JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL

MOTION NO: 26/2001

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE SMITH, J.A. (Ag.)

BETWEEN	**WILBERT CHRISTOPHER**	**APPELLANT**
A N D	**ATTORNEY GENERAL OF JAMAICA**	**RESPONDENT**

Dennis Goffe, Q.C. appears as Amicus Curiae

Ms. Cheryl Lewis and **Ms. Monique Harrison**
for Respondent instructed by the Director of State Proceedings

June 21 and November 9, 2001

FORTE, P.

Having read in draft the judgment of Langrin, J.A., I agree with the reasoning and conclusion and have nothing further to add.

LANGRIN, J.A.;

This is an application for leave to appeal out of time from an order of Her Honour Ms. Ingrid Mangatal striking out the claim on the basis that the causes of action were statute barred. At the conclusion of the hearing we refused the application but promised to put our reasons in writing at a later date. This we now do.

The appellant was a member of the Island Special Constabulary Force. He resigned from the Force on or about October, 1993. On March 1994, he collected from the Ministry of National Security and Justice the sum of $37,427.37. This sum represented money due to him by the Ministry in relation to his salary, allowances and pension for the period between October 1, 1993 and March 29, 1994. Mr. Christopher was absent from duty without leave for 100 days, from September 1, 1992 to December 1992. This absence continued from December 1992 until October 31, 1993. On the 29th June, 1999 he filed plaints Nos. 4162 and 4164 at the Sutton Street Resident Magistrate's Court claiming the payment of salary for the period of September 8, 1992 to October 30, 1993. Mr. Christopher sought to amend his particulars of claim in respect of both plaints. However, on February 20, 2001, counsel for the Attorney General made an application that the proposed amendments be denied and that the matters be struck out on the basis that the cause of action was statute barred. The learned Resident Magistrate granted the applications made by counsel for the Attorney General. Mr. Christopher gave a verbal notice of appeal on that very day and on March 13, 2001 a written Notice of Appeal was lodged at the Sutton Street Resident Magistrate's Court.

Several issues arise on the appeal against the decision made by the trial judge to strike out the plaints. The appellant had failed to comply with the requirements of s.256 of the Judicature (Resident Magistrates) Act ("JRMA"). This provision requires an appellant to deposit $600 for security for the due prosecution of the appeal at the time of pronouncing judgment when the appeal is taken and minuted or if not so taken then within 14 days after the date of the judgment when a written notice of appeal is lodged. A further $6000 is to be paid as security for costs within 14 days of the taking or lodging of the appeal. The question to be determined is whether non-compliance with the section vitiates or terminates the appeal process. In addition whether the Court of Appeal can grant an application by an appellant for an extension of time to comply with the section. The appellant appeals on the ground that the learned trial judge erred when she accepted the defendant's submission that the plaintiff's claim was statute barred by virtue of section 2(1)(a) of the Public Authorities Protection Act ("PAPA").

The appellant's submission, is that the requirements stipulated in s.265 of the JRMA is a mere formality and not a condition precedent. Therefore, the court has the power to reset the timetable regulating the conduct of appeal proceedings so as to enable that requirement to

be complied with. This is afforded by s. 12 of the Judicature (Appellate Jurisdiction) Act.

This section provides:

> "(2) Notwithstanding anything to the contrary the time within which –
>
> (a) notice of appeal may be given or served;
> (b) security for costs of the appeal and for the due and faithful performance of the judgment and order of the Court of Appeal may be given;
> (c) grounds of appeal may be filed or served,
>
> in relation to an appeal under this section, may upon application made in such manner as may be prescribed by rules of court, be extended by the court at any time".

The section clearly allows for the extension of time for the payment of security for costs. However, no mention is made of the payment of security for the due prosecution of the appeal. Fox J.A. in ***Patterson and Nicey v Lyn*** [1973] 12 JLR 124 held that this omission was deliberate and not the result of an oversight. It was aimed at resolving the earlier cases of ***Aaron v Lindo*** [1953] 6 JLR 205 and ***Welds v Montego Bay Ice Co. Ltd. and Smith*** [1962] 8 JLR 83. In the earlier case, the Court of Appeal treated the requirement to pay security for costs as a formality, though no reasons were given by the court for so holding. The court in the ***Welds*** case took a different view concluding that the requirement is a condition precedent. It was the opinion of the court that s.11(2) of

the Judicature (Appellate Jurisdiction) Law [1962] only gave the court power to extend time for the giving of notice of appeal and filing grounds of appeal. Therefore, the payment of security for costs and for the due prosecution of appeal were condition precedents and there can be no allowance of time given by the court for the compliance with these requirements. The court however expressed the view that the omissions ought to be remedied by the Legislature. This was done by s.3 of the Judicature (Appellate Jurisdiction) (Amendment) Act 1970 which repealed and re-enacted s.11 (2) which has become s.12 of the Act.

It seems clear that by the re-enactment of s.11 (2), now s.12, the Legislature intended that the payment of security for costs be a formality for which the Court of Appeal may allow an appellant an extension of time within which to comply at a later date. However, the payment of security for the due prosecution of the appeal still remains a condition precedent, being omitted from s.12. When interpreting the section, the presumption that "the mention of a thing is the exclusion of others" is most appropriate. In light of this the Court of Appeal may grant the appellant, Mr. Christopher, an extension of time to pay the $6,000. However, if the initial $600 has not been paid the court has no other recourse but to dismiss the appeal.

It has been noted that a written notice of appeal was lodged on March 13, 2001. This however, cannot be an effective notice of appeal. In ***R v Maslanka*** [1972] 12 JLR 843 the learned judge of appeal noted that the right of appeal is indivisible. When it is exercised it is expended . A person has only one right of appeal within the 14 days. Therefore, the effective notice of appeal was the verbal notice and the limitation period set out in s.256 would be from that time.

When seeking the exercise of the courts discretion to extend or enlarge time to do an act or for taking any proceedings in relation to the filing of an appeal, the appellant must show the reasons for his delay and that there is some merit to the appeal. In the case of ***Miguel Thomas and Josephine Thomas v William Johnson*** and ***Kathleen Johnson*** [1991] 28 JLR 677 the learned judges adopted the view that the delay must be shown to be "understandable and excusable", there must be merit to the appeal and the appellant must, at all material times, have had a serious and continuing intention to prosecute the appeal. Mr. Christopher has shown a serious and continuing intention to prosecute the appeal as a verbal notice of appeal was made on February 20, 2001 and grounds of appeal filed. However, the appellant gives no reasons for his failure to pay the

security for costs within 14 days of giving the verbal notice of appeal as required by the Judicature (Resident Magistrates) Act s.256.

Counsel for the **Attorney General** submitted that there is no merit to the appeal as the limitation period has in fact expired. Section 2 (1) (a) The Public Authorities Protection Act 1942 requires that proceedings against any person for any act done in execution of any public duty or authority must be instituted within one year after the act complained of. This section was however repealed by section 2 of the Public Authorities Protection Amendment Act, 1995. As a result, the present limitation period for proceeding against a public authority would be six years from the act complained of.

The question to be determined in this regard, is whether the Public Authorities Protection Amendment Act, 1995 is to have retrospective effect, as the cause of action arose in 1994. Section 25 (2) (c) of the Interpretation Act provides that:

> " Where any act repeals any other enactment, then unless the contrary intention appears, the repeal shall not –
> (a) revive anything not in force or existing at the time at which the repeal takes effect".

The Public Authorities Protection Amendment Act 1995 s.2 shows no contrary intention and accordingly, the Act is not to have retrospective effect.

In the case of ***Lemuel Gordon v The Attorney General for Jamaica*** SCCA 96/94, (unreported) delivered 20th December, 1995 Carey J.A. noted that the proper approach to the amending enactment is not to determine whether it is procedural or substantive but to see whether, if applied retrospectively, it would impair existing rights. The Crown's agents when acting in execution of their duties acquire a vested right by reason of the statutory limitation period of 12 months and should be able to assume that they are no longer at risk from a stale claim. There is an accrued right to plead the lapse of a limitation period which is in fact, an absolute defence. Phillips J.A. in ***Pierre v Walker*** **22** W.I.R 508 held:

> "that the principle whereby an amendment will not be granted the effect of which would be to deprive a party of the benefit derived from a statute of limitations is concerned with the preservation of rights acquired in connection with existing litigation..."

The appellant's cause of action arose in 1994. The relevant limitation period for bringing a claim against the respondent is one year from this date as expressed by Section 2 (1) (a) The Public Authorities Protection Act 1942. The Amendment Act 1995 cannot be applied retrospectively because it would deprive the respondent of the vested right of the limitation period derived from the statute. Therefore, the claim filed on the 29th June, 1999 is far beyond the limitation period of one year, from 1994. The appeal is then of no merit as the limitation

period has expired from 1995 and the learned trial judge rightly struck out the plaints.

Mr. Dennis Goffe, Q.C. on behalf of the appellant seeks to argue that the Public Authorities Protection Act is not applicable as the Island Special Constabulary Force was not acting within the execution of its public duty or authority. This contention is not supported by the authorities. The principle has been shown to be that where a body or institution is required by statute to engage in certain contracts, breaches of these contracts are subject to the Public Authorities Protection Act. In ***McManus v Bowes and Others*** **[1937]** 3 All ER 227, the county mental hospital maintained under the Lunacy Act, 1890 engaged the plaintiff as Assistant Medical Officer. The Act empowered the Committee to remove any person appointed under the section. The plaintiff was subsequently dismissed on October 21, 1927. In 1937, after years of claiming superannuation allowance, the plaintiff made a claim in damages for wrongful dismissal and arrears of salary and the repayment of his contributions to the superannuation fund. The learned judges of the Court of Appeal held that the plaintiff's contract of employment was a direct execution of a statutory duty and therefore the action for wrongful dismissal had to be brought within six months of the dismissal, as required by the Public Authorities Protection Act. Similarly, the failure to pay the plaintiff his

superannuation contributions was a neglect of a statutory duty imposed by the Lunacy Act 1890 and any action under that head should also have been brought within six months of the cause of action which arose in 1930. Grossman J in ***Compton v W. Ham County Borough Council*** [1939] 3 All ER 193 at pg. 199 plainly stated:

> "that a breach of a contract which a public authority is by statute bound to make does come within the Public Authority Protection Act..."

The Island Special Constabulary Force is a public authority created by the Constables (Special) Act Part II and is bound by the statute to appoint Special Constables: See Constables (Special) Act s.20; Island Special Constabulary Force (General) Regulations, 1950 s.11.

These provisions further authorize the Commissioner to suspend or determine the services or engagement of a Special Constable, at any time, if such Special Constable does not perform the duties he undertakes or is for any other reason considered unsuitable: (See Constables (Special) Act s.20 and Island Special Constabulary Force (General) Regulations, 1950 s.27. There can be no doubt that the Island Special Constabulary Force is a public authority bound to appoint Special Constables by statute, and any cause of action which arises based on such appointment is subject to the Public Authorities

Protection Act. Therefore Mr. Christopher's claim must have been brought within one year.

Counsel for the appellant referred to the case of ***Cooper and Associates Ltd v National Water Commission*** *29* JLR 183. This case is distinguishable from those mentioned above. In this case the contract between the plaintiff's contractors and the defendant Public Authority was a private contract as the law did not impose a public duty on the defendant to contract with the plaintiff. The Public Authority was charged with the duty to provide and improve sewerage systems throughout the country "within the limits of their resource". The fact that the contract was made in execution of some public duty imposed by statute does not bring it within the protection of the Public Authorities Protection Act. In the cases of ***McManus v Bowes and Others*** and ***Compton v W. Ham Country Borough Council*** (supra) the public authorities were expressly bound by statute to appoint persons to the particular offices. Similarly, the Island Special Constabulary Force was bound by statute to appoint persons to the posts of Special Constable as a public duty. The Law imposed a public duty on the Force to appoint Special Constables.

Before parting with this matter, I would like to commend Mr. Dennis Goffe, Q.C. for having come to the assistance of the appellant and the court in this matter.

In conclusion, I am of the view that the appellant has failed to show that his case is of merit since the claim is statute barred by virtue of section 2 (1) (a) The Public Authorities Protection Act 1942. In addition he gives no reason for his delay in payment of the security for costs. As a result, the court has no grounds on which to exercise its discretion to extend or enlarge time for the payment of the security for costs.

The application is therefore refused. There will be no order as to costs.

SMITH, J.A. (Ag.)

I also agree.