



[2022] JMSC Civ. 05

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

**CLAIM NO. SU2020 CV 03864**

<b>BETWEEN</b>	<b>ANDREW GORDON</b>	<b>APPLICANT</b>
<b>AND</b>	<b>RADIO JAMAICA LIMITED</b>	<b>1ST RESPONDENT</b>
<b>AND</b>	<b>THE GLEANER COMPANY (MEDIA) LIMITED</b>	<b>2ND RESPONDENT</b>
<b>AND</b>	<b>TELEVISION JAMAICA LIMITED</b>	<b>3RD RESPONDENT</b>
<b>AND</b>	<b>JAMAICA OBSERVER LIMITED</b>	<b>4TH RESPONDENT</b>

**HEARD ALONG WITH:**

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

**CLAIM NO. SU2020 CV 03865**

<b>BETWEEN</b>	<b>MICHAEL DIXON</b>	<b>APPLICANT</b>
<b>AND</b>	<b>RADIO JAMAICA LIMITED</b>	<b>1ST RESPONDENT</b>
<b>AND</b>	<b>THE GLEANER COMPANY (MEDIA) LIMITED</b>	<b>2ND RESPONDENT</b>
<b>AND</b>	<b>TELEVISION JAMAICA LIMITED</b>	<b>3RD RESPONDENT</b>
<b>AND</b>	<b>JAMAICA OBSERVER LIMITED</b>	<b>4TH RESPONDENT</b>

**IN CHAMBERS**

Mr. Bert Samuels and Mr. Matthew Hyatt instructed by Knight, Junor & Samuels for the Applicants

Ms. Stephanie Williams and Ms. Shannon Scott instructed by Henlin Gibson Henlin for the 1st, 2nd and 3rd Respondents

Mr. Charles Piper Q.C. for the 4th Respondent

**Heard: March 16, 2021 and January 14, 2022**

**DEFAMATION ACT 2013 – EXPIRATION OF LIMITATION PERIOD – EXTENSION OF TIME TO FILE CLAIM – SECTION 33.**

**HENRY-MCKENZIE, J**

## **INTRODUCTION**

[1] By way Notices of Application filed on October 13, 2020 and which were amended on March 11, 2021, the applicants seek an extension of time to bring a claim for defamation. The applications are supported by affidavits of both applicants and their attorney, John Junor. The 1st, 2nd and 3rd respondents filed an affidavit of Stacey Ann Steele in response and the 4th respondent filed an affidavit of Vernon Davidson, also in response.

## **BACKGROUND**

[2] Both applicants were employed to the Firearm Licensing Authority as senior officers. Mr Dixon was the Director of Audit and Complaints and Mr Gordon, a Senior Audit and Complaints officer.

[3] The applicants indicate in their affidavits that their contracts of employment at the Firearm Licensing Authority (FLA) were terminated with immediate effect about August 22, 2017. In that same week the respondents published several articles with defamatory statements concerning the circumstances of their dismissal and their alleged involvement in corruption whilst employed to the FLA.

[4] Further, the applicants indicate that on August 22, 2017 the Gleaner published a news report entitled *“Two Senior FLA employees dismissed amid corruption probe”* and on August 23, 2017 an article entitled *“New FLA Fallout- Two senior staff*

*members axed as MOCA probes 257 suspect firearms licences*". On the same day Radio Jamaica published an online article entitled "*Third FLA employee fired*". Similarly, on August 23, 2017 during the TVJ Midday News and Prime Time News broadcast the news anchor also reported on the corruption scandal. The Jamaica Observer also published an article entitled "*Cop on Secondment leaves FLA*" on August 24, 2013.

- [5] The applicants state that to date the defamatory statements are still available for viewing through the world wide web and have negatively affected their reputation and have caused them to be ridiculed in the government sector.
- [6] They also indicate that they have suffered prejudice and hardship even now.
- [7] Following the news reports, the applicants retained the services of the law firm Knight, Junor & Samuels to represent them concerning the alleged defamatory statements and the unjustified manner in which they say they were terminated.

#### **Affidavit of John Junor in Support of Applications**

- [8] Mr. Junor in his affidavit said that primacy was given to mounting a challenge at the IDT against the unjustified termination. Further, he indicated that the processes of the IDT were more critical as it was well underway and the FLA had retained counsel to oppose this challenge.
- [9] After Mr. Junor was engaged in the IDT for approximately 2 years and 1 month, on or about October 24, 2019 the panel found that the 2nd applicant, Mr. Dixon's, termination was wholly unjustified and without any substantiated cause.
- [10] Whilst the 2nd applicant's dispute was determined, the 1st applicant, Mr. Gordon's dispute had not sufficiently progressed at the IDT and the negotiations with the Ministry of Labour and Social Security were strained. For this reason, Mr. Junor said he dedicated greater effort in having the 1st applicant's dispute resolved.

- [11] In the meantime however, the limitation period to make a claim for defamation had passed without the knowledge of Mr. Junor. He explained that this was due to his lack of experience in this area of the law and as such, he believed the limitation period of 6 years still prevailed. It was not until about the end of July 2020 that it came to his attention by an attorney in the firm that the statutory limitation had drastically reduced to 2 years from the date of publication with the passing of the Defamation Act in 2013.
- [12] As soon as this was unearthed, the firm explained the difficulties to the applicants and the possible solutions. The firm then took swift action in preparing to file the application seeking extension of time to pursue the claim for defamation and in informing the respondents of their intention.
- [13] However, the applications were not filed until October 13, 2020 as deliberations with the applicants continued for months as they (the attorneys) sought to perfect the applicants' applications and their supporting affidavits in accordance with their instructions. This caused the claim to be filed out of time by 1 year and 2 months.
- [14] Mr. Junor accepted that the delay was on his part and added that his clients ought not to be denied their time in court due to his inadvertence. He indicated that the prejudice which the applicants have faced and will continue to face if the application is not granted, outweighs any prejudice the respondents might suffer if the application were granted. He highlighted that the damage to their reputation continues without ease or redress and that the defamatory content is still available for current readers.

### **Affidavit in Response on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**

- [15] Ms. Stacey-Ann Steele, attorney -at- law and legal adviser to 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, in an affidavit in response filed on March 11, 2021, indicated that due to the passage of time the respondents are not in a position to defend the claim or even prepare their defence, should the matter go to trial. She stated that the

statements in the Gleaner complained of as being defamatory were written by a staff reporter who had resigned and migrated to Canada since the publications. Further, that the reporter's specific location is unknown and there is no means of contacting him. Further she stated that the entities were not notified of a potential claim and as such the standard procedure to preserve the documents to be able to respond, was not followed.

[16] In addition, the identity of the reporters who produced the news report published by Television Jamaica Limited and Radio Jamaica Limited is not available as the newsroom software data was changed approximately three years ago, post publications and as such they were unable to access the old scripts and data with the names of reporter for both entities, despite several attempts to do so.

[17] As a result of this, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are not in a position to defend any claim that may be brought against them. Further, the delay is prejudicial as the respondents will not have any witnesses, were the extension to be granted. The delay has made it difficult for the respondents to adduce sufficient evidence to defend the claim.

#### **Affidavit in Response on behalf of the 4<sup>th</sup> Respondent**

[18] An affidavit in response from Mr Vernon Davidson was filed on January 8, 2021, on behalf of the Jamaica Observer Limited. The affidavit of Mr. Davidson demonstrates that they too would be severely impaired by the delay in defending the action. The affidavit indicates that the article complained of was published without disclosing the name of the reporter who authored it. However, after a search was done of the computer system to identify the reporter, they have not been able to locate any information relating to the article, or even who uploaded the report to determine if the person is still engaged to the company, or would be available to assist in the company in its defence. Mr. Davidson was of the view that the failure to locate the information was due to the information being removed from the system upon the expiration of the limitation period.

## SUBMISSIONS

### Applicants' Submissions

[19] On behalf of the applicants, Mr. Samuels submitted that though there may be a limitation period imposed by the Defamation Act to bring a claim for defamation, this may be displaced if the criteria outlined in section 33(4) are satisfied, that is:

- i. Whether there are reasonable and compelling grounds for the action not having been brought within the limitation period;
- ii. The prejudice to the respondent, if any, and;
- iii. The interest of justice

[20] Counsel submitted that the explanations provided in the evidence supporting the applications are sufficient to satisfy the requirements of reasonable and compelling grounds. He highlighted that the affidavit deposed by Mr. Junor has shown that the applicants are relying on two explanations for the delay. Firstly, the applicants' attorney's approach was to deal with the challenge before the IDT regarding the unjustifiable dismissal of the applicants before commencing the defamation claim, as it was perceived that should the FLA be successful at the IDT, this could negatively impact a claim for defamation. Secondly, that Mr. Junor was unaware of the change to the limitation period from 6 years to 2 years, which resulted in the applicants being out of time to file a claim. He drew reference to what Mr. Junor indicated was his limited experience in civil litigation, which also resulted in the delay.

[21] However, Mr. Samuels submitted that based on numerous case law it is a fundamental principle, that a litigant ought not to suffer or be denied an opportunity to have his day in court due to the fault of his counsel. He relied on the cases of ***CVM Television Limited v Tewarie*** SCCA 46/2003; ***Jamaica Public Service (JPS) v Rose Marie Samuels*** [2010] JMCA App 23; and ***Gale v Super Drug Stores*** [1996] 1 WLR 1089.

[22] He pointed out that in **JPS v Rose Marie Samuels**, Morrison JA (as he then was) cited with approval the dictum of Lord Denning in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865, who said at page 866, “*We never like a litigant to suffer by the mistake of his lawyers*”.

[23] Counsel also made mention of the dictum of Millet J in **Gale’s** case, where he stated, “*When a litigant or his advisor makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party.*”

[24] He bolstered his arguments with the case of **Costellow v Somerset CC** [1993] 1 ALL ER 952 in which Bingham MR stated:

*“A plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate.”*

[25] He also relied on the case of **Peter Haddad v Donald Silvera** SCCA No. 31/2003 Motion 1/07 where it was articulated by Smith JA that:

*“The absence of a good reason for delay is not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension.”*

[26] Further, in support of their position, counsel submitted that the inadvertence of Mr. Junor was not done with wilful recklessness, but was a mistake as to the limitation period for defamation. He submitted as such that justice requires that despite this, the applicants be allowed to “*put it right*” even if it causes delay and expense, provided it can be done without injustice to the other party.

[27] Counsel argued further, that the one (1) year and two (2) months delay in filing the claim cannot be considered inordinate, when the Defamation Act provides an extension of an outer band of two years after the initial limitation period of two

years has passed. He submitted that section 33 (5)(a) of the Act contemplates an extension of two years outside the “initial” limitation to file a cause of action for defamation and the applicants are well within the time specified. He further argued that in the instant claim it would be unreasonable to argue that the respondents would face any injustice by a stale claim, as there is no difficulty in retrieving the offending material which is widely accessible and capable of being adduced on line.

**[28]** As it relates to the issue of prejudice, counsel submitted that no prejudice will be suffered by the respondents if an extension is granted. He added that should there be any prejudice, cost in the cause can serve as an appropriate compensation to the respondents to alleviate its effects.

**[29]** He submitted that in the case of ***Cain v Francis and McKay*** [2009] 3 WLR 551, the court gave guidance on the disapplication of the limitation period, where Smith LJ in the Court of Appeal said:

*“...The disapplication of the limitation period, which would restore his obligation to pay damages was only prejudicial to him if his right to a fair opportunity to defend himself had been compromised.”*

**[30]** On the other hand, Mr. Samuels submitted, greater prejudice would be caused to the applicants if there is a refusal of the extension. He highlighted the individual prejudice of the applicants as evidenced in each affidavit as follows:

**[31]** In relation to Mr. Dixon, the prejudice includes:

- a. Termination from his employment at the FLA
- b. Denied job opportunities and applications went unanswered
- c. Falling into arrears with loan obligation
- d. Denied Canadian Visa



e. Embarrassed by irresponsible journalism

[32] The prejudice to Mr. Gordon includes:

- a. Termination from his employment at the FLA
- b. Ridiculed by the government sector and the Jamaica Constabulary Force
- c. Embarrassed by irresponsible journalism

[33] In his arguments relating to the interest of justice, counsel made the point that if the extension were not granted, it would inevitably lead to the stifling of the applicants' claim and as such deny them the opportunity to properly ventilate the issues surrounding the defamatory statement. He submitted that in the interest of justice the applicants ought not to be shut out from the courts which they have turned to for redress. He relied on the case of **Hugh Bennett & Jacqueline Bennett v Michael Williams (2013) JMSC Civ.194**, where the court accepted as correct, the approach suggested by Sir Thomas Bingham, M.R, in **Costellow v Somerset CC** with respect to an application for an extension of time. He had this to say:

*“Saving special cases or exceptional circumstances it can rarely be appropriate, on an overall assessment of what justice requires to deny the plaintiff an extension, (where the denial will stifle his action) because of a procedural default, which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs.”*

[34] He made the further submissions that there also exists a real prospect of success for the claim as the defamatory statements were made by the respondents, and referred to the applicants and were published widely via the media.

[35] Considering these circumstances, Mr. Samuels has asked this court to exercise its discretion to disapply the limitation period for defamation allowed under section 33(4) and apply section 33(5)(a) of the Act.

### **Submissions by the 1st, 2nd and 3rd Respondents**

[36] Ms. Williams submitted that while there is a scarcity in cases in this jurisdiction which interpret section 33 of the Defamation Act, the factors detailed in the Act have been widely considered in applications for extension of time generally. She referred to the case of **Paulette Richards v Orville Appleby** [2016] JMCA App 20 where Williams JA in considering an application for extension of time confirmed that the guiding principles for the exercise of the Court's discretion to extend time are those laid out in **Strachan v The Gleaner Company Limited and Dudley Stokes**. (Motion No.12/1999) In that case Panton JA (as he then was) stated:

*"The legal position may therefore be summarised thus:*

*(1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.*

*(2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.*

*(3) In exercising its discretion, the Court will consider-*

*(i) the length of the delay;*

*(ii) the reasons for the delay;*

*(iii) whether there is an arguable case for an appeal and;*

*(iv) the degree of prejudice to the other parties if time is extended.*

*(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done.”*

[37] It is against the background of these principles, that these submissions have been made.

#### *Length of Delay*

[38] Ms. Williams calculated the delay as over three years since the alleged cause of action arose and over one year since the expiration of the limitation period. She submitted that this is an inordinate delay such that the court ought to decline to exercise its discretion to extend time. She referred to the case of ***Ledgister et al v Bank of Nova Scotia (Unreported) [2013] JMCA Civ App 18*** where it was held that the delay of almost 2 years in seeking the application is inordinate and inexcusable. She also cited ***Alcron Development Limited v Port Authority of Jamaica [2014] JMCA App 4*** in which it was held that the delay of 349 days was inordinate and a flagrant flouting of the relevant rule.

#### *Reasons for Delay*

[39] In response to the reason given by the applicants for the delay in relation to primacy being given to mounting a challenge before the IDT, counsel submitted that this was not a compelling reason for the delay in bringing a claim. Counsel highlighted that the evidence has shown that an award was made by the IDT in Mr. Dixon's favour on October 24, 2019, giving the applicant sufficient time since the ruling of the tribunal to either notify the respondents of a potential claim for defamation or to file a claim against them for defamation. Additionally, she submitted that an unjustifiable dismissal claim would not have affected the defamation matter as they are two separate causes of action.

[40] She also referred to Mr. Junor's tardiness in bringing a defamation claim and has argued that the court does not usually distinguish between an attorney and his

client. She indicated that this position was addressed by the Simons J in **Corey Jackson v Annmarie Phillips and Priscilla Fisher** [2017] JMSC Civ 30 where she applied the dictum of the UK Court in **Hytec Information Systems v Coventry City Council** [1997] 1 W.L.R. 1666 where it was stated that:

*“Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: first, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr. MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself.”*

Counsel therefore submitted that the reasons given by the applicants are not so compelling as to satisfy the court that they are entitled to the relief claimed.

#### *Prejudice to the Respondents*

[41] Counsel submitted further, that the respondents have suffered prejudice and will continue to do so if the extension of time is granted, considering the applicants’ inordinate delay. This prejudice she said was outlined in the affidavit of Ms. Steele who deposed about the inability of the respondents to locate the reporter who published the articles or the news report and in the case of another report, to identify who the reporter is. She referred also to the fact that the respondents had not preserved any documents to mount an effective defence to the alleged claim against them, as they were not notified of a claim and the limitation period had expired. Therefore, counsel submitted that it would be inequitable for the application to be granted as the respondents will suffer significant prejudice by being unable to adduce sufficient evidence to defend the alleged cause of action.

- [42] Counsel based her arguments on the cases of ***Arawak Woodworking Establishment Limited v Jamaica Redevelopment Bank Limited*** (Unreported) [2010] JMCA App 6 delivered 14 May 2010; ***Austin v Newcastle Chronicle and Journal Ltd*** [2001] All ER (D) 243 and ***Steedman & others v British Broadcasting Corporation*** [2001] EWCA Civ 984.
- [43] In ***Arawak Woodworking Establishment Limited*** the Court of Appeal in considering an application for extension of time to file Notice of Appeal, stated that in an effort to determine what is required by the overall justice of the case, one of the factors the court will consider in such an application is the prejudice or continued prejudice to the respondent.
- [44] In ***Austin v Newcastle Chronicle and Journal Ltd***, an extension of time was sought and granted to pursue a defamation claim after expiry of the four-month period of service for the particulars of claim. The Court accepted that the relevant prejudice to the parties is a key determination in granting an extension. It was further accepted that there is a need for expedition in defamation actions, as “memories fade, journalists and their sources scatter and become, not infrequently, untraceable.”
- [45] In ***Steedman & others v British Broadcasting Corporation*** the Court of Appeal noted that a relevant question to consider in determining the question of prejudice is the impact the delay has had on the evidence.
- [46] Counsel also made submissions on the prospect of success of the claim. She argued that this is not a relevant consideration under the Act. However, she submitted that even if so accepted as an important consideration, the applicant has failed to disclose a case with a real prospect of success.
- [47] It is based on these arguments that counsel further submitted that this exceptional relief, the extension of time, should be refused as it is not supported in any real way by the applicants’ evidence. She argued that the reason given was ordinary, not compelling, and not meriting the exceptional accommodation of the court,

especially in light of the fact that the request is being made to the detriment of the respondents.

### **Submissions by the 4<sup>th</sup> Respondent**

- [48] Mr. Piper Q.C. also accepted that there appears to be no case law which speaks to the meaning of “*reasonable and compelling grounds*”, within section 33(4)(a) of the Defamation Act. However, he submitted that a plethora of cases have demonstrated that negligence on the part of an attorney gives the client a cause of action against the attorney in negligence. Negligence, he argued, has never been a reasonable and compelling ground for depriving a party of the limitation defence.
- [49] He indicated that the statutory guidelines are based on reasonableness, which requirement is well known in certain aspects of the administration of justice. However, in the absence of a definition of “reasonable and compelling grounds,” he submitted that the question of reasonableness ought properly to be applied and determined on a similar basis as reasonable and probable cause for making an arrest. He relied on the case of ***Desmond Prescott v AG*** (*unreported judgement of the Supreme Court delivered by Campbell J on the 18th April, 2008*) in support of this argument, where the learned judge had to consider whether the relevant police officer acted reasonably in detaining a Jamaican traveller to the UK for several hours, body searching and facilitated him being x-rayed, on the basis of an anonymous telephone call that he was alleged to be conveying drugs. The learned judge found that the officer had only suspicions based on the allegation and that she had no evidence or factual basis to support her claim that she had reasonable and probable cause for arresting the traveller.
- [50] Accordingly, Queen’s Counsel submitted that the legal concept of reasonableness under the Act requires that there be facts to support the conduct on which they rely as being reasonable.

[51] In this case, he indicated that the supporting information is based on the admission of the applicants' attorneys-at-law that they have been negligent, with no reasons being given by the applicants themselves as to why they did not press their attorneys to pursue their claim within the limitation period. Queen's Counsel submitted therefore, that the applicants have failed to show any reasonable and compelling reasons why their claims were not advanced during the limitation period.

[52] Further he submitted that there was clear evidence of prejudice from the affidavit of Mr. Davidson. Therefore, the applicants have not shown that they come within the criteria which must be met in section 33(4) of the Act.

## THE LAW

[53] The law governing defamation claims is set out in the Defamation Act of 2013. Section 33 of the Act prescribes the limitation period for bringing defamation claims and addresses the possible course of action where the strict limitation has expired. This is set out below:

*(1) An action for defamation shall be brought-*

*(a) in the case of defamatory matter published on the internet, within two years from the date upon which the defamatory statement is first published on the internet or the date upon which it is first capable of being viewed or listened to through the internet, whichever is later; or*

*(b) in the case of any other defamatory matter, within two years from the date that the defamatory matter was first published*

*hereinafter referred to as the "limitation period."*

- (2) *A person claiming to have a cause of action for defamation may apply to the court for an order extending the limitation period.*
- (3) *Subject to subsection (4) on an application under subsection (2), a court may extend the limitation period.*
- (4) *A court may not order the extension of the limitation period unless-*
- (a) *the court is satisfied that there are reasonable and compelling grounds for the action not having been brought within the limitation period;*
  - (b) *the court has taken into account any prejudice which the extension of time may cause to the defendant, including the extent to which any evidence relevant to the matter is, by virtue of the delay, no longer capable of being adduced; and*
  - (c) *it is in the interest of justice to grant the extension of time.*
- (5) *If a court orders the extension of the limitation period-*
- (a) *the limitation period shall not be more than four years from the date on which the cause of action arose; and*
  - (b) *that limitation period is accordingly extended for the purposes of an action brought by the applicant in that court on the cause of action that the applicant claims to have.*
- (6) *An order for the extension of a limitation period, and an application for an order, may be made even though the limitation period has already expired.*

**[54]** Subsection 1 imposes a two-year limitation period on filing defamation claims. However, it is clear that within the provisions of the Act, the limitation period may



be extended to file the claim if the court is satisfied that the requirements set out in subsection 4 are met.

## **DISCUSSION**

**[55]** I will begin my discussion by addressing an important point raised by counsel for the applicants.

**[56]** Mr. Samuels has argued that the Defamation Act provides an extension of an outer band of two years after the initial limitation period of two years has passed and further that section 33(5)(a) contemplates an extension of two years outside of the “initial two years limitation period to file a cause of action for defamation. To accept such an interpretation of the law goes against the clear wording of the statute and does not accord with the obvious intent of Parliament. I will highlight section 33(5)(a) which reads as follows:

*(5) If a court orders the extension of the limitation period-*

*(a) the limitation period shall not be more than four years from the date on which the cause of action arose; and*

**[57]** The section is clear. Once the court has seen it fit to exercise its discretion to extend time, this extension to the limitation period must not be more than four years from when the defamatory statement was published. There is no initial limitation period of two years and then an outer band to this limitation period of an additional two years. If this court were to adopt such an approach this would then mean that if applicants have failed to bring their suit within the initial two years’ limitation period, they can rely on these additional two years to file their claim. This cannot be the correct approach. There is one limitation period of two years. The court however in extending the limitation period, must do so within an absolute period of four years after the cause of action arose.

**[58]** I will now look at the section 33(4) requirements individually as it applies to the instant case.

**Reasonable and Compelling Grounds for the action not brought within limitation period**

**[59]** The issue as to whether reasonable and compelling grounds exist in a given case is a question of fact which must be decided on a case by case basis. However, the delineation of this concept of “reasonable and compelling ground” is a question of law.

**[60]** Mr. Piper Q.C. has urged the court to equate reasonable and compelling ground to the criminal standard of a reasonable and probable cause for arrest. He contended that the approach of the court is that it ought to be satisfied that there are facts to support the conduct on which the applicants rely as being reasonable.

**[61]** The question is, can the reasonable and compelling grounds standard be equated to the same standard of proof as reasonable and probable cause? My answer to this question is no.

**[62]** “Compelling” connotes a standard that carries a higher threshold. The Merriam Webster Dictionary gives among its synonyms for the word ‘compelling,’ “convincing, decisive, well-founded and irrefutable”. The applicants must therefore show convincing proof for not bringing the claim within the limitation period.

**[63]** I will now look at the affidavit evidence pertinent to the application. In this matter, no evidence was presented by the applicants themselves on the cause of the delay. Counsel Mr. Junor provided the only explanations on this point. On Mr. Junor’s own admissions, he was tardy in filing the defamation claim within the two years’ limitation period and he has accepted responsibility for this. Counsel has in effect stated ignorance of the law in relation to the limitation period. Evidently, it is this ignorance which also contributed to his decision to give preference to bringing the matter before the IDT, before initiating the claim for defamation. I am mindful,

however, and it is trite law, that ignorance of the law is no excuse. Counsel is expected to be au fait with the law, the rules of court, and any changes thereto, in a matter in which he is retained. Where he is unaware, he is expected to take the necessary steps to inform himself. The fact that he was without that knowledge, is not a good explanation.

[64] I will also add that though Mr. Junor accepted sole responsibility for his inadvertence, the position of this court is that it will not usually distinguish between an attorney and his client. I am fortified in this approach by the definition of a 'party' in rule 2.4 of the Civil Procedure Rules, which states that a party includes, "*both the party to the claim and any attorney-at-law on record for that party unless any rule specifies or it is clear from the context that it relates to the client or to the attorney-at-law only*".

[65] This issue was properly addressed by Sykes J (as he then was) in ***Kristin Sullivan v Rick's Café Holdings Inc T/A Rick's Café (No 2)*** (unreported) Supreme Court Jamaica claim no. 2007 HCV 03502 judgment delivered 15 April 2011. In that case, the action was struck out due to counsel's failure to file the core bundle on time. The court found counsel's explanation that his failure was as a result of his heavy workload not a good one. In arriving at this finding the learned judge made the following observations:

*"The explanation of counsel and the entreaty not to visit her counsel's omissions on her would make policing of the new rules impossible. **Taken to its ultimate conclusion, every litigant could simply blame his lawyer or the lawyer could easily say that he is to be blamed and the court would, as a matter of course, overlook the breach and grant relief.** Surely this is not the new culture being promoted by the CPR. If that were the case then [the] CPR would not be worth the paper that it is written on."* **[emphasis added]**

[66] In the circumstances, I am unable to accept that a distinction ought to be made between the applicants and their legal advisor whose knowledge and expertise the

applicants had relied on to deal with their matter. Further, I have also noted that the applicants have failed to provide any evidence of any due diligence taken on their part to follow up with their matter to ensure their claim was filed within the prescribed period. Accordingly, the explanations given have failed to convince this court that the defamation claim could not have been filed within the limitation period. To deprive the respondents of their limitation defence to which they are entitled, the evidence must be cogent. The applicants have failed to present reasonable and compelling grounds for the action not having been brought within the limitation period.

[67] However, the insufficiency of any explanation is not necessarily determinative of the application to extend time. I must also consider the prejudice to the respondents which the extension of time may cause, before a decision can be made as to exercise of the court's discretion.

### **Issue of Prejudice**

[68] The cause of action in this case arose in August 2017. The application to extend time was filed in October 2020, a little over 3 years later and there is a 1 year and 2 months' delay from the expiration of the limitation period.

[69] On the question of prejudice, I bear in mind that this delay in filing the claim would in and of itself cause prejudice to the respondents who would have to face a stale claim. In this regard the dictum of Lord Griffiths in *Donovan v Gwentlys Ltd* [1990] 1 WLR 472 is worth mentioning, where he said at paragraph 479A:

*"...the primary purpose of a limitation period is to protect a defendant from any injustices inherent in having to face a stale claim which he never expected to have to face..."*

[70] I have considered that the authorities show that the court will not grant an extension of time where to do so may cause serious prejudice to the respondents.

[71] In the case of **Hugh Bennett and Jacqueline Bennett v Micheal Williams** [2013] JMSC Civ 194, in examining this issue, the court had this to say:

*“The term 'prejudice' ought not to be considered in a narrow way. It is a term which ought to be considered, just as this application, in a practical and holistic (sic) way. Thus, whilst of course, there could be no real prejudice to the respondent/defendant, if it would be overall, in the interests of justice, to grant the applicants'/claimants' application, nonetheless, what this court must determine, in deciding on whether such real prejudice exists or not, is, when looked at wholistically, **whether such prejudice would be, in a very practical sense, substantial in nature. [emphasis added]***

[72] In these circumstances, the respondents have submitted that they would be prejudiced in their defence by the unavailability of witnesses and records relating to the alleged defamatory statements, were the court to grant the application to extend time. They have brought evidence in support of this contention. This has not been contradicted by any evidence from the applicants. Having witnesses and accessibility to the records relating to these statements are critical to the respondents putting forward their defence. If these are not available to them, their defence would be in jeopardy. From all indications, this would indeed cause substantial prejudice to them, which, as far as I am concerned, cannot be remedied by an award of costs.

[73] I have considered the indication by the respondents that they failed to preserve any records due to the expiration of the limitation period and having not being previously notified of an impending claim. I will say that the court cannot cast any obligation on the respondents to maintain their records after the expiry of the limitation period, especially where there was no prior notice of an impending claim. Though it may be prudent, this is better left to the internal operations of their companies. Taking the evidence holistically therefore, the respondents have proved substantial prejudice.

[74] As it relates to the applicants, I have also considered that there would be prejudice to them, if the extension were not granted. The applicants have alleged that their reputation has been tarnished and they have been ridiculed in the government sector. Mr. Dixon has explained that he is unable to obtain gainful employment and Mr. Gordon says he is embarrassed by the whole event. In addition to this, with the expiration of the limitation period, if the extension were not granted, the applicants would be barred from seeking civil redress and from having the matter adjudicated.

[75] However, I must juxtapose the respondents' position. They must be able to adequately respond to any action brought by the applicants against them, failing which severe prejudice would be occasioned to them.

[76] The overall consideration however, must be how best will the interest of justice be served.

### Interest of Justice

[77] In *Attorney General of Jamaica and Roshane Dixon v Attorney General of Jamaica and Sheldon Dockery* [2013] JMCA Civ 23, Harris JA posited as follows at paragraph 18:

*“It cannot be too frequently emphasized that judicial authorities have shown that delay is inimical to the good administration of justice, in that it fosters and procreates injustice. **It follows therefore, that in applying the overriding objective, the court must be mindful that the order which it makes is one which is least likely to engender injustice to any of the parties.**” [emphasis added]*

[78] The applicants are seeking justice for the alleged defamatory statements which they say have caused them reputational damage. If they are not allowed to pursue this claim, this would in effect stifle the applicants' actions. I have to consider however, whether it is just and fair for the respondents to be asked to answer to a claim which due to the passage of time they may not be able to adequately respond to. I think not. The interest of justice demands that they should not be

disadvantaged, through no fault of their own, in mounting their defence to the claim. There is adequate evidence of the possibility of serious prejudice occurring to the respondents, if this matter is allowed to proceed, which would result in injustice to them.

In these circumstances, I am satisfied that the interest of justice would best be served by refusing the application to extend time.

**[79]** Having considered the requirements set out in section 33(4) of the Defamation Act, the applicants have failed to meet the criteria for the court to grant an order extending the limitation period.

I therefore make the following orders:

- 1) Amended Urgent Notice of Application for Court Orders filed on March 11, 2021 in Claim No.SU 2020 CV 03864 is refused.
- 2) Amended Urgent Notice of Application for Court Orders filed on March 11,2021 in Claim No.SU 2020 CV 03865 is refused.
- 3) Costs to the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondents to be taxed if not agreed.

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**G. Henry-McKenzie J**