



[2024] JMFC Full 02

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU 2021 CV 03215

**CORAM: THE HONOURABLE MR. JUSTICE DALE PALMER
THE HONOURABLE MS. JUSTICE CAROLE BARNABY
THE HONOURABLE MRS. JUSTICE TARA CARR**

BETWEEN	MAURICE HOUSEN	CLAIMANT/ REPRESENTATIVE CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	1ST DEFENDANT
AND	THE COMMISSIONER OF POLICE FOR JAMAICA	2ND DEFENDANT

**Gavin Goffe and Jovan Bowes instructed by Myers, Fletcher & Gordon,
Attorneys-at-Law for the Claimant.**

**Lisa White instructed by the Director of State Proceedings, Attorney-at-Law
for the Defendants.**

IN OPEN COURT

Heard: 15th November 2023* and 26th January 2024

**Constitutional Law - Charter of Fundamental Rights and Freedoms -
Section 16 (11) - Right to due process - Prohibition against retrospective
application of more severe penalties.**

**Whether fixed penalty imposed by null and void ministerial order and upon
fixed penalty notice issued pursuant to section 116 of the Road Traffic Act
1938 in excess of fixed penalty prescribed by the Act constitutes a breach
of the right to due process enshrined in section 16(11) of the Charter of
Fundamental Rights and Freedoms.**

Charter of Fundamental Rights and Freedoms - Section 19(1) of Charter of Fundamental Rights and Freedoms - Appropriateness of award of vindicatory damages.

Representative action - Appropriateness of award of monetary remedy by way restitution or recovery of fixed penalties paid in excess of that lawfully imposed by the Road Traffic Act 1938.

D. PALMER, C. BARNABY, T. CARR, JJ

INTRODUCTION, ISSUES AND SUMMARY CONCLUSIONS

[1] On 5th July 2021 the Claimant was issued with a traffic ticket by a member of the Jamaica Constabulary Force wherein it is alleged that he had breached section 26 of the **Road Traffic Act, 1938** (hereinafter called “the 1938 RTA”) by exceeding the speed limit. A fixed penalty of \$5,000.00 (Five Thousand Dollars) which was prescribed by the **Provisional Collection of Tax (Road Traffic) Order, 2007** (hereinafter called “the Order) was imposed. By Fixed Date Claim Form filed on 8th July 2021 the Claimant pursues the following reliefs against the Defendants.

1. *A Declaration that the Provisional Collection of Tax (Road Traffic) Order, 2006 and the Provisional Collection of Tax (Road Traffic) Order, 2007 are null and void and of no effect.*
2. *A Declaration that the imposition of fixed penalties in excess of those stated in the Appendix to the Road Traffic Act, 1938, is a breach of the Claimant’s constitutional right to due process as set out in section 16(11) of the Constitution of Jamaica.*
3. *A Declaration that all traffic tickets issued containing fixed penalties in excess of those stated in the Appendix to the Road Traffic Act, 1938, are null and void.*
4. *An order for restitution and recovery of all fines paid to the Collector of Taxes in respect of traffic tickets issued containing fixed penalties in excess of those stated in the Appendix to the Road Traffic Act, 1938, upon proof of payment of those fines being submitted to the 1st Defendant.*

5. *In the alternative to the foregoing, a declaration that the offence of speeding is not one that properly falls within the category of offences in s. 116(1)(a) of the Road Traffic Act and therefore the issuing of speeding tickets is illegal.*
6. *An injunction to restrain the 2nd Defendant and/or his agents and officers from issuing traffic tickets containing fixed penalties in excess of those set out in the Appendix to the Road Traffic Act, 1938, until such time as the law is duly amended or replaced.*
7. *Damages for breach of the Claimant's constitutional rights.*
8. *Costs to the Claimant to be taxed if not agreed.*
9. *Such further or other relief that the court deems just.*

[2] The Defendants conceded in written submissions filed on 25th July 2023 that the **Provisional Collection of Tax (Road Traffic) Order, 2006** and the **Provisional Collection of Tax (Road Traffic) Order, 2007** are a nullity. They rejected the position of the Claimant that all issued traffic tickets containing fixed penalties in excess of those prescribed in the Appendix to the 1938 RTA are null and void but conceded that the excessive portion of the fixed penalties were to be so regarded. It was indicated by Counsel Mr. Goffe for the Claimant in oral submissions that the intention was to say in the order sought at paragraph 3 of the Fixed Date Claim Form, that the fixed penalty portions in excess are invalid, and not that that the entire traffic ticket is invalid.

[3] Counsel for the Claimant also announced at trial that the reliefs sought at paragraphs 5 and 6 of the Fixed Date Claim Form were not being pursued, the latter on account of the supervening passage of new road traffic legislation.

[4] In light of the foregoing, we find that the issues below are determinative of the claim.

- i. Whether the imposition of the fixed penalty in excess of that prescribed in the Appendix to the 1938 RTA constitutes a

breach of the Claimant's right to due process which is guaranteed by section 16(11) of the Constitution.

- ii. Whether the Claimant is entitled to damages for breach of his constitutional right to due process.
- iii. Whether it is appropriate to grant an order for restitution and recovery of all fines paid to the Collector of Taxes in respect of issued traffic tickets which contained fixed penalties in excess of those set out in the Appendix to the 1938 RTA, upon proof of payment of those fines being submitted to the 1st Defendant.

[5] It is our judgment that the imposition of a fixed penalty in excess of that prescribed in the Appendix to the 1938 RTA constituted a breach of the right to due process which is guaranteed to the Claimant by section 16(11) of the Constitution, which is appropriately vindicated by declaratory relief to that effect and a nominal award of \$250,000.00 to mark the breach.

[6] On the representative claim, in light of the concession of the Defendants it is our judgment that the State should not be permitted to retain the proceeds of monies received without lawful authority. While we consider that it is appropriate to grant an executory order to enable the members of the represented class to benefit from this aspect of the judgment, in the absence of a mechanism for recovery, the court is constrained at this time to grant declaratory relief and permit the Representative Claimant and the Defendants an opportunity to be heard on an appropriate recovery mechanism to give effect to the order declaring the right of members of the represented class to a refund of excess fixed penalties paid.

ANALYSIS

Whether the imposition of the fixed penalty in excess of that prescribed in the Appendix to the 1938 RTA constitutes a breach of the Claimant's right to due process which is guaranteed by section 16(11) of the Constitution.

- [7] Among the reliefs sought by the Claimant is a declaration that the imposition of fixed penalties in excess of those prescribed in the Appendix to the RTA 1938, “*is a breach*” of his right to due process set out in section 16(11) of the Constitution of Jamaica.
- [8] The Defendants argue that a person to whom a fixed penalty notice/traffic ticket has been issued may pay the fixed penalty, which is tantamount to a guilty plea, or challenge the ticket in summary criminal proceedings. They go on to say that the Claimant not having paid the ticket, expressed his intention to challenge the same in the Traffic Court if necessary, and there being no evidence of him having been convicted of the offence for which the ticket was issued, his rights have been preserved. Accordingly, the Defendants submit the Claimant’s right to a fair hearing has neither been engaged nor breached; and the assertion that the right of the Claimant to due process which is guaranteed by section 16 of the Constitution is untenable in law.
- [9] The due process right which is enshrined in section 16 of the Constitution manifests in various ways, including in the right to a fair hearing which appears at section 16(1). That is not the right upon which the Claimant’s claim for constitutional redress is premised, however. He specifically alleges breach of the due process right which appears at section 16(11) of the Constitution which provides:

No penalty shall be imposed in relation to any criminal offence or in relation to an infringement of a civil nature which is more severe than the maximum penalty which might have been imposed for the offence or in respect of that infringement, at the time when the offence was committed or the infringement occurred.

- [10] As to the nature of the right, two authorities were prayed in aid by the Defendants. The final decision in the Strasbourg case of **Coëme and Ors.**

v Belgium¹; and the decision of the House of Lords in **R (on the application of Uttley) v Secretary of State for the Home Department**².

[11] Two of the applicants in **Coëme** were charged and found guilty of criminal offences by the Court of Cassation in Belgium. Among other things, they complained that the application by the court of a new law relating to the limitation of prosecutions to their cases had breached article 7 (which will be reproduced later in these reasons) of the European Convention on Human Rights (hereinafter called “the Convention”). The Strasbourg court found that the applicants’ rights under article 7 were not infringed as the acts for which they were charged and convicted constituted criminal offences at the time they were committed, that their prosecution never became subject to limitation, and that the penalties imposed were not heavier than those which were applicable at the time of commission of the offences.

[12] **Coëme** was cited with approval in **ex parte Uttley** which concerned a claimant who was convicted of several sexual offences committed over a period prior to 1983. While the maximum sentence for rape in 1983 was life imprisonment, Uttley was not prosecuted for the offences until 1995 when he was convicted and sentenced to twelve years’ imprisonment. He was released after serving two-thirds of that sentence on licence pursuant to the Criminal Justice Act, 1991. The conditions of the licence to which he would be subject until he reached the three-quarters point of his sentence required him to be supervised and imposed certain restrictions on his freedom. If the claimant, while subject to the licence failed to comply with the conditions, he was at risk of being recalled to serve the balance of the twelve-year sentence. If the claimant had been sentenced to twelve years’ imprisonment under the release regime which applied in 1983 however, subject to good behaviour, he would have been released

¹ Applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96 delivered 18th October 2000

² [2004] 4 All ER 1

unconditionally at the same point in his sentence which would then have expired.

[13] Ahead of his release Uttley brought judicial review proceedings against the Secretary of State for a declaration that the provisions of the 1991 Act which made his release subject to licence were incompatible with article 7(1) of the European Convention on Human Rights which was incorporated in the UK Human Rights Act 1998, and prohibited the imposition of penalties which were heavier than those “applicable” at the time of the commission of the offence. While the claim was dismissed at first instance, that decision was reversed on appeal. The Secretary of State appealed to the House of Lords which held that there was no infringement of article 7(1). In a departure from the courts below and in arriving at a decision, their Lordships focused on the meaning of the word “applicable” as appears in article 7(1), which they found was referable to penalties which the law authorised courts to impose at the time the offence was committed.

[14] The court in **Coëme** stated:

[145] ... The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision.

[15] The foregoing was cited with approval in **ex parte Uttley** following which Lord Phillips remarked:

[21] ... [a]rt 7(1) will only be infringed if a sentence is imposed on a defendant which constitutes a heavier penalty than that which could have been imposed on the defendant under the law in force at the time that his offence was committed.

Lord Rodger stated:

[41] One has to identify the legal provision which made the act punishable at the time it was committed and make sure that the

punishment which the court imposes does not exceed the limits fixed by that provision.

[16] Article 7 of the Convention which was implicated in both **Coëme** and **ex parte Uttley** provides:

1. *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*
2. *This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.*

[17] It is observed that article 7 differs substantively from section 16(11) of the Constitution in several respects. In the first instance, the application of article 7 is expressly limited to criminal offences and penalties while section 16(11) is not so circumscribed. The protection afforded by the Constitution is applicable to criminal offences as well as infringements of a civil nature. Secondly, the protection under article 7 is two-fold in that it prohibits the retrospective application of offences and heavier penalties whereas the protection at section 16(11) is aimed at prohibiting the retrospective application of more severe penalties only.

[18] The facts of **Coëme** and **ex parte Uttley** are also clearly distinguishable from those giving rise to the instant claim, which has as its immediate concern an executive fixed penalty regime and not the imposition of a sentence or penalty by a court.

[19] Section 26(1) of the 1938 RTA provided that a person who drove a motor vehicle on a prescribed road at a rate of speed greater than the maximum speed prescribed is guilty of an offence and liable on conviction to certain penalties prescribed in the said subsection.

[20] Pursuant to section 116(1)(b) of the 1938 RTA, the special powers of enforcement and administration of traffic tickets contained in section 16 of the Act applied to any offence created by or under any enactment and was punishable on summary conviction, being a specified offence in the Appendix to the statute. The offence created by section 26, in respect of which the Claimant was issued the only fixed penalty notice/traffic ticket in evidence before the court, is among the offences in the Appendix to the Act.

[21] Under section 116(2), where a constable has reason to believe that a person was committing or had committed an offence to which the section applied, he was permitted to issue a prescribed notice in writing (hereinafter called "the fixed penalty notice"), which in accordance with section 116(6):

shall –

(a) specify the offence alleged, and give such particulars of the offence as are necessary for giving reasonable information of the allegation;

(b) state the period during which, by virtue of subsection (3), proceedings will not be taken for the offence;

(c) state the amount of the fixed penalty and that such fixed penalty shall be paid to –

(i) the relevant local authority; or

(ii) any tax office,

as the case may require, and, in the case of payment to a Local authority, the address at which the fixed penalty may be paid;

(d) require the person, in the event that the fixed penalty is not paid within the period specified in the notice pursuant to subsection (3), to attend before the Traffic Court or, as the case may be, the Parish Court in the parish in which the offence is alleged to have been committed, to answer the charge on such date as

may be specified, being a date not earlier than ten days after the expiration of the period specified pursuant to subsection (3).

[22] The purpose of the issue of the fixed penalty notice/traffic ticket and the consequence of payment of the fixed penalty are expressly stated in the said section 116(2), (3) and (4) of the 1938 RTA thus,

(2) ... offering the opportunity of the discharge of any liability to conviction of [the offence the subject of the notice] by payment of a fixed penalty under [the] section; and no person shall then be liable to be convicted of that offence if the fixed penalty is paid in accordance with this section before the expiration of the twenty-one days following the date of the notice or such longer period (if any) as may be specified therein or before the date on which the proceedings are begun, whichever event last occurs.

(3) Where a person is given a notice under this section in respect of an offence proceedings shall not be taken against any person for that offence by any constable or local authority, as the case may require, until the end of the twenty-one days following the date of the notice or such longer period (if any) as may have been specified therein.

(4) In subsections (2) and (3) "proceedings" means any criminal proceedings in respect of the act or omission constituting the offence specified in the notice under subsection (2), and "convicted" shall be construed in like manner.

[23] For the purposes of the **Justices of the Peace Jurisdiction Act** (hereinafter called "the JPJA"),

... any notice given under subsection (2) of section 116 of the [1938] Road Traffic Act [that is a fixed penalty notice] may be construed as an information and summons.

[24] Considering the utility of the fixed penalty notice under the 1938 RTA and the JPJA, it was observed by Harrison, P in **R v Anthony Lewis**³ that "the

³ Resident Magistrate's Miscellaneous App. No. 2/05 delivered 16th February 2006 at page 9

traffic ticket is therefore a composite document, statutorily created, with its functions clearly delimited by both... statutes."

[25] From the foregoing, while an issued fixed penalty notice/traffic ticket clearly has a dual purpose, including the initiation of criminal proceedings for the ticketed offence, there is a prohibition against such proceedings being taken until twenty-one days or longer period specified in the notice (the suspended enforcement period). The prohibition is aimed at enabling the person to whom the notice was issued to benefit from the opportunity presented by the said notice, to discharge liability to conviction in criminal proceedings.

[26] Further, pursuant to section 13(4) of the Constitution, the right to due process which is enshrined in section 16 - being among the rights guaranteed under Chapter III - "*applies to all law and binds the legislature, the executive and all public authorities*". It is earlier stated in section 13(2) that:

[s]ubject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society -

(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and

(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.

[27] In light of these clear constitutional prescriptions, it is our view that where legislation - subsidiary, delegated or otherwise - establishes a penalty which is to be obeyed or complied with in relation to a criminal offence or civil infringement, and that penalty exceeds that which is in fact lawfully prescribed at the time of the act which constitutes the offence or infringement, the prohibition against the application of more severe penalties enshrined in section 16(11), will be *prima facie* engaged. We are therefore unable to accede to the entreaty of the Defendants to find

that reference to penalties imposed in the section should be restricted to a penalty imposed by a court.

- [28] Additionally, while the person to whom a fixed penalty notice is issued may choose to pay the penalty to discharge his liability to conviction or participate in criminal proceedings in respect of the offence (which then enables one to make the argument that such a person was not bound to comply with the penalty stated in the notice so that it does not amount to an imposition) a constable who issues a fixed penalty notice is without choice or discretion as to the penalty applicable to an offence within the fixed penalty regime.
- [29] Further and perhaps more importantly, if the person to whom the notice is issued wishes to exercise the opportunity given to him by the statute to discharge his liability to conviction for the offence, he is required to pay the fixed penalty prescribed by law, which appears upon the notice, within the period prescribed.
- [30] Should there be any lingering concern about whether a fixed penalty under the 1938 RTA is as a “penalty” in relation to a criminal offence, section 116(9)(b) puts the matter beyond doubt. It provides that “*the fixed penalty for an offence specified in the Appendix, shall be the amount so specified in relation to each such offence.*” We therefore find that the fixed penalties prescribed in the Orders were “*imposed*” in relation to a criminal offence within the meaning of section 16(11) of the Constitution by operation of law, albeit laws which were invalidly promulgated.
- [31] The Claimant has only supplied proof of a single fixed penalty notice/traffic ticket being issued to him by a constable. This was a ticket dated 25th July 2021 in respect of a breach of a prescribed speed limit. A fixed penalty of five thousand dollars (\$5,000.00) which was prescribed by the 2007 Order was imposed. The fact that this fixed penalty exceeded that which was lawfully imposed by the Appendix to the 1938 RTA for the relevant offence at the time is not disputed. In the circumstances we find that a conclusion

that the right to due process enshrined in section 16(11) has been engaged in respect of the Claimant is inescapable.

[32] Pursuant to section 13(2) of the Constitution, the Parliament and organs of the State are prohibited from passing any law and taking any action respectively which abrogates, abridges or infringes the right, as prescribed in section 13(2), unless such laws or actions are demonstrably justified in a free and democratic society. In the result, *prima facie* engagement of a right alone does not equate to a breach of the right. The engagement hurdle having been passed; however, it is well established that the party who is seeking to have the derogation upheld must prove on a balance of probabilities that the derogation is justified. Outside of cases where justification is obvious, evidence of justification will be required to be produced to discharge the burden.⁴

[33] The Claimant here protests fixed penalties imposed by the operation of subsidiary legislation in the form of Orders made by the then Minister of Finance and Planning, a member of the executive under the **Provisional Collection of Tax Act** and execution of it against the Claimant by a constable in the discharge of his duties. The Defendants concede that these orders of the Minister are null and void, and there is no dispute that the fixed penalties prescribed by those Orders exceeded and are therefore more severe than the fixed penalties then in force and imposed by the Appendix to the 1938 RTA.

[34] No attempt has been made by the Defendants to show that the imposition by law of the impugned fixed penalties against the Claimant was demonstrably justified in a free and democratic society. Further, there is no self-evident justification on the facts of this case for the derogation from the right to due process which the Claimant invoked.

[35] In all these premises we find, contrary to the submissions of the Defendants, that the due process right guaranteed by section 16(11) of the Constitution is engaged on the facts of the case, and that in the

⁴ See **Julian J Robinson v The Attorney General of Jamaica** [2019] JMFC Full 04.

absence of justification for derogation from it, the fixed penalty notice/traffic ticket issued to the Claimant on 5th July 2021 with a more severe fixed penalty than that authorised by the law then in force constitutes a breach of the right.

Whether the Claimant is entitled damages for breach of his constitutional right to due process.

[36] Section 19(1) of the Constitution allows individuals to apply to the Supreme Court for redress where a provision of the constitution has been, is being, or is likely to be contravened. The Privy Council in **Attorney General of Trinidad and Tobago v Ramanooop**⁵ acknowledged that such redress could extend to the award of constitutional or vindicatory damages. The matter was stated at paragraphs 18 and 19 of the judgment thus.

18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional

⁵ [2005] UKPC 23

right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.

[37] The Claimant asserts that the fact that the violation complained of, and (which we have found established) is constitutional, a discretionary award, even if nominal, should be awarded to discourage the expedient and improper imposition of penalties in violation of section 16 (11) of the Constitution. This to reflect the "sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches" as enunciated in **Ramanoop**. It is the complaint that the improper penalties were imposed by the State as a revenue measure.

[38] The claimant in **Ramanoop** had an altercation with a man at a bar who later attended his home along with a police officer, PC Rahim, who handcuffed him and beat him as he hurled obscenities at him for what the officer styled as his interfering with police. During the ensuing hours the claimant was subjected to 'outrageous conduct' by the police officer in the company of the said man. This conduct included being handcuffed and dragged outside dressed only in his underpants and beaten. He was not allowed to properly dress before he was shoved into the backseat of a car and taken to the police station. His head was rammed into a wall, causing an injury, over which PC Rahim then poured rum which also got into his eyes. He was then soaked under a shower in the bathroom and humiliated by being spun around until he was dizzy. Bloodied and feeling weak, he was then made to sign a document under duress to be allowed to leave the police station and taken home by the very man with whom he had had

the initial altercation. It was this egregious violation of his constitutional rights for which vindictory damages were awarded, given the extra dimension to the wrong, to reflect the public outrage and gravity of the breach.

- [39] The Privy Council affirmed the approach in **Ramanoop** to award constitutional damages in **Mershon v Drexel Cartwright and the Attorney General of Bahamas**⁶. The police in arresting, falsely imprisoning and maliciously prosecuting Ms. Mershon were found to have behaved in “*a callous, unfeeling, high-handed, insulting and malicious and oppressive manner*”. The following guidance is provided at paragraph 18 of the judgment.

... The purpose of a vindictory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant ... to carry on his or her life ... free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.

- [40] The Claimant also relied on the decision in **Lowell Lawrence v Financial Services Commission**⁷. That case concerned a statutory notice which offered the appellant a choice to pay a fixed penalty or be reported by the FSC to the DPP for possible prosecution. While the fact of payment of the fixed penalty did not involve an acceptance of liability for the commission of an offence, liability would be discharged and the need for reporting to the DPP obviated. While the Board found that the notices issued were unlawful, the default had been cured by validating legislation.

⁶ [2005] UKPC 38

⁷ [2009] UKPC 49

- [41] We can see the parallels drawn by Counsel between **Lowell** and the instant case, as they are both concerned with a fixed penalty regime, for which a finite notice period applies, the expiration of which triggers a prosecutorial process. The cases are distinguishable, however.
- [42] The constitutional right invoked by the Claimant concerns the prohibition against the imposition of more severe penalties and not the right to a fair hearing guaranteed by section 16(1) of the constitution which was engaged in **Lowell**. In that decision the Privy Council acknowledged that there could be no issue of an entitlement on the part of the appellant to be heard before the notice was issued. In the view of the Board, the appellant's right to a fair hearing was entirely safeguarded by the statutory scheme, in particular his right to defend any prospective criminal proceedings. Where a report was made to the DPP following the failure or refusal to pay the penalty under the notice, the appellant could make representations to the DPP as to why he should not be prosecuted.
- [43] In **Lowell**, the non-payment of the fixed penalty triggered the right of a suspected offender to make representations to the DPP on whether criminal proceedings should be taken against him. This is to be contrasted with the position in the RTA where non-payment of the fixed penalty within the period specified in the notice results in automatic commencement of criminal proceedings. The reasoning in **Lowell** relative to activation of the right to be heard does not assist the Claimant.
- [44] Returning to the question of the appropriateness of an award for damages to mark the constitutional breach, it was submitted by the Defendants that the payment of the fixed penalty is tantamount to a plea of guilty. It was therefore suggested that the Claimant's right to due process was nevertheless preserved as he was still able to contest the traffic ticket in court and had accordingly suffered no loss. We are unable to agree with any aspect of that submission. While the payment of the fixed penalty discharges liability to conviction and the traffic violator receives demerit points on a sliding scale commensurate with the severity of a ticketed

offence, we do not agree that payment of the fixed penalty is tantamount to a guilty plea.

[45] The Board in **Lowell** referenced with approval, the decision of **Re McCutcheon and City of Toronto**⁸, a decision of the Ontario High Court. In the latter case the appellant was issued with a parking ticket. The statutory scheme pursuant to which the ticket was issued permitted a traffic violator to pay a fixed fine to avoid further proceedings and exposed the violator to liability for conviction and the payment of the fine, in the event of non-payment of the fixed fine. The appellant challenged the law on several grounds, to include that it was inconsistent with the presumption of innocence under the Canadian Charter of Rights and Freedoms. While the case is factually dissimilar to the instant, considering the constitutional right invoked, the following observation by the presiding judge of the statutory scheme is instructive.

*In my view there is no merit in this submission. **The sliding scale settlements scheme has nothing to do with the presumption of innocence. It is a convenient way for the traffic violator to avoid being charged.** Anyone can refuse to pay anything pursuant to the scheme and await service of the summons. At that time, the full panoply of defence rights come into play, including the presumption of innocence.*

[Emphasis added]

[46] Although the ticket in **Re McCutcheon** did not operate as a summons for the initiation of criminal proceedings in like manner as a traffic ticket issued pursuant to section 116 of the 1938 RTA, the effect of the ticket in both regimes is similar. Both provide something of value - an opportunity to a traffic violator to discharge liability to conviction for the ticketed traffic infraction, and as a corollary, avoid attendance at court. The question of guilt or innocence does not arise at either of those points.

⁸ (1983) 147 DLR (3d) 193

- [47] The Claimant has not paid the fixed penalty imposed in the ticket issued on the 5th of July 2021 and it was submitted on behalf of the Defendants that he has therefore suffered no loss. It is their position that he now has his right, consistent with the tenets of due process and a fair trial, to contest the ticket in court. We find the submission unmeritorious.
- [48] The imposition and collection of fixed penalties pursuant to the Orders benefitted the State by enhancing revenue collection at the expense of an attachment of a more severe penalty than authorised in law on the citizenry. It is apparent that until the offending Orders were repealed, the Claimant - but for this action commenced within days of the ticket being issued, effectively halting the effluxion of time prescribed for payment of the fixed penalty - would be required to pay a more severe fixed penalty than that which the law allowed in order to benefit from the opportunity presented by statute to discharge his liability to criminal conviction. The alternative was to pay the fine and in so doing, forfeit his constitutional right to due process embodied in section 16(11) of the Constitution. In our judgment, having to make such an election is oppressive.
- [49] That an award of constitutional damages is within the discretion of the court and is made to reflect the court's acknowledgment of a "*sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches*" as articulated in **Ramanoop**, is not in dispute. It is our view that an award which marks the breach is appropriate in the circumstances of this case.
- [50] Admittedly, the conduct which constitutes the violation of the Claimant's constitutional right to due process does not appear to be as egregious as those in **Ramanoop** or **Mershon** and was without the malicious intent which permeated those cases. It is the evidence that as soon as the authorities became aware of the import of the Orders, steps were taken to repeal them. The breach clearly arose out of a defect in legislative procedure. It is accordingly our decision that a nominal award of Two Hundred and Fifty Thousand Dollars (\$250,000.00) is sufficient to vindicate the right of the Claimant in the circumstances.

Whether it is appropriate to grant an order for restitution and recovery of all fines paid to the Collector of Taxes in respect of issued traffic tickets which contained fixed penalties in excess of those set out in the Appendix to the 1938 RTA, upon proof of payment of those fines being submitted to the 1st Defendant.

[51] Part 21 of the Civil Procedure Rules outlines the circumstances in which a party may be appointed as a representative of a class of persons. Rule 21.1 provides that –

*(1) This rule applies to any proceedings, other than proceedings falling within Rule 21.4, where 5 or more persons have **the same or a similar interest** in the proceedings.*

(2) The court may appoint –

(a) one or more of those persons; or

(b) a body having sufficient interest in the proceedings,

to represent all or some of the persons with the same or similar interest.

(3) A representative under this rule may be either a claimant or a defendant.

[Emphasis added]

[52] The consequence of an order appointing a representative party is set out at rule 21.3 which provides:

(1) Where there is a representative claimant or defendant, a judgment or order of the court binds everyone whom that party represents.

(2) It may not however be enforced against a person not a party to the proceedings unless the person wishing to enforce it obtains permission from the court.

(3) An application for permission must be supported by evidence on affidavit and must be served on each person against whom it is wished to enforce the judgment.

[53] On 3rd November 2021, Bertram Linton, J granted the application of the Claimant to be appointed as a representative claimant. The terms of the order are set out below:

Maurice Housen is appointed as representative for the class of persons who may be affected by this claim, being drivers and owners of motor vehicles in Jamaica who have been issued traffic tickets and/or paid a fine or fixed penalty that is in excess of that stated in the Road Traffic Act (as amended) from June 15, 2006, to the date of this Order.

[54] We note here that the claim for damages was limited by the Claimant to redress for the breach of his constitutional right and is distinct from the relief he seeks on behalf of the represented class. There being agreement among the parties that it is the fixed penalty portion of issued traffic tickets in excess of the penalties authorised by law which are invalid and not the entire traffic ticket, to which declaratory relief would properly go in aid, the sole issue for the court on the representative claim relates to restitution and recovery of those invalid payments.

[55] Counsel Mr. Goffe argued that the claim for restitution and recovery is applicable to all the persons represented in the class. Counsel Ms. White in attempting to resist the claim for monetary relief on behalf of the represented class posited that the members of the class are distinct individuals who may not share the same circumstances; and that restitution and recovery of invalid payments would be dependent on individuals identifying themselves to the authorities by providing their tickets to establish that they are in fact members of the class of persons identified in the order of Bertram-Linton, J.

[56] The provisions in Part 21 of the CPR are like the provisions for representative parties in the Civil Procedure Rules, UK. Rule 19.8 of the latter permits representative claims by “*one or more persons with the same interest*” and was the concern of the House of Lords in **Andrew**

Prismall v Google UK Ltd. and others⁹. The Supreme Court decision in **Lloyd v Google LLC**¹⁰ was cited with approval. The dictum of Lord Leggatt was examined and principles relevant to representative actions set out. Although the case concerned an application for summary judgment, we find the guidance provided in relation to monetary remedies in a representative action useful. The following appears at paragraph 96 of **Prismall**.

... As Lord Leggatt noted, there is only one condition that must be satisfied under CPR 19.6 before a representative claim may be begun or allowed to continue, namely that the representative has the “same interest” in the claim as the persons represented (para 69). A correct understanding of this phrase is therefore critical. Lord Leggatt considered that the phrase, “needs to be interpreted purposively in light of the overriding objective of the Civil Procedure Rules and the rationale for the representative procedure” (para 71). The purpose of the “same interest” requirement was “to ensure that the representative can be relied on to conduct the litigation in a way which will effectively promote and protect the interests of all the members of the represented class. That plainly is not possible where there is a conflict of interest between class members, in that an argument which would advance the cause of some would prejudice the position of others” (para 71).

[57] As to the availability of monetary remedies in representative actions, Mrs. Justice Foster DBE said this at paragraphs 108 of the judgment:

Lloyd confirms that a representative action is not precluded by the sheer fact that the claimed relief includes damages (or some other monetary relief), (paras 50, 58 and 80).

She goes on to state at paragraph 109:

*However, [Lord Leggatt] recognised that, “**there is no reason why damages or other monetary remedies cannot be claimed in a***

⁹ [2023] EWHC 1169

¹⁰ [2021] UKSC 50

representative action if the entitlement can be calculated on a basis that is common to all members of the class” (para 82). Lord Leggatt identified as examples of this, where every member of the class had been wrongly charged a fixed fee, and where all members of the class had acquired the same product with the same defect which reduced its value by the same amount. (A further example of where the entitlement could be calculated on a basis common to all class members was the claims for secret commissions in Marks (para 71)). Lord Leggatt noted that the difficulty would be avoided where damages were claimed on a global “top down” basis. However, damages in Lloyd were claimed on the “bottom up” approach of assessing a sum which each member of the class was individually entitled to recover (paras 82 and 86).

[Emphasis added]

- [58] In the instant case the Representative Claimant seeks restitution and recovery on the basis that invalid fixed penalties were imposed on the class of persons he represents. It is our view that this is a case in which entitlement to the monetary relief claimed could be calculated on a basis that is common to the members of the class and does not itself preclude an order for recovery and restitution of invalid fixed penalties paid.
- [59] That is not the end of the enquiry however as it was also argued by the Defendants in opposing the order for monetary remedy on the representative action, that the information as to the tickets issued and fixed penalties paid are not in their possession but in the custody of Tax Administration Jamaica, a government funded department. The Attorney General is the legal representative of the government of Jamaica and appears to us to be well placed to spearhead the effort - certainly on the part of the Defendants - to give effect to an order of the court directing restitution and recovery of invalid fixed penalties paid by members of the representative class.
- [60] It was also submitted on behalf of the Defendants that the Attorney General is not equipped to deal with any refund of tickets which were

overpaid. Considering the breadth of the representative class identified by Bertram-Linton, J, and the Representative Claimant's claim that recovery and restitution of the invalid fixed penalties should be "*upon proof of [their] payment ... being submitted to the 1st Defendant*", the concern, which is of a practical nature, appears to us to be a legitimate one.

- [61]** The Defendants having conceded that the Ministerial Orders which imposed more severe fixed penalties than was authorised by law are null and void and of no effect, and that fixed penalties (in excess) which were prescribed in traffic tickets issued are null and void, it would be unconscionable for the State to retain the proceeds of monies received without lawful authority.
- [62]** In the premises we are of the view that the Representative Claimant is entitled to a declaratory order that reflects that the State has an obligation to refund the excess of the fixed penalties stated on fixed penalty notices/traffic tickets issued between 15th June 2006 (the date of the Provisional Collection of Tax (Road Traffic) Order, 2006) and 3rd November 2021 (the date on which injunctive relief was granted by Bertram-Linton, J.)
- [63]** Such an order still leaves the issue of a mechanism for recovery of the unlawful amount of the fixed penalties received by the State, which arises on the legitimate concern of the Attorney General. No submissions having been made to the court in this regard however, an opportunity to be heard on this issue will be afforded to the parties.
- [64]** Ahead of setting out our orders in the instant claim, there is one matter which we believe to be impatient of address, even if briefly. It concerns rule 21.1 of the CPR in respect of which we observe, that besides the condition that 5 or more persons must have the same or a similar interest in proceedings to enable the appointment of a representative party by the court, no further guidance on the considerations for the court in exercise of this discretion have been provided. To the extent that we may be able to assist in this regard, it is our view that the following guidance distilled

from the decisions in **Prismall** and **Lloyd** and modified to reflect the threshold consideration in rule 21.1, may be of some utility.

- (i) A representative claim may be begun or continued where the representative party has the “same or similar interest” in the claim as the persons represented. This threshold requirement is to ensure that representative(s) can effectively promote and protect the interests of the class being represented.
- (ii) Where the same or similar interest criteria is satisfied, the court retains the discretion to decide whether to allow the claim to proceed as a representative claim and in so doing, must give effect to the overriding objective.
- (iii) There is no requirement for a member of a representative class to take any positive steps in proceedings or to be aware of the existence of the proceedings, although a judge in his or her discretion may impose a requirement that the members of the class be notified of the proceedings, and establish a procedure for members of the class to opt out of representation, or for limiting the class only to those persons who have positively opted into the proceedings. The manner of the exercise of the discretion in these regards will depend on the circumstances of a particular case.
- (iv) A matter which the court may properly consider in determining whether a claim should be begun or continued as a representative claim is the existence of any practical difficulty which would arise in distributing proceeds of a judgment to the members of the represented class.
- (v) It is desirable that the represented class of persons be clearly defined, but the adequacy of definition of the class only goes to the discretion of the court in deciding whether it is just and convenient to allow the claim to proceed as a representative claim and is not itself a bar to a representative claim. This

notwithstanding, the class of persons with the same or similar interest must be known at the date when the proceedings were commenced and must not be dependent on the outcome of the proceedings.

(vi) While the need for individualised assessment of damages or other monetary remedy will generally preclude a representative action which seeks damages or other monetary remedy on behalf of a class, a bifurcated process - where common issues of law and fact are determined through a representative claim and issues requiring individual determination being dealt with at a subsequent stage - could be advantageous. In determining the appropriateness of a bifurcated process, regard must be had to advancing the overriding objective.

[65] ORDER

1. The **Provisional Collection of Tax (Road Traffic) Order, 2006** and the **Provisional Collection of Tax (Road Traffic) Order, 2007** are null and void and of no legal effect.
2. The imposition of the fixed penalty in excess of that stated in the Appendix to the Road Traffic Act, 1938 on the fixed penalty notice/traffic ticket issued to the Claimant on 5th July 2021 is a breach of the Claimant's constitutional right to due process enshrined in section 16(11) of the Constitution of Jamaica.
3. Nominal damages for the constitutional breach are awarded to the Claimant in the sum of Two Hundred and Fifty Thousand Dollars (\$250,000.00).
4. The amount of the fixed penalty contained in the fixed penalty notice/traffic ticket issued to the Claimant on 5th July 2021 which exceeds the fixed penalty prescribed in the Appendix to the Road Traffic Act, 1938 is null and void.

5. Within twenty-one (21) days of the date of this order, the Claimant is permitted to pay the fixed penalty prescribed in the Appendix to the Road Traffic Act 1938 in respect of the offence stated in the fixed penalty notice/traffic ticket issued to him on 5th July 2021 in accordance with section 116(2) of the said Act, in order to discharge his liability to criminal conviction for the said offence, failing which criminal proceedings may be taken in respect of the act or omission constituting the offence specified in the said notice/ticket.
6. If the Claimant opts to exercise his option to pay the fixed penalty under order 5, he shall pay the sum of Eight Hundred Dollars (\$800.00) prescribed to the Attorney-at-Law for the 1st Defendant to discharge his liability.
7. It is declared that all sums stated on fixed penalty notices/traffic tickets issued between 15th June 2006 (the date of the Provisional Collection of Tax (Road Traffic) Order, 2006) and 3rd November 2021 (the date on which injunctive relief was granted by Bertram-Linton, J restraining the 2nd Defendant from issuing traffic tickets containing fixed penalties in excess of the fines (sic) stated in the Appendix to the Road Traffic Act, 1938, or any legislation in effect that replaces the Road Traffic Act), which exceed the fixed penalties prescribed in the Appendix to the Road Traffic Act, 1938 as at 15th June 2006, are null and void.
8. It is declared that drivers and owners of motor vehicles in Jamaica who have paid sums stated on fixed penalty notices/traffic tickets issued between 15th June 2006 and 3rd November 2021, which exceed the fixed penalties prescribed in the Appendix to the Road Traffic Act, 1938 as at 15th June 2006, are entitled to a refund of the sums paid in excess, on proof of payments in excess.
9. The court will hear the parties as to an appropriate executory mechanism for giving effect to the declaratory relief at order 7

herein, to enable consideration and determination of order(s) in that regard.

10. At the request of the parties that they be permitted to make submissions as to costs, the court will hear the parties in this regard.

11. The hearings at orders 9 and 10 are fixed for the 29th April 2024 at 10:00 a.m. for two (2) hours before the Full Court.

12. Written submissions and authorities in relation to the matters at orders 9 and 10 herein are to be filed and exchanged on or before 12th March 2024.

13. The Claimant's Attorneys-at-Law are to prepare, file and serve this order.

D. Palmer, J
Puisne Judge

C. Barnaby, J
Puisne Judge

T. Carr, J
Puisne Judge

*** Amended to remove "16th" and replace with "15th" to reflect the correct date on which the matter came on for trial before the Full Court.**