastern Caribbean Dollars (EC $5000) was awarded to the Claimants therein. Although I am mindful that it may not be deemed the most desirable approach to convert sums awarded for damages in a foreign jurisdiction to the Jamaican currency when considering a grant to be made here for a category of damages similar to that in the court abroad, nonetheless, I believe that that conversion may serve as a guide. Therefore, I will not discount the value of the nominal award of EC $5,000 in ***Forde*** to the determination of an amount for vindicatory damages in the case before this Court. I note that at the time of that award (March 2017) one EC dollar was equivalent to Forty-Seven Dollars Twenty-Two Cents ($47.22) in Jamaican currency (source: Treasury

Department Bank of Nova Scotia). Thus, the award of Five Thousand EC Dollars (EC $5,000) in March 2017 was equivalent to Two Hundred Thirty-Six Thousand One Hundred Dollars ($236,100.00). This figure updated using the March 2020 Consumer Price Index amounts to Two Hundred Sixty-Five Thousand Eight Hundred Seventy-Two Dollars Fourteen Cents ($265,872.14).

[77] It is my belief that the circumstances in the present case, though bearing some similarities to ***Forde,*** are far more egregious primarily because to date, the judgment has still not been delivered and cannot now be done. Consequently, the infringement of the Claimants' rights under section 16(2) of the Constitution continues until there is a final disposition of the Assessment of Damages. In light of those factors, the award in the present case must be exceedingly greater than that in ***Forde***; therefore, an award of One Million Five Hundred Thousand Dollars ($1,500,000) is deemed appropriate.

Submission that the Constitutional Court should award damages in the substantive claim.

[78] In their submission, the Claimants have beseeched the Court not to order a new Assessment of Damages as that would be inimical to the interest of justice in this case, particularly since trial dates are now being fixed for the year 2024. They have requested instead that the Court, as presently constituted, considers the damages which would have been awarded in the Assessment of Damages and makes that grant. It has also been advanced that given the powers of the Court as contained in Rule 56 of the Civil Procedure Rules (CPR), it is able to fashion a new remedy which will enable it, to so act.

[79] This argument gives rise to the jurisdiction of the Constitutional Court and moreso, what is it empowered to do.

[80] The Constitutional Court derives its jurisdiction from section 19(1) of the Constitution which states:

> "*If any person alleges that any of the provisions* ***of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."***

The extent of the powers of the Constitutional Court is addressed at section 19(3) which states that:

> "*The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled."*

[81] From the first sentence of Section 19(3), it is apparent that the jurisdiction of the Constitutional Court is limited to determining whether any rights secured under the Charter of Fundamental Rights and Freedoms has been contravened. This view is bolstered by the words used in the said section namely, "*hear and determine any application… in pursuance of subsection (1) ..."* Subsection (1) pertains to the Court addressing allegations of breach of the rights guaranteed by the constitution, and from that provision, it seems clear that the mandate and powers of the Constitutional Court do not extend to matters beyond those rights. In fact, subsection (1) specifically expresses that this Court's concern is with the application before it regarding the alleged breach of the Charter of Fundamental Rights and Freedoms.

[82] The role of Constitutional Courts was explored by The International Institute for Democracy and Electoral Assistance in a paper titled **Fundamentals of Constitutional Courts,** dated April 2017 and written by Andrew Harding, wherein he opined that: "*If a constitution is intended to be binding there must be some means of enforcing it by deciding when an act or decision is contrary to the*

constitution and providing some remedy where this occurs. We call this process 'constitutional review.' Constitutions across the world have devised broadly two types of constitutional review, carried out either by a specialized constitutional court or by courts of general legal jurisdiction. There are however many variations on each model, and some systems are even said to be 'hybrid'."

[83] Rule 56.1 (1) (b) of the (CPR) confirms the right to apply to the Supreme Court for relief under the Constitution. Rule 56.8 then sets out the constitution of the Court which will hear such an application and indicates as follows:

> *"(1) in any matter involving the liberty of the subject and in any criminal cause or matter an application for judicial review for which leave has been granted must be made to a full court.*
>
> *(2) Any other application may be heard by a single judge in open court unless the court directs that it be heard- (a) by a judge in chambers; or (b) by a full court."*

Thus our system may appropriately be classified as hybrid.

[84] Harding also said:

> "*A constitutional court (sometimes called a 'constitutional tribunal' or 'constitutional council') is a special type of court that exercises only the power of constitutional review… its role is to review laws, and usually also executive acts and decisions, to decide whether they are constitutionally valid and provide a remedy in cases where they are not."*

[85] It therefore appears to me that the generally accepted role of the Constitutional Court is to determine issues in respect of the constitution and it is not empowered to consider evidence in substantive matters.

[86] Even if I am singular in that position, I do maintain that this is not an appropriate case for this Court to make orders relative to the substantive matter. The Claimants have contended that they have, as part of the present claim, tendered the evidence in the form of witness statements which were previously given at the Assessment of Damages, as well as the evidence in support of damages sought for the breach occasioned by the unlawful search and seizure. To strengthen their position, it was argued that should a new Assessment of Damages be fixed, it would be prejudicial to them since they are already faced with the difficulty of locating witnesses.

[87] Whilst there can be no diminishment of the Claimants' dilemma, the role of the Constitutional Court must not be discounted, hence I cling to the position that the substantive matter ought not to be the concern of the said Court. Moreover, an acceptance of any argument pertinent to treating this hearing as the Assessment of Damages would stand in contradiction with the Full Court decision in ***Natasha Richards & Phillip Richards v Errol Brown and The Attorney General*** [2016] JMFC Full 05 where it was enunciated that, "*the Defendant at an assessment of damages has a right to be heard…. a party ought not to be barred or otherwise restricted from making relevant submissions or asking relevant question of witnesses at his assessment of damages."* Accordingly, it would not be sufficient for even the Defendant to simply rely on a Witness Statement without there being cross-examination of the witnesses called in support of each party's case. Certainly, if the Claimants are faced with difficulty in locating witnesses whose witness statements they already have, there are avenues available via the Evidence Act, which will allow them to still benefit from the evidence of those witnesses.

[88] The totality of the foregoing has reinforced my view that this tribunal is not at liberty to grant orders concerning the original breach which has occasioned the now setting aside of the Assessment of Damages.

Costs

[89] The Claimants have asked for the grant of costs in the present claim as well as costs thrown away in the Assessment of Damages heard by Justice King.

[90] In any consideration of costs recognition must be given to section 47 of the Judicature (Supreme Court) Act which provides, *"in the absence of express provisions to the contrary, the costs of and incident to every proceeding in the Supreme Court shall be in the discretion of the Court."* Rule 64 of the CPR further expounds on this provision at Rules 64.6(1), 64.6(3) and 64.6(4) respectively. There it is stated:

> **64.6(1)-** "*if the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party."*
>
> **64.6(3)-** "*in deciding who should be liable to pay costs the court must have regard all the circumstances."*
>
> **64.6(4)-** "*in particular it must have regard to-*
>
> *a. the conduct of the parties both before and during the proceedings;*
>
> *b. whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;*
>
> *c. any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 and 36);*
>
> *d. whether is it was reasonable for a part-*
>
> *(a) to pursue a particular allegation; and/or*
>
> *(b) to raise a particular issue;*
>
> *e. the manner in which a party has pursued-*
>
> *i. that party's case;*
>
> *ii. a particular allegation; or*

iii. a particular issue;

f. whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and

g. whether the claimant gave reasonable notice of intention to issue a claim."

[91] It would seem therefore, that even though a successful party is generally entitled to costs, it is ultimately a decision for the tribunal.

[92] The Defendant herein can mount no meaningful opposition to the Claimants' assertion for costs in respect of the breach of their right to a fair trial within a reasonable time. The Claimants' position is fortified due to the fact that this action having been engendered by the breach of the state agent, in the form of the retired judge, imposes liability on the Defendant by virtue of the Crown Proceedings Act. For that reason, this Court can find no circumstance which warrants a departure from the general rule.

[93] In respect of the now set aside Assessment of Damages, the Claimants have asked that costs thrown away be awarded in their favour. In determining this issue, I derived guidance from the Superior Court of Justice Ontario in the case of ***Nelson v Chadwick*** 2019 ONSC 4544, where it was the proclaimed that, "*an award of 'costs thrown away' is not designed to penalize a party who seeks, or is responsible for, an adjournment of the trial, but rather to indemnify a party for the wasted time incurred for trial preparation that was stripped of its value as a result of a subsequent adjournment or mistrial..."* This has enlivened the viewpoint that in awarding costs thrown away it must be manifested that one party has wasted time in its preparation for the adjudication of the matter and that it was some act on the part of the other party which has prevented this preparation from being put to good use. Those circumstances were not present in the case at bar to have prompted the now 'set aside' Assessment of Damages. In fact, both the Claimants and the Defendant were prepared and did what was necessary to have the matter ventilated before the retired judge. Furthermore, in the

Assessment of Damages the Attorney General was acting in the capacity of representative of the state agents who had carried out the unlawful searches and seizures at the Claimants' law offices, and not in the position which they presently appear - as representative of the judge who has breached the Claimants' right to a fair trial within a reasonable time. Thus, in the Assessment of Damages the Defendant was also a victim of the wasted preparation and resources which had emanated from the failure of Justice King to deliver a decision in that matter. There is therefore no solid reasoning to inspire the Court to award costs thrown away against the Defendant in respect of the Assessment of Damages which has been set aside.

Wolfe-Reece, J.

FACTS

[94] The Claimants before the Court are all attorneys-at-law whose rights were violated by the state on or about the 27th January, 2003 and the 28th January, 2003, when the police raided, seized and removed several of their clients' files from their offices under the cloak of three search warrants which were issued by His Honour Mr. Martin Gayle, Resident Magistrate for the Corporate Area (as he then was).

[95] Following the seizure, the Director of Public Prosecutions filed a Fixed Date Claim Form wherein they sought, among other things, an order that the seized documents be examined by a Judge of the Supreme Court to determine which documents were privileged, with a view of turning over the documents which were not privileged to the Canadian authorities.

[96] The Jamaican Bar Association and Messrs Ernest Smith and Hugh Thompson filed separate Judicial Review applications to quash the warrants and an order of

mandamus for the return of the documents. The Constitutional Court dismissed the claims after finding that the issuing of the warrants and the search were lawful.

[97] On appeal to the Court of Appeal, it was found, inter alia, that the Claimants' right of legal professional privilege was breached as there was no lawful authority for the search and that there was a breach of the claimants' rights under section 19(1) of the Constitution.

[98] Subsequent to the decision of the Court of Appeal, the Claimants in January 2009 filed their respective claims wherein they sought damages for breach of their constitutional rights, damages for trespass to property, assault, false imprisonment and aggravated and exemplary damages. The Defendant admitted liability and the matter then moved on to an assessment of damages hearing, which was heard before the Honourable Mr. Justice Raymund King (retired). Sometime in or about October, 2013, the Honourable Mr. Justice Raymund King reserved judgment in the Claim and subsequently retired from office in 2015 without delivering his judgment.

[99] The Claimants are aggrieved by the failure of the Learned Judge to deliver his judgment before his retirement and have filed claims numbered 2018HCV03062 and 2018HCV04791 respectively to seek redress for a breach of their right to a fair hearing within a reasonable time pursuant to section 16(2) of the Charter of Fundamental Rights and Freedom. The orders which the respective claimants are seeking are somewhat identical and can be summarized as follows:

> *(a) A declaration that the Judge, the Honourable Mr. Justice King (rt'd), who heard the assessment of damage, having retired can no longer deliver judgment on the assessment of damages thereby rendering the delivery of the judgment an impossibility.* ***(The Defendant has acceded to this order being made)***
>
> *(b) A declaration or order that the Assessment of Damages heard by the Honourable Mr. Justice King (rt'd) on the 7th day of*

October, 2013 be vacated and declared null and void. ***(The Defendant agrees to this order being made)***

(c) *A declaration that the delay in, and/or the impossibility of rendering a judgment in this matter is a breach of the Claimants' right to a fair trial within a reasonable time.* ***(The Defendant not only agrees to this point but notes that their right to a hearing within a reasonable time has also been breached by the omission of King J (rt'd)***

(d) A declaration that the Claimants' right to a fair trial under section 16(2) of the Charter of Fundamental Rights and Freedoms has been breached and the Claimants have been prejudiced as a result of the long delay in which they have been unable to acquire judgment.

(e) *A declaration and/or order that in all the circumstances a new assessment of damages would be unreasonable and unjust****. (This is a point of contention between the parties)***

(f) *An order that the claimants are entitled to damages for breach of his constitutional rights in respect to having a matter heard before an independent and impartial tribunal within a reasonable time* ***(The defendant argues that this is not an appropriate case for an award of damages)***

(g) *The costs of this Claim and the costs thrown away in the original claim be the Claimants to be taxed if not agreed* ***(The defendant contends that there should be no cost order and each party should bear their own costs.***

SUBMISSIONS OF BEHALF OF THE CLAIMANTS

[100] I have carefully looked at the submissions made on behalf of all the Claimants. I am of the view that there is no great disparity between the submissions made on behalf of the Claimants in claim number 2018HCV03062 and those made on behalf of Mr. Thompson in claim number 2018HCV04791. I believe that for efficiency it would not be harmful to summarize the Claimants' submissions together.

Section 16(2) of the Charter of Fundamental Rights and Freedoms

[101] Both Counsel submitted that the failure of King J (rt'd) to deliver his judgment prior to his retirement has given rise to a breach of the Claimants' right to a fair hearing within a reasonable time pursuant to section 16(2) of the Charter of Fundamental Rights and Freedoms.

[102] Mrs. Gibson-Henlin Q.C. highlighted that it was difficult to find cases which dealt with a breach of the section 16(2) right. However, both Mrs. Gibson-Henlin and Mr. Samuels relied on several criminal cases where the court examined the right to a fair trial within a reasonable time, which is enshrined under sections 14(3) and 16(1) of the Jamaican Charter. Mrs. Gibson Henlin Q.C. submitted that these cases were helpful because but for the reference to civil and criminal proceedings the statement of the right and entitlement are the same.

[103] The case of **Mervin Cameron v Attorney General of Jamaica** [2018] JMFC FULL 1 was heavily relied on by the Claimants. In particular, the Claimants preferred the dissenting judgment of Sykes, J (as he then was). It was submitted that the case highlighted three distinct rights that were created by section 16(1). That is, the right to a fair trial, the right to a trial within a reasonable time and the right to be tried by an independent and impartial tribunal. Mrs. Gibson Henlin submitted that the reasoning of the Learned Judge is equally applicable to the assessment of the section 16(2) right.

[104] The Claimants also relied on the case of **Herbert Bell v The Director of Public Prosecutions** [1985] 1 AC 937, which was applied in the case of **Mervin Cameron v Attorney General of Jamaica** (**supra),** to advance the point that failure to conduct a trial within a reasonable time could in circumstances lead to an automatic stay of proceedings. Mrs. Gibson Henlin pointed to paragraph G of page 947 of the judgment where the board expressed as follows:

> *"If the constitutional rights of the applicant had been infringed by failing to try him within a reasonable time, he should not be obliged to prepare for a retrial which must necessarily be convened to take place after an unreasonable time."*

[105] Both Counsel placed further reliance on the case of **Bell v The Director of Public Prosecutions, (supra),** as authority for the approach to be taken by the court in determining whether the right to a fair trial within a reasonable time has been infringed. The Privy Council outlined four factors to be considered, that is, the length of the delay, the reasons given by the prosecution to justify the delay, responsibility of the accused for asserting his rights and prejudice to the accused.

[106] Queens Counsel acceded to the fact that the ruling of Sykes, J in **Mervin Cameron v. Attorney General of Jamaica, supra,** was a dissenting judgment, however she argued that his decision was upheld in the case of **Patrick Chung v The Attorney General of Jamaica and the Director of Public Prosecutions** [2019] JMSC FULL 3 at paragraph 27 of the judgment when Batts J stated as follows:

> *I prefer, and apply, the reasoning of Sykes J:*
>
> *"What I have said in these reasons should be applied to the reasonable time requirement in section 16 (1) of the Charter. There is no rational reason to give the same phrase different meanings and in light of section 14(3) there is no reason to constrict the operation of the phrase in section 16(1) by subjecting it to the condition that the applicant must prove that he cannot get a fair trial –a virtual impossibility-before a stay and discharge can be granted. Bell showed that such a standard was not required even under the old Bill of Rights and there is even less reason for imposing that standard under the new Charter." (para 169 of his judgment).*

[107] Mrs. Gibson Henlin highlighted the fact that the authorities stated that there is no need on the part of the Claimants to establish specific prejudice. Nevertheless, both Counsel highlighted specific prejudice which the Claimants face as a result of the delay. Mr. Samuels submitted that the delay has left Mr. Thompson in an unfortunate position, in that he had already lost clients as a consequence of the unlawful search that was carried out at his firm. The delay worsened the problem as Mr. Thompson is unable to pay his legal fees and be compensated for the wrong which he endured. Mrs. Gibson-Henlin Q.C. focussed on the prejudice

which her clients faced, in that, if there was to be a re-hearing their case would be impaired as a result of the delay. She noted that one witness has since been deceased and another has resigned in circumstances where she would no longer have access to relevant information.

[108] Mr. Samuels went further to argue that the abrogation of the Claimants' right to be tried within a reasonable time amounted to a breach of the fundamental right to due process of the law. Counsel cited the case of **Mohammed v Trinidad and Tobago** [1999] 2 AC 111 wherein Lord Steyn expressed that *"The stamp of constitutionality on a citizen's rights is not meaningless; it is clear testimony that an added value is attached to the protection of the right."*

[109] Counsel submitted that judges are subject to supremacy of the rule of law and the protection of the right to due process of law. He noted that there is a need for reform so as to mitigate or to prevent any further breaches or infringements of an individual's constitutional rights by the Courts.

Section 13(2) of the Charter of Fundamental Rights and Freedoms

[110] It was submitted on behalf of the parties that the right to a fair trial, within a reasonable time before a fair and impartial tribunal is protected by section 13(2) of the Charter of Fundamental Rights and Freedoms where it is explicitly stated that Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes the right guaranteed under section 16 and that this right can only be derogated against in circumstances where it is shown to be demonstrably justified in a free and democratic society. Section 13(2) provides as follows:

> *Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as demonstrably justified in a free and democratic society-*
>
> > *(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and*

(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.

[111] Mr. Samuels went further in his submission to explore judicial decisions which examined what ought to be considered as demonstrably justified in a free and democratic society. Counsel relied on the case of **The Jamaican Bar Association v The Attorney General and the General Legal Council** [2017] JMFC Full 02 to argue his point that what is reasonable and demonstrably justified involves a 'form of proportionality test'. In that case, the Court examined paragraphs 138-140 of the Canadian case of **R v Oakes** [1986] 1 S.C.R. where Dickson CJ acknowledged that there are circumstances in which the fundamental rights and freedoms can be overridden. His Lordship went on to explain that what is considered as reasonable and demonstrably justified in a free and democratic society will depend on the satisfaction of two criteria. That is:

i. The objective must be of sufficient importance to justify derogation for a particular right; and

ii. The measure used to derogate from the right must be reasonable and justified.

Dickson CJ noted that this involves a form of proportionality test which will vary depending on the circumstances.

[112] Dickson CJ went further to note that;

"even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society"

[113] It was submitted that in the case at bar there was no reason advanced which justified the Judge's failure to deliver the judgment before his retirement.

Section 100 & 100(2) of the Constitution

[114] It is not in dispute that the Learned Judge was functus officio by virtue of his retirement. The Defendant has acceded to this point. Mrs. Gibson Henlin noted that the court as a public body or the judiciary as an organ of the state knew or ought to have known that the Claimants' constitutional right to trial within a reasonable time would be further impaired if they were not mindful of the number of outstanding judgments held by the judge and that his retirement would negatively impact the delivery of same. Counsel argued that measures were available under section 100(2) of the Constitution to seek an extension of time to allow the Judge to deliver outstanding judgments yet no such action was taken. In addition, counsel noted that no action was taken by the court to vacate the judgment and order a new hearing in light of the judge retiring without delivering his judgment.

[115] Mr. Samuels relied on the decision of **Paul Chen-Young and others v Eagle Merchant Bank Jamaica Limited and Others (The Attorney General for Jamaica, interest party)** [2018] JMCA App 7 which explored this point. At paragraph 46 of the judgment, Morrison P summarized the pertinent facts of the case as follows:

> *"This issue arises because, as has been seen, (i) section 106(1) of the Constitution sets the retirement age of a judge of appeal at 70 years; and (ii) by July 2016, all of the judges had retired, without having delivered a decision on the appeal, and without having received any permission pursuant to section 106(2) to continue in office for such period as may have been necessary to enable them to do so. In these circumstances, the applicants submit that the judges were entirely without authority to act as such on 1 December 2017 and that, accordingly, the impugned judgment is "unconstitutional, illegal, null and of no effect"*

[116] In the case of **Paul Chen-Young**, (supra), the Court of Appeal found that the judges were functus officio and the judgment which was delivered after their retirement was therefore a nullity.

[117] Counsel also cited the Trinidadian decision of **Boodhoo and Another v Attorney General** [2004] UKPC 17. He noted that there were several distinguishing features but noted that in that particular case the Privy Council held that:

> *"Delay in producing a judgment would be capable of depriving an individual of his right to the protection of the law, as provided for in s 4 (b) of the Constitution, but only in circumstances where by reason thereof the judge could no longer produce a proper judgment or the parties were unable to obtain from the decision the benefit which they should….." (see paragraph 12 of the judgment).*

[118] It was argued on behalf of the Claimants that the parties were forced to wait almost 12 years for their matter to be determined having filed their respective Claims in January 2009. It was further argued that not only were the Claimants' right to a fair trial within a reasonable time breached but that breach still persists as the Claimants are yet to obtain judgment in the matter. Both Mr. Samuels and Mrs. Gibson Henlin argued that to order a retrial would further perpetuate the breach.

What is a reasonable time to deliver a judgment?

[119] On the issue of what is a reasonable period for the delivery of judgments in Jamaica, Counsel relied on the case of **Desmond Bennett v Jamaica Public Service Co. Ltd** [2013] JMCA Civ 28 in submitting that no judgment should be outstanding for more than six (6) months and unless it is a complex judgment, the judgment should be delivered in three (3) months.

Section 19 and Rules 56.1(1)(b) & 56.(1)(4) of the Civil Procedure Rules

[120] It was submitted that pursuant to section 19 of the Charter, the Claimants are entitled to seek redress for breach of their constitutional rights. The section provides that:

> *In addition to or instead of an administrative order the court may, without requiring the issue of any further proceedings, grant - (a) an injunction; (b) restitution or damages; or (c) an order for the return of any property, real or personal.*

[121] Counsel relied on cases such as **The Attorney General of Trinidad and Tobago v Siewchand Ramanoop** PCA No. 13 of 2004 (delivered March 25, 2005) and **Gairy v A-G of Grenada** [2002] UKPC 30 to argue the point that the Court should be prepared to craft a new remedy which is adequate to compensate the Claimants for a breach of their right.

[122] Counsel relied on several authorities to advance the point that the "award of damages must be commensurate with the right that has been breached, the manner in which the right was breached and the consequences that flow from the breach." Both Counsel advanced cases which expressed that in some cases a declaration would be sufficient to meet the justice of the case when in other cases compensation is necessary to vindicate the Claimant and affirm the sanctity of the right breached.

[123] Mr. Samuels sought to assist the court in determining the appropriate quantum of damages. He noted that the court had three options. The first option is to refer the matter to the Assessment Court for constitutional damages to be assessed. The second option is to assess the damages in an amount equivalent to the interest payable with a condition that it should not exceed the capital amount and the third option being to assess the award with reference to previously decided cases. Mr Samuels submitted that an award of $10,000,000.00 would be reasonable compensation for the breach of Mr. Thompson's constitutional rights.

[124] The point most emphasised by both Counsel was that not only should the Court make a monetary award to the Claimants for breach of their constitutional rights

but that the award should be "substantial." The Claimants relied on the case of **Inniss v Attorney General of Saint Christopher and Nevis** - [2008] UKPC 42 to advance this point. The points coming from **Innis,** supra which Queens Counsel Mrs. Gibson Henlin emphasised were that the award should be substantial so as to be a vindication of the right and also serve as a deterrence against future breaches.

Assessment of the Nominate Torts

[125] On the issue of false imprisonment, Mrs. Gibson Henlin submitted that the considerations for such an award are as follows:

i. "Loss of liberty;
ii. Injury to Feelings (that is, the indignity, disgrace, humiliation and mental suffering arising from the detention);
iii. Physical injury, illness or discomfort resulting from the detention;
iv. Injury to reputation'
v. Any pecuniary loss which is not too remote a consequence of the imprisonment (for example; loss of business, employment or property) 33.

[126] Counsel relied on the case of **Walter v Alltools, Limited** (1944) 61 TLR 39 where the following was expressed:

> *"…any evidence which tends to aggravate or mitigate the damage to a man's reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man's liberty it also affects his reputation. The damage continues until it is caused to cease by an avowal that the imprisonment was false."*

[127] Mrs. Gibson-Henlin relied on the case of **Richard Millingen v The Attorney General & Anor** (1978) 16 JLR 119 (CA) to advance her point that in assessing the award for damages flowing from the tort of false imprisonment, the status of the Claimants is a relevant factor to be taken into consideration. In that case it

was found that *"the higher the status of the Plaintiff, the higher the damages."* Learned Queen's Counsel submitted that the damage to the 1st to 4th Claimants' reputation was significant given that they were at all material times in the public eye. She made specific reference to the 2nd Claimant, Mr. Ernest Smith who was at the material time a member of parliament who was subsequently relieved of that position. She also indicated in her oral submission that Mr. Smith suffered significant damage to his reputation and she made specific reference to certain disparaging utterances which were made across the aisles of parliament about him as a result of the actions of the Defendant.

[128] Mrs. Gibson Henlin submitted that an appropriate award would be in the region of $35,000,000,00 in keeping with the recent awards in similarly decided cases. See ***Owen Clunie v Francis Forbes*** (unreported) Supreme Court, Jamaica Claim number 2007HCV00871 judgment delivered.

Aggravated and Exemplary damages

[129] The Claimants also seek to recover constitutional damages for what they term as the "objectionable behaviour" of the state. Counsel submitted that damages should be awarded for both the nominate torts and vindicatory damages for infringement of the constitutional rights. Counsel relied on the case of ***Merson v Cartwright and another*** [2005] UKPC 38. In that case, the Privy Council noted at paragraph 10 of the judgment that *"in the present case there was an undoubted overlap between the facts constituting the tortious assault and battery and the facts constituting the art 17(1) infringement. But the overlap was not complete."* It was held that in such a case where there was not a complete overlap the claimant was entitled to both compensatory and vindicatory damages.

[130] Counsel also relied on the Jamaican case of ***Sharon Greenwood-Henry v The Attorney General of Jamaica*** CL G 116 OF 1999 where Sykes J noted that the decisions of ***Merson v Cartwright and another*** [2005] UKPC 38 and ***The***

Attorney General of Trinidad and Tobago v Siewchand Ramanoop PCA No. 13 of 2004 (delivered March 25, 2005) were a departure from the Court's resistance to award damages under the constitution in false imprisonment, assault and battery cases.

[131] The Claimants also claim damages for trespass for interference with their property. Counsel submitted that this was actionable per se without any proof of actual loss.

[132] Counsel also submitted that the Claimants were entitled to both aggravated and exemplary damages. Counsel relied on the dicta of McDonald-Bishop J (as she then was) in the case of ***Delia Burke v Deputy Superintendent Carol McKenzie and the Attorney General of Jamaica*** [2014] JMSC Civ 139 to advance her point that the Claimants should be compensated for injury to their proper feelings of dignity and pride. Counsel expressed the distress that each claimant faced as a result of the Defendant's conduct. She noted in particular that Nesta-Claire Smith no longer uses her maiden name Smith in a bid to disassociate herself from the firm. Counsel also noted that the ordeal has caused the ladies to become withdrawn as a result of the embarrassment they faced.

[133] It was argued by Counsel that the Claimants should be awarded exemplary damages under the first category highlighted in ***Rookes v Barnard*** [1964] AC 1129 where the House noted that: *"The first category is oppressive, arbitrary or unconstitutional action by the servants of the government."* Counsel highlighted that the search was unlawful, the police came in large numbers dressed in combat gear, they read through the Claimants files even in light of protests from those present. Counsel noted that at the Kingston office in particular, the police exudes arrogance whilst conducting the search and they even made particular utterances that they were willing to conduct the search with or without a warrant.

Costs thrown away

[134] Both Counsel argued that the Claimants should be awarded costs for the vacated hearing and the instant motion. Counsel relied on the case of **Maurice Arnold Tomlinson v Television Jamaica Ltd., CVM Television Ltd and the Public Broadcasting Corporation of Jamaica** [2014] JMFC Full 1 in arguing that the crown should pay the Claimants' costs for the current proceedings and the assessment of damages that was presided over by King J.

DEFENDANT'S CASE

[135] Mrs. Reid Jones did not dispute the fact that the assessment of damages presided over by King J is null and void consequent upon the learned judge retiring without delivering his judgment. Counsel also accedes to the fact that the Learned Judge cannot now deliver his judgment and that the delay of almost 12 years is unreasonable in the circumstances. The defendant also agrees that the conduct of the Learned Judge amounted to a breach of the Claimants' right to a fair hearing within a reasonable time under section 16(2) of the Charter. It was also Learned Counsel's contention that it was not only the Claimant's right which was breached but also that of the Defendant, who has also been prejudiced by the delay.

[136] Counsel submitted that the seminal issues to be determined were:

i. Whether the appropriate redress for breach of the Claimants' constitutional right to fair hearing within a reasonable time is monetary redress.
ii. If the Claimants are entitled to damages, how are those damages to be assessed.

[137] Counsel submitted that the appropriate remedy for violation of a constitutional right will depend on the circumstances of the case. She cited the dicta of Fraser J in the case **Mervin Cameron v Attorney General of Jamaica No.** 2 [2018] JMFC Full 4 where His Lordship noted that:

"a) The power to give redress for a contravention of a constitutional right is discretionary;

b) There is no constitutional right to damages; and

c) Where there is a constitutional violation the appropriate remedy will depend on the circumstances."

What is the appropriate remedy for breach of the Claimants Right?

[138] Mrs. Reid Jones did not dispute the fact that the Claimants ought to obtain redress but her submission was that a declaration would be sufficient. Counsel submitted that if an award for damages should be granted, same should be for inconvenience and distress rather than compensation for the actual torts from which the action arose. Counsel relied on the Trinidadian case of **Crane v Rees and others** [2001] 3 LRC 510 to support her point.

[139] Counsel objected to the Claimants' request for the court to make an order for an award of the nominate torts without the matter being referred to an assessment court for determination. Counsel conceded to the fact that there are decided cases which ruled that there can be an award for the nominate torts in addition to the breach of the constitutional rights. However, she noted that the instant case was distinguishable from such cases as **Merson v Cartwright** [2005] UKPC 38, in that, in cases where the court has granted relief for both the breach of the nominate torts in addition to the breach of the constitutional rights, the latter flowed directly from a breach of the nominate tort.

[140] In her oral submissions, Counsel sought to distinguish the case of **Inniss v Attorney General of Saint Christopher and Nevis** supra. she noted that the case of **Innis**, supra, involved a breach of contract which could be heard on paper without the need to call any witness. She went further to explain that the

Court would need evidence that could not be gotten from looking at witness statements.

[141] On the issue of costs, Counsel argued that each party should pay their own costs because the October 2013 proceedings was null and void, therefore, nothing can be said to flow from it. She argued in the alternative that the appropriate forum to determine whether the Claimants would be entitled to costs would be at the assessment hearing.

ISSUES, LAW & ANALYSIS

Issue # 1- Whether it would be unreasonable and/or unjust to make an order for the assessment of damages to commence de novo before a new tribunal

[142] The relevant provisions under the Charter of Fundamental Rights and Freedom are:

> Section 16(2)
>
> *In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.*
>
> *Section 19*
>
> *19.-(1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*
>
> *(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.*

Whether the reasonable time guarantee is invoked at any stage of the proceedings

[143] The Claimants have alleged that there was a breach of the reasonable time guarantee afforded them by virtue of section 16(2) of the Jamaican Charter when King J retired without delivering his judgment on the October, 2013 assessment of damages. It is first important to establish that there was in fact a breach of the Claimants' right to a fair hearing within a reasonable time. The issue of liability was already determined and the sole issue for determination before the Learned Judge was on the quantum of damages to be awarded. In determining the length of the delay and whether the reasonable time guarantee extends beyond the issue of liability to determining issues of costs and quantum of damages, much guidance can be taken from paragraph 4.6.47 of **Lester, Pannick and Herberg: Human Rights Law and Practice** (LexisNexis, 3rd Edition) where the learned authors expressed as follows:

> *"In civil cases, time usually begins to run for the purposes of the reasonable time guarantee from the initiation of court proceedings, although it may start to run even before the issue of proceedings in certain situations, as for example where an applicant is required to exhaust a preliminary administrative remedy under national law before having recourse to a court or tribunal . In criminal cases, the reasonable time guarantee runs from the time of charge**. In either case, the guarantee continues to apply until the case is finally determined (which may include appeal and judicial review proceedings, and proceedings determining the quantum of damages)." [Emphasis mine]***

[144] Based on the foregoing, it is clear that time began to run from January 2009 when the parties filed claims numbered 2009HCV00289 and 2009HCV00209 before the Court. By all accounts, the reasonable time guarantee did not expire when the Defendant admitted liability. Rather, the Claimants' right to a fair trial within a reasonable time extends beyond the issue of liability up to the point when the matter is finally determined before the court. This reasoning is only logical as the parties did not petition the court simply to have the issue of liability determined rather they sought the intervention of the court to obtain damages for breach of their civil and constitutional right.

The case of Herbert Bell and its application in our courts

[145] The Claimants have argued that the delay has deprived them of their right to a fair trial by outlining several prejudices that they have faced and continue to face because of delay. In particular, the Claimants contend that they will have a difficultly advancing their case due to the death and unavailability of certain witnesses. As a result, the Claimants are asking the Court to apply the ruling of the Privy Council in the case of ***Herbert Bell v DPP and another*** (supra) by refraining from ordering that a new assessment of damages hearing commence de novo. Instead Learned Counsel have asked this Court to exercise its power under section 19 of the Charter of Fundamental Rights and Freedoms and Civil Procedure Rule (CPR) 56.1(4) by determining the issue of the quantum of damages to be awarded for the nominate torts without convening a new hearing for that issue to be determined.

[146] The Learned Counsel have relied on several cases to advance the point that pursuant section 19 of the Charter, the Court has the power to fashion a new remedy to give effect to the relief being sought. The Claimants have also advanced the point that CPR 56.1(4) empowers the court in instances such as the present, to make an award for damages, without the need for any further proceedings. Rule 56.1(4) provides as follows:

> *"In addition to or instead of an administrative order the court may, without requiring the issue of any further proceedings, grant - (a) an injunction; (b) restitution or damages; or (c) an order for the return of any property, real or personal."*

[147] Queen's Counsel, Mrs. Gibson-Henlin, has highlighted the difficulty in finding jurisprudence on section 16(2), as a result, Counsel sought to rely on cases that examined section 16(1) of the Jamaican Charter, the relevant provision governs an accused man's right to a fair hearing in criminal proceedings. I agree with Counsel to the extent that both section 16(1) and 16(2) are similar in effect. The

slight exception being that one section is geared towards addressing the conduct of civil proceedings whilst the other is focused on criminal proceedings. I am mindful that there are fundamental differences in the way the courts have interpreted each provision, which therefore requires some amount of caution and modification in the application of the principles to interpreting section 16(2).

[148] The case of ***Herbert Bell v DPP another, supra***, is a decision from the Privy Council and despite the criticisms levelled against the decision, the judgment is binding on this court as it relates to the approach to be taken in interpreting section 16(1) of the Charter of Fundamental Rights and Freedoms. However, a seminal question for this Court to answer is whether the ***Herbert Bell*** *case* should be given equal weight when analysing section 16(2) of the Jamaican Charter.

[149] The brief facts of the case of **Bell** are important in understanding the issues which the matter raised. Mr. Bell sought redress under section 25 of the Constitution for a breach of his right to a fair hearing within a reasonable time under section 20 of the Constitution (the relevant provisions are now enshrined under section 19 and 16(1), respectively, of the Charter of Fundamental Rights and Freedoms).

[150] Mr. Bell was arrested in May 1977 on gun related charges and he was convicted in October, 1977. Mr. Bell appealed against his conviction and on March 7, 1979 the Court of Appeal quashed the conviction and the majority ordered a retrial. The Registrar of the Court Appeal sent written notice to both the Registrar of the Gun Court and the Director of Public Prosecutions advising them that the conviction was quashed and a new trial ordered. The Gun Court did not receive the notice until December1979. The matter came before the court for continuation on several occasions but could not continue because of the absence of prosecution witnesses. The matter against Mr. Bell was discontinued on the November 10,1981 when the prosecution offered no evidence against Mr. Bell. In February, 1982 Mr. Bell was rearrested.

[151] It was argued on behalf of the Respondents that the appropriate remedy would be for Mr. Bell to wait until the retrial of the matter to make the submission that a retrial would be an abuse of process. Lord Templeman rejected this position when he stated at page 947 paragraph G as follows:

> *"Their Lordships cannot accept this submission. If the constitutional rights of the applicant had been infringed by failing to try him within a reasonable time, he should not be obliged to prepare for a retrial which must necessarily be convened to take place after an unreasonable time."*

[152] In delivering his judgment Lord Templeman addressed his mind to Lord Devin's ruling in ***Connelly v. Director of Public Prosecutions*** [1964] A.C. 1254 in coming to the conclusion that a stay may be necessary to prevent an oppressive trial after a delay. Lord Templeman reasoned on page 950 as follows:

> *In Connelly v. Director of Public Prosecutions [1964] A.C. 1254, 1347, Lord Devlin rejected the argument that an English court had no power to stay a second indictment if it considered that a second trial would be oppressive. In his opinion:*
>
> > *"the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides … First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English criminal law … nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused."*
>
> *Lord Devlin was there speaking of the power of the court to stay a second indictment if satisfied that its subject matter ought to have been included in the first.* ***But similar reasoning applies to the power of the court to prevent an oppressive trial after delay.*** *[Emphasis Mine]*

[153] His Lordship then went on to address the seminal issue which he considered to have arisen from the case. That is*, "whether in the circumstances of the present case the applicant's right to "a fair hearing within a reasonable time" has been infringed"* see page 151 of ***Herbert Bell v DPP another, supra***. His Lordship relied on the decision of Supreme Court of the United States decision of ***Barker v. Wingo*** (1972) 407 U.S. 514 and laid down four conditions which must be satisfied in determining whether an individual has been deprived of his right to a fair trial. The conditions are:

i. The length of the delay

ii. The reasons given by the prosecution to justify the delay

iii. The responsibility of the accused for asserting his rights

iv. Prejudice to the accused

[154] The principles which were laid down in **Bell** has formed a pivotal part of our jurisprudence and despite the fact that the drafters of the new Charter of Fundamental Rights and Freedoms have made modifications by adding 14(3) to the Charter, the application of the principles remain in effect. Despite the existence of the breach of the reasonable time guarantee, the court will still allow a trial to proceed or a conviction to stand unless the applicant is able to establish on a balance of probabilities that the trial or conviction breaches his right to a fair trial.

[155] The ***Herbert Bell*** *case* was applied in the case of ***Mervin Cameron v Attorney General of Jamaica*** [2018] JMFC FULL 1. This case was relied on by both parties and the arguments put forward by the Counsel for the opposing parties highlighted the beautiful dichotomy in the opinions of Sykes J and Fraser J in delivering their respective judgment.

[156] The Claimants placed heavy reliance on the dissenting judgment of Sykes J in ***Cameron***. Sykes J criticized post Bell decisions and rebuffed the argument that section 16(1) contains a bundle of rights that are all geared towards protecting

the core right, which is the right to a fair trial. If the Learned Judge's approach is to be accepted, it would mean that the Court would have the discretion to grant a stay on the ground of delay even in circumstances where it is possible to have a fair trial. It is important to juxtapose the position of Fraser J and Sykes J in determining which if any of the two approaches can be modified and applied in the interpretation of section 16(2).

[157] Sykes J analysed several post Bell decisions to include the **Attorney General's Reference (No 2 of 2001)** - [2004] 2 AC 72 and in so doing he expressed his disapproval that the core right being protected by section 16(1) of the Charter of Fundamental Rights and Freedoms is the right to a fair hearing. The Learned Judge expressed several times throughout his judgment that such an interpretation would invariable mean that despite the length of a delay, the court would be reluctant to grant a stay or quash a conviction in the absence of evidence to the satisfaction of the Court that the delay is such as to impair a fair trial. After assessing Lord Hobhouse's reasoning in the **Attorney General's Reference**, His Lordship expressed at paragraph 132 as follows:

> *The consequence of Lord Hobhouse's approach is that no matter how egregious the delay, no matter how dilatory the state is, as long as the trial can be said to be fair such a trial can never ever be barred unless there is some undermining of the trial process itself or some evidence of abuse of power or manipulation by the state. This explains why, in Jamaica, trials are taking place in quite a few instances nine years after the incident. To borrow the words of the Canadian court, a culture of complacency has taken root and that culture has been nourished by the view that it matters not how long it takes as long as the defendant can meet the prosecution case then it cannot be said that a fair trial is no longer possible. If Lord Bingham's approach represents the law under the new Charter then section 14 (3) is completely useless in terms of securing a stay without proof of the inability to get a fair trial.*

[158] It is important to note that His Lordship made mention that section 14(3) would have no effect if it were to be interpreted that regardless of how egregious the

delay, the trial should proceed unless the probability of a fair trial has been impaired. The Learned Judge rightly argued that sections 14(3) and 16(1) of the Charter of Fundamental Rights and Freedoms must be read together in determining whether the breach of the reasonable time guarantee warrants the order for a stay of proceedings or the quashing of a conviction when he expressed as follows:

> *[17] Section 14 (3) states:*
>
> *Any person who is arrested or detained shall be entitled to be tried within a reasonable time and –*
>
> *(a) shall be –*
>
> *(i) brought forthwith or as soon as is reasonably practicable before an officer authorized by law, or a court; and*
>
> *(ii) released either unconditionally or upon reasonable conditions to secure his attendance at the trial or at any other state of the proceedings; or*
>
> *(b) if he is not released as mentioned in paragraph (a) (ii) shall be promptly brought before a court which may thereupon release him as provided in that paragraph.*
>
> *[18] During the course of argument neither counsel mentioned section 16 (1) of the Charter of Fundamental Rights and Freedoms; a provision which has to be taken into account in the resolution of this matter. Section 16 (1) reads:*
>
> *Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*
>
> *[19] The two provisions are linked in this way: both provisions may be engaged simultaneously in that a person's arrest and charge may occur concurrently. If that is the case, then the right to tried within a reasonable time (section 14 (3)) and the right to a fair hearing within a reasonable time by an independent and impartial court established by law (section 16 (1)) would be activated simultaneously and immediately. On the other hand, a*

> *person may be arrested or detained but not charged and therefore only section 14 (3) is engaged. Section 16 (1) is only engaged when the person is charged with a criminal offence. In the period after detention or arrest and before charge section 14 details what is expected to be done in respect of the person arrested or charged.*
>
> *[20] Section 14 (3) has no adjectives describing the type of trial to which the person is entitled. That is found in section 16 (1) which says that the hearing should be fair. Section 16 (1) describes the characteristic of the court conducting the trial, namely, impartial, independent and established by law. The adverbial phrase 'within a reasonable time' in section 16 (1) speaks to when the hearing is to take place and not the type of hearing or indeed the type of court. As is well known, adverbs or adverbial phrases never add to the meaning of nouns. The verb that the adverbial phrase modifies or adds to the meaning is 'afforded.' The 'afforded' trial is to take place 'within a reasonable time.'*

[159] Sykes J continued to emphasise the importance of section 14(3) of the Charter when he further opined that no provision is inserted in the Constitution in vain, he relied on the case ***Mohammed v Trinidad and Tobago*** [1999] 2 AC 111 in arguing that the drafters considered the reasonable time guarantee important enough to incorporate it in a separate provision which stands separately from section 16(1). His Lordship reasoned that in drafting the new constitutions the drafters incorporated section 14(3) to give an elevated value to the reasonable time guarantee. He expressed at paragraph 130 as follows:

> *The new placement of the reasonable time hearing must mean something. In my view, the reasonable time dimension was intended to be elevated and given equal standing with the fair hearing itself. It must be given weight. The expanded influence of the reasonable time dimension as reflected in section 14 (3) must influence how section 16 (1) is interpreted. It is my view that section 14 (3) stands on equal footing with section 16 (1) of the Charter.*

[160] Fraser J on the other hand reasoned that there was a hierarchy of rights with the right to a fair trial being sacrosanct to the others. Both Judges agreed that section 16(1) encompassed three separate rights; the right to a fair hearing, the

reasonable time guarantee and the right to be heard by a fair and impartial tribunal. The disparity in views comes about in what Fraser J described at paragraph 214 in the following fashion: *"In essence there is a "hierarchy of rights" with the overarching or core right being the right to a fair trial and the other rights being supportive of that."*

[161] Fraser J pointed to several authorities to enunciate the point that the reasonable time guarantee forms a part of the core bundles of rights and though the breach of the reasonable time guarantee will lead to redress, the appropriateness of the remedy will depend on the nature of the breach and whether such a breach goes towards jeopardizing the fair trial or the validity of the conviction, depending on the stage of the breach. His Lordship expressed at paragraph 228 as follows:

> *The cases decided based on constitutional or convention provisions that guarantee a bundle of due process rights, such as the former section 20 now section 16(1) of the Jamaican Constitution and Article 6 of the European Convention on Human Rights, while recognizing that the right to a hearing within a reasonable time is a separate and distinct right, or at least a distinct component of the bundle of rights, tended to view that right as primarily geared towards protecting and supporting the core right to a fair trial. Given that conceptual framework, while the desirability of timely justice from both individual and societal perspectives was always recognized, unless actual prejudice was shown, in terms of the delay having affected or being likely to affect the fairness of the trial, or it being otherwise unfair to try or have tried the accused, the remedy for breaching the reasonable time guarantee was not usually a stay or quashing of a conviction.*

Applicability of the Court's reasoning in Cameron to interpreting section 16(2) of the Charter

[162] Given the emphasis that Sykes J placed on the importance of section 14(3) in guaranteeing that an accused man is tried within a reasonable time, it begs the question of whether his reasoning can be applied to interpret section 16(2), which stands alone. Mrs Gibson Henlin argued that the reasoning of Sykes J was

applicable to interpreting section 16(2), Counsel pointed the Court to paragraph 134 of the judgment where the Learned Judge expressed as follows:

> *There is nothing wrong with the analytical model developed by Cromwell J in **Jordan** with appropriate change in phraseology and a bit of tweaking being applied to civil cases. I would say that a claimant in a civil matter can indeed have his claim barred if he has delayed unduly without any explanation.*

[163] On a deeper assessment of the words of Sykes J, I find that the use of the words "*bit of tweaking being applied in civil cases"* is indicative of the fact that the learned Judge was of the view that his reasoning as it stands, is not applicable to section 16(2) in the absence of some amount of modification. Secondly, on the issue of whether a claimant in civil cases can have his case debarred for undue delay, I find that Sykes J was not suggesting a new remedy. In fact, it has long been a principle which has been practiced in these courts for such a claim to be struck out for want of prosecution. The question is whether Sykes J's suggestion is applicable at all to the current case where the delay was not due to the fault of either party to the proceedings but was as a result of what Canadian Supreme Court's described in ***R v Morin*** [1992] 1 SCR 771 as "institutional delay or systematic delay." Sykes J applied this term in the ***Mervin Cameron*** *case* when he quoted at paragraph 41 the dicta of Sopinka J which are as follows:

> *Time will be taken up in processing the charge, retention of counsel, applications for bail and other pre-trial procedures. Time is required for counsel to prepare. Over and above these inherent time requirements of a case, time may be consumed to accommodate the prosecution or defence. Neither side, however, can rely on their own delay to support their respective positions. When a case is ready for trial a judge, courtroom or essential court staff may not be available and so the case cannot go on. This latter type of delay is referred to as institutional or systemic delay.*

[164] Based on the facts of the case, the delay was due to the Learned Judge's failure to deliver his judgment prior to his retirement. Therefore, the reasoning of Sykes J at paragraph 134 of **Mervin Cameron**, supra, is not applicable to the current

case as both parties stood equally before the law as Claimant and Defendant at the October 2013 hearing.

[165] We therefore turn to consider whether the reasoning of Fraser J is applicable to answering the issues before the court. At paragraph 216 of the judgment Fraser J himself answered this question when he stated as follows:

> *It should also be highlighted that the Convention right embraces both civil and criminal proceedings which create dynamics that require consideration of how these bundle of rights would be exercised between parties in civil matters as distinct from their exercise between the citizen and the state in a criminal matter.*

[166] This leads me to conclude that despite the similarities between section 16(1) and 16(2) the approach to be taken in applying section 16(2) might be slightly different than that of 16(1).

Interpretation of Article 6 of the European Convention on Human Rights in relation to Civil Matters

[167] Article 6(1) of the European Convention of Human Rights is similarly worded as section 16(1) and 16(2) of the Jamaican Charter and it would therefore be useful to explore how the English Courts have examined civil matters involving a breach of the reasonable time guarantee. Article 6(1) of the Convention on Human Rights provides as follows:

> *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

[168] Lord Hope of Craighead in the House of Lords decision of **Porter and another v Magill** - [2002] 1 All ER 465 provides useful guidance on how to interpret civil matters involving a breach of the Article 6 right. At paragraphs 108-109 His Lordship laid down the following principles:

> *"108 I would also hold that the right in art 6(1) to a determination within a reasonable time is an independent right, and that it is to be distinguished from the art 6(1) right to a fair trial. As I have already indicated, that seems to me to follow from the wording of the first sentence of the article which creates a number of rights which, although closely related, can and should be considered separately. This means that it is no answer to a complaint that one of these rights was breached that the other rights were not. To take a simple example, the fact that the hearing took place in public does not deprive the applicant of his right to a hearing before an independent and impartial tribunal established by law.*
>
> *[109] I would respectfully follow Lord Steyn's observation in* ***Darmalingum v State*** *[2001] 1 WLR 2303 about the effect of s 10(1) of the Constitution of Mauritius when he said that the reasonable time requirement is a separate guarantee. It is not to be seen simply as part of the overriding right to a fair trial, nor does it require the person concerned to show that he has been prejudiced by the delay. In* ***Flowers v R [****2000] 1 WLR 2396 a differently constituted Board, following* ***Bell v DPP of Jamaica*** *[1985] 2 All ER 585, [1985] AC 937, held that prejudice was one of four factors to be taken into account in considering the right to a fair hearing within a reasonable time in s 20(1) of the Constitution of Jamaica. In the context of art 6(1) of the convention, however, the way this right was construed in Darmalingum's case seems to me to be preferable. In* ***Crummock (Scotland) Ltd v HM Advocate*** *2000 SLT 677 at 679, Lord Weir, delivering the opinion of the High Court of Justiciary, said that under art 6(1) it was not necessary for an accused to show that prejudice has been, or is likely to be, caused, as a result of delay. The art 6(1) guarantee of a hearing within a reasonable time is not subject to any words of limitation, nor is this a case where other rights than those expressly stated are being read into the article as implied rights which are capable of modification on grounds of proportionality (see* ***Brown v Stott (Procurator Fiscal, Dunfermline)*** *[2001] 2 All ER 97 at*

> *131, [2001] 2 WLR 817 at 851;* ***R (on the application of Pretty) v DPP*** *[2001] UKHL 61 at [90], [2002] 1 All ER 1 at [90], [2001] 3 WLR 1598). The only question is whether, having regard to all the circumstances of the case, the time taken to determine the person's rights and obligations was unreasonable.*

[169] The dicta of Lord Hope is quite useful, it indicates that article 6(1) creates three distinct rights. This reasoning is in line with the approach taken in both ***Herbert Bell, supra*** and ***Mervin Cameron, supra***. Those distinct rights are; the right to a fair trial, the right to a trial within a reasonable time and the right to be tried by an independent and impartial tribunal. However, unlike in ***Herbert Bell*** and the majority in ***Mervin Cameron*****,** Lord Hope has ruled that the rights are free standing in civil cases with the reasonable time guarantee being independent of the right to a fair trial.

[170] While the approach expressed by Lord Hope provides useful insight, the Court is still left to grapple with what an appropriate remedy would be. I am guided by the case of ***Spiers (Procurator Fiscal) v Ruddy*** - [2008] 1 AC 873 which explored several civil decisions which were decided on by the European Human Rights Court. I find it useful to quote the Court's recital on the relevant authorities on the area as they provide useful guidance on the appropriate remedy in civil cases:

> *"11 The applicant in* ***Mifsud v France*** *Reports of Judgments and Decisions 2002-VIII, p 389, had issued civil proceedings in May 1994 for repayment of penalties ordered against him for breach of planning control. In March 2001 he had been advised by the public prosecutor to proceed against a different defendant, which he had done, but in March 2002 the proceedings were still unresolved. The applicant complained that the reasonable time provision had been breached. The European court, sitting as a Grand Chamber, found the complaint to be inadmissible. It repeated its ruling in* ***Kudla v Poland*** *35 EHRR 198, but found that in this case domestic law provided a compensatory remedy of which the applicant could yet take advantage. It made no difference that the proceedings were still pending. It was not suggested that the delay complained of had brought the proceedings to an end, and it does not appear that the applicant contended*

for such a result. Indeed, it seems likely that he wanted them to continue.

12 ***Cocchiarella v Italy*** *(Application No 64886/01) (unreported) 29 March 2006, also concerned civil proceedings, which arose from a claim for social security benefits made in July 1994 and finally resolved in early 2003. The applicant had in the meantime filed domestic proceedings claiming compensation for the delay in resolving the proceedings, and an award had been made under a domestic statute enacted in 2001. In its decision the European court, sitting as a Grand Chamber, reiterated at para 74, as it has routinely done, that* ***the best solution for problems of delay is indisputably prevention and that a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy has the advantage over a remedy affording only compensation*** *[Emphasis Supplied]*

"since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach a posteriori, as does a compensatory remedy of the type provided for under Italian law for example."*[Emphasis supplied]*

The court acknowledged, at para 77, that different types of remedy may redress a violation appropriately; in criminal cases the length of proceedings could be taken into account by reducing the sentence in an express and measurable manner. The court found on the facts that the reasonable time provision had been breached, and found the sum of damages awarded by the Italian court to be an inadequate remedy.

13 The European court, again sitting as a Grand Chamber, gave judgment in ***Scordino v Italy*** *(No 1) (2006) 45 EHRR 207 on the same day as in* ***Cocchiarella*** *(Application No 64886/01). The case concerned proceedings brought in 1990 to challenge the compensation paid for the compulsory acquisition of the applicant's land. The claim was finally resolved in 1998. The Italian courts had found the length of the proceedings to be excessive and had awarded compensation under the 2001 statute already mentioned, but the applicant complained that the compensation awarded was inadequate, and the European court agreed. Not surprisingly, given the timing of the judgments, the court*

> *repeated, in paras 183-188, the substance of what was said in Cocchiarella. It again found the compensation to be inadequate.*

[171] What I found most compelling about the reasoning of the Court, is that after finding that none of the cases *"concerned the situation where delay jeopardises the fairness of a forthcoming trial"* rather the court found that cases of the nature highlighted above concern breaches which are not of a nature which cannot be cured but for discontinuation of the proceedings. Therefore, even though Lord Hope had expressed in the case of **Porter v Magill** that a breach of each of the bundle of rights provided under article 6(1) is independent of each other, the breach of one not being dependent on the breach of another. I find that the overall approach of the English Courts leads back to the same conclusion. That is, whether the breach is such that it would impair a fair trial. This conclusion was expressed by Lord Bingham at paragraphs 15 & 16 of ***Spiers v Ruddy,*** *(supra)*:

> *None of these cases concerned the situation where delay jeopardises the fairness of a forthcoming trial or where, for any compelling reason, it is not fair to try an accused at all. It is axiomatic that if an accused cannot be tried fairly he should not be tried at all, and where either of these conditions is held to apply the proceedings must be brought to an end.*
>
> *The cases concerned a situation where there has (or may have) been such delay in the conduct of proceedings as to breach a party's right to trial within a reasonable time but where the fairness of the trial has not been or will not be compromised. The authorities relied on and considered above make clear, in my opinion, that such delay does not give rise to a continuing breach which cannot be cured save by a discontinuation of proceedings. It gives rise to a breach which can be cured, even where it cannot be prevented, by expedition, reduction of sentence or compensation, provided always that the breach, where it occurs, is publicly acknowledged and addressed. The European court does not prescribe what remedy will be effective in any given case, regarding this as, in the first instance, a matter for the national court. The Board, given its restricted role in deciding devolution issues, should be similarly reticent. It is for the Scottish courts, if and when they find a breach of the*

> *reasonable time provision, to award such redress as they consider appropriate in the light of the Strasbourg jurisprudence.*

[172] If the case of **Spiers v Ruddy**, (supra) is not compelling enough to suggest that automatic discontinuance would not be appropriate in civil cases, the words of Lord Bingham in the case of **Attorney General's Reference (No 2 of 2001)** - [2004] 2 AC 72 are very instructive His Lordship specifically said *"….a rule of automatic termination of proceedings on breach of the reasonable time requirement cannot sensibly be applied in civil proceedings."* The point was made even clearer when His Lordship expressed on page 84 at paragraph 11 as follows:

> *"…….article 6 applies not only to the determination of criminal charges, which understandably give rise to most of the decided cases, but also to the determination of civil rights and obligations. In a criminal case the issue usually arises between a prosecutor, who may be taken to represent the public interest, on one side and an individual defendant on the other. In a civil case there may well be individuals, each with rights calling for protection, on both sides. It will only be acts of a public authority incompatible with a Convention right which will give rise to unlawfulness under section 6(1) of the Act. But the Convention cannot, in the civil field, be so interpreted and applied as to protect the Convention right of one party while violating the Convention right of another."*

Application to the facts

[173] The authorities highlight that the nature of the breach will determine the remedy most appropriate given the facts of the case. The Claimants' contend that the delay has deprived them of a right to a fair trial. The Claimants argue that some witnesses cannot be found. One witness in particular was an employee at the Gleaner Company who no longer has access to the information she once had because she has now retired.

[174] The Claimants have therefore asked this Court to exercise its wide discretion under section 19 of the Charter of Fundamental Rights and Freedoms and Civil Procedure Rule 56.1(4) in making an order regarding the nominate torts without ordering that an assessment of damages commence de novo before a new tribunal.

[175] While I appreciate the hardship that the Claimants have faced, it is important to note that neither Sykes J nor Lord Hope ruled that a delay gave an automatic right to a stay of proceedings or in this case or an automatic discontinuation of further proceedings. At paragraph 68 of **Mervin Cameron, supra**, Sykes J expressed as follows:

> *"There are some who have advocated that judges must simply 'throw out' the cases. In my view that would not be a rational response to a serious problem. The role of the court is to adjudicate upon individual cases that come before it and not legislate under the guise of adjudication. If there is to be a blanket policy decision that cases should be 'thrown out' after a certain time then such a far reaching decision should be made by the democratically elected Parliament…"*

[176] The most appropriate remedy in the current case would be that which was explored by the Privy Council in the Scottish appeal of **Spiers v Ruddy, supra**. As noted in **Spiers v Ruddy**, the European Court expressed in **Cocchiarella v Italy** (Application No 64886/01) (unreported) 29 March 2006 that the best solution to delay is to expedite the matter to prevent successive breach of the right. I therefore conclude that automatic termination of further proceedings would not be the most appropriate remedy in the current case.

Issue # 2- Whether the Claimants should be awarded damages for a breach of their right to a fair hearing within a reasonable time

[177] In addressing this issue of constitutional redress, invaluable insight is provided by Halsbury Laws of England, 5th edition, [Enforcement of protective provisions in overseas territories] Volume 13 at paragraph 755 where the learned authors expressed as follows:

> *Where the Constitution of a British overseas territory makes provision for fundamental rights and freedoms, it also provides that if any person alleges that any of the rights and freedoms specifically protected has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme (or High) Court for redress. That court has original jurisdiction by virtue of the Constitution of each such territory to hear and determine any application made by such a person and, unless satisfied that adequate means of redress are or have been available to that person under some other law, may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of those provisions to the protection of which the person concerned is entitled. In most cases where breach of a constitutional right is established, the complainant is entitled not only to a declaration but also to damages; these are to be awarded not only to compensate (in those cases where the complainant has suffered loss) but also to reflect the sense of public outrage, emphasise the importance of the constitutional right that has been violated, and deter further breaches*
>
> *The Constitution normally confers, or empowers the making of laws to confer, on the Supreme (or High) Court further powers for enabling the court more effectively to exercise its jurisdiction to enforce the protective provisions, and for making rules of practice and procedure in relation to that jurisdiction; the absence of such rules does not stultify the protective jurisdiction of the court.*

[178] The passage from Halsbury Laws of England is an accurate reflection of the law in Jamaica. It is section 19 of the Jamaican Charter that gives an aggrieved person the right to petition the Supreme Court for redress. The drafters of the Constitution saw the rights enshrined in the Charter so sacred that they vested in the Supreme Court the power to stand as guardians of the Constitution by conferring upon the Court the right to make such orders, issue such writ or direction as is necessary to protect or give effect to these rights. The protective power granted to this Court is so wide that it gives the Court the discretion to craft a new remedy, if it is necessary to give effect to the relief.

[179] While acknowledging that the Claimants' right to a fair trial within a reasonable time has been breached by the conduct of the Learned Judge, the Defendant has advanced the point that the appropriate remedy for the breach would be public acknowledgment and a declaration. On the other hand, the Claimants' have placed reliance on the case of ***Inniss v A-G of St Christopher and Nevis*** [2008] UKPC 42 in arguing that they are entitled to monetary compensation for the breach, they have argued that the award should be substantial, not as a form of punishment to the Defendant but as a form of vindicatory relief to show disapproval of the breach and as a form of assertion that the right is a valuable one.

[180] Much guidance can be taken from the case of ***Gairy v The Attorney General of Grenada*** **[**2001] UKPC 30, a Privy Council decision which emanated from the island of Grenada. In that particular case, Lord Bingham of Cornhill examined several authorities in coming to the conclusion that *"the court has, and must be ready to exercise, power to grant effective relief for a contravention of a protected constitutional right."*

[181] In that particular case, the Respondent, who being the Attorney General of Grenada, argued that the Court did not have the jurisdiction to grant a mandamus order against the crown. In making this point, the Respondent relied on the cases of ***Jaundoo v Attorney-General of Guyana*** [1971] AC 972 and **In re *M*** *[*1994] 1 AC 377.

[182] In the ***Jaundoo*** *case*, following the plaintiff's application for a quia timet injunction against the government, it was held by the Court below that no Court in Her Majesty's dominion had the power to make such an order against the crown. On page 178 of ***Gairy v The Attorney General of Grenada,*** *(supra),* Lord Bingham summarized the ruling of the Court as follows:

> *"The claim for an injunction was rejected primarily because it was sought against the Government of Guyana, which would have meant granting an injunction against the crown (p 984).*

> *That, it was held, no court in Her Majesty's Dominions had jurisdiction to grant, for the court exercised its judicial authority on behalf of the crown and it was incongruous that the crown should give orders to itself. It was however pointed out that an interim injunction could have been sought and granted against the appropriate minister or public officer (p 985)."*

[183] Lord Bingham rejected the ruling in **Jaundoo** and instead expressed that **Jaundoo** is not a correct reflection of the modern constitutional law which prevailed in Grenada. His Lordship expressed at page 199 as follows:

> *"In interpreting and applying the constitution of Grenada today, the protection of guaranteed rights is a primary objective, to which the traditional rules of the common law must so far as necessary yield. The Board cannot regard Jaundoo as an accurate statement of the modern constitutional law applicable in Grenada."*

[184] What Lord Bingham described is what is now commonly known as constitutional supremacy. This principle is guaranteed in the Jamaican Constitution by virtue of Section 2 of Chapter 1 of the Constitution which provides that subject to sections 49 and 50, Parliament shall make no laws which are inconsistent with the Constitution and where such laws exist to the extent of its inconsistency the Constitution shall prevail.

[185] Lord Bingham also highlighted the unique nature of the written constitution and constitutional supremacy when he distinguished the case of **In Re. M** (supra) by highlighting that the reasoning of the Board in **In Re M** is not applicable to the interpretation of written constitutions, His Lordship noted that the judgment represented the law in the United Kingdom at a time when there was no entrenched constitution or enhanced protection for fundamental human rights and freedom.

[186] Lord Bingham went on to note that the preferred view was that which was applied in the Trinidadian case of ***Maharaj v Attorney-General of Trinidad and Tobago***

(No 2) [1979] AC 385. His Lordship summarised the facts and ruling of the case quite succinctly at page 179 as follows:

> *It is noteworthy that not many years later, in **Maharaj v Attorney-General of Trinidad and Tobago** (No 2) [1979] AC 385, [1978] 2 All ER 670, the Board made an order for compensation against the state. A barrister had been committed to prison by a judge in breach of natural justice. This was held to be a contravention of his constitutional rights. His constitutional right to apply to the High Court for redress, conferred in terms very similar to those of s 16 of the Grenada Constitution, showed a "clear intention to create a new remedy whether there was already some other existing remedy or not" (p 398). An order for payment of compensation when a right protected by the constitution had been contravened was clearly a form of redress (p 399). The Board made clear that the contravention in question was by the state, and its liability was not vicarious (pp 397, 399). The barrister obtained his remedy not against a minister, or a public official, or any servant of the state, but against, in effect, the government."*

[187] His Lordship therefore applied the principle in ***Maharaj v Attorney-General of Trinidad and Tobago*** *(supra)* and other similarly decided cases in coming to his conclusion that the Minister of Finance should take the necessary steps to ensure that the applicant was compensated in accordance with the Privy Council's ruling.

[188] Counsel for the Claimants relied on Lord Bingham's reasoning and argued that having come to the conclusion that there was a breach of the Claimants' right to a fair trial within a reasonable time, the remedy should not be restricted to a mere declaration or nominal damages, rather the court should be ready and willing to fashion a new remedy to give effect to the relief. Mrs. Gibson-Henlin cited the following passage from page 181 of the judgment of Lord Bingham:

> *Having proved a breach of a right protected by the constitution, having obtained a money judgment and having failed to obtain full payment, the appellant now seeks an effective, not merely a nominal, remedy. The court has power to grant such a remedy. **And if it is necessary to***

> ***fashion a new remedy to give effective relief, the court may do so within the broad limits of s 16.*** *Whereas, in granting a person constitutional relief not related to Ch 1, the court may under s 101(3) "grant to that person such remedy as it considers appropriate, being a remedy available generally under the law of Grenada in proceedings in the High Court", the court's powers under s 16(2) are not so limited.* ***The court has, and must be ready to exercise, power to grant effective relief for a contravention of a protected constitutional right. [Emphasis supplied]***

[189] Learned Counsel for the Claimants went further in their application and argued that not only should the Claimants be awarded a monetary compensation but that sum should be substantial. This therefore leads us to evaluate the case of ***Inniss v Attorney General of Saint Christopher and Nevis*** [2008] UKPC 42 which was relied on by the Claimants

[190] In the case of ***Inniss v Attorney General of Saint Christopher and Nevis***, supra, the appellant brought a constitutional motion in the High Court against the Respondent seeking, amongst other things, an award of damages for breach of her constitutional rights including exemplary damages after she was dismissed by a letter dated 20th February, 1998 from the office of Registrar of the Supreme Court.

[191] The facts of the case are that the Appellant was hired as the Registrar of the High Court and an additional Magistrate for certain districts. She advanced the point that pursuant to section 83(3) of the Constitution, she could only be dismissed by the Governor General acting on the recommendation and consultation of the Judicial Services Commission and the Public Services Commission respectively. She argued that procedures stipulated under section 83(3) were not adhered to when attempts were being made to dismiss her.

[192] At first instance, Moore J held that the appellant's right under section 83(3) of the Constitution was breached, he therefore made an award of EC$100,000 which was described as general damages with an element of exemplary damages. The Respondents appealed against the order of the learned Judge, the Court of

Appeal found in favour of the Respondents by ruling that there was no breach of section 83(3) of the Constitution and they accordingly set aside the award of the learned Judge. It is the order of the Court of Appeal that formed the subject matter of the appeal to the Privy Council.

[193] After finding that there was in fact a breach of the Appellant's constitutional right to be protected from interference with the execution of her contract, at paragraph 22 of the judgment Lord Hope referenced the dicta of Lord Nicholls of Birkenhead in the case of ***Attorney General of Trinidad and Tobago v Ramanoop*** [2005] UKPC 15 when he explained that if an alternative remedy is available then the constitutional relief should not be sought unless the circumstances are such that makes it appropriate to seek a constitutional relief. His Lordship went further to state as follows:

> *In general there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. In this case there is a parallel remedy, because an award for breach of the contract can be and is being made. But the only effective way of ensuring that such a flagrant breach of the Constitution is vindicated is by making an order for the payment of damages for the breach.* ***As Lord Nicholls observed in para 18, a declaration will articulate the fact of the violation but in most cases more will be required than words. This is such a case. [Emphasis supplied]***

[194] After the Court determined that the case was of the nature for which a mere declaration was not enough they went on to evaluate on what principles the Court was to assess damages for constitutional breaches. I find that the Court's assessment of the case of **Taunoa and others v A-G** [2007] 5 LRC 680, was very helpful in determining the issue at bar. At paragraph 26 of the judgment, Lord Hope analysed the ruling of the Court in Taunoa as saying that as a general rule, the remedy made by the court should be limited to an award to mark the additional wrong and to deter future breaches. However, in circumstances where the claimant has suffered loss, he would be entitled to compensation for the injury suffered. What is important to note is that monetary compensation as a

form of remedy is limited to cases in which the Claimant has suffered some form of injury. The paragraph 26 provides as follows:

> ***[****26] In Taunoa and others v A-G the court referred to these decisions and to cases from other jurisdictions when it was considering the approach that should be taken to an award of damages for a breach of the New Zealand Bill of Rights Act 1990. Elias CJ said in para 108 that where, as in the present case, remedies for other wrongs arising out of the same facts are provided, they may need to be taken into account in considering what is required for an effective remedy of the independent Bill of Rights Act violation. But it was not appropriate to take from this circumstance that the availability of damages for breach of the right was a residual remedy.* ***In para 109 she said that it should be limited to what is adequate to mark an additional wrong in the breach and, where appropriate, to deter future breaches. But where a Plaintiff had suffered injury through denial of a right, he was entitled to compensation for that injury, which might include distress and injured feelings as well as physical damage.*** *Blanchard J said in para 258 that the court should not proceed on the basis of any equivalence with the quantum of awards in tort. The sum chosen must be enough to provide an incentive to the Defendant and other state agencies not to repeat the infringing conduct and also to ensure that the Plaintiff does not reasonably feel that the award is trivialising of the breach. Tipping J said in para 317 that the general tenor of the cases gave at least presentational priority to vindication as opposed to compensation. In para 319 he said that considerable care was needed in regard to deterrence as an aspect of the award, and in para 321 he said that he would require considerable persuasion that punishment could ever be an appropriate ingredient.* ***[Emphasis supplied]***

[195] Lord Hope went on to point out that *"allowance must of course be made for the importance of the right and the gravity of the breach in the assessment of any* award" (see also **Merson v Cartwright and another** [2005] UKPC 38). The Board compared the facts of that particular case to the case of In **Horace Fraser v Judicial and Legal Services Commission** [2008] UKPC 25 in determining what an appropriate award would be. His Lordship found that in the case of **Horace Fraser**, the Board found that **$10,000.00 EC** for distress and

inconvenience caused by a breach of the constitutional right was sufficient. They went on to highlight that the gravity of the breach suffered by Ms Inniss was of a greater gravity by highlighting that her case involved a deliberate attempt to circumvent the provisions of the constitution so as to speed up the process of dismissing her. The Court also looked at the long-term effect that such a decision would have on the reputation of the appellant. After assessing those factors, they found that Miss Inniss was entitled to a moderate award.

[196] In determining the quantum of the award, this court is therefore called upon to assess the nature of the right and the gravity of the breach. No doubt, the right to a fair trial within a reasonable time before a fair and impartial tribunal is an important right which goes to the core of our democracy and is one of the pillars on which the authority and sanctity of the Court stands. If this right is eroded, the public will lose trust in the judiciary, which may cause them to resort to resolving disputes on their own without reference to the Court, such an outcome would undoubtable lead to other social ills.

[197] Nevertheless, when one compares the right which was contravened in the current case to that of the right which was contravened in **Inniss** (supra), it cannot be said that the gravity of the breach is equal. The breach in **Inniss** was of a greater gravity yet the Privy Council in that case found that a moderate award would be appropriate. I therefore conclude that the award should be neither substantial nor moderate but should be sufficient to illustrate disdain for the breach and mark in the mind of the judiciary and the public at large that the right is valuable.

[198] Counsel Mr. Bert Samuels highlighted the prejudice and inconvenience that his client faced because of the delay. He noted amongst other things that he has lost clients and is now in an embarrassing position as he is unable to satisfy his obligations to Counsel. Whilst the ordeal that the Claimant faced is unfortunate and must be discouraged in the future, I am afraid that I have come to the conclusion that the injuries that they have highlighted have not directly flowed

from the delay in obtaining judgment, rather, they are as a result of breaches of the nominate torts such as false imprisonment, the assault perpetrated upon the Claimants and so forth. To my mind, any remedy available for damages which flowed therefrom should be addressed at the assessment for damages hearing.

[199] I have concluded that based on the facts, the delay in obtaining the final award in the matter has caused the Claimants to suffer inconvenience and some amount of anxiety/distress. As indicated before, in the case of ***Horace Fraser v Judicial and Legal Services Commission****,* ***supra,*** after finding that the relevant appellant suffered inconvenience and distress as a result of breach of his constitutional right, an award of **$10,000.00 EC** was thought to be acceptable. The question is whether a similar award should be made in the circumstances?

[200] At paragraph 14 of the decision of ***Horace Fraser v Judicial and Legal Services Commission, supra.*** the Board described the sole issue in that case as *"ultimately a short one: were the Commission and the Ministry taking steps to "remove" the Appellant from his office, when they recommended and gave notice to determine his term of office under contractual provisions prior to its natural expiry date?"* The Board found that the Respondents were in breach of the Constitution in failing to follow the proper procedure in attempting to dismiss the appellant before the expiration of his employment contract which was slated to expire at the expiration of one year.

[201] In determining the issue of the appropriate remedy to vindicate the breach, it is incumbent on the Court to not only determine the nature of the right and the gravity of the breach, it is also important, given the dual function of the Attorney General in relation to each proceeding before the Court, to ask ourselves; who is the Attorney General representing in the current proceedings?

[202] Section 3(1) of the Crown Proceedings Act provides, inter alia, that the Crown shall be liable for all torts committed by its servants or agents except where the tortious act or omission committed by the agent or servant would have given rise

to a claim in tort against the agent. Section 13 of the Act provides that civil proceedings against the Crown shall be instituted against the Attorney-General. The breach which forms the subject matter of these proceedings is the breach of the Claimants' right to a fair hearing within a reasonable time as guaranteed by section 16(2) of the Jamaican Charter. This breach was occasioned as a result of the omission of a member of the judiciary to deliver his judgment before his retirement. I hope this oversimplification of the matter makes it abundantly clear that that in this instant the Attorney General is not named as a Defendant in relation to the nominate torts, rather, the Attorney General is named as the Defendant because of the breach of the Claimants constitutional rights resulting from the omission of a member of the judiciary.

[203] Based on the foregoing, I reject the Defendant's argument that a declaration is sufficient vindication for breach of the Claimants' rights as both parties were prejudiced by the breach. That analogy is flawed, the Attorney General is sued in the stead of the Learned Judge, it was the Learned Judge's omission that gave rise to the breach.

[204] As noted earlier, the breach occasioned by the Claimants is limited to inconvenience and the natural anxiety/distress that flows from court proceedings. Nevertheless, the right is important and a monetary award is necessary to show public outrage for the breach and vindicate the Claimants' rights. While I am so minded, I disagree with the Claimants that the award should be substantial, instead it is my position that the award must match the gravity of the breach. I therefore accept the reasoning of the Privy Council in ***Horace Fraser v Judicial and Legal Services Commission, supra***, in particular I find the Board's application of ***Attorney-General of Trinidad and Tobago v Ramanoop*** [2005] UKPC 15, para 19, [2005] 2 WLR 1324, [2006] 1 AC 328 to be instrumental. The Board reasoned as follows at paragraph 22 of the judgment:

> *"The Constitution empowers the court to "grant . . . such remedy as it considers appropriate, being a remedy available generally . . . in proceedings in the High Court" (s 105(3)). Interpreting the power to*

> *grant "redress" for constitutional wrongs which existed under s 14 of the Constitution of Trinidad and Tobago, the Board said in Attorney-General of Trinidad and Tobago v Ramanoop [2005] UKPC 15, para 19, [2005] 2 WLR 1324, [2006] 1 AC 328:*
>
> > *An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice.* ***The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches****. All these elements have a place in this additional award. 'Redress' in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances." [Emphasis Supplied]*

[205] I therefore find that an award of One Million Five Hundred Thousand dollars (**$1,500,000.00)** each is sufficient to vindicate the Claimants for the inconvenience and distress which was occasioned as a result of the breach.

Issue # 3- Whether the Claimants should be awarded costs for the current proceedings and costs thrown away for the assessment of damages hearing which was presided over by The Honourable Mr. Justice King (retired)

[206] The Counsel for the Claimants have argued that their clients are entitled to an order for costs in relation to the constitutional motion that now stands before the Court. They have also asked to be awarded costs thrown away for the assessment of damages hearing which was presided over before by the Honourable Mr. Justice King (retired) on the 7th October, 2013. Mrs. Gibson Henlin explained that she understood costs thrown away to include the costs of preparing and attending any hearing in which the order or judgment is set aside, Counsel cited an except from the **Cook on Costs** to substantiate her point.

[207] Counsel for the Defendant argued that the Claimants should bear their own costs for the current proceedings. Counsel explained that both parties suffered a

prejudice by the delay in obtaining judgment and as a result, it would only be fitting for each party to bear their own costs. On the issue of whether the Claimants should be awarded costs thrown away for the October 2013 assessment of damages hearing, the Defendant argued that the proceedings stand as null and void, therefore no cost order should flow therefrom.

[208] The starting point in addressing this issue is section 28(E) of the Judicature (Supreme Court) Act, which grants the Court a wide discretion to determine the appropriateness of making costs orders in civil proceedings. The relevant section reads as follows:

> *(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all civil proceedings in the Supreme Court shall be in the discretion of the Court.*
>
> *(2) Without prejudice to any general power to make rules of court, the Rules Committee of the Supreme Court may make provision for regulating matters relating to the costs of civil proceedings including, in particular prescribing-*
>
> *(a) scales of costs to be paid-*
>
> *(i) as between party and party;*
>
> *(ii) the circumstances in which a person may be ordered to pay the costs of any other person; and*
>
> *(b) the manner in which the amount of any costs payable to the person or to any attorney shall be determined.*
>
> *(3) Subject to the rules made under subsection (2), the Court may determine by whom and to what extent the costs are to be paid.*

[209] In the exercise of the discretion conferred by section 28E of the Judicature (Supreme Court) Act, the court is subject to Part 64 of the Civil Procedure Rules which outlines the general rules concerning costs orders and a litigant's

entitlement to same. CPR 64.3 specifically speaks to the power of the court to make such orders. CPR 64.3 states that:

> *The court's powers to make orders about costs include power to make orders requiring any person to pay the costs of another person arising out of or related to all or any part of any proceedings.*

[210] It has been a principle of the English legal system for centuries that "costs follow the event", which means that as a general rule the unsuccessful party should be ordered to pay the successful party's costs. This principle bears much weight in these proceedings and for that reason CPR 64.6 which is titled "*Successful party generally entitled to costs"* is very relevant to these proceedings. As indicated earlier, while the Claimants are claiming costs for both proceedings, the Defendant is asking the court to refrain from making a cost order in either proceeding. The wide discretion for this court to decide either way is provided for under CPR 64.6(1) and 64.6(2) which are hereunder provided:

> *(1) If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.*
>
> *(Rule 65.8(3)(a) contains special rules where a separate application is made which could have been made at a case management conference or pre-trial review.)*
>
> *(2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.*

[211] CPR 64.6 (3) stipulate that in coming to a decision, the Court should take into account all the circumstances of the case. 64.6(4) was more specific in listing certain factors which the court must have regard to, amongst these are *"whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings."*

[212] Buckley L.J. while delivering the judgment of the court in ***Scherer and Another v. Counting Instruments Ltd. and Another*** [1986] 1 WLR 615 noted that while

the successful party may have a reasonable expectation of obtaining an order as to costs from the unsuccessful party, he does not have a right per se to a cost order, rather the making of such an order is in the discretion of the court. Our very own Morrison JA (as he then was) expressed similar sentiments in the case of ***Winston Finzi and Mahoe Bay Company Limited v JMMB Merchant Bank*** [2015] JMCA App 39A at paragraph [17] where his Lordship made the following expression:

> *In similar vein, it seems to me that the effect of section 30(3) and (5) of the Act is therefore that, subject to rules of court, the costs of and incidental to all civil proceedings are in the discretion of the court and it is for the court to determine by whom and to what extent the costs are to be paid.*

[213] While the statement of Morrison JA was made in relation to section 30(3) and (5) of the Judicature (Appellate Jurisdiction) Act, his words are of equal application to sections 28E (1) and 28E (3) of the Judicature (Supreme Court) Act which is similarly worded. In addition, although the issue that was being addressed by his Lordship concerned the payment of costs to non-parties to a claim, his pronouncement, as cited above, remains relevant to all issues relating to the court's discretion to make an order for costs. The issue for this court to determine is whether given the circumstances of the case, an order for costs should be made in favour of the Claimants.

[214] The Claimants relied on the case of ***Maurice Arnold Tomlinson v Television Jamaica Ltd., CVM Television Ltd and the Public Broadcasting Corporation of Jamaica*** [2014] JMFC Full 1 where the Court relied on the South African decision of ***Affordable Medicines Trust v Minister of Health*** [2005] ZACC 3, 2005 (6) bclr 529 in stating that "*if the government won then each party bears its own costs and if the government lost then it pays the costs of the citizen."* The Full Court also relied on another South African decision, that being ***Biowatch v Registrar Genetic Resources*** [2009] 5 LRC ZACC where it was stated, inter alia, that, *"it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution……If there should*

be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good."

[215] To my mind, this is a straightforward case with no facts being presented that would require the court to deviate from the general rule that costs should be awarded to the successful party. The Defendant has argued that a no cost order should be awarded against the Crown as they too were adversely affected by the delay in obtaining the final judgment in the matter. I find that Counsel's line of reasoning in this regard blurs the line between the different agents/organs of the state that the Attorney General represents in each proceeding before the Court. In relation to consolidated claims numbered 2009HCV00289 and 2009HCV00209, the Attorney General is named as Defendant in relation to the nominate torts. In relation to the current constitutional motion, that now stands before this Court, the Attorney General stands as the representative of the judiciary. Which means that they are not wearing the cap as the representative of the tortfeasor of the nominate torts, rather, they are wearing the cap of representative of the perpetrator of the breach of the reasonable time guarantee.

[216] With that being said, in relation to the current constitutional motion, the Defendants have admitted that there has been a breach of the Claimants constitutional rights and that such breach was perpetrated by the judiciary which the Defendants represent by virtue of the Crown Proceedings Act. For these reasons, I find that an order as to costs should be made against the Defendants in relation to the current proceedings.

[217] The Claimants have claimed that they are entitled to costs thrown away in relation to the October 2013 assessment of damages hearing. The question to be asked is what exactly is costs thrown away and whether this form of costs can be awarded for a breach which can be classified as what Sykes J defined in ***Mervin Cameron, supra*****,** as an "institutional delay."

[218] The Claimants cited examples of instances where costs thrown away would apply by citing a passage from Cook on Costs. The excerpt as provides as follows:

> *Costs thrown away:*
>
> *Where, for example, a judgment or order is set aside, the party in whose favour the costs order is made is entitled to the costs which have been incurred as a consequence. This includes the costs of –*
>
> *preparing for and attending any hearing at which the judgment or order which has been set aside was made;*
>
> *preparing for and attending any hearing to set aside the judgment or order in question;*
>
> *preparing for and attending any hearing at which the court orders the proceedings or the part in question to be adjourned;*
>
> *any steps taken to enforce a judgment or order which has subsequently been set aside.*

[219] Similarly, Atkin's Court Forms Volume 13(1) provides a definition of cost thrown away, that is:

> *An order that one party pays the costs thrown away is usually made on an order to set aside a judgment. It may be imposed upon a defendant who, through failing to acknowledge service or deliver a defence, has allowed judgment to be entered by default. This order includes all costs reasonably incurred in enforcing the judgment, such as execution and third party debt proceedings, but does not include bankruptcy proceedings without a special direction.. If, however, the defendant is entitled to have the judgment set aside (for example, because the claimant has wrongly entered judgment) he is also entitled to his costs, and the costs thrown away should be borne by the claimant. An order for costs thrown away will also usually be made if there has been an unnecessary adjournment or on giving permission to amend.*

[220] I am of the view that costs thrown away would not be applicable in the current case. After exploring the authorities, costs thrown away is usually awarded against the opposing party who through their conduct has caused a waste of time and/or legal expenses. For reasons which I have explained earlier, costs thrown away could not rightly be ordered against the Defendant in relation to the October 2013 assessment of damages hearing. It is important to note that at that time, the Attorney General did not stand as the representative of the judiciary but stood on equal footing with the Claimants as a litigant before the Learned Judge. The breach occasioned was in no way the fault of the Defendant. I therefore agree with the Defendant that the October 2013 proceeding should stand as a nullity with no order as to costs being made to flow therefrom.

[221] Based on the abovementioned reasons I am in agreement with the Orders made.

Evan Brown J.
Orders

1. The Honourable Mr. Justice Raymund King (retired), who heard the assessment of damages, having retired, can no longer deliver judgment on the assessment of damages thereby rendering the delivery of the judgment an impossibility.

2. The Assessment of Damages heard by the Honourable Mr. Justice Raymund King (retired) on the 7th day of October, 2013 is vacated and declared a nullity.

3. The delay in, and/or the impossibility of rendering a judgment in Assessment of Damages is a breach of the Claimants' right to a fair hearing within a reasonable time.

4. The failure of a judgment being delivered on the hearing of the Assessment of Damages and inability for it to be delivered is a breach of the Claimants' rights' to a fair hearing within a reasonable

time which is guaranteed by section 16(2) of the Charter of Fundamental Rights and Freedoms.

5. The Claimants are entitled to vindicatory Damages in the sum of $1,500,000.00.

6. The Registrar of the Supreme Court is to set down these claims (2009HCV0289 & 2009HCV0209) for an Assessment of Damages at the earliest possible date to facilitate expeditious disposal of same.

7. The Costs of this claim are awarded to the Claimants to be taxed if not agreed.

…….
BROWN E., J

……
BROWN Y., J

…….
WOLFE-REECE S., J

p.s. *The Court notes the passing of Ms. Diedre Pinnock one of the counsel appearing for the Attorney General's Chambers since the date on which the judgment was reserved. We wish to put on record the court's profound sympathy. We extend to her family and colleagues our condolences. May her soul rest in peace.*