THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2013/0023

BETWEEN

BRYAN JAMES

Appellant

and

THE ATTORNEY GENERAL

Respondent

SLUHCVAP2013/0024

BETWEEN:

JAMES ENTERPRISES LIMITED

Appellant

and

THE ATTORNEY GENERAL

Respondent

SLUHCVAP2014/0021

BETWEEN:

[1] FAST KAZ AUTO SUPPLIES
[2] CURTIS HUDSON

Appellants

and

THE ATTORNEY GENERAL

Respondent

(Consolidated)

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Horace Fraser for the Appellants
Mrs. Brender Portland-Reynolds, Solicitor General with her, Mrs. Karen Bernard for the Respondent (in appeals SLUHCVAP2013/0023. and SLUHCVAP2013/0024)
Mr. Dwight Lay for the Respondent in appeal SLUHCVAP2014/0021

2015: October 28;
2016: February 10.

Interlocutory appeal – Article 28, Code of Civil Procedure, Cap 243 – Interpretation and application of article 28 – Proper party to institute civil proceedings against in claims involving public officers – Service of notice of intended suit on Comptroller of Customs and Excise Department and not Attorney General – Whether notice is required to be served on Attorney General – Whether failure to serve Attorney General fatal to claim – Section 13, Crown Proceedings Act, Cap 2.05 – Substitution of Attorney General as defendant in place of Comptroller – Substitution made three years after time of commission of the alleged delicts – Whether substitution created new and distinct claims made for the first time against a new party – Whether claims prescribed by virtue of article 2122 of the Civil Code of Saint Lucia, Cap 4.01

Civil appeal nos. 23 and 24 of 2013, ("the James Claims and where appropriate the James Parties") were commenced by claim forms issued on 12th June 2012 for damages and other relief as a result of alleged wrongful searches, seizure and detention of goods and documents from the James parties' personal and business premises on 14th October 2009, by a team of officers from the Customs and Excise Department. Prior to the issuance of the claim forms, the Comptroller of Customs ("the Comptroller") and the James Parties had attempted an amicable resolution of the matter but to no avail. On 2nd April 2012, the James Parties gave to the Comptroller, a notice of intended suit ("Article 28 Notice") in purported compliance with article 28 of the Code of Civil Procedure of Saint Lucia ("the CCP"). There is no assertion that the Article 28 Notice was defective either in form or substance or as to conformity with article 28 of the CCP. The James Parties did not however give to the Attorney General an Article 28 Notice. On 25th October 2012, an amended claim form was filed substituting the Attorney General as defendant in place of the Comptroller. This was done well before the first case management conference which took place in September 2013, but the amendment was effected after a period of three years had elapsed from the date of commission of the alleged delicts.

The Attorney General contended in their defences filed on 16th November 2012 to the James Parties 'amended claims, among other things, that the failure to serve the Attorney General with an Article 28 Notice was fatal to the claims and also that the claims were prescribed by virtue of Article 2122 of the Civil Code of Saint Lucia ("the Civil Code"), as

the acts complained of took place on 14th October 2009, being more than three years before filing the amended claim, by which amendment the Attorney General had been substituted as defendant in place of the Comptroller. On 23rd November 2012, an application was made by the Attorney General to strike out the James Claims on these bases. The Attorney General succeeded on her strike out application. The learned master ruled that the failure to give to the Attorney General an Article 28 Notice was fatal to the claims. The learned master also found that the claims were prescribed under Article 2122(2) of the Civil Code. The James Parties appealed to a single judge of the Court who upheld the master's rulings. The James Parties, dissatisfied with the decision appealed to the Full Court.

In the proceedings which gave rise to Civil appeal no. 21 of 2014, ("the Fast Kaz Claims and where appropriate the Fast Kaz Parties") a suit was also initially brought in the name of the Comptroller who was given an Article 28 Notice. It is common ground that Fast Kaz Parties had not given to the Attorney General an Article 28 Notice. Following the setting aside of a judgment in default against the Comptroller, permission was sought and granted for the substitution of the Attorney General in place of the Comptroller as the defendant in the claims. The Attorney General, in her defences to the claims did not however raise the issue of the requirement of giving her an Article 28 Notice. It was the Fast Kaz Parties who, in their application for substitution of the Attorney General in place of the Comptroller, sought also a declaration to the effect that the giving of the Article 28 Notice to the Comptroller was 'proper notice on the Attorney General' in regard to the proceedings. The learned master directed the filing of submissions on the issue for her determination. She thereafter ruled, in similar fashion as in the James Claims, that the failure to give to the Attorney General an Article 28 Notice was fatal to the Fast Kaz Claims and those claims were similarly struck out on that basis. The Fast Kaz Parties appealed to the Full Court.

The three appeals, each having dealt with the common issue of the interpretation and application of article 28 of the CCP were consolidated and heard together. The appellants contend that at the time the claims were first brought the limitation period was current. They also contend that there is no requirement to serve the Attorney General with an Article 28 Notice. The respondent, relying on the Crown Proceedings Act ("the CPA"), argue that until the amended claims were filed no claim existed against the Crown and that the claims were prescribed under Article 2122 (2) of the Civil Code. The respondent also contends that since the suit must be brought against the Attorney General, the notice of intended suit, namely the Article 28 Notice could only be intended as a notice to the Attorney General. Thus, article 28 of the CCP must be construed as a requirement to serve the Attorney General as the proper party to the claim.

Held: allowing the appeals and setting aside the order of the single judge upholding the orders striking out the James Parties Claims; ordering that the master's order striking out the James Claims and the master's order striking out the Fast Kaz Claims be set aside; directing that all the claims be remitted to the court below to be proceeded with in accordance with the Rules of Court and ordering costs to the appellant to be fixed at two thirds of the amount agreed between the parties below, failing which, costs to be assessed within thirty (30) days and discounted by 25% as an expression of the court's displeasure

at the lack of proper preparation of the bundles and records in these appeals by the appellants, that:

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

   Article 28 of the Code of Civil Procedure of Saint Lucia Cap. 243, Revised Laws of Saint Lucia 1957 applied; **Bertha Compton v Dr. Nathaniel et al** SLUHCVAP2004/0012 (delivered 15th February 2005, unreported) followed; **General Aviation Services Ltd et al v The Director General of the Eastern Caribbean Civil Aviation Authority et al** SLUHCVAP2012/006 (delivered 11th September 2012, unreported) applied; **Percival Sonson v PC236 Gavin Hunt and the Attorney General of Saint Lucia** SLUHCVAP2007/0005 (delivered 31st October 2007, unreported) considered.

2. It is notable that the Article 28 Notice does not commence proceedings. It simply gives notice to the public officer or government department concerned of an intention to commence proceedings. It may be described as nothing more than a pre-action protocol with an expressed and drastic sanction built in against a prospective claimant who fails to comply. The CPA deals with service of documents on the Attorney General once proceedings have been instituted and does not govern service of documents prior to the commencement of proceedings.

3. The nature of the claim or the cause of action giving rise to the claim against a public officer or servant or agent of the Crown, as a claim against the Crown, does not change by virtue of the fact that the Attorney General is subsequently made the defendant. The acts or omissions of the public officer complained of, continue to be the cause of action giving rise to the claim save that the CPA has provided for the Attorney General as the representative of the public officer, servant or agent of the Crown to be made the defendant. The Attorney General is simply made to stand in the shoes of the public officer, or other servant or agent of the Crown, in respect of any delicts or quasi delicts committed in the performance of his/her duties. There is no separate and distinct cause of action against the Attorney General outside that created by the delict or quasi delict of the public officer, servant or agent of the crown.

Norman Walcott v Moses Serieux SLUHCVAP1975/0002 (delivered 15th October 1975, unreported) distinguished; **Michele Stephenson et al v Lambert James-Soomer** SLUHCV2003/0138 and 0453 (delivered 19th April 2004, unreported) distinguished.

4. Rule19.4 (1) of the Civil Procedure Rules 2000 ("CPR") permits the court to add or substitute a party where the relevant limitation period was current when proceedings were started. In the instant case, proceedings were started within the relevant limitation period notwithstanding the Comptroller was named as defendant and not the Attorney General. The failure to name the Attorney General as defendant does not render a claim any less a claim against the Crown albeit suffering from a defect by misnomer of the officer to be named as defendant in the proceedings. The CPA makes the Crown liable for the delicts or quasi-delicts of its officers and because the comptroller is an officer of the Crown, it would be incorrect to say that no claim existed against the Crown. Thus, the substitution of the Attorney General in place of the Comptroller in accordance with section 13 of the CPA did not thereby bring about a fresh cause of action against a wholly new party and as such, there has been no offending against CPR 19.4(2) as it relates to the relevant limitation period namely, article 2122 of the Civil Code.

JUDGMENT

PEREIRA, CJ: These appeals are interlocutory appeals. They were consolidated for hearing together as they raised a central issue going to the foundation of claims made in all the matters - that is the interpretation and application of Article 28 of the **Code of Civil Procedure**[1] ("the CCP") of Saint Lucia. As a secondary issue, civil appeal nos. 23 and 24 of 2013 also concern the question whether those claims are prescribed by Articles 2122(2) and 2129 of the **Civil Code of Saint Lucia** ("the Civil Code").[2]

The background

[2] For the purpose of placing the issues to be determined into context, I set out below a short background to the matters so far as is relevant. Civil appeal nos. 23 and 24 of 2014 will be referred to as "the James Claims" and where appropriate "the James Parties". In Civil appeal no. 21 of 2014, the claims will hereafter be

[1] Cap. 243, Revised Laws of Saint Lucia 1957.
[2] Cap. 4:01, Revised Laws of Saint Lucia 2008.

referred to as "the Fast Kaz Claims" and where appropriate "the Fast Kaz Parties". The James Claims and the Fast Kaz Claims all arise from complaints made against officers of the Customs and Excise Department of the Government of Saint Lucia in relation to their search, seizure and detention of various goods and documents on various dates relevant to the respective claims, which the James Parties and the Fast Kaz Parties say were wrongful acts by the customs officers, giving rise to claims for damages and other remedies. It is common ground that the customs officers, in so doing, were purportedly acting in accordance with their duties and powers under the **Customs (Control and Management) Act**[3] ("the Customs Act")and thus as servants or agents or officers of the Crown.

The James Claims

[3] The James Claims were commenced by claim forms issued on 12th June 2012 for damages and other relief as a result of alleged wrongful searches, seizure and detention of goods and documents from the James Parties'[4] personal and business premises on 14th October 2009 by a team of officers from the Customs and Excise Department.

[4] After the elapse of more than two years during which the parties (the James Parties and the Comptroller of Customs) had attempted an amicable resolution of the matter to no avail, the James Parties, on 2nd April 2012, gave to the Comptroller a notice of their intention to file suit. It is not disputed that the notices of intended suit were given to the Comptroller in purported compliance with Article 28 of the CCP ("the Article 28 Notice"). There is no assertion that the Article 28 Notice was defective either in form or substance or as to conformity with article 28 of the CCP.

[5] On 11th and 12th June 2012, the James Parties instituted their claims as aforesaid, naming the Comptroller as the defendant. On 25th October 2012, the James

[3] Cap.15.05, Revised Laws of Saint Lucia 2008.
[4] Mr. Bryan James conducted business through and is the owner of the company James Enterprises Limited.

Parties sought to file amended claim forms in which they substituted the Attorney General as defendant in place of the Comptroller. This they did, no doubt having regard to section 4 (Liability of the Crown in Delict) and section 13 (Parties to Proceedings) of the **Crown Proceedings Act**[5] ("the CPA") which, among other things, says that civil proceedings against the Crown shall be instituted against the Attorney General. **The James Parties did not however give to the Attorney General an Article 28 Notice**. The amended claim was filed well before the first case management conference which took place in September 2013, but the amendment was effected after a period of three years had elapsed from the date of commission of the alleged delicts complained of by the customs officers. Article 2122 of the Civil Code provides in effect that where no other provision applies, a claim for damages resulting from delicts is prescribed by three years.

[6] The Attorney General contended in their defences filed on 16th November 2012 to the James Parties' amended claims, among other things, that the failure to serve the Attorney General with an Article 28 Notice was fatal to the claims[6] and also that the claims were prescribed by virtue of Article 2122 of the Civil Code, as the acts complained of took place on 14th October 2009, being more than three years before filing the amended claim, by which amendment the Attorney General had been substituted as defendant in place of the Comptroller. The Attorney General moved quickly in pursuing these contentions as an application was made on 23rd November 2012 to strike out the James Claims on these bases. The Attorney General succeeded on her strike out application. The learned master ruled that the failure to give to the Attorney General an Article 28 Notice was fatal to the claims. In so doing, she relied on the oft cited authority of **Castillo v Corozal Town Board And Another**[7] for the proposition that a failure to meet a mandatory requirement and to plead its compliance in the statement of claim is fatal to the claim. I hasten to point out that the James Parties did plead the fact that an Article

[5] Cap. 2.05, Revised Laws of Saint Lucia 2008.
[6] Para. 9 of defence to amended statement of claim in SLUHCV2012/0532 and para. 11 of defence to amended statement of claim in SLUHCV2012/0542.
[7] (1983) 37 WIR 86, decision of the Belize Court of Appeal.

28 Notice had been given to the Comptroller on 2nd April 2012 and thus the master must be taken to have been relying only on the first limb of the proposition, namely the failure to meet a mandatory requirement which she obviously concluded as being a requirement to serve the Attorney General with an Article 28 Notice. I will return to the **Castillo** decision later. The master also found that the claims were prescribed under Article 2122(2) of the Civil Code.[8] However, no reason has been gleaned from her written decision given on 10th October 2013, for so concluding.

[7] The James Parties appealed and these were heard before a single judge of the Court. The single judge upheld the master's rulings. The James Parties appealed to the Full Court.

The Fast Kaz Claims

[8] The Fast Kaz Claims had a more checkered route through the court system which it is not necessary to detail for the purposes of this appeal. It is sufficient to state the following:

(a) The Fast Kaz Parties also gave to the Comptroller an Article 28 Notice. They also initially brought suit in the name of the Comptroller.[9] Following the setting aside of a judgment in default against the Comptroller, permission was sought and granted for the substitution of the Attorney General in place of the Comptroller as the defendants in the claim. The Attorney General, in her defences to the claims did not raise the issue of the requirement of giving an Article 28 Notice to the Attorney General. It is common ground that the Fast Kaz Parties had not given to the Attorney General an Article 28 Notice. It was the Fast Kaz Parties who, in their application for substitution of the Attorney General in place of the Comptroller, sought also a declaration to the effect that the giving of the Article 28

[8] Prescription was also pleaded under Article 2124 of the Civil Code, but the claimants having pleaded bad faith, the issue was to be left for trial.
[9] Statement of claim filed 2nd November 2011 in claim no. SLUHCV2011/1143 Record of Appeal 2.

Notice to the Comptroller was 'proper notice on the Attorney General' in regard to the proceedings.

(b) Not surprisingly, the master, no doubt having had previous experience in relation to the James Claims, raised the issue as to the effect of failure to serve the Article 28 Notice on the Attorney General of the intended claims, and directed the filing of submissions on the issue for her determination. She thereafter ruled, in similar fashion as in the James Claims, that the failure to give to the Attorney General an Article 28 Notice was fatal to the Fast Kaz Claims and those claims were similarly struck out on that basis. This decision gave rise to the Fast Kaz appeal.

The Appeals

[9] Apart from the Article 28 Notice issue common to all the appeals, the Fast Kaz Parties sought to argue that the learned master had improperly descended into the arena when she, uninvited by either side so to do, raised the effect of the failure to serve the Article 28 Notice of her own motion, the same not having been raised by the Attorney General whose privilege it was and the reliance on which could have been waived by them, if thought fit. The Fast Kaz Parties accordingly sought to argue that the learned master was without jurisdiction in raising and determining this issue. This point, however, was conceded during the hearing of the appeals and in our view rightly, having conceded, that they, having opened the door to this issue in seeking the declaration they sought from the learned master, could not then be heard to complain in her seeking to fully address it. On the Fast Kaz appeal, this left remaining the sole issue of the Article 28 Notice.

[10] In respect of the James Parties appeals, the secondary issue raised is whether the James Claims, having been amended by substitution of the Attorney General in place of the Comptroller, thereby constituted new causes of action as against the Attorney General which were therefore prescribed, the substitution having been

made more than three years after the commission of the alleged delicts, having regard to article 2122 of the Civil Code. In this regard, counsel for the James Parties, apart from relying on the construction of article 28 of the CCP also sought to argue that the Article 28 Notice operated as a judicial demand for the purposes of article 2085 of the Civil Code and thus would have created a civil interruption thus stopping time from running for the purposes of article 2122 which prescribes claims by three years.

[11] As pointed out during the hearing, this argument would take the matter no further as it is accepted that the Article 28 Notice, having been served on the Comptroller only and not on the Attorney General, and, absent a deeming of service of the Article 28 Notice on the Comptroller as service on the Attorney General (which is neither necessary nor otherwise justifiable), would have no effect on the article 2122 prescription point, the Attorney General having been substituted as the defendant after the three year period had elapsed. Unless the Article 28 Notice is deemed to have been given to the Attorney General (which I am not prepared to hold) the question of whether it amounts to a judicial demand thus interrupting the three-year prescription period is neither here nor there (it simply does not arise). This makes it wholly unnecessary to engage in a discourse for the purpose of determining whether an Article 28 Notice is of the character of a judicial demand under article 2085 of the Civil Code.

[12] The only secondary issue which arises in my view then, is whether the substitution of the Attorney General in the James Claims has thereby transformed the claims into wholly fresh ones, and as such, are thereby prescribed. Or, put another way, whether the substitution has created new and distinct claims made for the first time against a new party, namely the Attorney General, and the substitution having been done after the elapse of the period of three years from the time of commission of the alleged wrongful acts, the claims became prescribed by virtue of article 2122 of the Civil Code. I propose to deal with this issue after considering the question arising on the Article 28 Notice as this prescription point only arises

for consideration on a finding, contrary to the earlier decisions, that failure to serve the Attorney General with the Article 28 Notice **is not** fatal to the claims.

The Article 28 Notice

[13] An appropriate starting point is by setting out article 28 of the CCP in full. It states:

> " No **public officer**, or other **person fulfilling any public duty or function**, can be sued **for damages** by reason of any act done by him in the exercise of his functions, nor can any judgment be rendered against him, **unless notice of such suit has been given him** at least one month before the issuing of the writ of summons.
>
> "Such notice must be in writing, it must specify the grounds of the action, must be served upon him personally, or at his domicile[10], and must state the name and residence of the plaintiff." (emphasis added)

[14] Both sides agree that the language of article 28 of the CCP is clear. So did the learned judge. Indeed the learned judge held, as summarized in the headnote of her judgment at paragraph 1, that in order to bring a suit against a public officer for damages a claimant must serve notice of the intended suit on the public officer personally or at his domicile. I am also of the view that this is what article 28 of the CCP says and that it clearly says what it means without the necessity for resorting to any rules of interpretation outside the natural and ordinary meaning of the words used.

[15] In **Bertha Compton v Dr. Nathaniel et al**,[11] Rawlins JA (Ag.), although dealing with the question whether an Article 28 Notice which had in fact been served on the Attorney General was defective (and not the question with which we are here concerned (i.e. whether an Article 28 Notice is required to be served on the Attorney General) opined at paragraphs 20 and 22 as follows respectively:

> "[20] Article 28 requires a Notice to be served on any public officer or other person who is fulfilling any public duty or function. The Article

[10] The term "domicile" is usually taken to mean the country where a person is ordinarily resident. This term seems broad enough to cover the place where the Department or Office of a public body is physically located.

[11] SLUHVCAP2004/0012 (delivered 15th February 2005, unreported).

provides that such a person cannot be sued for damages for anything that he or she does in the exercise of his or her functions unless the person is served with a Notice at least 1 month before the Writ is issued. The Article requires the Writ[sic] to be served on the officer personally or at his/her domicile."

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

[16] In **General Aviation Services Ltd et al v The Director General of the Eastern Caribbean Civil Aviation Authority et al**,[12] Mitchell JA [Ag.] was of a similar view to Rawlins JA. In that case, the issue was whether the claim failed for failure to serve the Article 28 Notice on the public authority there concerned, namely, the Civil Aviation Authority. At paragraph 10 he had this to say:

" … Parliament has provided for the protection of public officers a mandatory requirement that a party intending to issue a claim in court against a public authority must give one month's notice and otherwise comply with the requirements of Article 28 of the **Code of Civil Procedure**. This claim was wrongfully brought without compliance with Article 28. … Article 28 provides that the consequence of failure to give the necessary notice is that the public officer cannot be sued nor can any judgment be rendered against him."

[17] Both Justices of Appeal made plain that the Article 28 Notice was required to be served on the public officer or public authority concerned or whose actions were the subject of the complaint. As Rawlins JA succinctly stated, and which I adopt, **article 28 does not speak to service upon the Attorney General**. It does not say in terms that notice must be served on the Attorney General. Indeed, no reference whatsoever is made therein to the Attorney General. In as much as it is

[12] SLUHCVAP2012/006 (delivered 11th September 2012, unreported).

accepted that the language of article 28 is clear and thus says what it means, it begs the question why should it not mean what it clearly says or, put another way, why should it mean something other than what it says.

[18] The confusion (if I may call it that) seems to have arisen, not in the interpretation of article 28 but as to its application following, it seems, an extempore decision of Barrow JA on behalf of the Court in the case of **Percival Sonson v PC 236 Gavin Hunt and the Attorney General of Saint Lucia**[13] in 2007, the short excerpt of which states as follows:

> "Article 28 of the Code of Civil Procedure negatives liability of public officers, or other person fulfilling any public duty or function, in respect of any act done by him in the exercise of his functions if no notice of suit is given to him at least one month before issuing the claim form.
>
> "Section 4(4) of the Crown Proceedings Act Ch. 13 of the Revised Laws of Saint Lucia 1957 enables the Crown to rely on any enactment, which (1) negatives the liability or (2) limits the amount of liability of any Government department or officer of the Crown in respect of any delict or quasi-delict committed by that department or officer.
>
> "As such, Article 28 of the Code of Civil Procedure applies to the Crown by virtue of section 4 (4)."

It appears that it is on this basis that the view came to be held that article 28 must be taken to mean something other than what it plainly says, that is, that the requirement to serve the public officer concerned must be read not as a requirement to serve the public officer with the Article 28 Notice, which it plainly says, but rather must be read as a requirement to serve it on the Attorney General failing which the Crown's liability on a claim for damages for its officer's delict or quasi-delict is thereby negatived.

[19] While I am in agreement with the purport of article 28 and section 4(4) of the the CPA as set out in the first and second paragraphs respectively of **Sonson**, I am unable to discern why it would have followed, as set out in the third paragraph thereof, that article 28 is therefore applicable to section 4(4) of the CPA unless the

[13] SLUHCVAP2007/0005 (delivered 31st October 2007, unreported).

third paragraph is taken to mean only that where there has not been compliance with article 28, in a suit for damages brought against the Crown in respect of a delict or quasi-delict committed by a government department or officer of the Crown, the Crown may avail itself of the immunity or limitation provided by article 28 as a consequence of that failure. On the other hand, if the third paragraph of **Sonson** is taken to mean that section 4(4) of the CPA requires, either as a matter of construction or as to its consequence, that the Article 28 Notice be served on the Attorney General (on behalf of the Crown), either in addition to or as distinct from service on the government department or officer or authority concerned, (as plainly required by article 28 itself) with the consequence that the claimant who has given notice to the public officer or department concerned but not the Attorney General, is thereby defeated by the privilege contained in article 28, affords considerable cause for pause. It is this latter view for which the Attorney General contends for the purpose of defeating the claims and which she says is the proposition for which **Sonson** stands.

[20] Unfortunately, the available excerpt of the **Sonson** decision is devoid of the factual background or any note as to how the issue in that case arose. It is also devoid of any analysis as to the correlation or interplay between article 28 of the CCP and the provisions of the CPA. While it cannot be disputed that the Crown may take the benefit of an exemption or limitation of liability provided under article 28 of the CCP or indeed any enactment which negatives or limits the liability of a government department or public officer, as may be invoked pursuant to section 4(4) of the CPA, it does not, in my view, follow that a requirement to serve an Article 28 Notice on a public officer or government department translates, without more, to a requirement to serve the Article 28 Notice on the Attorney General if a claimant is to avoid his claim being defeated.

[21] To bolster the view for which she contends, the Attorney General, apart from reliance on section 4(4) of the CPA also prayed in aid section 13 (claim to be

instituted against the AG), section 14 (service of documents) and section 26 (benefits between subjects) of the CPA.

[22] Taking section 13[14] of the CPA firstly, the Attorney General says that since the action can only be brought against the Attorney General and not the public officer as the proper party to the claim, then article 28 of the CCP must be construed as a requirement to serve the Attorney General against whom suit can be brought with the notice of the intended suit. They also contend that the CPA having been passed many years after the CCP, the CCP should be interpreted within the more modern context of the CPA which made the Crown liable for the delicts or quasi-delicts of its servants or agents and public officers. The argument therefore goes that since the suit must be brought against the Attorney General, the notice of intended suit, namely the Article 28 Notice could only be intended as a notice to the Attorney General, and thus article 28 of the CCP must be so interpreted. The difficulty with this argument is that it has not been shown that the interpretation or compliance with the plain terms of Article 28 of the CCP creates an absurdity or leads to an unworkable consequence or that compliance with it places it at odds with any provision in the CPA. It has not been demonstrated that construing article 28 of the CCP as a requirement to serve notice on the Attorney General is to be implied as a matter of necessity for the efficacious operation of the CPA. To my mind, the provisions are not in conflict and are quite capable of operating harmoniously. The Article 28 Notice does not commence proceedings. It simply gives notice to the public officer or government department concerned of an intention to commence proceedings. Furthermore, the drafters of the CPA itself were quite aware of the provisions of the CCP as specific reference was made to it in section 10 of the CPA to the effect that proceedings were to be 'instituted and proceeded with in accordance with the Code of Civil Procedure and not otherwise'.

[14] Section 13(2) of the CPA states: "Civil proceedings against the Crown shall be instituted against the Attorney General".

[23] The Article 28 Notice may be aptly described as nothing more than a pre-action protocol with an expressed and drastic sanction built in against a prospective claimant who fails to comply. The claimant loses his right to sue the public officer against whom he complains for damages. It is a built in privilege afforded to the public officer and extended to the Crown by virtue of section 4(4) of the CPA. It is well settled law that provisions such as article 28 of the CCP which seek to delimit or defeat a claimant's right is to be accorded a strict construction. In **Tardif (Estate of) v Wong**,[15] the Canadian Court of Appeal opined that 'limitation statutes are to be construed strictly in favour of plaintiffs.' This to my mind must be the appropriate approach. Similarly, provisions which negative a defendant's liability must be accorded the same treatment. Thus it could hardly be right or fair as a matter of law and principle that a claimant who has done precisely what article 28 of the CCP says he must do - by serving an Article 28 Notice on a public officer - be deprived of his right to sue because he failed to do something **other than** what the said article required him to do – namely serving the Attorney General.

[24] The Attorney General seeks to suggest that applying article 28 to mean what it says may present practical difficulties for the Attorney General, presumably because some public officers may not be as diligent in bringing same to the attention of the Attorney General. However, that to my mind is far from being a sufficient reason for extending the meaning of article 28 in that way for the purposes of the CPA when compared to the dire consequence to the claimant who fails to comply with its terms. Further, if Parliament wished the article 28 requirement to apply in this way, surely it was easy enough to express such a requirement in the CPA itself when providing for the Attorney General to be the proper party; in essence to stand in the shoes of the public officer. It chose not to do so and no good reason has been put forward for implying it. If such a requirement is desired, then such must be brought to Parliament for so enacting. In my view, it would be a counsel of prudence, as occurs in practice, that a public

[15] [2002] ABCA 121 at para 56.

officer who is served with an Article 28 Notice brings the notice to the attention of the Attorney General as soon as possible.

[25] I now turn to section 14 of the CPA dealing with service of documents. It says:

> "All documents required to be served on the Crown for the purpose of or in connection with any proceedings by or against the Crown shall, if those proceedings are brought by an authorised department, be served on the head of such department, or if the proceedings are brought by or against the Attorney General, shall be served on the Attorney General."

A cursory reading of that section clearly shows that it deals with the service of documents once proceedings have been instituted and does not govern service of documents prior to the commencement of proceedings. It speaks to the situation where 'proceedings are brought.' The pre-action protocol, which the Article 28 Notice clearly is, coupled with its specificity as to the person on whom service is to be made is not caught within this section. This accordingly does not assist the Attorney General in making its case for a requirement to serve the Attorney General with an Article 28 Notice.

[26] Reliance is also placed on the Crown's privilege of limitation or similar enacted provisions which may benefit subjects (as between subjects) given in section 26 of the CPA. For the reasons already advanced in paragraph 19 this takes the argument no further unless it can be shown that there was a failure to comply with whatever may be the prerequisites for defeating the privilege or benefit. Here, the prerequisite was to give notice to the public officer concerned at least one month before commencing suit, failing which the claim would be barred. Here, there was due compliance with this prerequisite, thus the privilege from which the Crown may have benefitted could not be prayed in aid. The principle in **Castillo** to the effect that a failure to meet a mandatory requirement and to plead its compliance in the statement of claim is fatal to the claim, is often trotted out in matters of this kind without further analysis and may be misunderstood as standing for a broader proposition than that for which it in fact stands. The **Castillo** principle does not seek to address what the nature of the obligation in fact is but only the

consequence of failure to comply with it as it was common ground that no notice of intended suit had been given. **Castillo** was concerned with the specific provisions of the Public Authorities Protection Ordinance, namely section 3,[16] which was there engaged. It was in construing section 3 that the court concluded that the provisions of both subsections were mandatory and enabled it to conclude that it did 'not matter that section 3(1) had been complied with if proof thereof is not given as required by section 3(2). The suit must fail under section 3(2);' and further that 'if section 3(1) has not been complied with, section 3(2) cannot be complied with'.

[27] Here it is critical to first address what in fact is the nature of the obligation rather than assuming a failure to comply with it. It is only by firstly determining what the obligation is that one can then go on to consider whether there was a failure to comply with it. It is only on making the determination at this second stage that the principle in **Castillo** may become engaged if the consequence is expressed, as in **Castillo**, in mandatory terms. In my view, the principle for which **Castillo** stands (if it may be said to have stated a general principle at all) is not applicable in any of the matters concerned in these appeals as it has not been shown that there was a failure to comply with the obligation contained in article 28 of the CCP. The fact of service of the notice on the Comptroller was certainly pleaded and no issue has been taken in this respect. To the contrary, it was well established and is common ground that there was due compliance to the letter with article 28.

For completeness, less I be misunderstood, I am not here saying that the Attorney General should not be served with an Article 28 Notice. Indeed I would consider it prudent for the claimant to also serve the Article 28 Notice on the Attorney General based on my later reasoning in respect of the requirement to make the Attorney

[16] Section 3(1) stated: "No writ shall be sued out against … any public authority for anything done in the exercise of his office, until one month after notice in writing has been delivered to him … .". Section 3(2) stated: "No evidence of any cause of action shall be produced except of such as is contained in such notice, and no verdict shall be given for the plaintiff unless he proves on the trial that such notice was given and in default of such proof the defendant shall receive in such action a verdict and costs."

General the defendant in such proceedings. Rather, the point I am making is that the claim does not fail where a claimant has served the public officer with the article 28 Notice but has failed to similarly serve the Attorney General. It may be arguable that where a claimant serves only the Attorney General with an Article 28 Notice that the claim does not fail but I need not decide this point on this appeal and I refrain from so doing.

Conclusion

[28] For the above reasons I would hold that there is no requirement expressed or to be implied for service of an Article 28 Notice on the Attorney General in order to maintain a claim for damages against the Crown in respect of a delict or quasi-delict committed by a public officer or other servant or agent of the Crown.

Prescription

[28] Having concluded that there is no requirement to serve an Article 28 Notice on the Attorney General, the prescription point which arises in the James Parties appeals must now be considered.

[29] The James Parties rely on rule 19.2(2) and 19.4(1) of the **Civil Procedure Rules 2000** ("CPR"). CPR 19.2(1) and (2) states as follows:

> "19.2(1) A claimant may add a new defendant to proceedings without permission at any time before the case management conference.
>
> (2)The claimant does so by filing at the court office an amended claim form and statement of claim, and Parts 5 (service of claim within jurisdiction), 7 (service of court process out of jurisdiction), 9 (acknowledgment of service and notice of intention to defend), 10 (defence) and 12 (default judgments) apply to the amended claim form as they do to a claim form."

[30] However, the James Parties were not adding a new party but in effect substituting a party, by substituting the Attorney General in place of the Comptroller, as the defendant. CPR 19. 2 (5) also deals with substitution of parties. It says:

> " The court may order a new party to be substituted for an existing one if the –

(a) court can resolve the matters in dispute more effectively by substituting the new party for the existing party; or
(b) existing party's interest or liability has passed to the new party."

Also, the court may substitute a party at the case management conference or after the case management conference on or without an application.[17]

[31] CPR 19.4 (1) seeks to preserve a claim from being defeated by virtue of a limitation or prescription provision. It states:

> "19.4 (1) This rule applies to a change of parties after the end of a relevant limitation period.
>
> (2) The court may add or substitute a party only if the –
>
> (a) addition or substitution is necessary; and
>
> (b) relevant limitation period was current **when the proceedings were started**." (emphasis added)

[32] The James Parties therefore argue that they had amended their claim form well before the case management conference by naming the Attorney General in substitution for the Comptroller of Customs and that at the time when the claim was first brought it had not been prescribed under Article 2122(2) of the Civil Code; in short, the limitation period was current at the time when the proceedings were started. He urges that the misnomer merely renders the claim irregular but not a nullity.

[33] The Attorney General posits that until the amended claim/ statement of claim was filed no claim existed against the Crown. She buttresses this by saying that section 13 of the CPA requires that actions against the Crown be instituted against the Attorney General and that the filing of a claim against the Comptroller of Customs does not constitute a suit against the Crown as it does not conform to the

[17] CPR 19.2 (6), (7) and 19.3(1).

requirements of the CPA. In essence, she says that the Attorney General is a wholly new party in respect of the claim and thus applying the principles emanating from the case of **Norman Walcott v Moses Serieux**[18] as followed in **Michele Stephenson et al v Lambert James-Soomer**,[19] there has been no civil interruption. These cases, she says, establish that no substitution or addition of a party is permitted after the end of the relevant prescription period. It is useful to note that **Serieux** is a pre- CPR 2000 decision whereas **James-Soomer** is post-CPR 2000.

[34] In **Serieux**, the Court of Appeal was dealing with the situation where the plaintiff who brought the claim for damages in respect to damage done to 'his' motor car from a motor collision, admitted at trial that he was not the owner of the motor car but rather that it was owned by a company in respect of which he was a director. By that time the 3 year prescription period under the Civil Code had expired. It was sought to substitute the company as the plaintiff using Order 15 r 6 (which allowed correction of a genuine mistake) and Order 20 r 5. The appellant relied on the English case of **Rodriguez v Parker**[20]. Peterson JA (with whom the other members of the panel agreed) opined as follows:

> "Returning to the three criteria mentioned in Rodriguez case, the first question I ask myself is whether the error of citing the wrong plaintiff… is the sort of mistake envisaged by this authority. In that case…all that was required was to correct the initials of the name of the defendant, whereas in the instant case the substitution of a new and different plaintiff … sought. This is not correcting the name of a party it is not a matter of mistake."

He further opined, based on the reasoning in **Rodriguez,** that the Limitation Acts in England can properly be regarded as dealing with practice and procedure rather than conferring substantial rights. In relation to prescription under the Civil Code he concluded thus:

> "In Article 2129 … both the right and the remedy are extinguished, and therefore there is no question of a party being called upon to choose

[18] SLUHCVAP1975/0002 (delivered 15th October 1975, unreported).
[19] SLUHCV2003/0138 and SLUHCV2003/0453 (delivered 19th April 2004, unreported) per Edwards J.
[20] (1966) 2 All ER 349.

> whether he would plead the defence of limitation. As long as the evidence in a case discloses that the period of limitation has expired, the judge has no discretion in the matter. In the instant case, to have allowed an amendment would have meant that the substituted plaintiff would have been instituting proceedings out of time."

[35] In **James-Soomer** the facts were decidedly different. There the claimant purported to bring a claim under the under Article 988 of the Civil Code (which provides for the bringing of a claim by and in the name of the Executor or Administrator) which is in pari materia to English Law Reform (Miscellaneus Provisions) Act, 1934, and which is similar to the provision found in many common law jurisdictions within the OECS sub-region, when at the time of commencing the claim he had lacked capacity as either an Executor or Administrator. The primary issue which arose then was whether the claim so commenced, was a nullity. Edwards J opined, at paragraphs 30 and 31, that the failure to constitute himself an administrator resulted in the commencement of an action which was not properly constituted and that the subsequent grant of administration could not cure the previously issued claim; that all that it would have allowed is for the issuing of a new claim where the prescription period has not expired. At paragraph 60 she further opined that CPR 19.4(2) and 20.2(4) would not be applicable where the claim is a nullity but assuming that those provisions could be applicable, following **Serieux,** she concluded that CPR 19.4 (2) and 20.2(4) were not applicable.

Discussion

[36] There is no argument, nor can there sensibly be, that the Comptroller is not a person sui juris[21]. As such, the naming of the Comptroller as the defendant does not thereby make the claim a nullity. Under the Customs Act, the office of the Comptroller is expressed to be a public office. It is the Comptroller who is expressly made responsible for the administration of the Customs Act. The Customs Act also provides that 'any act or thing required or authorised by any customs enactment to be done by the Comptroller may be done by any officer

[21] Customs (Control and Management) Act.

authorised… in that behalf…by the Comptroller.'[22] In short, the Comptroller may be said to be the personification of the Customs Department of the Crown. Further, CPR 8.5 (1) states that:

> "The general rule is that a claim will not fail because a person –
>
> (a) who should have been made a party was not made a party to the proceedings;."

[37] The positon here is, to my mind, distinguishable from both of the above authorities. In **Serieux**, it is clear that the substitution of the company, which is a separate and distinct person from the individual, would have amounted to institution of a fresh cause of action maintainable only at the instance of the company in whom the cause of action had ever been grounded. The individual had no cause of action as against the defendant at the time that the claim was brought as no wrong was allegedly committed as against him. Thus, the substitution of the company for the individual would have been thereby constituting a proper cause of action for the first time which would not be covered by CPR 19.4 (2) which requires that the 'relevant limitation period was current when the proceedings were started.' It could not be said that proceedings were started where no cause of action ever resided in the individual.

[38] By parity of reasoning, in **James-Soomer**, there could not be said to be proceedings which were started within the current limitation period as the person purporting to start the proceedings clearly lacked the capacity to do so and thus no cause of action properly resided in a person who was neither the Executor nor the Administrator, for the purposes of article 988 of the Civil Code. The proceedings there could only be said to have 'started' when started by an Executor or Administrator or otherwise in accordance with the terms of article 988, and thus, any limitation period would fall to be reckoned as from the time when the proceedings were started by a person with capacity to bring such proceedings.

[22] Section 5 of the Customs Act.

[39] In the instant case, the James Parties' cause of action arose in respect of the alleged delicts of the Comptroller of Customs or customs officers. Section 13 of the CPA says that 'civil proceedings **against the Crown** shall be instituted against the Attorney General.' Importantly, the cause of action giving rise to the claim against a public officer or servant or agent of the Crown, as a claim against the Crown, does not change the nature of the claim or the cause of action by virtue of the fact that the Attorney General is made the defendant. The acts or omissions of the pubic officer complained of, continue to be the cause of action giving rise to the claim save that the CPA has provided for the Attorney General, as the representative of the Crown and thus the representative of the public officer, servant or agent of the Crown, to be made the defendant in the claim. The CPA simply provides the statutory fiction of the alleged wrongdoer being the Attorney General as distinct from the cause of action arising as a result of the commission of a delict or quasi -delict by the Attorney General qua Attorney General. Put another way, the Attorney General, by virtue of the CPA, is simply made to stand in the shoes of the public officer, or other servant or agent of the Crown, in respect of any delicts or quasi-delicts committed in the performance of his/her public duties.

[40] Accordingly, the Attorney General's argument that the Attorney General is a wholly new party in respect of the claim is unsustainable. There is simply no new cause of action being put forward for the first time on the substitution of the Attorney General in place of the Comptroller. In essence, for the purposes of a claim engaging the CPA, it may be said that the Attorney General and such public officer is indivisible. There is no separate and distinct cause of action against the Attorney General outside that created by the delict or quasi-delict of the public officer, servant or agent of the Crown. Similarly, the privileges or limitations of which the Crown, through the Attorney General, may take the benefit, does not arise outside of the same construct. For this reason also, I would reject the Attorney General's contention that until the amended claim/statement of claim was filed, no claim existed against the Crown. The Comptroller is an officer of the

Crown. The CPA makes the Crown liable for the delicts or quasi-delicts of its officers. A claim in delict was brought against an officer of the Crown. Therefore, it is not correct to say that no claim existed against the Crown. The failure to name the Attorney General as defendant does not thereby render the claim any less a claim against the Crown albeit suffering from a defect by misnomer of the officer to be named as defendant in the proceedings.

[41] At best, the naming of the Comptroller as defendant may be considered an irregularity. However, it certainly cannot be said to be a nullity so that on the substitution of the Attorney General as defendant, a new claim against a new party could be said to have been brought about for the first time at that stage. In my view, the claim was a properly constituted claim at the time when the proceedings were started. The substitution of the Attorney General in place of the Comptroller in accordance with section 13 of the CPA did not thereby bring about a fresh cause of action against a wholly new party for the reasons I have explained earlier. As such, there has been no offending against CPR 19.4(2) as it relates to the relevant limitation period namely, article 2122 of the Civil Code.

Conclusion

[42] For the reasons given, I would allow the appeals and set aside the order of the single judge upholding the orders striking out the James Parties Claims. I would further order that the master's order striking out the James Claims and the master's order striking out the Fast Kaz Claims be set aside, and would further direct that all the claims be remitted to the court below to be proceeded with in accordance with the Rules of Court.

[43] This leaves the matter of costs. The appellants having succeeded, the general rule as to liability for costs should apply. The costs below were left to be agreed by the parties. The general rule on appeal is that an award of costs would be ordered in two thirds of the costs ordered below. I am minded to order that the costs of these appeals be fixed at two thirds of the amount agreed between the parties below or failing such agreement, within thirty (30) days hereof that the

amount be assessed. I would order however, that the amount on an assessment be discounted by 25% in any event as an expression of the court's displeasure at the total lack of proper preparation of the bundles and records in these appeals by the appellants.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Mario Michel
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal