JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

APPLICATION NO COA2023APP00094

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST APPLICANT**
AND	**DETECTIVE SERGEANT ALVAN FEARON**	**2ND APPLICANT**
AND	**DETECTIVE SERGEANT ROYE**	**3rd APPLICANT**
AND	**SHAWN ROBINSON**	**RESPONDENT**

Miss Kristina Whyte instructed by the Director of State Proceedings for the applicants

Hadrian Christie instructed by Asher & Asher for the respondent

19 June and 14 July 2023

Appeal – Practice and procedure – Application for leave to appeal and application for extension of time within which to apply for leave to appeal – procedure to be adopted.

Malicious Prosecution – Whether sufficient pleading or evidence to establish reasonable or probable cause.

MCDONALD-BISHOP JA

[1] I have read, in draft, the reasons for judgment of Laing JA (Ag). I agree with his reasoning and conclusion, which accord with my reasons for concurring in the decision of the court and there is nothing I could usefully add.

SIMMONS JA

[2] I, too, have read, in draft, the judgment of Laing JA (Ag), and agree with his reasoning and conclusion and have nothing to add.

LAING JA (AG)

[3] On 19 June 2023, we heard a notice of application, which was filed by the applicants on 11 May 2023, seeking an extension of time to apply for permission to appeal the order of Master S Reid ('the master'), which was made on 24 April 2023. We made the following orders:

> "1. The application for extension of time for permission to appeal the order of Master S Reid made on 24 April 2023, is refused.
>
> 2. Costs of the application to the respondent to be taxed, if not agreed."

We promised then to give our reasons in writing. This is a fulfilment of that promise.

Background

[4] By an amended claim form filed on 10 September 2019, and served on 12 September 2019, Shawn Robinson ('the respondent') claimed under various heads of damages for false imprisonment and malicious prosecution. The claim arose from what he alleged was his wrongful arrest, detention and charge, commencing on or about 9 May 2009, and continuing to 16 January 2017, when no evidence was offered in respect of the charge of murder which was the final remaining charge against him. The offence of illegal possession of firearm for which he had been charged was dismissed on 30 August 2011. The claim was against the Attorney General of Jamaica ('the 1st applicant'), Detective Sergeant Alvan Fearon ('the 2nd applicant'), and Detective Sergeant Roye ('the 3rd applicant'), who are referred to herein collectively as ('the applicants').

[5] By notice of application filed 29 October 2019, the applicants sought an extension of time within which to file their defence. The notice of application was heard over a year

later, on 23 November 2020, and Master P Mason granted an extension of time for the applicants to file and serve their defence on or before 26 February 2021, failing which the claimant was permitted to enter judgment against the 1st applicant.

[6] On 25 February 2021, the applicants filed a notice of application for further extension of time to file a defence and that they be permitted to file their defence within 14 days of the hearing of the application or in the alternative that the defence filed be permitted to stand as filed ('the application for further extension'). A defence had not been filed up to that date, however, a draft defence was subsequently exhibited to the affidavit of Ricardo Maddan filed on 10 June 2021.

[7] The master heard the application for further extension on 30 June 2021. On 24 April 2023, the master delivered her ruling and made orders refusing the applicants' application for further extension ('the Order') and granting permission for judgment to be entered for the respondent. The applicants applied to the master for leave to appeal the Order and the application was refused.

The application for permission to appeal and extension of time

[8] The applicants filed a notice of application on 11 May 2023 in this court seeking permission to appeal the Order, pursuant to section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act and also seeking an extension of time to apply for permission to appeal. By virtue of section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act, except for a few instances, where the matter involves an interlocutory judgment or order, leave either of the judge below or this court is required before an appeal can be brought. This case involved an interlocutory judgment or order because whichever way the application for further extension was decided, it would not have brought finality to the claim (see para. [16] of **The Attorney General v Barrington Irwin** [2017] JMCA App 40). The application for further extension did not fall within any of the listed exceptions in the section; therefore, permission to appeal was required.

[9] Rule 1.8(1) and (2) of the Jamaica Court of Appeal Rules, 2002 ('the CAR') specifies the time within which an application for permission to appeal should be made and requires that:

> "(1) Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought.
>
> (2) Where the application for permission may be made to either court, the application must first be made to the court below."

It is now settled that, where permission to appeal must first be sought in the court below, and permission is refused by that court, that does not affect the requirement that an application to this court for permission to appeal must be filed within 14 days of the order against which permission to appeal is being sought. The application for leave to appeal the Order was refused by the master on 24 April 2023. and, consequently, the applicants ought to have applied to this court for permission to appeal within 14 days of that date.

[10] Nevertheless, rule 1.7(2)(b) of the CAR empowers the court to extend or shorten the time for compliance with any rule; even if said application is made after the time has passed for compliance. In considering an application for extension of time to appeal, the court should be guided by the principles set out in **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes** ((unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999), which have been followed and approved in numerous cases including **Price Waterhouse (A Firm) v HDX 9000 INC** [2016] JMCA Civ 18. These principles require the court to consider:

a. the length of the delay;

b. the reason for the delay;

c. the prospects of success of the proposed appeal; and

d. any possible prejudice to the other parties to the appeal.

[11] However, the grant of an extension of time to apply for permission to appeal is also dependent on whether there is merit in the application for permission. The reasoning behind this is that if permission to appeal ought not to be properly given, it would be futile to enlarge the time within which to apply for permission to appeal. The rationale for this approach has been explained by the court in **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2007 and Application No 166/2007, judgment delivered 26 September 2008, page 9. This procedural approach where there is both an application for leave to appeal and an application for extension of time to obtain leave to appeal has been considered and adopted in a number of cases of this court, including **Garbage Disposal & Sanitations Systems Ltd v Noel Green & Ors** [2017] JMCA App 2 in which F Williams JA at para. [17] described this approach as 'the primary rule'.

[12] The court concluded that it was prudent to also adopt the primary rule in respect of these applications and invited counsel for the parties to focus their initial submissions of whether this was a case in which permission to appeal ought to be given on the basis that the proposed appeal would have a "real chance of success".

The applicants' submissions

[13] The convenient starting point for the applicants was their proposed grounds of appeal which were:

> "a) The Master erred as a matter of law and/or fact in failing to consider the merits of the proposed defence in keeping with established principles and authorities.
>
> b) The Master erred as a matter of law and/or fact in finding that [sic] grant of an extension of time would be prejudicial to the [respondent] because of the failure of the [applicants] to file a defence or to indicate when they would be in a position to do so as at the date of hearing.
>
> c) The Master erred as a matter of law and/or fact in failing to consider the evidence in support of the application and the

> relevant submissions and authorities in arriving at her decision."

[14] The applicants submitted that there was no delay in the filing of the application for further extension since it was filed a day before the expiration of the time which had been previously extended by the order of Master P Mason. It was argued that the explanation for the delay in filing the defence, as deponed in the relevant affidavits, was sufficient. The explanation is that the 1st applicant made several attempts to obtain instructions to facilitate the filing of a defence but the senior investigating officer died and the 2nd applicant is retired. As a result, further time was required for investigative purposes.

[15] It was also submitted that the respondent would not have been prejudiced by a further extension of time to file a defence because he failed to highlight any prejudice which would accrue to him if the application for a further extension was granted. It was argued that the prejudice identified by the respondent was unsubstantiated and amounted to no more than a bare assertion. Furthermore, it was advanced that the respondent contributed to the delay since he was dilatory in bringing the claim before the court.

[16] The applicants relied on the case of **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4 ('**Fiesta**'), which was an appeal against the refusal of a judge to grant leave to file a defence out of time that resulted in summary judgment being granted. It was submitted that in **Fiesta** the court reinforced the importance of a judge (or master) hearing an application for extension of time to examine the proposed defence to determine whether it discloses an arguable defence to the claim. The applicants argued that the master did not adequately consider the evidence contained in the affidavit of Louis Jean Hacker filed on 25 February 2021, and the affidavit of Ricardo Maddan filed on 10 June 2021. The affidavit of Ricardo Maddan exhibited the draft defence. It was advanced that these affidavits and draft defence together sufficiently set out the reasons for the failure to file a defence within the time ordered by Master P Mason, and the basis on which liability was being disputed by the applicants. Accordingly,

they said the master failed to consider their meritorious defence because the draft defence illustrated that the relevant police officer acted reasonably on the assertion made by Courtney Campbell that the respondent was the perpetrator of the offences for which the respondent was arrested and charged.

[17] It was also argued by the applicants that the meritorious nature of the draft defence is evidenced by the fact that the respondent abandoned the false imprisonment claim (which was statute barred), a day after the applicants' affidavit with the draft defence was filed. Additionally, relying on **Camelia McBean v The Attorney General For Jamaica** [2019] JMSC Civ 243, the applicants advanced the position that the respondent's arguments regarding the failure to hold an identification parade and issues surrounding the identity and name of the perpetrator, were matters of fact for the trial judge after the evidence had been tested by cross-examination. It was further advanced that if the court were to look behind the statements of case to assess whether there was reasonable and probable cause to prosecute the respondent, that would be tantamount to conducting a mini-trial.

The respondent's submissions

[18] The respondent challenged the accuracy of the applicants' contention that the master did not consider the evidence before her and the merits of the proposed defence. It was submitted that the master did consider the evidence, as well as the submissions and authorities that were presented to her, but in delivering her decision, she did not specifically review the parties' submissions and give her opinion on them.

[19] The respondent submitted that the applicants have no real chance of success on the proposed appeal which would be done by way of rehearing pursuant to rule 1.16(1) of the CAR. It was also argued that the applicants failed to demonstrate that they had any defence with merit. Regarding his claim for malicious prosecution, counsel highlighted the respondent's case that the 2nd applicant acted unreasonably and without reasonable and probable cause in prosecuting him on the evidence of the sole eyewitness which described the suspect as being "Selvin Robinson" with the alias "Shawn" when the

respondent's name is Shawn Robinson, and he does not have an alias. Furthermore, it was underscored that the description of Selvin Robinson as being 5 feet 3 inches tall did not match that of the respondent who is 5 feet 9 inches tall.

[20] The respondent argued that in these circumstances, after arresting the respondent and before charging him, it was incumbent on the 2nd applicant to have taken reasonable steps to confirm that the respondent was one and the same person as the perpetrator described by the eyewitness. Instead, the 2nd applicant failed to conduct an identification parade, with the result that any verification of the identity of the person described by the eyewitness, Courtney Campbell, was delayed until eight years later when he confirmed the respondent was not the person he had described. Counsel argued that the applicants have not provided any reason for the failure to conduct an identification parade or any explanation regarding how the 2nd and 3rd applicants could have reasonably decided that the person described as Selvin Robinson otherwise called Shawn, was the respondent. Consequently, it was submitted that, having failed to challenge the averments made by the respondent, the applicants now have no basis on which to assert that there was "reasonable and probable cause" to charge the respondent as that element of the tort of malicious prosecution has been defined by the court in **Richardo Robinson v Attorney General & anor** [2016] JMCA Civ 3.

[21] In his written submissions, the respondent also relied on **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, in emphasising the principle that this court cannot interfere with the master's exercise of her discretion, merely because this court might have exercised its discretion differently.

Discussion and analysis

[22] The standard of review to be applied by this court in considering the exercise of any discretion by a lower tribunal such as the master is well settled (see **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 at page 1046). In **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, Morrison JA, as he then was, in reiterating these principles at para. [20], said:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[23] The master had before her an application pursuant to rule 10.3(9) of the Supreme Court of Jamaica Civil Procedure Rules, 2002 ('CPR') to extend the time within which to file a defence. This rule does not enumerate the factors that a court should consider. However, the relevant factors are, in essence, the same factors (with appropriate modification) that are to be considered on an application to extend time to file an appeal as set out in **Leymon Strachan** (see para. [10] above). The only modification of those factors that would have been necessary for the master would have been that instead of considering the merits of the proposed appeal, the master would have had to consider the merits of the proposed defence.

[24] In deciding what factors are to be considered, this court has also adopted the observations of Lightman J in **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors** [All England Official Transcripts (1997-2008) (delivered 18 January 2000)], at paras. 8 and 9 are instructive, where he said the following:

> "8. The position, however, it seems to me, has been fundamentally changed, in this regard, as it has in so many areas, by the new rules laid down in the CPR which are a new procedural code. The overriding objective of the new rules is now set out in Pt 1, namely to enable the court to deal with cases justly, and there are set out thereafter a series of factors which are to be borne in mind in construing the rules, and exercising any power given by the rules. It seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that each application must be viewed by reference to the criterion of justice and in applying that criterion there are

> a number of other factors (some specified in the rules and some not) which must be taken into account. In particular, regard must be given, firstly, to the length of the delay; secondly, the explanation for the delay; thirdly, the prejudice occasioned by the delay to the other party; fourthly, the merits of the appeal; fifthly, the effect of the delay on public administration; sixthly, the importance of compliance with time limits, bearing in mind that they are there to be observed; seventhly, (in particular when prejudice is alleged) the resources of the parties.
>
> 9. I am in no ways setting out all the relevant factors, but all the factors I have set out appear to me to be relevant and require to be taken into account in deciding what justice requires in respect of the particular application. I should add that the existence of this broad approach, which decides the case by reference to justice, is not to be treated as a passport to the parties to ignore time limits because, as I say, one of the important features in deciding what justice requires is to bear in mind that time limits are there to be observed and that justice may be seriously defeated if there is any laxity in that regard." (Emphasis supplied) Although Lightman J did mention the matter of merit, the point to be noted for these purposes, is that it "is no longer sufficient to apply some rigid formula in deciding whether an extension [of time] is to be granted".

The approach suggested by Lightman J has been repeatedly adopted by the court, see for example Harris JA in **Fiesta** at para. [15] and Brooks JA, as he then was, in **The Attorney General of Jamaica, Western Regional Health Authority v Rashaka Brooks Jnr (A Minor) By Rashaka Brooks Snr (His father and next friend)** [2013] JMCA Civ 16, ('**Rashaka Brooks**') in para. [15].

[25] There were no written reasons for the master's decision provided to the court and the parties were not in agreement as to what her oral reasons were. In such circumstances, it was for the court to consider, without the benefit of the reasons, whether the decision which resulted in the Order, demonstrated a proper exercise of the learned master's discretion (see **Ray Dawkins v Damion Silvera** [2018] JMCA 25, at paras. [46] and [47].

[26] In analysing the master's decision, I adopted the approach suggested in **Evanscourt**, to which reference has previously been made and, accordingly, consideration was given first to the question of whether the applicants would succeed on the application for permission to appeal. Rule 1.8(7) of the CAR states the general rule:

> "[T]he general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success".

It is now well settled, following **Swain Hillman** [2001] 1 All ER 91, and numerous decisions of this court citing that case with approval, that the phrase "real chance of success" means a "realistic" as opposed to a "fanciful" prospect of success.

[27] In assessing whether the intended appeal had a realistic chance of success, it was necessary to consider the length of the delay in filing the defence and the reasons therefor. The amended particulars of claim were filed on 10 September 2019 and served on 12 September 2019. Even with the extension of time permitting the applicants until 26 February 2021, to file and serve their defence, they had not done so when they filed the application for a further extension on 25 February 2021.

[28] I acknowledge the observation of Brooks JA, at para. [18] of **Rashaka Brooks**, that the delay in not being able to file a defence is most likely to arise in the case of large corporations and state entities. However, each case must be considered on its own facts and in the instant case, the explanations that the senior investigating officer had died and the 2nd applicant had retired were inadequate. The assertion that additional time was required for investigations to be completed and sufficient instructions were unavailable was not a good reason when one considers that the respondent had been before the court since on or about 11 June 2009. The essence of the defence, as reflected in the proposed draft defence, was that the respondent was arrested and charged based on a purported eyewitness's statement naming Selvin Robinson as the perpetrator of the crime and describing him. Presumably, there was a court file with written statements from which it should be evident why the respondent was charged and before the court until

16 January 2017. Therefore, although counsel from the Attorney General's Chambers, like all counsel, act on instructions, it was incumbent on them to be proactive in obtaining such instructions. Given the delay in this case, being proactive would have necessarily involved multiple written correspondence and telephone calls. There was no evidence before the master that a robust attempt was made to obtain the necessary instructions in this case.

[29] On the issue of whether the draft defence disclosed any merit, which could have justified it going forward, it was necessary to examine the element of the claim of malicious prosecution to which it responded. In **Wills v Voisin** (1963) 6 WIR 50, Wooding CJ at page 57 para. C, identified the elements which a litigant must prove, on a balance of probabilities, to succeed on a claim for malicious prosecution at common law as follows:

> "Accordingly, in an action for the vindication of the right to be protected against unwarranted prosecution, which is the action for malicious prosecution, a plaintiff must show (a) that the law was set in motion against him on a charge for a criminal offence; (b) that he was acquitted of the charge or that otherwise it was determined in his favour; (c) that the prosecutor set the law in motion without reasonable and probable cause; and (d) that in so setting the law in motion the prosecutor was actuated by malice."

[30] Section 33 of the Constabulary Force Act requires a claimant, who is alleging that a tortious act (including malicious prosecution) was done to them by a constable acting in the course of his duties, to prove that the defendant acted either maliciously or without reasonable or probable cause. It is helpful to quote the section:

> "Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause; and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant."

In **Peter Flemming v Det Cpl Myers and the Attorney General** (1989) 26 JLR 525, Forte JA, as he then was, (at page 535 of the report) adopted the statement of Lord Devlin in **Glinski v McIver** (1962) 2 WLR 832 that, "'malice' covers not only spite or ill-will but also any motive other than a desire to bring a criminal to justice". However, in most cases, the issue which poses the greatest difficulty is, whether the prosecution was initiated maliciously or without reasonable or probable cause. Reasonable and probable cause was defined by Devlin LJ in **Hicks v Faulkner** (1878) 8 QBD 167, at page 171, as follows:

> "Now I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

[31] The emphasis of the submissions before the court was on the presence or absence of reasonable or probable cause. The possible presence of malice was not addressed in any detail. In the Privy Council case of **Kevin Stewart v Attorney General of Trinidad and Tobago** [2022] UKPC 53, the Board considered the correct test of the state of mind of the police officer against whom a claim for malicious prosecution has been brought. Their Lordships made the following observation at para. 26, which are relevant to this case:

> 26. Nevertheless, and although nothing turns on it in this case, there is one point on the law which it is helpful to clarify. This concerns the question as to what the police officer's honest (and reasonably held) belief must be about in the context of deciding whether there is a lack of reasonable and probable cause. It has commonly been stated that the honest belief must be as to the accused's guilt in respect of the offence charged: see *Hicks v Faulkner* (1878) 8 QBD 167, 171, per Hawkins J, which was approved by the House of Lords in *Herniman v Smith* [1938] AC 305. But in the Board's view, the principled and correct approach was articulated by Lord

Denning in the House of Lords in *Glinski v McIver* [1962] AC 726. He said at pp 758-759:

> '[T]he word 'guilty' is apt to be misleading. It suggests that in order to have reasonable and probable cause, a man who brings a prosecution, be he a police officer or a private individual, must, at his peril, believe in the guilt of the accused. That he must be sure of it, as a jury must, before they convict. Whereas in truth he has only to be satisfied that there is a proper case to lay before the court. … After all, he cannot judge whether the witnesses are telling the truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal and not for him ... So also with a police officer. He is concerned to bring to trial every man who should be put on trial, but he is not concerned to convict him. ...No, the truth is that a police officer is only concerned to see that there is a case proper to be laid before the court."

It was, therefore, necessary for this court to examine the facts which were within the knowledge of the 2nd applicant, or the information that he had ascertained by whatever means, and the effect it had on him at the time he arrested and charged the respondent.

The importance of the statement of case

[32] Pleadings continue to be important under the CPR regime, although they are not required to be extensive since the witness statement(s) will supply the particulars of the pleader's case and the evidence (see judgment of Lord Woolf MR in **McPhilemy v Times Newspapers Ltd and others** [1999] 3 All ER 775 at 792-793, and Phillips JA in **Akbar Limited v Citibank N.A** [2014] JMCA Civ 43 at para.[64]). However, rule 10.5(1) of the CPR requires that "[t]he defence must set out all the facts on which the defendant relies to dispute the claim". Against this requirement, it is helpful to examine para. 10 of the draft defence of the applicants, which is in the following terms:

> "10. Paragraph 12 of the Amended Particulars of Claim is denied. The Defendants will say that the 2nd Defendant was

> not actuated by malice when he brought charges against the Claimant but rather acted upon reasonable and probable cause having regard to the statement provided by Courtney Campbell which named the Claimant as one of the perpetrators of the crime."

[33] I agreed with the submission of the respondent that the assertion in this paragraph that the statement of Courtney Campbell named the respondent as one of the perpetrators of the crime is inaccurate. It is an inference that the applicants are asking the court to draw, disguised as a statement of fact. The material portion of that statement where Courtney Campbell introduces and describes one of the alleged perpetrators is as follows:

> "I will be referring to Selvin Robinson as Shawn which he is called. I have known Shawn for about 20 years. He is of brown complexion he is about 5ft 3 inches, medium built, he is about 27 years old. He lives on Grants Pen Drive."

[34] The unchallenged evidence of the respondent, as contained in his affidavit filed on 11 June 2021, is that his "official name" is Shawn Robinson and "Shawn" is not an alias for him. Furthermore, he avers that he is of "dark complexion" not "brown complexion" and neither the name nor the description that was given to the 2nd applicant matched him. These assertions are consistent with para. 12 b) of the amended particulars of claim in which the respondent pleads the following:

> "b) The said Detective Sergeant Fearon acted unreasonably and without probable cause as the sole eye-witness to the Crime described the offender as follows:
> i) Suspect True Name: Selvin Robinson, while the Claimant's true name is Shawn Robinson;
>
> ii) Suspect's Alias: Shawn, while the claimant had no alias; and
>
> iii) Suspect's Height: 5" 3', while the Claimant's height was 5"9'. "

[35] At para. 11.(ii) of the draft defence, the applicants plead that:

> "(ii) Save that it is neither admitted nor denied that the Claimant is 5"9' as this information is not within the knowledge of the Defendants, subparagraph b) is denied and the Defendants repeat paragraph 10 of this Defence."

It is significant that there is no positive pleading that the legal name of the respondent is Selvin Robinson nor is there any positive assertion of the height, age, address or complexion of the respondent, which were identifying features of the assailant provided by the witness, Courtney Campbell. It is, therefore, inaccurate to positively plead that the statement provided by Courtney Campbell named the respondent as one of the perpetrators of the crime. The witness, in his statement, named "Selvin Robinson" and that name coupled with the description of the person, without more, does not provide a nexus to the respondent in the absence of a confirmatory event, such as a formal or informal identification parade.

[36] In the case of **Peter Flemming**, Carey P (Ag) disagreed with Forte and Morgan JJA, in their conclusion that the trial judge was correct in his finding that on the evidence in that case, the defendant acted on the information of others when he arrested and charged the plaintiff and that the plaintiff failed to prove that the defendant acted maliciously or without reasonable or probable cause in so doing. Forte and Morgan JJA agreed that the trial judge had correctly found that the officer had sufficient evidence from an eyewitness to have prosecuted the plaintiff, although the eyewitness did not attend the preliminary enquiry. Despite the dissenting position of Carey P on the facts, that case provides support for the proposition that the information contained in a written statement can, in certain circumstances, provide a sufficient basis on which a police officer can conclude that a person committed an offence, and on that basis properly arrest and charge that person.

[37] The entire foundation of the defence is that the 2nd applicant acted with reasonable and probable cause in concluding that the offender named as "Selvin Robinson" in the written statement is the respondent. It was, therefore, necessary for the applicants to

plead the facts capable of reasonably supporting such a conclusion and on which they relied but they failed so to do.

[38] Additionally, it was uncontroverted that this conclusion by the 2nd applicant introduced a subjective component into the defence to the respondent's claim due to the requirement that the 2nd applicant should be "concerned to see that there is a case proper to be laid before the court".

[39] Consequently, it was necessary for the applicants to establish the nexus between the person named in the witness statement as Selvin Robinson and the respondent. For that reason, affidavit evidence in support of the application for further extension ought properly to have stated the facts which grounded the 2nd applicant's belief and explained the basis or bases on which he arrived at his conclusion that Selvin Robinson and the respondent were one and the same person. If there were any perceived discrepancies between the description of the perpetrator in the witness statement and the actual height and complexion of the respondent, the 2nd applicant should have explained why, notwithstanding these discrepancies, his conclusion that the perpetrator and the respondent were one and the same, was reasonable in the circumstances.

[40] The submission of the applicants that an analysis which involves "looking behind" the statements of case to assess whether there was reasonable or probable cause would be tantamount to conducting a mini-trial is, with respect, misconceived. The court is entitled to assess the draft defence to determine whether it has any merit, and in doing so, the court is not required to accept the integrity of the statements contained therein without question. Accordingly, the court is permitted to interrogate, albeit in a limited way, the soundness of any assertion which is being made, especially where, as in this case, the factual underpinning which could lead to such a conclusion is absent and the applicants were relying on an unchallenged document. Furthermore, the evidence of the respondent of his name and other features of his identity was unchallenged. Consequently, there were no disputed facts to be resolved and the court did not have to

embark on an exercise to resolve disputed evidence which could properly be described as a mini-trial.

[41] In considering the issue of prejudice and whether the respondent's conduct had any significance, it must be appreciated that the time within which the respondent could have brought his claim for malicious prosecution without it being barred by the operation of the statute of limitation, only began to run from the date of his acquittal on or about 16 January 2017. This is contrasted with the claim for false imprisonment for which time began to run from the date the claim accrued in 2009. Therefore, the respondent was not dilatory in filing his claim for malicious prosecution. His ability to commence a claim seeking recourse for the wrong he alleged was done to him, was a function of the nature of the claim for malicious prosecution and its attendant preconditions for it to be proved. The fact that the respondent may have been dilatory in filing his claim for false imprisonment and subsequently discontinued it because it was statute-barred, is irrelevant in assessing the promptness of the filing of his claim for malicious prosecution.

[42] The requirement for the respondent to plead his acquittal in a claim for malicious prosecution elevated the risk of prejudice to him if there was protracted delay. This was quite evident in this case. The respondent was arrested and charged with offences including murder on or about 11 June 2009. It was not until on or about 16 January 2017 that the case against him for murder was discontinued and only then did it become permissible for him to file a claim for malicious prosecution. It is through this lens that any additional delay in the adjudication of his claim must be viewed. The respondent having served his amended particulars of claim on 12 September 2019, the applicants had the benefit of an order on 23 November 2020, granting an extension of time within which to file and serve their defence to 26 February 2021. The applicants did not comply with that order and filed the application for a further extension. It was against this procedural background that the master considered the application for a further extension and in my opinion, it was quite permissible for her to consider and give weight to the issue of prejudice.

[43] The importance of an approach with a broad consideration, including the interests of justice, as established by Lightman J in **Commissioner of Customs and Excise v Eastwood Care Homes** permitted the master to assess the application for an extension of time, not in a vacuum, but bearing in mind the possible prejudice to the respondent in light of his personal circumstances. The prejudice which the respondent asserted was the inordinate delay in having his claim determined given his situation where he was suffering without a job and in "destitute circumstances" (to use his words), and by implication, his 'resource deficit' (to borrow the language used by Lightman J), when compared to the vast resources of the state.

[44] In my view, in weighing the prejudice to the respondent, it would have been quite appropriate for the master to consider the date the respondent was charged, the length of time that had passed since he filed and served his amended particulars of claim and the difficult circumstances which he said he faced. I concluded that there were sufficient bases on which the master could properly have found that a further extension of time for the applicants to file their defence was prejudicial to the respondent, if she did so find as the applicants alleged.

Conclusion on the application for extension of time to file an application for leave to appeal

[45] In addition to there not having been a good reason for the delay in filing the defence before the time as extended by Master P Mason, I found that there was ample evidence to support a finding of prejudice to the respondent. Moreover, when I considered the deficiencies in the pleadings contained in the draft defence, which were not cured by any evidence to explain the nexus between Selvin Robinson named in the witness statement and the respondent, I formed the opinion that there were sufficient bases on which the master could properly have concluded that the applicants' draft defence did not disclose an arguable case. When all these elements were considered in the round, factoring in the need to adopt a broad approach in the interests of justice, I formed the view that the decision of the master to refuse the application for a further extension was not aberrant, plainly wrong, or deficient in any way which would amount

to an incorrect exercise of her discretion. It was, therefore, my conclusion that there would be no proper ground on which to disturb the Order, or which could justify this court's interference on an appeal.

[46] Based on the foregoing conclusion, there was no arguable case on an appeal, and, therefore, it would have been futile to enlarge the time within which to apply for permission to appeal. Accordingly, the application for an extension of time to apply for permission to appeal failed.

[47] For these reasons, I agreed with the orders made by the court as set out at para. [3] above.