

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVP2022/0014

BETWEEN:

THE ATTORNEY GENERAL

Appellant

and

JAMES ST. PRIX

Respondent

Before:

The Hon. Mde. Margaret Price-Findlay
The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Rochelle John-Charles with Ms. Antonia Charlemagne for the Appellant
Ms. Maureen John-Xavier for the Respondent

2024: March 13;
2025: February 28.

Interlocutory appeal – Appeal against the learned master’s refusal to strike out claim – Whether the learned master erred in the exercise of his discretion – Interpretation and application of Article 28 of the Code of Civil Procedure of Saint Lucia (“CCP”) – Failure to serve Article 28 notice (giving one month’s notice) on public officer before claim is issued – Whether the learned master erred in finding that an Article 28 Notice need only be served on the public officer if such public officer is named as a defendant to the claim – Whether the learned master erred in finding that the claim for vicarious liability against the Attorney General would survive where the Article 28 Notice is not served on the public officer who is not named as a defendant to the claim – Sections 4(4) and 13(2) of the Crown Proceedings Act (“CPA”) – Whether the learned master failed to have regard to the legal effect of section 13(2) and section 4(4) of the Crown Proceedings Act of Saint Lucia

In March of 2022, the respondent filed a claim for damages against the appellant pursuant to section 13(2) of the Crown Proceedings Act (“CPA”) alleging that while in police custody, a police officer/servant/agent of the Crown (“the public officer”) compelled him to unlawfully and wrongfully transfer ownership of his motor vehicle to the second named defendant in the court below, thereby causing him damage and loss (“the claim”). As a result, the respondent claimed the sum of \$47,850.00 in addition to a sum for aggravated and exemplary damages, interests and costs.

The public officer was not joined as a defendant to the claim in the court below and no relief was sought against her. The respondent served the appellant with a document entitled ‘Notice of Intended Prosecution’ (“Article 28 Notice”). However, the respondent did not serve the public officer with an Article 28 Notice as required under the the Code of Civil Procedure (“CCP”). Due to this failure, the appellant invoked section 4(4) of the CPA and filed an application to strike out the claim pursuant to Article 28 of the CCP (“the application”).

In a judgment dated 5th July 2022, the learned master identified that the central issue for determination was whether service of a notice of intended action on the police officer (the principal tortfeasor) is necessary (when she was not joined as a party to the claim) and, if so, whether service of the notice on the Attorney General (rather than the police officer), is sufficient for the purpose of Article 28 of the CCP. The master ultimately dismissed the application to strike out the claim.

Being dissatisfied with the learned master’s decision, the appellant filed a notice of appeal disputing several of the master’s findings on a multiplicity of grounds.

Held: dismissing the appeal, affirming the order of the learned master, ordering the appellant to pay the respondent’s costs to be assessed by a judge of the high court if not agreed within 21 days of this judgment that;

1. Article 28 lays down the procedure where suits are brought against a public officer, and it clearly imposes a bar against the institution of any judgment against a public officer or other person fulfilling any public duty or function. The object of the notice required under Article 28 of the CCP is to inform the public officer, or other person fulfilling any public duty or function (the actual tortfeasor) before-hand of the nature of the action contemplated and to give him an opportunity to consider his legal position. It clearly affords a privilege to a public officer against whom legal proceedings are actually contemplated. Where the officer is not intended to be joined as defendant, Article 28 is not engaged. Where a claimant has taken the strategic decision to not sue the public officer or other person fulfilling any public duty or function for damages, there is no need to afford him or her notice of legal proceedings in which he or she will not be joined as defendant and where no legal remedies are being pursued against him or her.

Article 28 of the **Code of Civil Procedure**, Cap 22.08 of the Revised Laws of Saint Lucia applied; **Bryan James et al v The Attorney General** SLUHCVP2013/0023, SLUHCVP2013/0024, SLUHCVP2014/0021 (delivered 10th February 2016,

unreported) applied; **Bihari Chowdhary & Anr v State of Bihar and Ors** 1984 AIR 1043 considered; **Bhagchand Dagadusha Gujarati and Ors. v Secretary of State for India** (1927) 43 TLR 617 considered.

2. The wording in Article 28 of the CCP is clear and it must therefore be given its plain and ordinary meaning. Given the legislative context and the wording of Article 28, it is clear that the drafters did not intend to impose a similar pre-action protocol in regard to the Crown or the State because at the time the CCP would have been promulgated, the legal landscape in regard to liability of the Crown would have been quite different, that is, the Crown was immune from liability.

Article 28 of the **Code of Civil Procedure**, Cap 22.08 of the Revised Laws of Saint Lucia applied; **Conseil des Ports Nationaux v Langelier** [1969] SCR 60 applied.

3. A claimant who sues the Crown for a tort committed by a public officer does not need to bring proceedings against the officer personally because the CPA makes clear that the Crown is subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject in respect of torts committed by its servants or agents. Initially, one needed to identify an individual Crown servant who had committed a tort in the course of their duties or employment. However, this is no longer the case. Recognising that it may be difficult or impossible to positively prove which one of several servants was tortious (what may be described as “collective failures”), the court have nevertheless found employers vicariously liable. While primary liability of the primary tortfeasor/servant must be made out, it is therefore not always possible or necessary to join the primary tortfeasor as a defendant in order to prove his primary liability or in order to establish vicarious liability of the Crown. It therefore follows that it will not always be possible or indeed necessary to serve notice of intended action on the public officer who is the primary tortfeasor.

Hogg, Monahan, and Wright- “**Liability of the Crown**” (Carswell 4th edn, 2011) applied; The **Crown Proceedings Act**, Cap 2.05 of the Revised Laws of Saint Lucia applied; **The Queen v Levy Brothers Company Limited and the Western Assurance Company** [1961] SCR 189 applied.

4. Procedurally, section 13 of the CPA makes clear that in a suit by or against the Crown, the authority to be named as claimant or defendant is the Attorney General. Section 13 does not prohibit or prevent suit being instituted personally against a public officer who is an alleged tortfeasor. Rather it simply codifies the position that the Crown may be vicariously liable for his actions.

Section 13 of the **Crown Proceedings Act** Cap 2.05 of the Revised Laws of Saint Lucia applied; **Basil Williams v The Attorney General of Guyana et al** [2023] CCJ 3 (AJ) GY applied; **Bryan James et al v The Attorney General** SLUHCVP2013/0023, SLUHCVP2013/0024, SLUHCVP2014/0021 (delivered 10th February 2016, unreported) applied; **Bertha Compton v Dr. Nathaniel et al** SLUHCVP2004/0012 (delivered 15th February 2005, unreported) applied; **General**

Aviation Services Ltd et al v The Director General of the Eastern Caribbean Civil Aviation Authority et al SLUHCVAP2012/006 (delivered 11th September, unreported) applied.

5. Section 4(4) of the CPA essentially states that any legal provision which limits the liability of a government department or Crown officer in relation to a tort will also apply to the Crown when being sued under this section. This means that the Crown is treated as if it were that specific department or officer, in terms of liability limitations for that particular tort. The scheme of Article 28 is procedural in its wording and intent. The framers of Article 28 intended to encourage parties to consider their legal position and make amends or settle if so advised. The object is the advancement of justice and the securing of public good by avoidance of unnecessary litigation. This characterization is not consistent with an enactment which negatives or limits the amount of the liability of an officer of the Crown in respect of any delict or quasi-delict which he or she may have committed. Article 28 protections are therefore not captured by section 4(4) of the CPA.

Article 28 of the **Code of Civil Procedure**, Cap 22:08 of the Revised Laws of Saint Lucia applied; Section 4 (4) of the **Crown Proceedings Act** Cap 2:05 of the Revised Laws of Saint Lucia applied;

Matthews v Ministry of Defence [2007] 3 All ER 513 applied; **Vallayan Chettier v Government of the Province of Madras** AIR 1947 PC 197 considered. **Bryan James et al v The Attorney General** SLUHCVAP2013/0023, SLUHCVAP2013/0024, SLUHCVAP2014/0021 (delivered 10th February 2016, unreported) considered. Section 4(4) of the **Crown Proceedings Act**, Cap 2:05 of the Revised Laws of Saint Lucia applied.

JUDGMENT

Introduction

- [1] **ELLIS JA:** This is an interlocutory appeal against the judgment of the learned master in which he dismissed an application filed by the Attorney General (“the appellant”) to strike out the respondent’s claim on the basis that the respondent failed to serve the notice pursuant to Article 28 (“Article 28 Notice”) of the **Code of Civil Procedure**¹ (“CCP”) on a servant of the Crown who was not joined as a party to the claim. The Article 28 Notice was however served on the Attorney General.

¹ Cap 24:3 of the Revised Laws of Saint Lucia.

Background

- [2] In March 2022, the respondent filed a claim for damages against the appellant pursuant to section 4 and section 13(2) of the **Crown Proceedings Act**² ("**CPA**") alleging that while in police custody, a police officer/servant/agent ("the police officer") of the Crown compelled him to unlawfully and wrongfully transfer ownership of his motor vehicle to the second-named defendant in the claim below, causing him damage and loss. The respondent claimed the sum of \$47,850.00 in addition to a sum for aggravated and exemplary damages, interests, and costs ("the claim").
- [3] The respondent admitted that the police officer was at all material times acting in the execution of her duties as a police officer. The police officer however was not joined as a defendant to the claim and no relief was sought against her.
- [4] The respondent served the appellant with a document entitled '*Notice of Intended Prosecution*'. The respondent did not serve the police officer with an Article 28 Notice as required by Article 28 of the **CCP**. Due to the respondent's failure to observe the mandatory statutory requirements, the appellant invoked section 4(4) of the **CPA** and filed an application to strike out the claim pursuant to Article 28 of the **CCP** ("the Application").

The Judgment in the Court Below

- [5] The Application came on for hearing before the learned Master on 13th June 2022. In a judgment dated 5th July 2022, the learned master ultimately dismissed the Application. Firstly, the master identified that the central issue for determination was whether service of a notice of intended action on the police officer (the principal tortfeasor) is necessary (when she was not joined as a party to the claim) and, if so, whether service of the notice on the Attorney General (rather than the police officer), is sufficient for the purpose of Article 28 of the **CCP**.

² Cap 2.05 of the Revised Laws of Saint Lucia.

[6] The master made a number of findings with which the appellant takes issue. At paragraph [4] of his submissions the appellant presents the following list:

- (i) That Article 28 of the **CCP** seeks to protect the public officer from personal liability and does not prevent judgment being rendered against the Attorney General in the event that no notice was served on the public officer [paragraph 12 of the judgment].
- (ii) That the literal meaning of Article 28 of the **CCP** contemplates a situation where the public officer is not a party to the claim, as in the case at bar. That the obligation to serve the notice personally on the public officer only arises if the public officer is named as a party to the claim [paragraphs 16, 17, and 24 of the judgment].
- (iii) That Article 28 of the **CCP** provides for a defence to the public officer and not the Crown and that section 4(4) of the **CPA** does not assist the Crown [paragraphs 23 and 26 of the judgment].
- (iv) That a failure to serve the public officer is not fatal where judgment is not sought against the public officer [paragraph 27 of the judgment].
- (v) That the appellant being the sole defendant in this claim, Article 28 of the CCP has no applicability whatsoever to this case [paragraph 29 of the judgment].

The learned master ultimately determined that the claim against the appellant could survive by virtue of the appellant/defendant being vicariously liable for the actions of its servants/agents.³

The Appeal

[7] Being dissatisfied with the master's judgment, the appellant filed a notice of appeal

³ SLUHCV2022/0128 (delivered 5th July 2022, unreported) at para 12.

on 26th July 2022, disputing several of the master's findings in law and/or of fact and citing the following five grounds of appeal:

- (i) The learned master erred when he concluded that Article 28 seeks to protect the officer from personal liability as the provision specifically refers to public officers being sued by reason of acts done in exercise of his or her functions. This is in direct contrast to the learned master's findings at paragraph [23] when he concluded that before a public officer can avail himself of an Article 28 defence, he must show he was fulfilling a public duty or function.
- (ii) The learned master erred in law when he misconstrued the legal effect of section 4(4) and 13(2) of the CPA which allows the Crown to rely on any provision which limits or negatives the liability of the public officer contained in any enactment.
- (iii) The learned master erred when he concluded that a notice pursuant to Article 28 must be served on the public officer personally only if that public officer is named as a party to the claim.
- (iv) The learned master erred when he concluded that in the circumstances where the public officer is not named in the proceedings then failure to serve an Article 28 Notice is not fatal to the claim.
- (v) Whether the learned master was correct at paragraph [29] of the judgment where his Lordship concluded that the appellant/defendant being the sole defendant in this case, rendered Article 28 of the CCP inapplicable.

The Parties' Submissions

The Appellant

- [8] First, the appellant submitted that the learned master fell into error when he failed to analyse or sufficiently analyse section 4(4) of the **CPA** as it correlates to Article 28 of the **CCP**. While the master found that the general effect of the provision of

section 4 (4) of the **CPA** operates to permit the Crown to take advantage of any benefit that the public officer would be entitled to under the **CCP**, as it relates to Article 28 he ultimately determined that this could not be so in the case of Article 28 as that Article only prevents the Court from rendering judgment against the public officer. He concluded that the protection in Article 28 does not apply in favour of the Crown and so section 4 of the **CPA** does not assist the Crown.

- [9] Counsel for the appellant submitted that the learned master failed to give any sufficient reason to explain why there would be any derogation from the general rule in section 4(4) of the **CPA** in the case of Article 28. He submitted that the master did not appreciate that the effect of the section would also prevent the Court from rendering judgment against the Crown.
- [10] According to the appellant, section 4 (4) of the **CPA** allows the Crown (the vicariously liable party), to raise any defence which an officer of the Crown could have raised to negative his or her liability had the proceedings been against the officer. Whereas Article 28 makes provision for a mandatory condition precedent to the institution of a claim for damages against a public officer namely, the service of the notice in writing in the terms stipulated.
- [11] Counsel argued that Article 28 of the **CCP** operates as a defence which negatives the liability of an officer of the Crown in respect of any delict or quasi-delict committed by that officer if a notice of suit, fulfilling the requirements of the Article, has not been served on him or her personally.
- [12] Counsel further submitted that when read together with section 13 (2) of the **CPA** which mandates that civil claims against the Crown must be instituted against the Attorney General, the conjoint effect of the sections requires that the appellant be the only named party in civil proceedings (section 13(2)). As the vicariously liable party (section 4(1) (a)), the appellant can rely (section 4(4)) on any enactment which the officer could have utilised to negative his or her liability had the proceedings

been brought against him or her (Article 28). Once the Crown relies on section 4(4), the enactment shall apply (section 4(4)). Counsel for the appellant therefore argued that had these proceedings been against the officer, invoking Article 28 as a defence would have resulted in a dismissal of the claim against the officer.

[13] Counsel for the appellant further submitted that notwithstanding that the police officer was not specifically joined as a defendant to the claim, (pursuant to the plain wording of Article 28 of the **CCP**, at least one month prior to the instituting of the claim) she ought to have been served personally or at her domicile with a notice in writing stating the respondent's name and address and specifying the grounds of the actions. In circumstances where this was not done, counsel submitted that (because Article 28 is a mandatory condition precedent to the bringing of a claim for damages against the police officer) the claim for damages cannot be maintained; neither can any judgment be rendered against the police officer.

[14] Applying the *ratio* in **Bryan James et al v The Attorney General ("Bryan James")**⁴ Counsel argued that Parliament's intention is to have Article 28 apply to the Crown as it would have applied to the officer and that the master was bound to follow that *ratio*. The claim should therefore have been dismissed against the appellant.

[15] Counsel for the appellant further submitted that the fact that service of the 'Notice' was effected on the Attorney General does not cure the problem given the clear terms of this Court's judgment in **Bryan James**. Accordingly, service on the Attorney General does not remove the requirement built into Article 28 by Parliament, neither does it cure the respondent's non-compliance with this mandatory Article. In as much as the Crown is the party who is responsible for the delicts or quasi-delicts committed by its servants or agents and the Attorney General is the party who the claim should be made against, the defence afforded by failure to serve the Article 28 Notice attaches to the public officer and extends to the Crown

⁴ SLUHCVP2013/0023, SLUHCVP2013/0024, SLUHCVP2014/0021 (delivered 10th February 2016, unreported).

by virtue of section 4(4) of the **CPA**.

- [16] According to the appellant it is of no moment that the respondent did not join the police officer as a defendant to the claim and does not seek judgment against her personally, because in drafting sections 4 and 13(2) the **CPA**, the drafters must have been mindful of Article 28 of the **CCP**. Counsel referenced paragraph [22] of the judgment in **Bryan James** where Pereira CJ (as she then was) noted:

"Furthermore, the drafters of the CPA itself were quite aware of the provisions of the CCP as specific reference was made to it in section 10 of the CPA to the effect that proceedings were to be 'instituted and proceeded with in accordance with the Code of Civil Procedure and not otherwise.'"

- [17] Counsel for the appellant argued that Parliament was therefore well aware that vicarious liability claims would now be brought against the Attorney General as the sole defendant. Noting that civil proceedings will no longer be against the public officer but intending to clothe the Crown (the vicarious liable party), with the protections that applied to the public officers, Parliament enacted section 4(4) of the **CPA**. The Crown was made liable for the acts of public officers, but Parliament also intended that the Crown be afforded the protection in any enactment that would have been given to the officers. Counsel for the appellant submitted that the interpretation that section 4(4) encompasses Article 28, supports the **Bryan James** position that the provisions operate harmoniously. There is therefore no tension between the provisions.

- [18] Counsel further submitted that there is no absurd result in the application of section 4(4) with Article 28. Even if a document purporting to be a notice of intended prosecution is served on the appellant/defendant, this does not prevent the Crown from relying on section 4(4), especially in circumstances where (i) it is clear that Parliament, in drafting the **CPA**, had regard to Article 28 of the **CCP** and intended for it to apply to section 4(4) and (ii) Parliament made it mandatory that the enactment shall apply to negative the Crown's liability. Once the enactment is invoked by the Crown, it is submitted that the Court has no discretion and jurisdiction

to go further and determine the claim but has to apply the enactment and its effect to the present proceedings.

[19] Counsel also noted that the master failed to give any reason or sufficient reason as to why section 4(4) would be extended to the Crown when the public officer is named in the claim as opposed to when he is not named in the claim. He argued that taken to its logical conclusion, if a claimant has brought a vicarious liability claim against the Crown and named the public officer as a party, then by virtue of section 13(2) of the **CPA**, the court, on its own motion or on an application, is entitled to/must strike out the public officer as a party to the claim. Therefore, the issue of the public officer being named as a party in a vicarious liability claim becomes redundant as it ought not to have been a factor at all. Counsel therefore submitted that the learned master fell into error in holding that section 4(4) does not apply.

[20] Counsel for the appellant contends that the effect of the learned master's ruling is to render Article 28 otiose which could not be the intention of Parliament. Parliament intended that the Article 28 Notice be served personally on the public officer despite the claim being commenced against the Crown. Parliament being alive to the fact that claims would no longer be brought personally against the public officer, if Parliament intended to remove the requirement to serve the same public officer prior to the commencement of the proceedings it would have simply done so. If Parliament intended for the Notice to be served on the appellant, Parliament would have said so.

[21] The appellant submitted that section 4(4) of the **CPA** is clear - the language used is plain and unambiguous and there is therefore no need for resorting to any rules of interpretation outside the natural and ordinary meaning of the words used.

[22] The appellant concluded that the appellate court is at large to interfere with the exercise of the learned master's decision as he took into account irrelevant factors and gave too little weight to relevant factors so that his decision is blatantly wrong.

He submitted that the Court should allow the appeal, set aside the decision of the master and exercise its own discretion to grant the application as sought by the appellant with costs of the appeal to the appellant.

The Respondent

- [23] In responding to this appeal, the respondent submitted that the failure to serve the police officer personally with the notice of intended action is not fatal to the claim because she was not sued and named a party to the claim. In support of this submission, the respondent focused on principles of statutory interpretation, advanced her arguments in the alternative: first, considering the literal interpretation of Article 28 and secondly applying a purposive construction.
- [24] In regard to the former, counsel for the respondent submitted that because no lawsuit has been instituted against the police officer (the primary tortfeasor), she is not a party to the proceedings. Therefore, the Attorney General cannot rely on section 4 (4) of the **CPA** as a defence to the claim by reason of non-service on the police officer.
- [25] Counsel further submitted that the position would have been different if the police officer was added as a party to the proceedings. In other words, if the respondent had instituted a lawsuit against the officer and the Attorney General was also added as a party to the claim, by reason of being vicariously liable, then the claim would have been fatal if the Article 28 Notice was not served on the police officer.
- [26] According to counsel for the respondent, this submission finds support in several judicial authorities including **Bryan James** where Pereira, CJ, made the following statement:
- “Article 28 Notice may be aptly described as nothing more than a pre-action protocol with an expressed and drastic sanction built in against a prospective Claimant who fails to comply. The Claimant loses his right to sue a public officer against whom he complains for damages. It is a built-in privilege afforded to the public officer and extended to the Crown by virtue

of section 4(4) of the CPA.”

[27] Counsel also referenced the judgment in **Bertha Compton v Dr. Christiana Nathaniel**⁵ in which the Court considered the issue whether an Article 28 Notice served on the Attorney General was defective. In that case, learned counsel for the Attorney General argued that Order 54 rule 3(2) is not applicable because the Notice of Intended Prosecution is not ‘... a document required to be served on the Crown for the purpose of or in connection with any civil proceedings. He premises this view that a Notice is a pre-litigation process and not a document in the proceedings. He contended that the Notice was served before civil proceedings commenced and cannot therefore be a document that was served for the purpose of or in connection with litigation that did not subsist at the time of service.’

[28] Rawlins J.A [AG] in **Bertha Compton** held that:

“the words “in connection with” mean associated with or related to. The Notice in this case was associated with or related to civil proceedings, notwithstanding that it has to be done before civil proceedings are instituted. It was required a necessary part of the proceedings. In the premises, therefore, the Notice of Intended Prosecution was regularly served pursuant to Order 54 Rule 3(2) of the 1970 Rules”.

[29] On the question of service, Rawlins J.A [AG] also noted that:

“It is noteworthy that Article 28 relates to public officers generally whilst Order 54 rule 3 spoke specifically to the method by which service was to be effected on the Attorney General in proceedings against the Crown. Article 28 does not speak about service upon the Attorney General. It speaks to service upon persons in the position of 1st and 2nd named defendants. Under the Article, if they are sued for anything done in the exercise of their functions, they must be given notice at least 1 month prior to the commencement of the action. The notice must be served on them personally, or at their domicile. Order 54 rule 3(2) provides for service on the Attorney General.”

[30] Applying the literal rule of statutory interpretation, Counsel submitted that Article 28

⁵ Saint Lucia High Court Civil Appeal No. 12 of 2004 (delivered 15th February 2005, unreported).

speaks to 'no public officer can be sued' and 'no judgment being rendered against him or her'. It does not refer to judgment against the Attorney General. It therefore does not prevent judgment being rendered against the Attorney General if no notice has been served on the public officer. Counsel therefore commended the learned master's reasoning at paragraph [20] and [21] of his judgment where he observed:

"The function of the court is to give effect to the laws passed by Parliament. This goes to the heart of the separation of powers. In my respectful view, if the literal interpretation is clear and unambiguous, there is no need to examine the intention of Parliament.

The ordinary and grammatical meaning of the words in Article 28 imposes a mandatory obligation on an intended Claimant to serve a notice of intended action on the public officer. The Code is clear if this is not done, no judgment may be rendered against the public officer. The obligation to serve this notice on the public officer in my view cannot be circumvented by service on the Attorney General in a situation where a public officer is a party. Where the public officer is a party, he/she must be personally served with the notice..."

[31] Counsel concluded that this is a case, which can be proceeded without the police officer being added as a party to the proceedings, as the appellant has conceded that the police officer was acting during the course of her employment.

[32] Turning to the alternative purposive interpretation, Counsel for the respondent cited the judgment in **Danny Allison George v The Attorney General of Saint Lucia et al**⁶, in which the court considered whether the failure of the respondent to serve the notice of intended claim on the police officer was fatal notwithstanding that the Attorney General had been served. Smith J in that case held that:

"For the purpose intended by Article 28 of the CCP, a claim does not fail if the notice is served upon the Attorney General instead of upon a public officer who it is alleged committed the wrongful act. This interpretation, in my view, and for the reasons outlined above, avoids an absurdity and injustice while at the same time achieving the ultimate ends for which the

⁶ SLUHCv2013/0634 (delivered 3rd April 2019, unreported).

article was intended”.

- [33] At paragraph [14], the learned Judge applied this Court’s judgment in **Bryan James** and noted that the question with which the Court of Appeal was concerned was whether Article 28 was applicable to the Attorney General, based on the provisions of the **CPA**, such that it was mandatory to serve notice of suit on the Attorney General. In **Bryan James**, the Chief Justice concluded that it had not been shown that the compliance with the plain terms of Article 28 created an absurdity or led to an unworkable consequence or placed it at odds with any provision in the **CPA**. She found that the provisions are not in conflict and are quite capable of operating harmoniously. However, the Chief Justice expressly reserved her judgment as to whether the result would be the same in circumstances where the Attorney General was the sole defendant served with notice, but not the public officer, noting:

“It may be arguable that where a Respondent serves only the Attorney General with an Article 28 Notice that the claim does not fail but I need not decide this point on this appeal, and I refrain from so doing.”

- [34] Smith J then considered and applied the Indian judgment in **Bihari Chowdhary & Anr v State of Bihar & Ors**⁷ in which the Supreme Court of India examined the rationale for section 80 of the **India Code of Civil Procedure** (the equivalent of article 28 of the CCP). Balakrishna J. provided the following helpful statement:

“When we examine the scheme of the Section it becomes obvious that the Section has been enacted as a measure of public policy with the object of ensuring that before a suit is instituted against the Government or a public officer, the Government or the officer concerned is afforded an opportunity to scrutinize the claim in respect of which the suit is proposed to be filed and if it be found to be a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person, who has issued the notice, to institute the suit involving considerable expenditure and delay. The Government, unlike private parties, is expected to consider the matter covered by the notice in a most objective manner, after obtaining such legal advice as they may think fit, and take a decision in public interest within the period of two months allowed by the Section as to whether the claim is just and reasonable and the contemplated suit should, therefore, be avoided by

⁷ 1984 AIR 1043.

speedy negotiations and settlement or whether the claim should be resisted by fighting out the suit if and when it is instituted. There is clearly a public purpose underlying the mandatory provision contained in the Section insisting on the issuance of a notice setting out the particulars of the proposed suit and giving two months' time to the Government or a public officer before a suit can be instituted against them. The object of the Section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation."

[35] At paragraph [23] of his judgment, Smith J concluded that:

"If the purpose of the Article 28 Notice is to give the ultimate responsible party (the state) time to assess a claim and possibly avoid unnecessary, costly litigation for the public good, it would lead to an absurdity if a claim fails for doing precisely that, namely, directly giving the Attorney General the required notice instead of the public officer for whom the state is vicariously liable. Beyond the absurd, it would lead to grave injustice if a claim were to fail because a Respondent does not serve notice upon the public officer but instead serves the Attorney General who the notice, in any event, is intended to benefit and facilitate."

[36] Counsel for the respondent concluded that the learned master's decision should be upheld and the appeal dismissed with costs.

The Appellant's Reply

[37] In reply, the appellant reiterated that whether or not the public officer is named in the claim, it does not change the fact that the claim would be a claim against the Crown in vicarious liability. Parliament has provided that any enactment that would have negated the public officer's liability had the claim been brought against him shall negative the Crown's liability in the present proceedings. Counsel cited in support the treatise of Sir Thomas Barnes found in the Canadian Bar Review⁸ in which he considered the equivalent section 4(4) of the **English Crown Proceedings Act 1947** and concluded that:

"It is obviously reasonable that, where Parliament has deliberately decided that servants of the Crown are entitled to certain protection in carrying out their duties, the Crown should enjoy the same protection in the case of proceedings in respect of the acts of those servants."

⁸ Vol. 26 No. 2 1948 CanLilDocs 102 – addressing section 2(4) of the Crown Proceedings Act 1947 (section 4(4) CPA).

- [38] According to counsel for the appellant, this protection is not extended only when the public officer is named in the suit. In fact this is more so in circumstances where the public officer ought not to be named because the proper party is the Attorney General and no one else.⁹ The appellant therefore submitted that since the public officer ought not to be named and Parliament has not repealed Article 28 upon the enactment of the **CPA**, it stands to reason that it was Parliament's deliberate intention for the protection to be attached to the Crown albeit the public officer is named or not, which is in any event, an irrelevant factor.
- [39] Counsel further submitted that the respondent's reliance on the judgment in **Bertha Compton** is misplaced as this was a judgment which considered an alleged defective Article 28 Notice so that ruling of the Court of Appeal must be considered in light of that context. He also critiqued the respondent's reliance on the judgment of Gill M in **Roydel Solomon v Shem Nanton and Another**¹⁰ on the basis that this judgment is flawed and does not address the import of section 4(4) together with the failure to serve the notice which is the issue before this Court.
- [40] The appellant further took issue with the respondent's reliance on the judgment of Smith J in **Danny Allison George**. Counsel for the appellant noted that this judgment was not followed by the master and that there has been no cross appeal against this finding. He submitted that this decision should not be adopted as correct law as the foundation is flawed. Counsel pointed out that while section 80 of the India Code of Civil Procedure is similar to Article 28 in the sense that it is a notice prior to the institution of a suit, it is materially different. Counsel noted that when the language of the statute is clear and unambiguous, it is the plain and unqualified duty of the Court to give effect to it, considerations of hardship will not be a legitimate ground for not faithfully implementing the mandate of the legislature.

⁹ Per Gordon JA in *W. Goodwin v Hon. Winston B Spencer and Hon Justin L. Simon* ANUHCVP2005/0025 (delivered 14th March 2007, unreported) at para 4.

¹⁰ SVGHCV2020/0052 (delivered 15th February 2022, unreported).

- [41] Counsel for the appellant concluded that the learned master having considered irrelevant factors in his decision, the Court of Appeal can intervene and give effect to the mandate of Parliament and hold that whether or not the police officer is named in the claim, if there has been a failure to serve the Article 28 Notice on the police officer, the claim cannot proceed as against the Crown having regard to the effect of section 4(4) of the **CPA**.

Analysis and Conclusion

In this appeal, the question to be determined is whether the learned master erred in law when he determined that the respondent's claim against the Attorney General did not fail as a result of the respondent's failure to serve the police officer with an Article 28 Notice. This requires a staged analysis of several relevant statutory provisions. I do not think that this question should be answered by examining these provisions in isolation, without regard to the overall context in which they were enacted.

The Code of Civil Procedure

- [42] The Saint Lucia Code of Civil Procedure has some significant vintage. When it came into force in 1882, it included Article 28 in its present-day formulation. This article lays down the procedure where suits are brought against a public officer and provides that:

"No public officer, or other person fulfilling any public duty or function, can be sued for damages by reason of any act done by him or her in the exercise of his or her functions, nor can any judgment be rendered against him or her, unless notice of such suit has been given to him or her at least one month before the issuing of the writ of summons.

Such notice must be in writing, it must specify the grounds of the action, must be served upon him or her personally, or at his or her domicile, and must state the name and residence of the plaintiff."

- [43] The effect of this provision is clearly to impose a bar against the institution of a suit in damages or the entry of any judgment against a public officer or other person fulfilling any public duty or function in respect of any act purported to be done by

him in his official capacity until written notice of such suit has been served on him or her personally at his domicile at least one month before the suit is issued.

[44] Article 28 has been the subject of judicial consideration in a number of judgments. As far back as 1902, the Saint Lucia Gazette recorded the judgment in **Evelyn v Gray et al**¹¹ in which the Saint Lucia Royal Court considered an appeal against the decision of the magistrate of the District Court in which he non-suited the plaintiff/appellant on the ground that he had not complied with the requirements of Article 28 of the **CCP**. The Court held that while the court below properly declined to entertain the claim for damages against the respondent, in the absence of notice required to be given under Article 28 of the **CCP**, the magistrate should have taken evidence and come to a decision with respect to money paid by the appellant under protest. The magistrate's decision would be confirmed but the case must be returned to the district court so that evidence could be received, and the court adjudicates on the point.

[45] It is beyond controversy that Article 28 of the **CCP** mandates what is typically referred to as a pre-action notice. This is a statutory provision which requires notice of intended action to be first served on an intended defendant by an aggrieved party before such aggrieved party may seek to pursue legal redress. Such notice of action is usually required to disclose the cause of action, the relief or reliefs sought and the name and abode of the aggrieved party.

[46] The most recent authoritative pronouncements are found in this Court's judgment in **Bryan James**. In that case, the critical issue concerned the interpretation and application of Article 28. In that judgment, Pereira CJ (as she then was) observed that:

“[23] The Article 28 Notice may be aptly described as nothing more than a pre-action protocol with an expressed and drastic sanction built in against a prospective claimant who fails to comply. The claimant loses his right to sue the public officer against whom he complains for damages.”

¹¹ (1902), Saint Lucia Gazette, 850.

[47] Therefore, where it is required, this notice constitutes a condition precedent for institution of legal proceedings; any action brought without the notice would be precipitate and invalid. The notice operates to delay the exercise of an accrued right of action until the notice is given in the manner prescribed. It effectively limits the individual right to access courts and the justification for this has also been judicially pronounced at the highest level.¹²

[48] In **Bryan James**, the learned Chief Justice explained that while the Article 28 Notice does not commence proceedings, it '*gives notice to the public officer or government department concerned of an intention to commence proceedings. It may be described as nothing more than a pre-action protocol with an expressed and drastic sanction built in against a prospective claimant who fails to comply.*'

[49] This description dovetails with the reasoning of the Supreme Court of India in **Bihari Chowdhary** where, in considering the import of the pre-action notice prescribed under section 80 of the India Code of Civil Procedure, that Court observed:

“...it becomes obvious that the Section has been **enacted as a measure of public policy with the object of ensuring that before a suit is instituted against the Government or a public officer, the Government or the officer concerned is afforded an opportunity to scrutinise the claim in respect of which the suit is proposed to be filed and if it be found to be a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person, who has issued the notice, to institute the suit involving considerable expenditure and delay.** The Government, unlike private parties, is expected to consider the matter covered by the notice in a most objective manner, after obtaining such legal advice as they may think fit, and take a decision in public interest within the period of two months allowed by the Section as to whether the claim is just and reasonable and the contemplated suit should, therefore, be avoided by speedy negotiations and settlement or whether the claim should be resisted by fighting out the suit if and when it is instituted. There is clearly a public

¹² Bhagchand Dagadusa and ors. v. Secretary of State for India in Council & Ors. (1927) 43 TLR 617; see also Bihari Chowdhary & Anr vs State of Bihar & Ors. 1984 AIR 1043.

purpose underlying the mandatory provision contained in the Section insisting on the issuance of a notice setting out the particulars of the proposed suit and giving two months' time to the Government or a public officer before a suit can be instituted against them. **The object of the Section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation.**" Emphasis added

- [50] I completely agree with that summation, and I am satisfied that the guidance also applies in the case of Article 28 of the **CCP**. This article is explicit and mandatory in its terms. The object of the notice required by this article is to inform the public officer, or other person fulfilling any public duty or function (the actual tortfeasor) before-hand of the nature of the action contemplated and to give him an opportunity to consider his legal position and decide whether to contest it or to compromise and make amends and settle the claim, if so advised, without litigation or afford restitution without recourse to a court of law. They are expected to advise the claimant of their position within the statutory period or, in any case before the claimant attempts to commence legal proceedings. If the provisions of the section are not complied with, the claim must be rejected, struck out and dismissed.
- [51] I therefore find no merit in the appellant's submission that service of the Article 28 Notice on the public officer is a prerequisite regardless of whether the claimant intends to sue the officer in damages or regardless of whether the claimant intends to seek to enter judgment against such officer. It clearly affords a privilege to a public officer against whom legal proceedings are actually contemplated. Where the officer is not intended to be joined as defendant, the Article is not engaged
- .
- [52] A claimant who sues the Crown for a tort committed by a public officer does not need to bring proceedings against the officer personally because the **CPA** makes clear that proceedings against the Crown for a tort committed by a Crown servant are subject to the same liability rules that would apply to the servant as if the proceedings were against the servant.

[53] The learned authors of the seminal text **Liability of the Crown**¹³ have reiterated this position where they state that: “a plaintiff who sues the Crown for the tort of a Crown servant need not bring proceedings against the servant personally (although sometimes the plaintiff will see advantages in adding the individual servant as a defendant)”.¹⁴ The learned authors noted that some of the advantages (of suing the crown servant or officer) include instances where there may be some doubt as to whether the individual wrongdoer was a servant or was at the time acting in the course of employment. Additionally, joining the individual alleged tortfeasor, could guarantee that he or she could be made to attend the trial for cross examination or for discovery.

[54] In these premises, and on a plain reading of the text of Article 28 and given its obvious object and purpose, it would be wholly illogical for a claimant to be compelled to give notice of a suit to an individual who he does not wish or intend to sue. I am therefore unable to conclude that the learned master erred when he concluded:

“...I hold that there was an obligation on the Claimant to serve a notice of intended action on Sgt. Ferdinand pursuant to Article 28 if she was named as a party to this claim. Sgt. Ferdinand being the tortfeasor and the public officer in respect of whose conduct this claim is brought not being served with such a notice is not fatal in my view in circumstances where she is not named as a Defendant on a literal interpretation of Article 28.”

[55] The wording in Article 28 is clear and must therefore be given its plain ordinary meaning. Article 28 is clearly made for the benefit of the party namely - the public officer, or other person fulfilling any public duty or function. Unlike the case in many other jurisdictions, the **CCP** does not impose a similar obligation on a claimant to give notice of intended action to the Crown (the State). This is certainly the case in India where section 80 of the India Code of Civil Procedure 1908 provides:

“80. Notice

(1) Save as otherwise provided in sub-section (2), **no suits shall be instituted against the Government (including the Government of the**

¹³ Hogg, Monahan, and Wright - Liability of the Crown 4th ed (Toronto: Carswell, 2011) at page 176.

State of Jammu and Kashmir) or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of—

(a) in the case of a suit against the Central Government, [except where it relates to a railway] a Secretary to that Government;

(b) in the case of a suit against the Central Government where it relates to railway, the General Manager of that railway;

(b(b)) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorized by that Government in this behalf;

(c) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the district;

and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and shall contain a statement that such notice has been so delivered or left.”
Emphasis added

[56] Given the clear wording of Article 28, it is clear that the drafters did not intend to impose a similar pre-action protocol in regard to the Crown or the State. This is perhaps not surprising because at the time the **CCP** would have been promulgated, the legal landscape in regard to liability of the Crown would have been quite different.¹⁵

[57] In his treatise **Case de Non Procendendo Rege Inconsulto**¹⁶ Francis Bacon would have described the common law as having woven “a garland of prerogatives” around lawsuits involving the Crown. One critical example was that the King could not be sued in the royal courts. It was however accepted that the Crown had a moral obligation to correct wrongs done to its subjects, just as those subjects were obliged

¹⁵ Article 28 became the law in Saint Lucia in 1882 when the CCP was given force of law.

¹⁶ Francis Bacon, “*Case de Non Procendendo Rege Inconsulto*” in James Spedding, Robert Leslie Ellis & Douglas Denon Heath, eds, *The Works of Francis Bacon* (London, UK: Longman, 1859) vol 7 681 (“what a garland of prerogatives doth the law put upon them” at 693).

to correct wrongs they did to each other. A complex system was therefore developed by which the plaintiff would first submit a petition of right, seeking redress for their grievance. If the monarch consented to its adjudication by endorsing the petition with the words *fiat justitia* (let justice be done), then the claim could be adjudicated in court. This procedure however a critical limitation - it could not be used to seek remedies in tort. Given that there was no other procedural vehicle to bring a tort claim against the Crown; the practical result was that, at common law, the Crown was immune from claims in tort.

[58] Since the Crown could not commit a tort and nor could it be held vicariously liable for the torts of its servants based on the fiction that the wrong of the servant was the wrong of the master. The flip side to this was that Crown servants could not justify their tortious actions by arguing that they had been ordered so to act by the Crown: “[F]rom the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong.” It follows that while the Crown was immune from tort liability, Crown servants — government officials — were not.¹⁷

[59] In **Conseil des Ports Nationaux v Langelier**, the Supreme Court of Canada in 1968 summarized the common law in four propositions:

“First is the proposition that the Crown itself could not be sued in tort.

Second is the proposition that Crown assets could not be reached, indirectly, by suing in tort, a department of government, or an official of the Crown. ...

Third is the proposition that a servant of the Crown cannot be made liable vicariously for a tort committed by a subordinate. The subordinate is not his servant but is, like himself, a servant of the Crown which, itself, cannot be made liable.

Fourth is the proposition that a servant of the Crown, who commits a wrong,

¹⁷*Ibid.*

is personally liable to the person injured.”¹⁸

[60] It is in this context that Article 28 must be considered and interpreted. At the time of promulgation, it would have been out of the question for the Crown to have been joined as a defendant to any claim. Only the crown servant or public officer would have been sued and therefore it would only have been necessary for him or her to be served with the requisite notice.

[61] Of course, tort liability of public officials could never be a complete substitute for Crown liability and so in 1947, the United Kingdom embarked on major reforms to Crown liability which resulted in **Crown Proceedings Act 1947**. This Act was replicated in Saint Lucia in 1956 and subjected the Crown to liability in tort, abolishing the requirement of a royal fiat and eventually eliminated the need to file a petition of right. Section 4 of that Act provides that:

“4. - (1) Subject to the provisions of this Act, the crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject –

(a) in respect of torts committed by its servants or agents;

(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and

(c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property:

Provided that no proceedings shall lie against the crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate.

(2) Where the crown is bound by a statutory duty which is binding also upon persons other than the crown and its officers, then, subject to the provisions

¹⁸[1969] SCR 60 at para 71-72. This position was also replicated in England, see *Feather v The Queen* (1865) 122 ER 1191; *Entick v Carrington* [1976] EWHC KB J98; and *Phillips v Eyre* (1869) LR 4 QB 225.

of this Act, the crown shall, in respect of a failure to comply with that duty, by subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity.

(3) Where any functions are conferred or imposed upon an officer of the crown as such either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the crown.

(4) Any enactment which negatives or limits the amount of the liability of any government department, or officer of the crown in respect of any tort committed by that department or officer shall, in the case of proceedings against the crown under this section in respect of a tort committed by that department or officer, apply in relation to that department or officer if the proceedings against the crown had been proceedings against that department or officer.

(5) No proceedings shall lie against the crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which lie has in connection with the execution of judicial process.

(6) No proceedings shall lie against the crown by virtue of this section in respect of any, neglect or default of any officer of the crown, unless that officer has been directly or indirectly appointed by the crown and was at the material time paid in respect of his duties as an officer of the crown wholly out of the revenue of The Bahamas or was at the material time holding an office in respect of which the minister for the time being responsible for finance certifies that the holder thereof would normally be so paid.”

[62] The proviso to section 4(1) of the **CPA** shows that under that act no right of action exists against the Crown in tort unless the act or omission would, apart from the provisions of the Act, give rise to a cause of action in tort against that servant or agent or his estate in respect of whom it is alleged that vicarious liability arises against the Crown.

[63] Procedurally, section 13 of the **CPA** makes clear that in a suit by or against the Crown, the authority to be named as claimant or defendant is the Attorney General. These provisions remain in force today and there are two important factors which must be noted. The first is that section 13 does not prohibit or prevent suit being instituted personally against a public officer who is an alleged principal tortfeasor. Rather, it simply codifies the position that the Crown may be vicariously liable for his actions. This position has been made clear by the Caribbean Court of Justice (CCJ) in the judgment in **Basil Williams v Attorney General of Guyana et al.**¹⁹

[64] In that case, the CCJ had to consider whether the FNR (a public office holder at the material time) could be sued personally for torts allegedly committed by him. The CCJ noted that the Guyana State Liability Act was modelled after the United Kingdom's Crown Proceedings Act 1947 (the "UK Act"). Section 2 of the UK Act and section 3 of the State Liability Act both impose liability on the Crown in cases where torts are committed by the agents or servants of the Crown, or State as the case may be, in the course of the execution of their duties. The CCJ found that there was nothing in the State Liability Act or any authority that removed the right of an injured party to sue the person who committed the tort for acts or omissions in the performance of their duties as an agent or servant of the State

[65] At paragraphs [15] – [18] of the judgment, Saunders, PCCJ explained:

"In the United Kingdom, prior to the passage of the UK Act, a person injured by the tortious act or omission of Crown servant had to sue the particular Crown servant and was unable to sue the Crown. The informal practice was that in 'a proper case' the Crown would 'stand behind' and defend its servant and pay any damages awarded. This practice was not without its problems. Difficulties arose where it was not possible to identify the allegedly errant Crown servant or where a Crown servant was artificially nominated to be sued. To address these challenges, the UK Act was enacted to make the Crown vicariously liable in tort for the acts of their servants and agents. Section 2 of the UK Act is similar to s 3 of the Act. Both sections impose liability on the Crown (the State in the case of republican Guyana) in cases where torts are committed by the agents or servants of the Crown, or State as the case may be, in the course of the

¹⁹ [2023] CCJ 3 (AJ) GY.

execution of their duties. Claimants in such cases are therefore assured that there is a solvent party against whom any damages awarded might be enforced.

The *Law of Tort* explains the doctrine and application of vicarious liability in this way:

The essence of vicarious liability is that it is imposed on the employer without the need for fault on the employer's part – the employer is strictly liable as long as the elements needed for vicarious liability are present. *Vicarious liability does not, however, replace the defaulting employee's primary liability for his own tort, so that the employer and the employee are jointly and severally liable for the employee's tort.* In theory, the employer (and, by subrogation, his indemnity insurer) may claim an indemnity from the employee for any damages paid, on the basis of an implied term in the employment contract that the employee will take reasonable care when performing his duties or as joint tortfeasors ... (emphasis added).

Similarly, Hogg, Monahan, and Wright explain that 'a plaintiff who sues the Crown for the tort of a Crown servant need not bring proceedings against the servant personally (although sometimes the plaintiff will see advantages in adding the individual servant as a defendant)'. Some of the advantages noted include instances where there may be some doubt as to whether the individual wrongdoer was a servant or was at the time acting in the course of employment. Additionally, joining the individual alleged tortfeasor, could guarantee that he or she could be made to attend the trial for cross examination or for discovery.

In *M v Home Office*, Woolf LJ reiterated the continuing liability of the actual wrongdoer. He stated at 410:

"Section 1 [of the UK Act] enabled the Crown to be sued directly in those situations where prior to the Act a claim might have been enforced by petition of right. Section 2 in general permitted actions to be brought against the Crown in respect of torts committed by its servants or agents for any breach of its duties which gave rise to a tortious liability (including a breach of statutory duty where the breach created a cause of action)." *Section 2 did not remove the right to sue the actual tortfeasor.* (emphasis mine).

[66] At paragraph 19, Saunders PCCJ concluded:

"In light of these and other authorities, the Court is of the view that nothing in the Act prevents an alleged wrongdoer employed by the State from being sued in their personal capacity for acts or omissions in the performance of

their duties as agent or servant of the State.”

- [67] This latter observation becomes relevant because the Counsel for the appellant contends that when read together with section 13 (2) of the **CPA** which mandates that civil claims against the Crown must be instituted against the Attorney General, the conjoint effect of the sections requires that the appellant be the only named party in civil proceedings (section 13(2)). The submission however is not consistent with what is now binding judicial precedent and must be rejected.
- [68] It follows that it was open to the respondent to also sue the police officer personally. For some reason, in this case he has chosen not to do so. It further follows that if she was joined as a defendant then notice or intended action or pre-action notice would have to be served in accordance with Article 28.
- [69] Although other jurisdictions would have taken the necessary steps to adjust the procedural provisions to ensure consistency with the new liability regime, Saint Lucia did not. No consequential amendments were made to the **CCP** mandating that in a suit against the Crown that the Attorney General should be also served with an Article 28 Notice. This is somewhat unfortunate because this oversight has spawned repeated applications resulting in a myriad of judgments at all levels of the court system. Where litigation engages the Crown and its servants or agents, the pre action notice or protocol is a commendable tool which is aimed at encouraging the early exchange of information between parties involved in a potential legal dispute, enabling them to try and resolve the issue through negotiation and settlement before initiating formal court proceedings, thereby reducing costs and streamlining the litigation process. In light of this, it my view that Parliament should make the necessary legislative changes to put this matter beyond doubt.
- [70] The Court in **Bryan James** confirms this continuing problem. At paragraph [1] of the Held, the Court applied the judgments in **Bertha Compton** as well as **General Aviation Services Ltd et al v The Director General of the Eastern Caribbean**

Civil Aviation Authority et al²⁰ and confirmed that:

“The language of article 28 of the CCP is clear and thus says what it means without the necessity for resorting to any rules of interpretation outside the natural and ordinary meaning of the words used. In order to bring a suit against a public officer for damages, a claimant must serve notice of the intended suit on the public officer personally or at his domicile. While it would be prudent for a claimant to also effect service of an Article 28 Notice on the Attorney General, article 28 itself does not speak to service upon the Attorney General. It does not say in terms that notice must be served on the Attorney General nor is any reference whatsoever made therein to the Attorney General. There is therefore no requirement expressed or to be implied for service of an Article 28 Notice on the Attorney General in order to maintain a claim for damages against the Crown in respect of a delict or quasi-delict committed by a public officer or other servant or agent of the Crown. A claim does not fail where a claimant has served the public officer but has failed to similarly serve the Attorney General.”

[71] The appellant however contended that the position is not that simple. He asserted that whether the potential claimant intends to seek judgment against the public officer personally and has joined him or her as a defendant is irrelevant. Where the claim is one in which a claimant contends that the Crown is vicariously liable for the tortious act of its servants or agents (public officers) acting in the exercise of his or her official functions, then the liability of that servant or agent must be established whether he is sued or not and he must be served with notice of the intended action.

[72] With regard to the first submission, it is accepted that in order to prove vicarious liability, the claimant must first prove the commission of a tort by a servant. Denning LJ explained the position in the following terms:

“... to make a master liable for the conduct of his servant, the first question is to see whether the servant is liable. If the answer is “yes”, the second question is to see whether the employer must shoulder the servant’s liability.”²¹

Vicarious liability of the employer therefore arises only on the primary liability of the servant.

²⁰ SLUHCVP2012/006 (delivered 11th September 2012, unreported).

²¹ *Young v Box and Co Ltd* [1951] 1 TLR 789 at page 793.

[73] Initially, one needed to identify an individual Crown servant who had committed a tort in the course of their duties or employment. However, this is no longer the case. Recognizing that it may be difficult or impossible to positively prove which one of several servants was tortious (what may be described as “collective failures”), courts have nevertheless found employers vicariously liable.²² When it comes to the Crown, the judgment of the Canadian Supreme Court in **The Queen v. Levy Brothers Company Limited and The Western Assurance Company**²³ is instructive. In that case, a parcel of diamonds was lost while in the possession of the post office. No particular employee could be identified who had committed a tort and yet the Crown was held liable on the basis that some unidentified employee must have misappropriated the diamonds.

[74] While primary liability of the primary tortfeasor/servant must be made out, it is therefore not always possible or necessary to join the primary tortfeasor as a defendant in order to prove his primary liability or in order to establish vicarious liability of the Crown. It also follows that it will not always be possible or indeed necessary to serve notice of intended action on the primary tortfeasor/servant.

[75] I therefore do not accept Counsel for the appellant’s submission. I reiterate that if there is no contemplated suit in damages against the public officer or other person fulfilling any public duty or function then Article 28 has no application. Put simply, where a claimant has taken the strategic decision not to sue the public officer or other person fulfilling any public duty or function for damages, there is no need to afford him or her notice of legal proceedings in which he or she will not be joined as a defendant and where no legal remedies are being pursued against him or her.

The import of section 4 (4) of the Crown Proceedings Act

[76] The appellant further submitted that as the vicariously liable party, the appellant can

²² Cassidy v Ministry of Health [1951] 1 All ER 575.

²³ [1961] SCR 189, see also Swinamer v. Nova Scotia (Attorney General) [1994] 1 SCR 445.

rely on any enactment which the officer could have utilised to negative or limit his or her liability had the proceedings been brought against him or her. In that regard, the appellant relies on section 4 (4) of the **CPA** which provides that:

“Any enactment which negatives or limits the amount of the liability of any Government department or officer of the Crown in respect of any delict or quasi-delict committed by that department or officer shall, in the case of proceedings against the Crown under this section in respect of a delict or quasi-delict committed by that department or officer, apply in relation to the Crown as it would have applied in relation to that department or officer if the proceedings against the Crown had been proceedings against that department or officers.”

[77] In Ground 4.2 of the notice of appeal the appellant contends that the master erred in law when he misconstrued the legal effect of sections 4 (4) and 13 (2) which entitled the Crown to rely on any provision which limits or negatives the liability of the public officer contained in any enactment. Counsel prays in aid the judgment of this Court in **Bryan James**, in which the learned Chief Justice observed that Article 28 “...is a built in privilege afforded to the public officer and extended to the Crown by virtue of section 4(4) of the CPA.”

[78] At paragraph [20] of that judgment, she further observed that:

“While it cannot be disputed that the Crown may take the benefit of an exemption or limitation of liability provided under article 28 of the CCP or indeed any enactment which negatives or limits the liability of a government department or public officer, as may be invoked pursuant to section 4(4) of the CPA it does not, in my view, follow that a requirement to serve an Article 28 Notice on a public officer or government department translates, without more, to a requirement to serve the Article 28 Notice on the Attorney General if a claimant is to avoid his claim being defeated.”

[79] The learned master’s reasoning is set out at paragraph [26] where he states:

“Counsel for the Crown also submitted that the effect of the provision of Section 4 of the Crown Proceedings Act operates to permit the Crown to take advantage of any benefit that the public officer would be entitled to under the Code. Whilst I agree that this is the general position, I do not agree that this is so in the case of Article 28. If that position were to be correct, then the Crown ought to be able to avail itself of the defence provided. This in my view cannot be the position where Article 28 only prevents the Court from rendering judgment against the public officer. The

protection in Article 28 does not apply in favour of the Crown. In my view, Section 4 of the Crown Proceedings Act does not assist the Crown.”

- [80] The critical issue which arises is whether the appellant can take the benefit afforded to a public officer by Article 28 on the basis that it has been extended to the Crown by virtue of section 4 (4) of the **CPA**. Subsection 4 (4) essentially states that any legal provision which limits the liability of a government department or Crown officer in relation to a tort will also apply to the Crown when being sued under this section. This means that the Crown is treated as if it were that specific department or officer in terms of liability limitations for that particular tort.
- [81] This is not unreasonable as it effectively makes the Crown subject to the same restrictions as its individual officers or departments would be under similar circumstances. This section ensures that the Crown cannot be held liable beyond the limits imposed on individual government departments or officers when a tort is committed. So that if a specific law restricts the liability of a government department or officer in a particular type of tort case, that same limitation will apply when suing the Crown for that tort.
- [82] In my view it is reasonable that, where Parliament has deliberately decided that servants of the Crown are entitled to certain protection in carrying out their duties, that the Crown should enjoy the same protection in the case of proceedings in respect of the acts of those servants. In the United Kingdom, examples of such provisions will be found in section 23(4) of the **Post Office Act, 1908** which provides that *‘No action or other legal proceeding shall be instituted against the Postmaster-General or any officer of the Post Office, or any person whomsoever, in respect of any compliance with the said regulations, or otherwise in relation thereto, or in respect of the payment of any such money orders being refused or delayed by or on account of any accidental neglect, omission, or mistake, by or on the part of any officer of the Post Office, or for any other cause whatsoever, without fraud or wilful misbehaviour on the part of any such officer of the Post Office’*. In Saint Lucia a somewhat equivalent provision is found in section 7 of the **Saint Lucia Land**

Registration Act (“Land Registration Act”)²⁴ which provides that:

“The Registrar shall not, nor shall any other officer of the Registry, be liable to any action or proceeding for or in respect of any act or matter done or omitted to be done in good faith in the exercise or supposed exercise of the powers under this Act, or any regulations made thereunder.”

[83] These statutes provide a clear and unequivocal example of Parliament negating or limiting liability in respect of the actions taken by crown servants in the course of their duties.

[84] Counsel for the appellant submitted that Article 28 falls within the category of enactments “...which negatives or limits the amount of the liability of any Government department or officer of the Crown in respect of any delict or quasi-delict committed by that department or officer...” I am unable to concur with that submission. In my view the answer lies in the clear wording of the provision and its object and purpose. Article 28 lays down the procedure where suits are brought against public officers. The provision clearly affords protection to public officers, however, as the Board (considering section 80 of the India Code of Civil Procedure) in **Bhagchand Dagadusha Gujarati and Ors. v Secretary of State for India**²⁵ made clear, ‘*this protection takes the form of providing a fixed and obligatory interval of two months between the required notice and the commencement of any suit....*’

[85] The court in **Bhagchand Dagadusha Gujarati and Ors. vs Secretary of State for India** is just one of many which has pronounced on the consequences of failure to serve a pre-action notice when it is a mandated condition precedent for the commencement of a suit.²⁶ The Judicial Committee in that case described the consequence in the following terms:

“The consequence is that the appellants’ present position in regard to the taxes imposed on them is as if their action had never been brought. It is unsustainable in *limine*. They commenced their suit before the law allowed them to sue, and can get no relief in it either by declaration or

²⁴ Cap 5.01 of the Revised Laws of Saint Lucia.

²⁵ (1927) 43 TLR 617.

²⁶ Ibid at page 114 applied in *Cumberbatch v Weber* (1965) 9 WIR.

otherwise....They have taken their own course and have brought this result on themselves.”

- [86] The Article absolutely bars a court from entering judgment against a public officer or indeed entertaining a suit which has been instituted without compliance with its provisions. If the subject matter is within the jurisdiction of the court, failure on the part of the claimant to serve a pre-action notice on the defendant gives the defendant a private right solely for his benefit to insist on such notice before the claimant may approach the court. Non-service of pre-action notice (where it is required), renders the action premature, it does not eliminate the right of a claimant to approach the court for redress rather it merely puts the jurisdiction of a court on hold pending compliance.
- [87] In my judgment the provision provides for the procedure only, it does not negative or limit rights and liabilities in the way that these sections 7 of the **CPA** and the **Land Registration Act** do. In arriving at this conclusion, I am aware that it departs from what I consider to be the observation made *obiter* in **Bryan James**²⁷. However, I derive support for this conclusion from the House of Lords dictum in **Matthews v Ministry of Defence**.²⁸ That case was a landmark decision which addressed the compatibility of the Crown Proceedings Act 1947 with Article 6 of the European Convention on Human Rights (ECHR), which guarantees the right to a fair trial.
- [88] The appellant in that case sought to claim damages for personal injury suffered during his service in the Royal Navy due to asbestos exposure. However, section 10 of the Crown Proceedings Act 1947 rendered the Crown (the Ministry of Defence in this case) immune from liability in tort under specific circumstances. The core legal question was whether this immunity constituted a violation of the right to a fair trial under Article 6. The House of Lords unanimously dismissed Mr. Matthews' appeal, holding that section 10 of the Crown Proceedings Act 1947 constituted

²⁷ SLUHCVP2013/0023, SLUHCVP2013/0024, SLUHCVP2014/0021 (delivered 10th February 2016, unreported) at paras 20 and 23.

²⁸ [2002] 3 All ER 513.

a *substantive limitation* on the right to sue the Crown in tort rather than a purely procedural bar. Consequently, this limitation did not infringe Article 6 of the ECHR. Their Lordships reasoned that the immunity provisions were part of the substantive law governing Crown liability and were not arbitrary or disproportionate restrictions on access to the courts. The decision carefully considered the nature of section 10 (section 8 of the **CPA**) determining it to be a substantive limitation.

[89] The House of Lords underscored the distinction between a (1) substantive limitation which refers to rules that alter the fundamental legal rights or liabilities²⁹ and (2) procedural bars which involve rules that affect the process of litigation without changing the underlying rights. The latter may limit how a claim is filed or require certain steps before proceeding, but it doesn't nullify the right to sue itself.

[90] At paragraphs [35] – [36] of the judgment, the Court observed that:

“Some statutory rules and regulations are clearly designed to regulate court procedure.....Other statutory rules, which may preclude a successful claim for infringement of a civil right, do so because they delimit the rights and liabilities that arise under civil law. They are not procedural rules, but rules of substantive law.”

[91] After considering the judgment in **Ketterick v UK**³⁰ the House of Lords went on to hold:

“It seems to us that the Commission ruled the complaint inadmissible because the effect of s 10 and the issue of the certificate was to alter the applicant's substantive legal rights, rather than to pose an impediment to his access to the courts to enforce those rights.”

[92] I further find support from the fact that in any given case, it is open to the public officer for whose benefit the provision has been made to waive the compliance with the statutory requirements. The view is reiterated in a passage in **Craies on Statute**

²⁹ Ibid, in that case it was determined that section 10 limits the Crown's liability in tort, effectively defining when the Crown can or cannot be sued.

³⁰ (1983) 5 EHRR 465.

Law³¹:

"If the object of a statute is not one of general policy, or if the thing which is being done will benefit only a particular person or class of persons, then the conditions prescribed by the statute are not considered indispensable. This rule is expressed by the maxim of law, *quilibet potest renuntiare juri pro se introducto*. As a general rule, the conditions imposed by statutes which authorize legal proceedings are treated as being indispensable to giving the court jurisdiction. But if it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered indispensable, and either party may waive them without affecting the jurisdiction of the court."

- [93] In the Judicial Committee's judgment in **Vellayan Chettiar v Government of the Province of Madras**³² where the Board considered the position in respect of pre-action notices and found:

"...there appears to their Lordships to be no reason why the notice required to be given under Section 80, should not be waived if the authority concerned thinks fit to waive it. It is for his protection that notice is required: if in the particular case he does not require that protection and says so, he can lawfully waive his right".

- [94] The Judicial Committee pointed out that there was no inconsistency between the propositions that the provisions of section 80 of the India Code of Civil Procedure were mandatory and must be enforced by the court and that they might be waived by the authority for whose benefit they were provided. It follows that any defendant, who wishes to insist on his right to be served a pre-action notice, must act timeously by pleading non-service of the notice in his defence, and raise objection to the suit. Any failure to do this may arguably be deemed to be a waiver.
- [95] In my view this characterization is not consistent with an enactment which negatives or limits the amount of the liability of an officer of the Crown in respect of any delict or quasi-delict which he or she may have committed. The scheme of Article 28 is procedural in its wording and intent. I am of the view that the framers of Article 28

³¹ W, Craies, *Statute Law* (7th edn, Sweet and Maxwell, 1971) at page 269.

³² AIR 1947 PC 197 at para 14, see also *Graham v Ingleby* (1848) 1 Exch. 651 Per Alderson.

intended to encourage parties to consider their legal position and make amends or settle the claim if so advised. The object is the advancement of justice and the securing of public good by avoidance of unnecessary litigation. I am therefore of the view that the Article 28 protections are not captured by subsection 4(4) of the **CPA**.

- [96] I am therefore unable to conclude that the learned master erred in principle in the exercise of his discretion on the appellant's/defendant's application to strike out. I am also not satisfied that the learned master's decision exceeded the generous ambit within which reasonable disagreement is possible.

Disposition

- [97] For the reasons given above the appeal is dismissed with costs to the respondents. I therefore make the following orders:

- (1) The appeal is dismissed, and the order of the learned master is affirmed.
- (2) The appellant will pay the respondent's costs to be assessed by a judge of the High Court if not agreed within 21 days of this judgment.

- [98] It is only left for me to express the Court's appreciation for the helpful submissions by counsel for the parties, and to express my regret for the delay in the delivery of this reserved judgment.

I concur.
Margaret Price-Findlay
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar