



[2023] JMSC Civ. 95

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. SU2023CV00432**

<b>BETWEEN</b>	<b>MERVIN CAMERON</b>	<b>CLAIMANT/ APPLICANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>DEFENDANT/ RESPONDENT</b>

**IN CHAMBERS**

**Mr. Hugh Wildman & Mr. Duke Foote, instructed by Hugh Wildman & Company,  
Attorneys-at-Law for the Claimant**

**Ms. Kamau Ruddock, instructed by the Director of State Proceedings for the  
Defendant**

**May 19, 2023 & June 6, 2023**

**Civil Procedure Rules – Application for leave to cross-examine a person not an  
Affiant/Witness before the Court ( His Excellency, the Governor General) – Power  
of Court to control evidence under CPR 29.1 - Whether Court should exercise  
overriding jurisdiction to call non-witness to be cross-examined – Overriding  
objectives**

**WOLFE-REECE, J**

**INTRODUCTION**

**[1]** The Claimant Mervin Cameron has filed a Notice of Application for Court orders for interim Injunction on April 12, 2023 for the Court's determination. I believe the title amounts to a typographical error. The body of the Notice is not seeking an

interim injunction but seeks an order that leave be granted by the Court to cross-examine His Excellency, the Governor General of Jamaica, Sir Patrick Allen at the substantive hearing of the Fixed Date Claim Form that was filed on February 13, 2023.

## **BACKGROUND**

[2] The Fixed Date Claim Form (FDCF) seeks Constitutional, Declaratory orders in respect of the Governor General's decision to extend the appointment of the Director of Public Prosecutions, Ms. Paula Llewelyn K.C. beyond the age of sixty years old. The FDCF specifically seeks the following orders

1. A Declaration that the purported extension granted by the Prime Minister and the Governor general of Jamaica to Ms. Paula Llewelyn to remain in the office as Director of Public Prosecutions beyond the age of 60 years old, such extension not being gazetted in keeping with Section 31(1) of the Interpretation Act is illegal, null and void and of no effect.
2. A Declaration that in the absence of a gazetted extension given to Ms. Paula Llewelyn to remain in the office as Director of Public Prosecution by the Prime Minister and the Governor General of Jamaica renders the Office of the Director of Public Prosecutions vacant.
3. A Declaration that any purported appointment given to Ms. Paula Llewellyn as the Director of Public Prosecutions after she has attained the age of 60 years old in breach of section 96(1)(b) of the Constitution of Jamaica rendering such appointment illegal null and void and of no effect.
4. A Declaration that in keeping with Section 96(1) of the Constitution of Jamaica, in the absence of a valid extension granted to Ms. Paula Llewellyn as Director of Public Prosecutions, she automatically vacates office on attaining the age of 60 years old.
5. A Declaration that in the absence of any gazetted extension given to Ms. Paula Llewellyn to remain in office beyond the age of 60 years old, renders any action taken by her as Director of Public Prosecutions without being validly

appointed under section 96 (1) of the Constitution of Jamaica illegal, null and void and of no effect.

- [3] Mr. Mervin Cameron in his affidavit in support of the FDCF filed on February 13, 2023, alleges that the relevant authorities failed to follow the proper procedure provided for an extension being granted to the Director of Public Prosecutions as set out under the Constitution of Jamaica and the Interpretation Act. Therefore, as a consequence of this failure the extension of the appointment of Ms. Llewellyn was illegal, null, void and of no effect.
- [4] Along with the FDCF, the Claimant/Applicant also filed a Notice of Application for Court Orders on February 13, 2023 seeking an interim injunction restraining the Respondent from allowing the extension of the appointment to take effect, pending the final determination of the claim.
- [5] The Defendant/Respondent filed an Affidavit of Jacqueline Mendez in response to the Affidavit of Mervin Cameron in support of the FDCF on March 24, 2023 and an Affidavit of Faith Hall was filed on March 14, 2023 in response to the application of Mervin Cameron in support of the Notice of Application for Interim Injunction. Both affidavits were relied on in the course of the Application now being considered before the Court.

## **THE APPLICATION**

- [6] The main grounds of this application for leave to cross examine His Excellency the Governor General are that:
- a) The Applicant, caused an investigation to be conducted by his Attorney-at-Law into whether the tenure of Ms. Paula Llewelyn in the office as Director of Public Prosecutions complied with the Constitution and laws of Jamaica
  - b) The investigation, which involved checks at the Jamaica Printing Services into whether Ms. Llewelyn was granted an extension beyond her sixtieth birthday as required by section 96 of the Constitution and whether it was gazetted,

revealed there was no gazetted extension of her appointment to remain in office after the age of sixty, thereby breaching section 96(1)(b) of the Constitution and section 31(1) of the Interpretation Act

## ISSUE

- (i) Whether there is any ground or basis in law for the Court to exercise its discretion to permit His Excellency, the Governor General to be called or summoned as a witness at the hearing of the Fixed Date Claim Form to be cross-examined**

## SUBMISSIONS

- [7] Upon the hearing of the Notice of Application, Counsel made the following oral and written submissions:

### *Claimant/Applicant*

- [8] Mr. Wildman submitted that the decision granting the extension of the appointment of the office of the Director of Public Prosecutions for an additional three years is illegal, null and void and of no effect because the proper procedure provided by the Constitution and the Interpretation Act was not adhered to.
- [9] Counsel argued that s. 96(1) of the Jamaica (Constitution) Order in Council and s.31(1) of the Interpretation Act, when read together provide that: (i) the extension being given to the office holder must be given before the office holder attains the age of sixty years old and (ii) the gazette publishing said extension takes effect on publication, unless otherwise stated. Therefore, since the gazette was published on the 26<sup>th</sup> August 2020 and in this case it stated that it takes effect on 21<sup>st</sup> September 2020, which is the sixtieth birthday of Ms. Llewelyn, the extension was in breach of s. 96(1)(b) of the Constitution.
- [10] Counsel submitted, based on the affidavit of Mr. Cameron, that at the time the claim was filed, there was no gazetting of the appointment. Further, that checks at

the Printing office revealed that there was no gazette in place reflecting the extension of the appointment of Ms. Paula Llewellyn K.C.

- [11] Counsel further submitted that these being interlocutory proceedings, and almost two weeks after the Constitutional claim was filed, there was still no gazette in place.
- [12] Counsel argued that the Applicant (and any citizen of this country) has every right to bring an action seeking declaratory or constitutional relief, pursuant to the Constitution, challenging the constitutionality of any decision made by a public person, such as the Governor General, which affects this country. Counsel urged the Court to accept that there was a clear lacuna in the evidence as to how the gazette sprung up after the constitutional claim was filed and the Governor General should be cross examined on that issue.
- [13] Mr. Wildman indicated that the Attorney General is the named party as required by law. However, the Governor General is the true Respondent and would be the person to instruct the Attorney General to respond to the claim. He says it is pertinent to the claim that the Governor General answer questions as to when the appointment was made and when the gazette was brought into being among other things.

***Defendant/Respondent***

- [14] Ms. Ruddock submitted that the application be refused on the basis that there is no legal basis or ground for said application. Counsel argued that the Governor General is not a party to the claim, nor has he provided evidence in the matter. Counsel referred to the Affidavit of Faith Hall filed on March 14, 2023 and submitted that the only connection the Governor General has to the matter is the letter to the Prime Minister dated July 8, 2020 which states:

*Dear Prime Minister,*

*“Reference is made to your letter dated July 7, 2020, in which you advised, after consultation with the Leader of the opposition, that the appointment of Miss Paula Llewelyn, QC, Director of Public Prosecution, should be extended for three (3) years.*

*In accordance with Section 96 (1) (b) of the Constitution of Jamaica, permission is hereby granted.”*

*Yours Sincerely,*

*Governor General*

- [15]** Counsel also argued that there is no evidence before this Court as to when and who conducted the search at the Printing Service of Jamaica. Miss Ruddock submitted that the applicant by way of his affidavit is not capable of giving evidence in respect of any search that was conducted at the Jamaica Printing Service, as he is currently an inmate at the General Penitentiary.
- [16]** Counsel submitted further that there is no legal basis for the application. The Court pursuant to the Civil Procedure Rules (CPR) 29.1(1) should exercise its discretionary power to control and limit evidence in trials and hearings and refuse the application. Counsel referred specifically to the Court’s power to control evidence given by (i) witness statements under CPR 29.10 and (ii) affidavits under CPR 30.1(1). Counsel argued that these rules deal with the procedure for cross-examining only those witnesses who have given evidence in proceedings, whether by witness statements or affidavits. Therefore, there is no rule that allows a witness who has not given evidence in proceedings to be arbitrarily called as a witness to be cross-examined in Court.
- [17]** Ms. Ruddock submitted that the Applicant has provided no evidence or basis on which the Court can rely to grant the application seeking an order to cross-examine the Governor General at the hearing of the claim. Therefore, the Court should dismiss the application with costs to the Respondent.

## LAW & ANALYSIS

[18] The main question for determination by the Court is whether there is any basis for the Court to exercise its discretionary power to grant the application for an order compelling His Excellency, The Governor General of Jamaica, Sir Patrick Allen to be called as a witness at the hearing of the FDCF to be cross-examined.

[19] A useful starting point is that any party in civil proceedings is free to call any witness to give evidence on his behalf in order to prove the facts in issue within the case. In these circumstances, the Court has a wide discretionary power to do what is necessary to manage and control the evidence, which includes overriding the parties' views on which issues call for evidentiary proof. It is well-known that the general requirement under the CPR is that such evidentiary proof may be in the form of a document, such as a witness statement or affidavit; and in addition, in the form of oral evidence where necessary.

[20] The Court's power to control evidence is seen in CPR 29.1, a direct replica of the UK equivalent seen in CPR 32.1, and in this case, much guidance can be gleaned from the English position. CPR 29.1 states that:

- "29.1 (1) The Court may control the evidence to be given at any trial or hearing by giving appropriate directions as to –*
- (a) the issues on which it requires evidence;*
  - (b) the nature of the evidence which it requires to decide those issues;*
- and*
- (c) the way in which the evidence is to be placed before the Court, at a case management or by other means.*
- (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.*
- (3) The court may limit cross-examination."*

[21] The introduction of the CPR, has not caused a departure from the common law position, which is that parties to a case have the sole discretion to decide who to call as a witness to prove their case. In the instant case the Claimant/Applicant is seeking to have the Court call the Governor General as a witness so he may cross

examine him. The Court has an inherent overriding jurisdiction to do that which is necessary to illicit relevant evidence in order to prove facts in issues by any party to the proceedings. In the criminal arena this power extends to the Court choosing to call a person not called as a witness by either party, for the purpose of putting questions to that person. In that case, neither party can put questions to or cross-examine that 'witness' without the leave of the Court. **Coulson v Desborough** [1894] 2 QB 316, the Court of Appeal ruled that:

*"(1) At the trial of an action, the judge has power to call and examine a witness who has not been called by either of the parties and when he does so neither party has a right to cross-examine the witness without the leave of the judge."*

[22] The learned authors of **Blackstone's Civil Practice, 2015** stated that following:

*"49.2 In a civil trial, the Claimant must prove those facts that are in issue in order to succeed in his claim, Similarly, the Defendant must also prove those facts in issue to succeed in his defence...However, the CPR make it clear that the Court also has a role to play in determining what are the facts in issue.... R. 32.1 ...*

*This provision invests the court with an extraordinarily wide power whereby it can override the views of the parties not only as to the nature of the evidence appropriate to decide the issues in the case, and as to the way in which the evidence should be given, for example, in documentary form rather than orally, but also as to the very issues that do or do not call for evidence..."*

[23] Upon consideration that the Governor General is not a witness for either party in these proceedings, (i.e. he has not given an affidavit), the question for determination is whether there are special or extraordinary circumstances that require the Court to use its discretionary overriding power to order that the Governor General attend the hearing of the FDCF for the purposes of being cross-examined. It is imperative that it is noted that this discretion should be used sparingly in special or extraordinary circumstances, and where the evidence of the witness (in this case the Governor General) is deemed crucial or necessary in resolving the issues that arise in the claim. The Court must also consider whether granting the application will cause prejudice to either party in the proceedings, and whether granting the application will achieve the overriding objective of dealing



with cases justly and at reasonable and proportionate costs, so far as is practicable.

[24] According to **Halsbury's Laws of England**, Volume 12 (2020), paragraph 838, the purpose of cross-examination is directed to:

1. The credibility of the witness;
2. The facts to which he has deposed in chief, including the cross-examiner's version of them; and
3. The facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose.

[25] It is clear and accepted that cross examination must be relevant to the issues to be determined by the Court. The test of relevance in the context of admissibility was considered by Lord Steyn in **R v Randall** [2004] 1 All ER 467 at 474, where he stated:

*"...relevance is a question of degree determined, for the most part by common sense and experience."*

Mr. Wildman submitted that cross examination of the Governor General as to when the appointment was made and when the gazette was brought into being was pertinent to the determination of the Fixed Date Claim Form. In applying the relevance test, this Court fails to see the relevance of calling the Governor General to answer those questions. The gazette speaks for itself, it is a public document which reflects that it was published on Wednesday August 26, 2020. Further it states:

***"the Governor General acting on the recommendation of the Prime Minister, after consultation with the Leader of the Opposition has approved the appointment of Miss Paula Llewellyn Q.C. Director of Public Prosecution in the Office of the Director of Public Prosecutions be extended for three (3) years with effect from the 21<sup>st</sup> September 2020 in accordance with section 96(1)(b) of the Constitution of Jamaica."***

- [26]** The letter signed by the Governor General to the Prime Minister dated July 8, 2020 also speaks for itself. The Claimant/Applicant has provided no evidence at this stage on which he seeks to challenge the authenticity of either document. In his affidavits in support of this application Mr. Cameron states “he caused an inquiry to be made by my Attorney-at -law at the Jamaica Printing Service, to determine whether the extension to Ms. Llewellyn has been gazetted in keeping with Section 31(1) of the Interpretation Act of Jamaica.” He acknowledges that Ms. Mendez produced a gazette that an extension was granted to Ms. Llewellyn, and goes on to state that the Constitution of Jamaica clearly stipulates that any extension given to the holder of the office of the DPP must be done before the person attains the age of 60. The Claimant concludes that the extension took effect on the birthday of Ms. Llewellyn, which is a violation of the Constitution as she would have already attained the age of sixty years old.
- [27]** On my assessment of the FDCF and the affidavit evidence filed by the Claimant, I conclude that the issues in the substantive claim relate to whether the gazetted extension of the appointment of Ms. Llewellyn, published on the 26<sup>th</sup> August 2020, that took effect on 21<sup>st</sup> September 2020, on Ms. Llewellyn’s sixtieth birthday is in breach of the Section 96(1)(b) of the Constitution of Jamaica.
- [28]** Jacqueline Mendez has provided an affidavit in her capacity as the Chief Personnel Officer and Head of the Services Commission. She has sought to set out for the Court what transpired and led up to the extension of the appointment of Ms. Llewellyn. In addition to the gazette and the letter of the Governor General recommending the extension, she exhibited the letter dated January 14, 2020 from Ms. Llewellyn to the Chairman of the Public Services Commission indicating her desire for an extension.
- [29]** Therefore, the notion of having the Governor General cross-examined, on issues which arises from the contents of these documents (the gazette and his letter dated July 8, 2020), in circumstances where they are not being challenged, to this Court is not relevant nor does it align with the overriding objective. Further, in light of the

fact that the Governor General has not sworn to an affidavit on behalf of the Defendant/Respondent in the matter I conclude it cannot be said that the evidence put before the Court in support of this application amounts to exceptional and extraordinary circumstances.

**[30]** In light of these considerations, the Court sees no evidentiary or probative value in calling the Governor General to be questioned or cross-examined as to the validity of the gazette or as phrased by Counsel to determine how it “sprung up” into being. Such evidence to my mind would not be crucial to the determination of the claim.

**[31]** I therefore conclude that the Claimant/Applicant has not established a legal basis or outlined any exceptional and/or extraordinary circumstances that exist for the Court to grant leave to the Applicant to cross-examine the Governor General at the hearing of the Fixed Date Claim Form.

## **DISPOSAL**

- 1. The Claimants’/ Applicants’ application for leave to cross examine His Excellency, the Governor General of Jamaica, Sir Patrick Allen at the hearing of the Fixed Date Claim Form in the said Claim SU2023CV00432 is refused.**
- 2. Costs awarded to the Defendant/ Respondents to be taxed if not agreed.**