

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

SAINT LUCIA

SLUHCVAP2012/0035

BETWEEN:

JEWEL THORNHILL

Appellant

and

THE ATTORNEY GENERAL

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Gertel Thom

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Horace Fraser for the Appellant
Mr. Dwight Lay for the Respondent

2015: January 28;
April 16.

Civil appeal – Police Act – Claimant injured by off duty police officer – Whether police officer was at the relevant time acting as an officer of the Crown – Whether claim prescribed by Civil Code – Bad faith – Whether bad faith had been established in relation to police officer’s actions

Harvey Taliam, who was a police constable (“PC Taliam”), was on 15th May 2009, engaged in private security duties at Glace supermarket when he observed a fracas involving the appellant and others outside the supermarket. PC Taliam who said that he had anticipated a breach of the peace identified himself as a police officer to the persons involved in the fracas. He also stated that the appellant pointed a gun at him and as a result he (PC Taliam) shot at him (the appellant) causing him to be wounded. The matter was investigated by another officer who concluded that the appellant was a victim.

The appellant brought proceedings against the Attorney General on 21st May 2010 for damages for the negligent discharge of a firearm by PC Taliam. The Attorney General denied liability for PC Taliam’s actions. The defence was that PC Taliam was neither a servant nor agent of the Crown in respect of the acts complained of and was, in respect of his public duties, exercising his independent discretion and common law powers of arrest when he sought to apprehend the appellant using such force as was reasonable in the

circumstances; the appellant's claim was prescribed by Articles 2124 and 2129 of the Civil Code of Saint Lucia ("the Civil Code"); and that the appellant was the cause of his own injury.

The learned trial judge found that PC Taliam was, at the relevant time, exercising his common law powers of arrest. He was engaged in private security duties as such he was not an agent of the Crown and therefore the Crown could not be held liable for PC Taliam's actions. Further, that in any event, bad faith having not been proven, the claim was prescribed by the Civil Code.

The appellant has appealed the findings of law and fact as made by the learned trial judge.

Held: dismissing the appeal and ordering each party to bear their own costs; that

1. An appellate court will not impeach the finding of facts by a first instance or trial court that saw and heard witnesses give evidence except in very limited circumstances. Where a trial judge misdirects himself and draws erroneous inferences from the facts, an appellate court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts. In the present case, the learned trial judge paid undue regard to the fact that PC Taliam was at the supermarket performing private security services. In that regard, he came to the wrong conclusion as to the nature of the relationship between PC Taliam and the Crown. On that basis, the appellate court is in as good a position to evaluate the evidence and determine what inference should be drawn from the proved facts.

East Pine Management Limited v Tawny Assets Limited et al BVIHCVAP2012/0035 (delivered 24th March 2014, unreported) followed.

2. A police officer is not a servant or agent of the Crown in the strict sense, merely by virtue of his office or in respect of the performance of his general duty to serve, and protect the citizenry by enforcing the law of the land. Nonetheless, he or she is an officer or an employee of the Crown in the sense that he or she performs a very important public duty – that of peace officer charged with enforcing the law of the land by protecting citizens as they go about their daily lives in peace within a community. Therefore, the Crown would be liable for any acts in the nature of a delict or quasi-delict committed by a police officer in the performance or purported performance of his police duties.

Section 4(3) of the **Crown Proceedings Act** Cap. 2:05, Revised Laws of Saint Lucia 2008 applied; **R v Commissioner of Police of the Metropolis, Ex parte Blackburn** [1968] 1 All ER 763 applied; **Thornhill v The Attorney General** (1976) 31 WIR 498 applied; Section 94 of the Constitution of Saint Lucia Cap. 1:01, Revised Laws of Saint Lucia 2008.

3. The evidence was that PC Taliam acted on the premise that he was in every respect a police officer at the time that he observed a breach of the peace was imminent at which time he assumed the full character and responsibilities of a police officer and acted in a manner to prevent a breach of the peace. At the relevant time, there was no doubt that he was acting as a police officer and was therefore an officer of the Crown. His action in discharging the firearm was closely connected with the acts he was authorised to do which include his duty to preserve the public peace. On the facts and circumstances of this case, the Crown, barring any limiting circumstances, would be liable for PC Taliam's actions if the performance of the functions he performed or purported to perform amounted to a delict or quasi-delict.

Section 4(3) of the **Crown Proceedings Act** Cap. 2:05, Revised Laws of Saint Lucia 2008 applied; **Attorney General of the British Virgin Islands v Hartwell** [2004] UKPC 12 applied.

4. The liability of the Crown however is circumscribed by the requirement of bad faith where the action is commenced after six (6) months. In order to determine whether an act was done in good faith, one may look at the conduct not only at the time of the act amounting to the violation but also at the actions before and after as bad faith is usually to be inferred from a certain state of things which may include conduct not only at the specific point in time of the action complained of but also actions taken before and after, as all of these may be relevant in divining bad faith in respect of the act. The mere telling of a lie does not in and of itself amount to bad faith; it all depends on the circumstances of the case. The evidence in this case showed that PC Taliam's actions were as a result of perceived danger to life or limb. His actions could not be said to amount to gross recklessness or gross carelessness. On the particular facts of this case, PC Taliam's evidence and actions, when weighed with all the relevant circumstances surrounding the incident, does not meet the threshold requirement for a finding of bad faith. The learned trial judge was correct in his conclusion that bad faith had not been proven. There is therefore no reason to disturb that finding.

Article 2124 of the **Civil Code of Saint Lucia** Cap 4:01, Revised Laws of Saint Lucia 2008 applied; **R v Dara M. Wilder** 1997 CanLII 1616 (BC SC) applied; **Finney v Barreau du Quebec** 2004 SCC 36; [2004] 2 SCR 17 distinguished.

5. The learned trial judge, although he erred on the nature of the relationship between PC Taliam and the Crown, was nonetheless correct in his finding that bad faith had not been proven. Accordingly, the appeal fails for the reason that by the time the claim was brought it was time barred.

Article 2124 of the **Civil Code of Saint Lucia** Cap 4:01, Revised Laws of Saint Lucia 2008 applied.

JUDGMENT

- [1] **PEREIRA, CJ:** This appeal raises the issue as to the circumstances in which the Crown may be liable for the actions of an off-duty police officer, who discharged shots from his police issued firearm resulting in injury to the appellant. It also raises the issue as to the time limitation for commencing an action against the Crown.

The Background

- [2] Harvey Taliam, was a police constable bearing regulation No. 296 of the Royal Saint Lucia Police Force ("PC Taliam"). During his off-duty periods, PC Taliam rendered security services to a private business entity, Glace Motors Limited ("Glace"), which operates among other businesses, a supermarket situate at Marisule, in the Quarter of Gros Islet, Saint Lucia.
- [3] On 15th May 2009, PC Taliam's attention, while performing off-duty security services to Glace, was drawn by a loud commotion outside in the compound of the supermarket building. This commotion involved the appellant ("Thornhill") and some other men over a vehicle. PC Taliam who said he apprehended a breach of the peace came out of the supermarket into the compound and announced that he was a police officer. PC Taliam also stated that Thornhill pointed a gun at him and as a result he shot at him causing him to be wounded.
- [4] Corporal Errol Henry ("Henry") investigated the incident. No charges were brought against Thornhill. Corporal Henry concluded that he was a victim.

[5] Thornhill brought proceedings against Glace¹ and the Attorney General on 21st May 2010 for damages for the negligent discharge of a firearm by PC Taliam. The Attorney General defended the claim and asserted, so far as relevant to this appeal, that:

- (a) PC Taliam was neither a servant nor agent of the Crown in respect of the acts complained of and was, in respect of his public duties, exercising his independent discretion and common law powers of arrest when he sought to apprehend Thornhill using such force as was reasonable in the circumstances;
- (b) The claim by Thornhill was prescribed by virtue of Articles 2124 and 2129 of the **Civil Code of Saint Lucia** (“the Civil Code”);² and
- (c) Thornhill was the cause of his own injury.

The trial judge’s findings

[6] The learned trial judge in an oral judgment delivered on 25th October 2012 identified two main issues for determination: firstly, that in order for the prescription defence not to succeed, (it being common ground that the claim was brought more than six (6) months after the claim arose) Thornhill was required to prove bad faith on the part of PC Taliam in relation to his actions and whether this had been shown; and secondly, whether PC Taliam was acting as an officer of the Crown.

[7] The learned judge dismissed Thornhill’s claim and found on the evidence that:

- (a) PC Taliam was not at the time in question acting in bad faith;
- (b) the action of PC Taliam on the day in question was one in which he exercised his common law right or his common law duty;

¹ Thornhill discontinued the claim against Glace – See Record of Appeal, p. 42.

² Cap 4.01, Revised Laws of Saint Lucia 2008.

- (c) PC Taliam was not carrying out police duties on the day in question, “that what happened was that he was doing private security duty for Glace Motors, and he saw an incident and he responded as a trained police officer would in the circumstances to try to maintain peace”;³ but that this did not make him an agent of the Crown as on that day he was not acting in that capacity.

- [8] The learned judge, after referring to section 23(c) of the **Police Act**⁴ which speaks to a police officer’s duty to keep the peace opined as follows:

“That’s the ordinary duties of the police. It is obvious then that that is one of the duties of the Force to take lawful measures for that conduct. However, it doesn’t mean that every time a police officer attempts to apprehend somebody that they are acting as part of their police duties under the act. It could be in some circumstances that they are performing their common law duties. So that in this particular case, it would seem to be that the police officer was aware of his general duty as a police officer, but he had not any instructions as such, any duty beyond the general duty to apprehend persons if they are causing a breach of the peace, but he was also at the time being paid by Glace Motors to be a security guard basically at Glace Motors.

So, I am persuaded... that Taliam acted according to his common law powers, which are simply enshrined in the legislation where he is to engage when necessary in quelling breaches of the peace, but it is not a situation where he is on duty and following the instructions of the police high command ... in doing anything that would bring about liability for the Crown.”

The Appeal

- [9] Thornhill’s sole ground of appeal is that the learned judge’s findings are wholly unsupported by the evidence even though in his skeleton arguments he identified three errors, namely:

- (a) that PC Taliam was not acting as a servant of the Crown on that day;

³ See Record of Appeal, p. 11, lines 19-23.

⁴ Cap. 14.01, Revised Laws of Saint Lucia 2008.

- (b) that PC Taliam was exercising his common law powers of arrest;
- (c) that PC Taliam did not act in bad faith.

[10] Counsel for the respondent rightly points out that the finding by the learned judge to the effect that PC Taliam was exercising his common law powers of arrest was not raised as a ground of appeal in Thornhill's notice. At the hearing, the Court expressed its dissatisfaction at the widely drawn ground of appeal after setting out two findings of fact with which Thornhill took issue which are that:

- (a) Thornhill caused his own injury; and
- (b) The respondent's servant, PC Taliam, is not liable on the facts for occasioning injury to Thornhill.

[11] I must confess, having read the oral decision, which was transcribed, that I have been unable to find either of the two statements in the transcript of the oral decision. I am satisfied however, that the respondent had an adequate opportunity to address the issues as particularly raised by Thornhill in his skeleton arguments and thus in my view no prejudice has been occasioned thereby. The Court however deprecates this approach as skeleton arguments are not a substitute for clear and concise grounds of appeal.

The issues

[12] I propose to deal with the issues in the reverse order to that adopted by the trial judge, by determining firstly whether on the evidence before the trial judge, it was reasonable to conclude, as the trial judge appears to have done, that PC Taliam was not at the relevant time acting as an officer of the Crown. If he was, then the second issue would be to determine whether the learned judge was right in concluding, for the purposes of prescription of actions against the Crown, that bad faith had not been established in relation to PC Taliam's actions. If PC Taliam was not acting as an officer of the Crown at the relevant time then the issue of bad faith

would not arise for determination as the determination on the first limb would be dispositive of the matter. As the learned judge noted, PC Taliam is not a party to the action in any capacity.

The Legislation

(a) The Civil Code

- [13] Article 2124 of the Civil Code states, “[a]ctions against public officers in respect of acts done by them in **good faith** and in respect of their public duties are prescribed by six months.” (My emphasis).

(b) The Crown Proceedings Act (“CPA”)⁵

Section 4(1) of the CPA states, so far as is relevant to this appeal, as follows:

“Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in delict or quasi-delict to which, if it were a private person of full age and capacity, it would be subject-

(a) in respect of delicts or quasi-delicts committed by its servants or agents;

(b) ...

(c) ...”

Section 4(3) further states as follows:

“Where any functions are conferred or imposed upon an officer of the Crown as such by any enactment having the force of law in Saint Lucia and that officer commits a delict or quasi-delict while performing or purporting to perform those functions, the liabilities of the Crown in respect of such delict or quasi-delict 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.” (My emphasis).

- [14] In the court below, the focus appears to have been on section 4(1)(a) of the CPA. However, Thornhill pleaded at paragraph 5 of his statement of claim⁶ that the Attorney General is sued in his capacity as the legal representative of the Crown

⁵ Cap. 2:05, Revised Laws of Saint Lucia 2008.

⁶ Record of Appeal, p..26.

by virtue of sections 4 and 13(2)⁷ of the CPA. Accordingly, this puts into issue the question whether the Crown's liability arises either under section 4(1) of the CPA or under section 4(3) of the CPA or both.

PC Taliam – Servant or agent of the Crown – CPA 4(1)(a); or an officer of the Crown – CPA 4(3)

- [15] This question involves mixed findings of fact and law. The bases on which an appellate court will disturb findings of fact made by a trial judge are so well established that they need not be restated save for completeness. In **East Pine Management Limited v Tawny Assets Limited et al**⁸ it was put this way:

“An appellate court will not impeach the finding of facts by a first instance or trial court that saw and heard witnesses give evidence except in very limited circumstances. Where a trial judge misdirects himself and draws erroneous inferences from the facts, an appellate court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts.”⁹

- [16] The Attorney General contends that when a police officer carries out his/her duties as a constable the relationship with the Crown is not that of master and servant or principal and agent. Reliance is placed on the text, **Wade and Forsyth – Administrative Law**,¹⁰ where the status of a police officer is examined. It states that:

“In their ordinary daily acts and decisions the police are as independent of the local police authority as they are of the central government: a police officer holds a public position – that of peace officer, in which he owes obedience to no executive power outside the police force. ... **They do, indeed, hold office under the Crown** and when appointed they swear that they will well and truly serve the sovereign in the office of constable. But this does not make them servants of the Crown; and the Crown is not

⁷ Section 13(2) states that civil proceedings against the Crown shall be instituted against the Attorney General.

⁸ BVIHCVAP2012/0035 (delivered 24th March 2014, unreported). See also *Golfview Development Limited v St. Kitts Development Corporation*, SKBHCVAP2004/0015 (delivered 31st March 2005, unreported); *Chiverton Construction Limited et al v- Scrub Island Development Group Limited*, BVIHCVAP2009/0028 (delivered 19th September 2011, unreported); *Calvin Todman (As Executor of the Estate of Edward Todman, deceased) v Marguerite Hodge*, BVIHCVAP2012/0002 (delivered 4th October 2012, unreported).

⁹ At p. 3.

¹⁰ 10th edn, Oxford University Press 2009, pp. 108-109.

liable for any wrong doing by the police.¹²⁸ [*Lewis v Cattle* [1938] 2 KB 454] This independence of constables means that there is no vicarious liability by their employer for their misdeeds. **But special statutory provision ensures that chief constables are liable for their subordinate police officers so that the victims of wrongdoing are not left with no effective remedy ...** (My emphasis).

- [17] The Attorney General also relies on the case of **Thornhill v The Attorney General**,¹¹ a decision of the Court of Appeal of Trinidad and Tobago in which reliance was placed on the dictum of Lord Denning in **R v Commissioner of Police of the Metropolis, Ex parte Blackburn**¹² where the court stated that:

"The position of a police officer in his relation with members of the public in this country is similar to that of the police officer in England. His duty is to enforce the law of the land and take such steps as may be necessary to see that honest citizens go about their affairs in peace. ... a police officer is independent of the executive;... A police officer is the servant of, and answerable to, no-one but the law."¹³

- [18] In **R v Commissioner of Police of the Metropolis, Ex parte Blackburn**, Lord Denning MR said at page 136:

"I hold it to be the duty of the Commissioner of Police of the Metropolis... to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no [sic] suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. ... He is answerable to the law and to the law alone."

This dictum was recently referred to with approval by the Privy Council in an appeal from this Court from the State of Antigua and Barbuda in **Commissioner of Police and another v Steadroy C.O. Benjamin**.¹⁴

¹¹ (1976) 31 WIR 498.

¹² [1968] 1 All ER 763.

¹³ At p. 507.

¹⁴ [2014] UKPC 8, para. 29.

[19] Thornhill places reliance on the case of **Michael Christopher v PC 240 John Flavien et al**,¹⁵ a decision of the High Court in Saint Lucia in which Edwards J found at paragraphs 124 and 125 as follows:

“[124] I refer to Section 4 of the said Act [CPA] (the relevant portions of which have been reproduced at paragraph 20 above). By virtue of Section 4(1) and (3) of the Act, I hold that PC Flavien was at the material time a servant or agent of the Crown, in light of the pleadings and evidence.

[125] Having regard to the evidence ... it is clear that PC Flavien was in the execution of his public duty as a police officer. The breadth of Section 4(3) of the Act appears to trap and make the Crown liable for any delict committed by a police officer while he is acting within the scope of his employment and he is performing a public duty. This section seems to make the Crown liable for any such delict even where that police officer in pursuance of his statutory authority commits the delict outside statutory or other legal justification.”

Discussion

[20] Significantly, the Trinidad and Tobago Court of Appeal in **Thornhill**, after determining that the matter involving the conduct of the police did not engage section 6 of the Trinidad and Tobago Constitution, (which was the question in issue)¹⁶ went on, at page 507 to say, “[h]owever, Thornhill is not without remedy because he is protected against any irregular conduct of a police officer by the ordinary law of the land”.

Surely, the CPA which makes special provision in respect of the liability of the Crown is where one must look in relation to a tort or delict committed by a police officer where that officer is performing his public duty. In my view, this is what is alluded to by the authors **Wade and Forsyth** in the emphasized quotation from their text in paragraph 15 above. It may also be taken to be the view expressed in **Thornhill** when the court referred to “the ordinary law of the land”.

¹⁵ SLUHCV2004/0502 (delivered 25th July 2007, unreported).

¹⁶ The Court held that for the purposes of section 6 of the Constitution, a police officer is not a legislator, a member of the judiciary or an agent or member of the executive.

[21] I am not prepared to hold that a police officer is a servant or agent of the Crown in the strict sense, merely by virtue of his office or in respect of the performance of his general duty to serve, and protect the citizenry by enforcing the law of the land. That a police officer could not be so regarded in the strict sense is for good and obvious reason. A police officer's solemn duty is to enforce the law of the land. This can and may involve doing so even in respect of a member of the executive, the legislature or indeed the judiciary, and thus could not be subject to the directions or instructions of members of any of those classes of persons in the exercise of his judgment in carrying out or performing that duty. He or she must be free to perform that duty without influence or instruction of anyone save and except in accordance with the law. Thus in that respect, he/she is answerable to no-one but the law.

[22] However, that special position does not leave a citizen who may have been wronged by the commission of a wrongful act, delict or quasi-delict by a police officer without a remedy. Special statutory provision has provided for this. In respect of Saint Lucia, it is contained in section 4 of the CPA above quoted and as found by Edwards J in the **Michael Christopher** case. There is no doubt in my mind that although a police officer may not be regarded as a servant or agent of the Crown in the sense above described, he/she is nonetheless an officer or an employee of the Crown in the sense that he/she performs a very important public duty – that of peace officer charged with enforcing the law of the land by protecting honest citizens as they go about their daily lives in peace within a community. In **Attorney General of the British Virgin Islands v Hartwell**¹⁷ a case involving a police officer who fired shots in a public bar aimed at other persons but one of which struck and injured Mr. Hartwell, an English tourist, it was accepted as common ground before the Privy Council and without demur, that the police officer

¹⁷ [2004] UKPC 12 (on appeal from the Virgin Islands).

was an employee of the Government.¹⁸

[23] In Saint Lucia, the Constitution provides for the appointment of a Commissioner of Police by the Governor General acting in accordance with the advice of the Public Service Commission, (a body established under the Constitution of Saint Lucia) which Commission shall before rendering its advice to the Governor General, consult with the Prime Minister.¹⁹ The Constitution also provides that police officers below the rank of Inspector are to be appointed by the Commissioner of Police.²⁰ Police officers in Saint Lucia are therefore without a doubt employees of the Crown. Accordingly, notwithstanding that police officers may not be regarded in the strict sense as servants or agents of the Crown, the Crown is nonetheless liable for any acts in the nature of a delict or quasi-delict committed by a police officer in the performance or purported performance of his police duties.

[24] The public duties with which police officers are tasked have largely been developed under the common law but in many respects those duties have in more modern times been codified or enshrined in legislation. Such is the case in respect of the **Police Act** of Saint Lucia. Section 23 of that Act exemplifies such a codification. Two of those duties need be set out for present purposes:

“(1) It is the duty of the Force to take lawful measures for –
(a) preserving the public peace;
(b) preventing and detecting crimes and other infractions of the law;
...”

[25] These provisions clearly show that those duties which were hitherto considered as the duties of police officers under the common law have simply been codified. I can see no good reason for drawing a distinction, as the learned judge appears to have done, between a police officer's common law duty to preserve and prevent a breach of the peace or to prevent crimes and other infractions of the law, and the

¹⁸ At para. 6.

¹⁹ See Constitution of Saint Lucia, Cap. 1.01, Revised Laws of Saint Lucia 2008, section 94(1).

²⁰ The Constitution of Saint Lucia, section 94(3).

similar duties set out under section 23 of the **Police Act**. To my mind, it matters not whether the duty may be said to arise at common law or by virtue of statute reflecting the common law. The critical consideration is whether the duties, be it under the common law or statute, are part and parcel of a police officer's public duty.

[26] The above sets out my conclusions as it relates to the law. I now come to the question whether, on the facts of this case, PC Taliam at the time of the action complained of was acting in the performance of his duty as a police officer.

[27] PC Taliam was called as a witness at the trial. He gave a witness statement and was also cross-examined. Portions of his witness statement²¹ bears setting out:

"[6] On Friday the 15th day of May, 2009 about 5:45pm, while working at Glace supermarket I heard what sounded like a loud altercation outside the front doors. I proceeded to the front door. There I saw a green Daihatsu Terios reg. # PE6122 parked about 10 feet from the front entrance of the supermarket. I saw Ranney Hermas, of Balata standing near the left front door of the vehicle. He was exchanging words with the driver of the Terios. There were other men present who appeared to be in the company of Hermas, who also joined in the conversation.

[7] I saw the driver of the Terios disembark the vehicle. I identified him as Ron Williams. I then saw Williams move around to the left side of the Terios, and had an exchange of words with the other men present. At one point I heard Williams say he was going to leave and return to deal with all of the men. He went back into the Terios and left the compound. The men retreated to a white van, parked to the left of the front door of the supermarket. Next to the white flat van, was a white Mitsubishi panel omnibus. I re-entered the supermarket.

[8] At about 6:10pm, I was in the process of having a conversation with a friend, when I was summoned to the front of the supermarket by a security officer, Marguerite Fannis. Miss Fannis was an employee of Glace. She told me that the Terios had returned and there was something happening outside. As I approached the front door, I noticed the Terios had in fact

²¹ This witness statement was filed on behalf of the Attorney General.

returned to the compound. It was about 30 feet away from where I stood. I saw Williams and Jewel Allison Thornhill, walking towards the supermarket entrance. At the time I did not know Thornhill. I stood near the front door. I noticed Williams had something bulging underneath his shirt, on the left side of his waist line.

[9] I saw Williams walk up towards the group of men gathered near the white flat van to the left of the front door, I noticed Thornhill stopped near the front door, facing Williams and the group of men. He had on a white t-shirt. I saw a bulge under his shirt, likewise on the left side. He kept pacing around. He was about 5 feet away from me. I then heard an exchange of words between Williams and the group of men. I heard Williams say, "Look me in you'll mother cunt! Who want it first! I come for all ah you'll!" I then noticed Thornhill, raise his shirt slightly on the left side with his left hand and was reaching for the item concealed under his shirt with his right hand. At that point I was of the belief that he was about to retrieve a weapon, and that the lives of the group of men were in jeopardy.

[10] I was at the time armed with a 9mm Glock 19 serial #075 service pistol. I withdrew my pistol, and identified myself in a very loud voice, as a police officer. I asked Thornhill, and Williams to get their hands up, and to keep their hands away from their waist area. Both men turned to face me, but none of them complied with my instructions. I again declared my office in a loud voice to them both and asked them to get down and keep their hands up where I could see them.

[11] At that point Thornhill started walking backwards away from me, while looking at me. I shouted to him asking him to stop, declaring my office to him again. He did not comply. I noticed Williams began pacing around. I discharged 1 round of ammunition, up in the air, asking Thornhill to stop. Thornhill, backed away, and began going out of my sight, behind the white panel omnibus, parked near the white van.

[12] I then immediately move right, away from the door, such that I could still keep sight of Williams, but more so that I would not lose sight of Thornhill. At that point, I noticed that as Thornhill was about to get behind the omnibus, he raised his shirt again, and withdrew what appeared to be a handgun with his right hand from his left waist area. It looked like a dark colored pistol. I shouted in a very loud voice, "Police!! Freeze!! Put it down!! Freeze!! Put it

down!!” I noticed Thornhill raise the gun in my direction. I was very much fearful for my safety. At that point I discharged 1 round of ammunition in his direction. I saw him go down, and turn and run behind a car parked near the omnibus. I then lost sight of him.”

[28] In answer to questions in cross examination, PC Talam stated that when he came out of the supermarket, based on his observations of what was taking place, he came out with his police-issued firearm acting as a police officer to prevent “a situation,” to do his duty as a police officer. He stated that he identified himself to the men as a police officer and asked them to “keep their hands up”. He is of the firm view that at that time he was in every respect a police officer and acting as such.

[29] There is nothing in the transcript of the judgment to suggest that the learned judge did not accept PC Talam’s evidence to the effect that he identified himself at the time in question as a police officer. Indeed, as set out in paragraph 8 above, the learned judge accepted that the ordinary duties of police officers involve preventing a breach of the peace. He also stated:

“...while I do not believe the officer when he says that he saw a gun in Thornhill’s hand or he saw him about to pull a gun, because of the entire -- the way in which the entire scenario played out, I do believe however that he acted in a manner which he felt was warranted in the circumstances on the day in question, and that it would be difficult to prove ... that he acted in bad faith.”²²

Later, he stated as follows:

“It is clear ... that the police officers [sic] was not carrying out police duties on the day in question, that what happened was that he was doing private security for Glace Motors, and he saw an incident and he responded as a trained police officer would in the circumstances to try and maintain peace.”²³

[30] With utmost respect to the learned judge, when his reasoning is considered in the

²² See p.11, lines 3 to 7 of the Record of Appeal.

²³ See p. 11, lines 19 to 23 of the Record of Appeal.

round, reconciling his conclusions to the facts accepted by him presents me with great difficulty. He appears to accept on the one hand that PC Talam was acting according to his common law powers which are enshrined in the **Police Act** in seeking to prevent a breach of the peace but then on the other he seems to conclude that because on that day PC Talam was engaged in performing private security duties for Glace he could not thereby be considered at the time of the incident as carrying out his public duty as a police officer in seeking to prevent a breach of the peace. It seems to me that the learned judge sought to draw an artificial distinction which was wholly unnecessary and unwarranted in the circumstances. Based on his line of reasoning it would mean that a police officer who, after signing off from active or specific duty at a certain time, later encounters an affray while on his way home and about his own personal business, if he intervened in seeking to prevent a breach of the peace or the commission of a crime, he would not be thereby doing so in furtherance of his police and public duty to so act. Such a view would be most surprising and in my judgment a downright dangerous approach to adopt in respect of the protection of the freedoms of citizens in any society who are entitled to go about their daily lives in peace, with faith in the knowledge that police officers are charged with this solemn duty of protecting and preserving the public peace. It has always been understood that a police officer is a public officer 'around the clock' given the very nature of those duties.

- [31] The learned judge's attention was drawn to the **Hartwell** decision of the Privy Council where the test to be applied was set out. However, it is clear from a review of his oral decision that the learned judge failed to apply the test but rather focused on distinguishing the peculiar facts of **Hartwell** which raised the question whether the police authorities in the Virgin Islands were negligent in permitting a police officer, PC Laurent, to have access to a revolver kept at a police sub-station and the special relationship which was found to exist in the peculiar circumstances there. The argument which found favour with the Privy Council was that the police authorities knew or ought to have known that Laurent was not a fit and proper

person to be entrusted with a gun; that when entrusting a police officer with a gun the police authorities owe to the public at large a duty to take reasonable care to see that the officer is a suitable person to be entrusted with such a dangerous weapon, less by any misuse of it he inflicts personal injury, whether accidentally or intentionally to other persons. The case on vicarious liability of the Crown was roundly rejected by the Privy Council in that they found that Laurent's conduct on the evening in question had "nothing whatever to do with any police duties, either actually or ostensibly". Laurent's conduct included abandoning his post on the island of Jost Van Dyke where he had been assigned, helping himself to the firearm kept in a locked box at the police sub-station (but in respect of which he had access to the key), journeying across by ferry to the island of Virgin Gorda, and then to a bar at the Bath & Turtle in Virgin Gorda, to execute a personal vendetta in respect of his girlfriend or ex-girlfriend and using the firearm for that purpose. The Board held that Laurent's conduct fell wholly within the classical phrase of "a frolic of his own". This finding was based, as I indicated above, on the established premise that a police officer is an employee of the government or Crown.

[32] On the facts of the present case, the principle of the general duty of care owed by the police authorities to the public in terms of the fitness of PC Taliam to hold a firearm is not in issue. It is nowhere suggested that PC Taliam ought not to have been allowed access to or to carry a firearm or that it was in any way improper for him to have been armed that day or that there were reasons why the police authorities ought to have considered him an unfit and improper person to have a police issued firearm.

[33] The test as set out by the Privy Council in **Hartwell** may be stated for present purposes thus:

"... whether [PC Taliam's actions in discharging the firearm] was so closely connected with acts he was authorised to do that, for the purposes of liability of the Government [or Crown] as his employer, his wrongful use

may fairly and properly be regarded as made by him while acting in the ordinary course of his employment as a police officer.”

I am in no doubt based on the facts of this case and as accepted by the learned judge that this test is satisfied. Indeed the learned judge concluded, in my view rightly, that PC Taliam was acting in accordance with his general duty as a police officer. He was clearly acting pursuant to his duty to preserve the public peace. The circumstances which faced him at the time bear this out. He identified himself as a police officer. He had no personal interest in the matter. He clearly anticipated, based on the altercations which he was witnessing, that at least a breach of the peace was imminent or death or personal injury to others might result. In my view, the learned judge paid undue regard to the fact that PC Taliam was there in proximity of the scene as a person performing private security services. That this was his engagement on that day is not in question. However, when he observed that a breach of the peace was imminent it is beyond doubt on the facts that he, at that point in time, assumed the full character and responsibilities of a police officer and acted as one in seeking to perform his duties as a police officer and not as a security guard for Glace. In my view, PC Taliam's actions fall squarely within the scope of section 4(3) of the CPA which may be said to statutorily create a special type of vicarious liability in respect of the Crown. I would hold that on the facts and circumstances of this case that the Crown would be liable for PC Taliam's actions if the performance of the functions he performed or purported to perform amounted to a delict or quasi-delict. The trial judge in my view erred in his evaluation of the facts and further failed to apply the correct test. This led him to an erroneous conclusion.

Prescription – Bad Faith

- [34] The finding that PC Taliam at the relevant time was acting as a police officer does not however get Thornhill home. It is not in dispute that Thornhill's claim would be prescribed pursuant to Article 2124 of the Civil Code unless he can show that PC Taliam's actions on the day in question lacked good faith, or put conversely, were

done in bad faith. The learned judge found that even though “bad faith” may be said to have been pleaded, it had not been proven on the evidence. Thornhill says that bad faith should have been found by the learned judge having accepted that PC Taliam was untruthful when he said that Thornhill had pulled out or seemed to be pulling out a gun. Interestingly, the learned judge, while saying that he did not believe PC Taliam when he said he saw a gun in Thornhill’s hand or about to pull a gun, said he believed that PC Taliam acted in a manner which he felt was warranted in the circumstances and concluded that he could not be said to have acted in bad faith.

- [35] Thornhill takes issue with the fact that the learned judge in concluding that PC Taliam did not act in bad faith, did so by refusing to have regard to PC Taliam’s statement after the incident in response to the claim. The learned judge had this to say:

“Although I am of the view that the officer must have stretched the truth somewhat in saying that he saw the young man Thornhill with a firearm ... and the follow up behavior by the corporal who investigated seem to suggest that the officer’s statement to him did not lead to any conclusion other than that Thornhill was a victim. ... in spite of all that, whatever the Officer Taliam said after the incident in response to this claim cannot be ascribed to his behavior on the day of the incident.”

- [36] Thornhill contends that it was wrong of the learned judge to disregard PC Taliam’s conduct in response to the claim. He says that the learned judge equated ‘bad faith’ to ‘malice and premeditative acts’ and in so doing ‘ring-fenced’ himself into the erroneous belief that the action of the officer after the fact cannot be used to explain his state of mind at the time of the shooting. Counsel for Thornhill relied on the Canadian authorities of **R v Dara M. Wilder**,²⁴ **Martel v Andrew**²⁵ and **Finney v Barreau du Quebec**²⁶ for determining the concept of ‘bad faith’ for the purposes of the Civil Code which finds its genre in the old Civil Code of Quebec.

²⁴ 1997 CanLII 1616 (BC SC).

²⁵ 2005 ABCA 63 (CanLII).

²⁶ 2004 SCC 36; [2004] 2 SCR 17.

[37] In **Wilder** the Supreme Court of British Columbia held that in order to determine whether an act was done in good faith, one may look at the conduct not only at the time of the act amounting to the violation but also at the actions before and after - in essence by assessing the actions as a continuum. The Court held that support for this view was found in section 24(2) of the Canadian Charter of Rights and Freedoms which required the court to have regard to “all the circumstances”. I must point out that Charter rights or fundamental constitutional rights are not in issue here. I accept however, as a general and common sense proposition that in determining bad faith one should look at the entire course of conduct as a continuum, as bad faith is usually to be inferred from a certain state of things which may include conduct not only at the specific point in time of the action complained of but also actions taken before and after as all of these may be relevant in divining bad faith in respect of the act.

[38] Counsel for Thornhill also relies on **Wilder**²⁷ and the case of **Martel**²⁸ to show that lies amount to bad faith. However, neither case, in my view, is support for this proposition. What is clear is that in various circumstances such as was the case in **Wilder** where the entire conduct was conduct calculated to deceive, all aimed at a specific objective, that lies told in furtherance of that objective can amount bad faith. In **Martel**, the Court held that whether or not Mr. Martel had lied in his affidavit does not translate into bad faith as there is no duty on counsel presenting an affidavit to the court to verify that the information sworn is true. In short, the mere telling of a lie does not in and of itself amount to bad faith. It all depends on the circumstances and the telling of a lie may very well factor into the circumstances.

[39] In the present case, while I agree that it was not open to the learned judge to disregard PC Taliam’s conduct or statement in response to the claim, to my mind

²⁷ At paras. 17 and 18.

²⁸ At paras. 11 and 12.

the fact that the judge stated that he may have “stretched the truth” in relation to the gun or seeing a gun when giving his witness statement, that factor, when weighed with all the relevant circumstances surrounding the incident and PC Taliam’s actions, I am unable to conclude that this factor is one which is demonstrative of bad faith in relation to the action in question.

[40] Thornhill also argues that under the civil law the concept of bad faith has been extended so that serious or gross carelessness and recklessness are capable of grounding a finding of bad faith. He relies on the **Finney** case. In **Finney**, B was entered on the Roll of Order of Advocates in 1978. Between 1981 and 1987, the Barreau’s Committee on Discipline and the Professions Tribunal found him guilty on at last three occasions of disciplinary offences. In 1990, after a lengthy investigation, the Professional Inspection Committee submitted a report to the Executive Committee concluding that B was incompetent. Two years later, the Executive Committee required that B complete a refresher training period and ordered that he practice his profession only under the supervision of a tutor. The respondent’s difficulties with B began in 1990. Between 1991 and 1993, she filed several complaints against B and even contacted the Office des professions to complain about the Barreau’s inaction. It was not until 1994 that the syndic served B with a request to have him provisionally struck off the Roll, which was granted by the Barreau’s Committee on Discipline in May 1994. In 1998, B was found guilty on 17 counts and struck off the Roll of the Order for five years. In 1996, the respondent launched an action in damages against the Barreau for breach of its obligation to protect the public in the handling of the complaints made against B. The Superior Court dismissed the action. The Court of Appeal allowed the respondent’s appeal in part and ordered the Barreau to pay her \$25,000 for the moral injury she had suffered.

[41] The Court referring to the partial immunity which was enjoyed by the Barreau de Quebec under section 193 of the Professional Code opined that since good faith is the key concept in this provision, the respondent must show that the Barreau

acted in bad faith; that however, in the case of duties relating to the management of disciplinary cases, it would be contrary to the fundamental objective of protecting the public set out in section 23 of the Professional Code if this immunity provision were interpreted as requiring evidence of malice or intent to harm in order to rebut the presumption of good faith. The Court held that the concept of good faith must be given a broader meaning that encompasses serious carelessness or recklessness. The Court found that the conduct of the Barreau, when considered in its entirety, constitutes a fault for which it cannot claim the immunity set out in section 193; that the conduct of the Barreau was not up to the standards imposed by its fundamental mandate, which is to protect the public; that the virtually complete absence of the diligence called for in the situation amounted to a fault consisting of gross carelessness and serious negligence.

- [42] On any view of the facts in **Finney**, it was a clear case of gross recklessness or serious negligence. However, accepting the broadened concept of bad faith expounded in that case, it cannot be said in the circumstances of the present case that PC Taliam's actions amount to gross recklessness or serious negligence as counsel for Thornhill is urging. The learned judge made no such finding. Indeed, he said that it may be arguable that he was negligent but expressly refrained from making any such finding. **Finney** speaks of 'gross carelessness' or 'serious negligence' which I understand to mean gross negligence. On the facts and circumstances of this case where the officer was acting in circumstances of perceived danger to life or limb and one where the situation was rapidly unfolding, I am unable to conclude that PC Taliam acted in a manner which may be considered as grossly reckless or grossly negligent. Nor do I consider that such an attribute could be accorded to his conduct merely in hindsight flowing from the mere fact that he resorted to the use of his firearm in the circumstances with which he believed he was presented at the relevant time. In my view, it would be taking too strict an approach to weigh up an officer's reaction when faced with a situation in which he has reasonable cause to believe is one fraught with imminent danger to some fine nicety. The facts of this case are miles away from the facts in **Finney**

which warranted such a finding. Accordingly, notwithstanding the matters left out of account by the learned judge, having taken those matters into account, I am not persuaded that PC Taliam's conduct can be categorized as gross negligence or gross carelessness or recklessness or such that it amounts to bad faith. There is therefore no reason to disturb the trial judge's finding that bad faith has not been proven. Having so concluded, Thornhill's claim would have accordingly been prescribed under article 2124 of the Civil Code.

Conclusion

[43] For the reasons given above, I would dismiss this appeal. No costs order was made in the court below. In my view, the Crown was unsuccessful in its primary submission in seeking to show the lack of vicarious liability on its part. The appeal fails for the reason that by the time the claim was brought it was time barred save unless Thornhill was able to show that the officer acted in bad faith. I agree that bad faith on the part of the officer has not been shown. In the circumstances, I consider that an appropriate costs order on this appeal is that each party shall bear their own costs, and I would so order.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal