



[2021] JMFC Full 1

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CONSTITUTIONAL DIVISION
CLAIM NO. SU 2019 CV 04326**

**BEFORE: THE HONOURABLE MR JUSTICE K. ANDERSON
 THE HONOURABLE MR JUSTICE K. LAING
 THE HONOURABLE MISS JUSTICE A. NEMBARD**

**IN THE MATTER OF THE CONSTITUTION
OF JAMAICA**

AND

IN THE MATTER OF an Application by **CINDY
ROBINSON** alleging breaches of her Rights
under Section 16(2) of the CHARTER OF
FUNDAMENTAL RIGHTS AND FREEDOMS
(CONSTITUTION AMENDMENT) ACT 2011

AND

IN THE MATTER of an Application for
Constitutional redress under the said
CHARTER

BETWEEN CINDY ROBINSON CLAIMANT

AND THE ATTORNEY GENERAL OF JAMAICA DEFENDANT

IN OPEN COURT

Mr Manley Nicholson instructed by Nicholson Phillips for the Claimant

Ms Tamara Dickens instructed by the Director of State Proceedings for the Defendant

Heard: January 18, 19, 20, and 22, 2021

Constitutional law – Breach of right to a fair trial within a reasonable time – Delay in judgment being delivered – Impossibility of judgment being lawfully delivered the Judge having retired_ – Whether a retrial ought to be ordered – Burden of proof as regards whether a retrial ought to be ordered – Remedies – Whether compensation ought to be awarded to the claimant as damages arising from the breach – Assessment of sum to be awarded – Whether award can include damages and costs in original claim – Charter of Fundamental Rights and Freedoms (Constitution Amendment) Act, 2011, section 16(2) – The appropriate costs order to be made in respect of this claim – Civil Procedure Rules, 2002, rule 64.6 (3) and 64.6 (4) (b) and (d)

ANDERSON, K. J

THE BACKGROUND

- [1] The judgment in this claim was announced orally to the parties on January 22, 2021. This court had then promised that written reasons for judgment would have been provided at a later date. These reasons are now so provided.
- [2] The claim for constitutional redress in the instant matter concerns the constitutional right to a fair hearing within a reasonable time before an independent and impartial court or authority established by law.

The claim for medical negligence

- [3] The claimant through her attorneys - Nicholson Philips, instituted Claim No. 2008 HCV 00513 - Cindy Robinson v Dr. Alfred Atkinson, Morant Bay Health Centre and the Attorney General of Jamaica, ('hereinafter referred to as the original claim'), in which she sought damages in medical negligence which allegedly arose from an incident, which took place on April 30, 2007. The claimant, alleges that, on that date, she attended at the Morant Bay Health Centre, in Morant Bay, in the parish of St. Thomas, where she underwent a dental procedure to have an "eye" tooth, on the right side of her mouth, extracted. During and following that procedure, the claimant contends that she experienced blurred vision, severe headaches, vomiting, permanent loss of vision and permanent disability. The claimant contends that, as a consequence, she was compelled to seek further medical attention in 2007. At the conclusion of that process, it was determined that there was no possibility of reversing her injuries.
- [4] The original claim was tried by the Honourable Mr. Justice Raymund King, during the period of June 28 to 30, 2010, at the end of which, judgment was reserved. King J retired from the position of Puisne Judge in 2013, without delivering the judgment of the court.
- [5] Since his retirement, the claimant had, through her attorneys – Nicholson Phillips, written to the office of Chief Justice on September 17, 2013, March 2, 2016 and April 11, 2018. Correspondence was also written by the said claimant's attorneys to the Attorney General's chambers, on April 18, 2011 and March 21, 2019. Those were geared towards obtaining a resolution of the original claim. Unfortunately, however, the same did not produce any fruitful result, towards the achievement of the desired objective.

Claim for constitutional redress

- [6] By way of a fixed date claim form, filed on November 5, 2019, the claimant has sought the following redress, pursuant to section 19 of the Charter of

Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 and Part 56 of the Civil Procedure Rules, 2002:

- '1. A Declaration that the Claimant's constitutional right to a fair hearing within a reasonable time by an independent and impartial court or authority established by law, as guaranteed by section 16(2) of the Charter, has been breached;*
- 2. A Declaration that a fair hearing can no longer be guaranteed to the Claimant in her claim brought in the Supreme Court in Claim No. 2008 HCV 00513 Cindy Robinson v Dr Alfred Atkinson, Morant Bay Health Centre and the Attorney General of Jamaica;*
- 3. Damages including that sought in Claim No. 2008 HCV 00513;*
- 4. Special Damages as claimed in Claim No. 2008 HCV 00513;*
- 5. Interest on Damages;*
- 6. Costs in Claim No. 2008 HCV 00513;*
- 7. Costs; and*
- 8. Such further and other relief be given as this Honourable Court deems fit.'*

[7] In support of her fixed date claim form, the claimant has filed an affidavit in support in which she outlines, inter alia:

- a. The circumstances of her original claim;
- b. The steps which she has taken to have her claim resolved to the date of the filing of this claim; and
- c. Her emotional and psychological condition arising from her having to await judgment in her original claim.

[8] The relevant portions of the claimant's affidavit evidence, will be examined further on, in these reasons. There was an affidavit filed by the defendant, in response to this claim. That was the affidavit of Louis Jean Hacker, Attorney-at-

Law employed at the office of the Director of State Proceedings, which was filed on the 21st day of January, 2020. At a case management hearing though, the defence counsel then informed the court that the defendant no longer intended to rely on that affidavit evidence. As such, there is no affidavit evidence being relied on by the defendant, in response to this claim. Both parties have filed skeleton submissions as regards this claim. This court has carefully considered the claimant's evidence and the respective parties' skeleton and oral submissions.

THE ISSUES

[9] The following issues have arisen from the claim:

- i) Whether the claimant's constitutional right to a fair hearing within a reasonable time before an independent and impartial court or authority established by law, as guaranteed by section 16(2) of the Charter, has been breached and if so, what remedies, if any, ought to be ordered, arising from same.
- ii) Whether a retrial of the original claim, ought to be ordered.
- iii) Whether the claimant is entitled to recover compensation for any of the expenses incurred by her, with respect to the trial of her original claim.

THE LAW AND ANALYSIS

[10] The Constitution of Jamaica and, in particular, the Charter of Fundamental Rights and Freedoms, guarantees to all persons in Jamaica, certain rights and freedoms which are subject only to such limitations as are placed on said rights and freedoms by the Charter itself. See: **Section 13(2) of the Charter of Fundamental Rights and Freedoms (Constitution Amendment) Act, 2011.**

Breach of right to fair trial within a reasonable time

[11] **Section 16(2) the Constitution** concerns the right to a fair trial in civil proceedings. It reads as follows:

'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.'

[12] The claimant contends that the trial of the matter of her original claim which ended in June of 2010, without judgment having been delivered, amounts to a breach of her right to a fair trial within a reasonable time. That breach she has alleged, is concretized by the recent judgment of the Court of Appeal in **Paul Chen-Young and others v Eagle Merchant Bank Jamaica Limited and Others (The Attorney General for Jamaica, interested party) [2018] JMCA App 7** where at paragraphs 69 and 70, it is stated that:

*'69. If there is a common thread running through these cases, albeit each based on different constitutional and statutory regimes, it seems to me to be this: 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 (as, for instance, in section 106(2), or in provisions found in statute or rules, as in cases like *Ritcey et al v The Queen and Orient Bank Limited v Fredrick Zaabwe and Mars Trading Limited*), any 'judicial' act subsequently done by him or her will have been done without authority.*

70. It accordingly seems to me that, as I have already suggested, 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.'

[13] **Section 100 (1) of the Constitution** prescribes that:

‘... A Judge of the Supreme Court shall hold office until he attains the age of seventy years...’

[14] The claimant contends that the fact that King J has retired, and has not delivered and cannot ever hereafter deliver a judgment in her original claim, amounts to a breach of her constitutional right to have her claim tried within a reasonable time.

[15] The defendant has conceded that the claimant’s right to a fair trial in a reasonable time under **Section 16(2) of the Constitution** has been breached.

[16] It must be stated that the right to a fair trial within a reasonable time includes not just the trial of a claim, but it also encompasses receiving a verdict/judgment, within a reasonable time. Brown J in **Ernest Smith & Co (A Firm) and Others v Attorney General of Jamaica [2020] JMFC Full 7** at paragraph 8, states that principle as follows:

‘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.’

[17] Further at paragraph 11, he states as follows:

‘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].’

[18] This court accepts the claimant’s contention that since King J has retired and had not delivered a judgment, in respect of the claimant’s original claim, which he had presided over at the part-heard trial, that said part-heard trial, is now a nullity. It is

not just the time which has elapsed since the ending of the trial, which this court accepts is an inordinately long one, that has caused this court to accept that there has been a breach of the claimant's right to a fair trial within a reasonable time, but it is also to be considered in conjunction with the fact, that King J has retired without having delivered the judgment. According to the ruling in the **Chen -Young case** (op. cit), the judgment cannot ever, hereafter, lawfully be delivered, by that retired judge.

Consequence of breach of right to fair trial within a reasonable time

[19] **Section 19 of the Constitution** provides that:

'(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.'

[20] Brown J, at paragraph 22 of his judgment, in the **Ernest Smith case** (op. cit), cited the dictum of Powell J in **Barker v Wingo (1972) 407 U.S. 514**, as regards the question of presumed prejudice surrounding the breach of one's constitutional right to a fair trial within a reasonable time. He stated as follows:

'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 pre-trial 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.'

[21] Though the quotation above refers to an accused, this court is of the belief that the same test ought to be applied for litigants in a civil matter. The mere fact that there is an unreasonable delay in the outcome of one's matter, it ordinarily stands true that the litigants in respect of that matter, will suffer some degree of prejudice by likely suffering anxiety, concern and distress.

[22] In **Mervin Cameron v Attorney General of Jamaica No. 2 [2018] JMFC Full 4**, it was noted by all of the justices who presided over the judgment, which was a majority one, that the power to give redress for a contravention of a constitutional right is discretionary and therefore, where there is a constitutional violation, the appropriate remedy will depend on the circumstances.

[23] At paragraph 139 in **Mervin Cameron case** (op. cit), it was stated by Sykes J. (as he then was), as part of the minority judgment in that case, that:

'As this passage shows the nature of the reasonable time guarantee is that once it has been violated that time cannot be recovered; it's gone forever. Unlike the violation of fair trial and independent and impartial standards which can be remedied by a new trial or preventing the trial by a particular judge if lack of impartiality is established, the reasonable time guarantee can be remedied by (a) a declaration; (b) damages; (c) speedy trial order; or (d) a stay or (e) a combination of them. Section 19 of the Jamaican Charter enables the court to fashion remedies appropriate for the case including remedies not among the four main ones just mentioned.'

I accept that which has been stated by Sykes J (as he then was), as above – quoted, as being a correct statement of law.

[24] The court and the relevant parties having accepted that said right has been breached, this court must now consider the consequence(s) of said breach and most importantly, what remedy or remedies may be ordered, in order to, as best as this court can, enable such breach to be remedied.

[25] This court is guided by the rules which surround the power of the court to award damages for a breach of a constitutional right. The starting point, in considering whether any redress ought to be ordered arising from a proven breach of a person's constitutional right, is the recognition that all remedies in such types of cases are left to the exercise by the court, of its discretion.

[26] Based on the discretion which is given to the court to render an appropriate remedy for the breach of one's constitutional right, the court may be satisfied that in the relevant circumstances, an award of damages may be warranted. In some cases, a declaration may be the only remedy which the court may deem adequate, to remedy the infringed right, while in other cases, that declaration may not be adequate. The court, in exercising its supervisory jurisdiction, under **Section 19(3) of the Constitution**, ought not to be too restricted, in crafting relevant remedies to address breaches of constitutional rights. This may fetter the role which has been imposed on it, as a guardian of the Constitution.

An award for damages

[27] The claimant's learned counsel, in his written submissions to the court, has urged the court that the claimant ought to be awarded the sum of three million dollars (\$3,000,000), for the breach of her right to a fair trial in a reasonable time. Counsel sought to use the award given in the **Ernest Smith case** (op. cit) as a starting point and then sought to distinguish it on the ground that the effect of the delay in awaiting judgment has been greater to the claimant at bar, being an individual, than that of the claimants in the **Ernest Smith case** (op. cit), being members of a firm.

[28] The defendant in its written submissions, had posited that a reasonable sum to be awarded is \$500,000. In oral submissions to the court, however, learned crown counsel, advanced that the reasonable sum to be given to the claimant is \$1,500,000, as was given to the claimants in the **Ernest Smith case** (op. cit).

[29] The court accepts that this is a reasonable sum for the prejudice, anxiety, concern and distress which the claimant is presumed to have suffered and which the court finds that she has in fact experienced. The claimant has given evidence that she suffered as a result of the unreasonable length of time in which judgment of the matter was reserved.

[30] This court finds that the sum of \$1,500,000, serves as sufficient compensation for the breach of the claimant's constitutional right to a fair trial within a reasonable time.

Retrial

[31] As part of the claimant's claim, she has sought a declaration that a fair trial can no longer be guaranteed to her, in respect of her original claim. In support of this assertion, the claimant has alleged at paragraphs 16 and 17 of her affidavit that:

'16. ...I am still legally blind and the sole financial and psychological support I had during my trial was my fiancée who has since passed away. I currently have no financial assistance, I am not working and my condition including the ability to recall events over a long period of time, has been adversely affected.

17. That furthermore, I am unsure of the whereabouts of the several doctors who attended to me over 10 years ago arising out of the extraction and resultant blindness. I am advised and verily believed that expert medical evidence is crucial to my case and that without the several doctors who attended to me being available at any subsequent retrial, my case would be severely prejudiced. I am also unsure of ordinary witnesses who I could rely on to recall the events of over a decade ago and who would be considered credible to speak on my behalf if a trial were now to be had in the matter.'

[32] The claimant's learned counsel has submitted that, due to the passage of time since the trial of the original claim, the claimant's health has deteriorated and that, as such, if a retrial is ordered, that retrial will result in a further breach of the claimant's constitutional right to a fair trial.

[33] The defendant on the other hand, has urged the court to find that the claimant has not established that a fair trial in her original claim, can no longer be

guaranteed. The defendant has instead, urged that a retrial is required and is an appropriate order to be made in all of the circumstances.

Burden of proof as regards a retrial

[34] The claimant having positively asserted in her fixed date claim form that a fair hearing can no longer be guaranteed in her original claim, had the burden of proving same. That assertion forms part of her statement of case, which she must prove.

[35] The learned authors of **Murphy on Evidence (12th ed.)** state at 4.5:

'The legal burden of proof as to any fact in issue in a civil case lies upon the party who affirmatively asserts that fact in issue, and to whose claim or defence proof of the fact in issue is essential... If the claimant fails to prove any essential element of his claim, the defendant will be entitled to judgment. The position of the defendant is somewhat different. Since the claimant affirmatively asserts his claim, he bears the burden of proving the claim, and the defendant assumes no legal burden of proof by merely denying the claim. However if the defendant asserts a defence which goes beyond a mere denial (sometimes referred to as an „affirmative defence“) the defendant must assume the legal burden of proving such defence. An affirmative defence is most easily recognized by the fact that it raises facts in issue which do not form a part of the claimant's case...It is a sound rule, therefore, that every party must prove each necessary element of his claim or defence.'

[36] The right to a fair trial is a right which is protected by the constitution, and therefore, since it is the claimant who has asserted that her right, which she is guaranteed under the constitution, cannot be observed, then undoubtedly, she needed to have led sufficient evidence, to prove same. The standard of proof which is required, is, on a balance of probabilities.

[37] In the **Mervin Cameron case** (op. cit), Fraser J, (as he then was) in writing for the majority, noted at paragraph 214, as follows:

'Article 6 (1) of the Convention is headed "Right to a fair trial" and contains a bundle of rights. 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. It is in this context that Lord Bingham giving the leading judgment for the majority thought that it would be anomalous if breach of the reasonable time requirement had an effect more far-reaching than breach of the defendant's other art 6(1) rights when (as must be assumed) the breach does not taint the basic fairness of the hearing at all, and even more anomalous that the right to a hearing should be vindicated by ordering that there be no trial at all. This was the basis of the view of the majority that the remedy of a stay could only be obtained where actual prejudice was shown in that a fair hearing could not be guaranteed or it was otherwise unfair to proceed against the accused.'

[38] The claimant has made a bald assertion that a retrial is impossible. Although there is no evidence which has been properly presented by the defendant to contradict the claimant's assertion in this regard, the bald assertion of the claimant, without more, cannot serve to discharge her burden in proving that a fair trial can no longer be guaranteed in her original claim. The court will now examine that assertion of hers, in detail below.

Inability to locate witnesses

[39] The claimant has not led any evidence as to what efforts she has placed into locating any witness which she may seek to rely on, at a retrial of her claim. Further, it is the court's understanding that the only witness that the claimant had in the original claim in support of her claim, was herself. She has given no evidence specifying that she wishes, if hereafter given the opportunity to do so, by means, of a retrial, to change course and rely on any additional witness or witnesses, other than herself, but that such witness is unavailable.

[40] In the circumstances, there is no credible evidence that the claimant will be in a less advantageous position, in terms of leading evidence, upon a retrial than she was in, during the trial of the original claim.

Difficulty recalling the events

[41] The claimant has led no medical evidence in support of her assertion that, if a retrial were to take place, at that retrial, she will have difficulty in recalling the

pertinent events underlying her original claim. This court is unable to properly conclude that the claimant cannot recall, or will have any difficulty in recalling the said relevant events.

[42] Also, this court has, as part of the evidence in this case, received a witness statement which was deponed to by the claimant on March 31, 2010. By law, she is allowed to refresh her memory from such a statement, in giving her evidence in order to assist her in giving reliable evidence, as compared to an exercise which seeks to tests her memory. She would be entitled to refresh her memory from said witness statement, before giving her evidence, without conditions. See: **R v Richardson [1971] 2 All ER 773.**

[43] Additionally, even while giving her evidence, at trial, the law allows for the trial judge to exercise his/her discretion, in allowing her to refresh her memory. See **R v Ribble Magistrate's Court, ex parte Cochrane [1996] 2 Cr App. R 554.**

[44] Having outlined that, I am satisfied that there is no proper evidence which is before this court which enables me to draw a conclusion, on a balance of probabilities that the claimant's memory has been impaired, in any way so as to impair her ability to lead evidence at a retrial, if so ordered.

[45] The importance of the claimant's ability to recall the pertinent events in detail also has to be considered in the context of the nature of the claim. The core facts are not disputed. There is no issue joined between the parties as to the fact that the claimant was treated by a dentist employed to the state who extracted her tooth. A critical issue to be determined is whether the extraction of the tooth led to the injuries of which the claimant complains. This is solely a matter of expert evidence.

Awarding damages arising from the original claim

[46] The claimant not only seeks a declaration and damages for that breach, but also damages under the original claim. It must be stated for the purposes of this

judgment, that the court cannot award damages from the original claim. There is no basis in law, which properly enables this court, to do so.

[47] The court must also make a distinction between a stay of proceedings in criminal claims and a refusal to order a retrial in civil claims. In the criminal arena, the court, being the guardian of the Constitution, may find that given the circumstances of the breach of the claimant's right under **Section 16(1) of the Constitution**, it would be unfair, for the Crown to bring further criminal action against the accused and may order that a stay, is an appropriate remedy, in addition to other remedies.

[48] The same situation, legally, applies mutatis mutandis, with respect to civil cases, since the constitutional court can, in exercise of its jurisdiction, order that a retrial be held, or may order the contrary. In respect of this claimant's original claim, this court is of the view that, if a retrial is not ordered, both parties will suffer significant detriment, in so far as the claimant will not then have an opportunity to obtain the remedies which she has sought as part of that claim. The defendant will not then have the opportunity to defend against the alleged action/inaction of the Crown's servants and/or agents, which allegedly constitute the foundation for that claim.

Retrial and further breach the claimant's right to a fair trial

[49] In deciding to order a retrial, the court is of the opinion that it must be satisfied that same is a viable option in this claim. As regards any consideration that the grant of a retrial, will further breach the claimant's right to having a fair trial within a reasonable time, it is the considered view of this court, that the retrial will not lead to additional breaches in this regard. The Court will put in place adequate provisions for a speedy trial which will guard against this.

[50] I am therefore, minded, for there to be an order for a retrial to be held as soon as reasonably practicable, coupled with an award of damages. That collectively will,

to my mind, adequately compensate the claimant, arising from the violation of her constitutional right.

[51] Since damages will be ordered in this case, this court ought to consider the inter-relation between the award of damages and the extent to which it remedies, the relevant constitutional rights' breach or breaches. In having considered same, it is the considered view of this court, that a damages award in favour of the claimant, will not be an adequate remedy for the breach of her constitutional right to a fair trial within a reasonable time.

[52] Since the court is now compensating the claimant for a breach of that right, she cannot come back to this court to rely on the delay, up until the announcement of this judgment, as a basis for any claim that her right to a fair trial has been breached. In essence, time begins to run afresh, as at the date of the announcement of this judgment.

[53] Further delay cannot be looked upon, in conjunction with the delay which the claimant would have already received redress for, any future delay ought to be considered as arising from, and since the date of the judgment orders.

Speedy Retrial

[54] Wolfe-Reece J at paragraph 176 in the **Ernest Smith case** (op. cit), quoted the dictum in in **Cocchiarella v Italy (Application No 64886/01) (unreported) 29 March 2006**, where the European Court expressed that the best solution to delay is to expedite the matter, to prevent successive breaches of the right. I find that this statement expresses a pragmatic and judicious approach which is applicable to the case at hand.

[55] In keeping with that objective, the court will order that a retrial be held expeditiously, and that as far as is within the court's power, said retrial be held as soon as is reasonably practicable. Also, this court believes that a further case management conference ought to be held, in order to ensure that things are in the proper order, leading up to that retrial. If any further application ought to be

heard, same ought to be made during that further case management conference hearing.

Loss of expenses in original claim

- [56] In addition to seeking orders for general and special damages in the original claim, the claimant has also sought an order for the costs of the original claim.
- [57] The defendant has opposed that order and has urged the court to conclude, that because the trial of the original claim was a nullity, the costs of that claim, should not be borne by the defendant. In the ***Ernest Smith*** case (op.cit), that was the approach taken by this court.
- [58] It should be noted however that in the ***Ernest Smith*** case, the claimants were seeking the costs of the assessment which was a nullity on the basis that such costs were '*wasted costs.*' The court found that having regard to the nature of wasted costs, the costs of the earlier proceedings could not be considered to have been wasted costs. Consequently, such costs could not have been ordered against the defendants on that basis. I do agree that the costs of the earlier proceedings in that case as in the instant case are not wasted costs and does not necessitate any further reference, or consideration, as, to my mind, such is irrelevant, for present purposes.
- [59] With the greatest of respect to my learned judicial colleagues in the ***Ernest Smith*** case (op.cit), I appreciate that they were constrained to grapple with the issue of costs of the earlier proceedings, as it was framed by the applicants in respect of that claim, that is, as an issue of wasted costs. It is however, my considered view and I state this, with respect for any contrary view, that this is not the only prism through which the claim for compensation for earlier proceedings can be viewed. The real issue to be determined is whether the claimant ought to receive compensation for the expenses she incurred in the pursuit of her original claim, bearing in mind that it is this court's determination,

that, based on the particular circumstances of this particular case, the claimant's right to a fair trial within a reasonable time, has been breached.

[60] It must also be stated that in considering this issue, the court is not considering the possibility of punishing the defendant, in making an order, pertaining to the loss of expenses in the claimant's original claim. For the avoidance of doubt and confusion, we have deliberately chosen to address this issue, using the phraseology, 'expenses incurred', to describe this component of claim rather than describing it as an element of 'costs' as that term is understood. Thus, what we are addressing here, is the possibility of this court making an order which assists in ensuring that the claimant obtains adequate compensation, arising from the breach of her constitutional right.

[61] The defendant further contends that the relevant expenses incurred by the claimant cannot be recovered in light of the fact that, if the court finds that a retrial ought to be ordered, those expenses, though incurred pursuant to the original claim, will be relied on in that retrial and will then form a part of the costs award in that claim.

[62] For my part, I partially agree with that submission of defence counsel. I wish however, to make a point of distinction. While it is correct that if said retrial will be ordered the claimant will be able to rely on the documents, which she has already filed, it is unchallenged that by virtue of the retirement of King J in 2013, the trial of the original claim for June 28, 29, and 30, 2010, was a nullity. The expenses for those three (3) days of trial, cannot be recovered as, costs, for the purposes of any retrial of the original claim and as such, it is within the jurisdiction of this court, to consider whether to order that the expenses of those three (3) days be reimbursed.

[63] Through no fault of the claimant, the trial of the original claim was declared a nullity. The nullification of the said trial does not, by any means, nullify the expenses which were incurred on those three (3) days. The claimant ought to be awarded a sum which is roughly equivalent to such, as estimated by this court.

Amount to be awarded

- [64] It would have been helpful if the claimant had adduced evidence as to the expenses she incurred, as it relates to pursuit by her, of her original claim. Though she has not done so, the court having been satisfied that said expenses were incurred, and cannot ever hereafter be recovered, ought to reasonably determine what sum is to be awarded to the claimant as damages, in the circumstances.
- [65] This court accepts that the general principle of recoverability of special damages is that such damages and expenses, as a general rule, ought to be, specifically pleaded and specifically proven.
- [66] It is though, always open to a court, in considering the quantum to be given to a litigant as special damages, to find that notwithstanding a relevant expense has not been specifically pleaded, if there is sufficient allegation in the claim as a whole, which the court is satisfied that a litigant suffered that loss, the court may relax the overall principles of proof and make an award accordingly. See: **Jamalco (Clarendon Alumina Works) v Dennie (Lunette)** [2014] JMCA Civ 29, in that regard.
- [67] The evidence in this case reveals that the claimant was represented by counsel at the trial of the original claim, who this court notes, is the same counsel representing the claimant in this trial. This court will now, do its best, in trying to ascertain the fees which the claimant would have reasonably paid to her attorney, which she cannot hereafter recover.
- [68] As a guide, this court will rely on **Practice Direction 2 of 2018 on Assessment of Costs**. The trial of the claim being for three (3) days, yields the total number of hours as fifteen (15). That is 10 a.m. to 1 p.m. and 2 p.m. to 4 p.m., each day. The court will use the fee per hour, as \$15,000. This amounts to \$225,000, for the trial of the original claim. The expenses that were incurred leading up to this trial, will not have been wasted costs, since they will not have to be re-incurred,

once the retrial occurs. Those expenses can and will be expected to form part and parcel of the costs of the retried claim.

Costs of the present claim

[69] Part 64 of the Civil Procedure Rules which outlines the general rules concerning costs orders. **Rule 64.6 (3)** and **64.6 (4) (b) and (d)**, read as follows:

'(3) In deciding who should be liable to pay costs the court must have regard to all the circumstances.

(4) In particular it must have regard to –

a. ...

b. whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;

c..

d. whether it was reasonable for a party - (i) to pursue a particular allegation; and/or (ii) to raise a particular issue;'

[70] Since the claimant had not been entirely successful in proving this claim, she shall be awarded two- thirds (66 ^{2/3} %) of the costs of this claim.

CONCLUSION

[71] The claimant's right to a fair trial has been breached in respect of her original claim as the learned judge, King J, has retired and cannot hereafter, lawfully deliver that judgment. As a remedy for said breach, the claimant ought to obtain a declaration that her constitutional right has been breached and also an award of damages. The claimant has not discharged her legal burden in proving that a fair trial can no longer be guaranteed, in respect of her original claim and as such, she cannot receive that declaration as sought.

LAING J

[72] I have read the Judgment of my learned brother, Anderson J, which accurately reflects the agreed position of the court which was communicated orally to the parties on January 22, 2021. In the circumstances, I concur and I have nothing to usefully add.

NEMBARD J

[73] I too have read the draft Judgment of my learned brother, Anderson J. I agree that it accurately reflects the agreed position of the court which was communicated orally to the parties on 22 January 2021. I have nothing further to add.

ANDERSON, K. J

DISPOSITION

[74] In the circumstances, this court's orders are as follows:

1. It is declared that the claimant's constitutional right to a fair trial within a reasonable time, has been breached, in respect of Claim No. 2008 HCV 00513.
2. The claimant's said constitutional right has been breached in so far as the trial of that claim has not been and cannot be concluded within a reasonable time.
3. A retrial of Claim No. 2008 HCV 00513 shall be held expeditiously and the Registrar shall, along with the parties' counsel, use their best efforts to ensure that same occurs. Additionally, if any trial dates are vacated, in order to enable the retrial of this claim to be held on those vacated dates, it shall be the duty of the Registrar to bring those dates to the attention of the parties' counsel, with a view to scheduling the retrial of this claim.

4. The said retrial shall take place before a Judge alone, in open court, on two (2) days, commencing at 10 a.m. on each day.
5. A further case management conference with respect to Claim No. 2008 HCV 00513, shall be held before a Judge alone, in chambers, on February 19, 2021 commencing at 10 a.m. for one (1) hour.
6. If either party files any application for court orders, at least fourteen (14) clear days before that further case management conference hearing, is held then said application shall be listed for hearing, during that further case management conference hearing and said application shall be served, not less than seven (7) clear days, before that scheduled further case management conference hearing
7. The claimant is awarded damages in the sum of \$1,725,000.00
8. The claimant is awarded two-thirds (66 ²/₃%) of the costs of this claim and such costs shall be taxed, if not sooner agreed.
9. The claimant shall file and serve this order.

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Hon. K. Anderson, J.

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Hon. K. Laing, J.

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Hon. A. Nembhard, J.