[2020] JMCA Civ 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 52/2017

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**THE ATTORNEY GENERAL**	**APPELLANT**
AND	**PETER BANDOO**	**RESPONDENT**

Miss Deidre Pinnock and Mrs Donia Fuller-Barrett instructed by the Director of State Proceedings for the appellant

Miss Akuna Noble, Sean-Christopher Castle and Miss Kristen Fletcher instructed by Kazembe and Associates for the respondent

1, 3 May 2018 and 3 April 2020

MCDONALD-BISHOP JA

[1] I have read in draft the judgment of my brother F Williams JA. I agree with his reasoning and conclusion and have nothing to add.

SINCLAIR-HAYNES JA

[2] I too have read the draft judgment of my brother F Williams JA and agree with his reasoning and conclusion.

F WILLIAMS JA

[3] On 5 June 2017, the Attorney-General (one of several defendants in the court below and "the appellant" herein) filed a notice of appeal, seeking to set aside an award of special damages for loss of income made to Mr Peter Bandoo (the claimant below and "the respondent" herein). That award, recorded in a written judgment dated 26 April 2017, was made by a judge of the Supreme Court ("the learned judge") after a contested assessment of damages. The assessment of damages had been conducted subsequent to the respondent's obtaining permission to enter judgment in default, in his favour, against the appellant.

[4] The respondent has also appealed against the judgment of the learned judge by counter-notice of appeal filed on 23 June 2017. By that counter-notice, the respondent seeks to increase the quantum of damages awarded for false imprisonment and malicious prosecution on the basis that those awards are inordinately low.

Background and procedural history

[5] The claim below was commenced by claim form filed on 5 February 2013. By that action, the respondent claimed against Detective Sergeant Ralph Grant, the Director of Public Prosecutions and the Attorney General, damages for his wrongful arrest, false imprisonment and malicious prosecution. By notice of discontinuance filed on 21 May 2013, the Director of Public Prosecutions ("the DPP") was released from the suit.

[6] A synopsis of the events culminating in the filing of the claim may be gleaned from the particulars of claim filed on 5 February 2013. By those particulars, the respondent

averred that on 5 June 2005, whilst employed as a property manager and security manager at the Merrils Beach Resort, Westmoreland, he discovered a dead body on the said property. He reported that discovery to the police. Shortly thereafter, he was arrested on suspicion of murder. The respondent was not brought before the court until 24 June 2005, consequent to the filing of a *habeas corpus* application by his attorneys-at-law.

[7] That application was listed for hearing in the Supreme Court but was remitted to the Westmoreland Parish Court (then "Resident Magistrates' Court") held at Savanna-la-Mar, where it was heard on 28 June 2005. The respondent at that time was refused bail. However, a judge in chambers at the Supreme Court subsequently granted him bail. On 21 April 2009, he was committed to stand trial in the Westmoreland Circuit Court and his bail conditions modified. However, administrative delays resulted in his being detained until 25 April 2009.

[8] The matter remained before the court until 14 May 2012, when the DPP offered no evidence against the respondent. It was after the dismissal of the criminal charge against him, that the respondent filed his claim. As is unfortunately too often the case in claims against the Crown, however, the appellant failed to acknowledge service or to file a defence to the claim. Consequently, by notice of application filed on 23 December 2013, the respondent sought the court's permission to enter default judgment.

[9] Master Harris (Ag) (as she then was) heard the application for default judgment as well as an application filed by the appellant, on 22 April 2015, which sought an extension of time within which to file a defence and to consolidate claims. The learned

master refused the orders sought by the appellant and entered a default judgment in the respondent's favour. Those orders are contained in a formal order filed on 21 December 2015.

[10] Thereafter, the respondent, on 29 November 2016, filed a notice of intention to tender several documents into evidence, pursuant to section 31 of the Evidence Act. Of relevance for the purpose of this appeal is that listed at item 19, that is, a:

> "[s]tatement from Merrils Beach Resort dated November 19, 2012 evidencing loss of income for the period June 2005 to September 2012 in the sum of **Ten Million One Hundred and Seventy Thousand Two Hundred and Seven Dollars and Fifty-two Cents ($10,170,207.52)**."
> (Emphasis as in original)

[11] The appellant, in response to that notice, on 13 December 2016, filed a notice to object to the tendering of hearsay evidence. The notice included an objection to the admission of the document listed at item 19. It further requested the attendance, for the purpose of cross-examination, of the maker of the document at the hearing of the assessment of damages.

[12] At the assessment of damages, conducted on 9 and 14 February 2017, both parties were ordered to file written submissions in the matter. Written submissions were so filed. The orders thereafter made by the learned judge were that:

> "In the circumstances, the claimant is entitled to:
>
> (a) General Damages in the sum of- **$14, 250,000.00**
>
> i. False Imprisonment - $3,550,000.00
>
> ii. Malicious Prosecution -$4,500,000.00

iii. Aggravated Damages -$1,200,000.00

iv. Exemplary Damages -$2,000,000.00

v. Psychological Damage and Future Medical-

-$3,000,000.00

(b) Interest on General Damages at a rate of 3% per annum from February 5, 2013, the date of service of the Claim Form to April 26, 2017, the date of the judgment.

(c) Special Damages in the sum of - **$10,214,707.52**

(d) Interest on Special Damages at a rate of 3% per annum from June 5, 2005, the date of Mr. Bandoo's detention to April 26, 2017, the date of judgment

(e) Cost to the Claimant to be agreed or taxed."

(Emphasis as in original)

The appeal

[13] The grounds of appeal, succinctly expressed, are predicated upon what the appellant contends to be an error in the learned judge's award of damages for loss of income, which was a portion of the sum awarded for special damages. These are the grounds:

"a. The Learned judge misdirected herself in finding that the Respondent has pleaded Special Damages for loss of earning in his Claim Form and Particulars of Claim and thus satisfied **Rule 8.7**

b. The learned judge misdirected herself in finding that the Respondent had proven Special Damages for loss of earning.

c. The learned judge misdirected herself in having regard to the contents of a hearsay document not admitted into evidence." (Emphasis as in original)

Ground a: pleadings for loss of income

Summary of Submissions

For the appellant

[14] Counsel for the appellant contended that the learned judge was wrong to have awarded special damages for loss of income when the respondent had failed to particularize that loss. Counsel argued that the omission to particularize or to seek an amendment to do so, resulted in a failure to satisfy rule 8.7 of the Civil Procedure Rules (CPR). Counsel highlighted paragraph 23 of the particulars of claim and stated that it contained a general reference to "past and future lost income". As such, counsel maintained, the appeal ought to be allowed. Among the cases cited by the appellant were **Donovan DeSouza v CB Duncan & Associates Ltd and others** (unreported), Supreme Court, Jamaica, Claim No 1998 CL D096, judgment delivered 18 June 2004; **Michael Thomas v James Arscott & Another** (1986) 23 JLR 144; **Marvalyn Taylor–Wright v Sagicor Bank Jamaica Limited** [2016] JMCA Civ 38; and **Ilkiw v Samuels and others** [1963] 2 All ER 879.

For the respondent

[15] Relying on the case of **McPhilemy v Times Newspapers Ltd and others** [1999] 3 All ER 775, counsel argued that the claim for loss of income had been sufficiently pleaded, as there is no longer a requirement for detailed pleadings where there has been

an exchange of witness statements. Counsel submitted that, moreover, the ambit of rule 8.7(1)(b) of the CPR allows the court to grant any remedy to which a party is entitled. Accordingly, the first ground of appeal, it was submitted, must fail. The case of **Capital and Credit Merchant Bank Limited v The Real Estate Board** [2013] JMCA Civ 29 was also cited in support of the respondent's arguments.

Findings of the learned judge

[16] The learned judge, in reviewing the matter, reiterated the seminal principle that special damages must be specifically pleaded and proven in order for them to be awarded to a party. The learned judge found that the respondent had been suspended from his job throughout the period of his prosecution and that he had provided verification from his past employers of the salary to which he would have been entitled, had he continued to work. The court accepted that verification and awarded the sum of $10, 170,207.52 for loss of income.

Discussion

[17] The issue to be decided here is whether the respondent had sufficiently pleaded his loss of earnings. From the learned judge's discussion, it can be inferred (she not having expressly so stated) that she found that he did. It therefore falls to be determined whether the learned judge was plainly wrong in finding that the loss of income claimed had been properly pleaded.

[18] It will be recalled that the appellant's primary challenge under this ground is that the pleadings in relation to loss of income are insufficient to satisfy the requirements of

rule 8.7 of the CPR. It will therefore be necessary to consider that rule. Rule 8.7, which sets out what must be included in the claim form, provides, so far as is relevant to this discussion, that:

> "8.7 (1) The claimant must in the claim form (other than a fixed date claim form) –
>
> (a) include a short description of the nature of the claim;
>
> (b) specify any remedy that the claimant seeks (though this does not limit the power of the court to grant any other remedy to which the claimant may be entitled);"

[19] It is also necessary to examine rule 8.9(1) and (3) of the CPR. Those provisions stipulate the claimant's duty to set out his case by specifying that the claimant must: (a) include in the claim form or the particulars of claim "a statement of all facts" on which reliance will be placed; as well as (b) bring to the attention of the other party or parties, documents necessary to his or her case. Rule 8.9A stipulates the consequence where claimants fail to set out their case. It provides that:

> "The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission."

[20] The cumulative effect of these rules is that a claimant has a duty to set out the substance of his claim and the remedies that are being sought from the court. Further, a claimant has a duty to bring to the fore any documentary evidence necessary to prove his or her claim. However, ultimately it is within the discretion of the court whether to allow reliance on a factual contention, which has not been set out in the particulars of claim.

[21] The court is also empowered to grant other remedies to which a party may be entitled on a claim properly brought by that party. This jurisdiction of the Supreme Court to manage the cases brought before it and to grant remedies to which a party is entitled, apart from residing in the court's inherent jurisdiction, is also reflected in section 48(g) of the Judicature (Supreme Court) Act. That section reads:

> "(g) The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided."

[22] It is observed that the claim form, in this case, contains a statement that the claim is brought "...pursuant to the Crown Proceedings Act, arising out of the wrongful arrest, false imprisonment and malicious prosecution of the Claimant…". That, in my view, provides a short description of the nature of the claim.

[23] In relation to the requirement to specify the remedy being sought, the claim form sets out claims for several types of damages inclusive of special damages. These averments, in my view, satisfy the requirements of rule 8.7(1)(a) and (b) of the CPR.

[24] Paragraph 23 of the particulars of claim contains an averment that "[the respondent] has suffered past and future lost income…" Also, the penultimate paragraph of the claim form contains a claim for special damages, in the sum of $500,000.00. The

appellant has complained that there is an absence of any particularization of the averment for loss of income. Accordingly, there arises a question of the adequacy of these pleadings. Is the pleading concerning loss of income sufficient? What does the law require? Let us consider some of the authorities.

[25] Lord Diplock, in **Ilkiw v Samuels** at page 890, reiterated the approach that should be taken as follows:

> "As regards the question of damages, I would put it in this way. Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularised... In my view, it is plain law—so plain that there appears to be no direct authority, because everyone has accepted it as being the law for the last hundred years—that one can recover in an action only special damage which has been pleaded, and, of course, proved." (Emphasis added).

[26] Decades later, Lord Woolf MR, at page 792 of the case of **McPhilemy v Times Newspaper Ltd and Others** (delivered on 21 May 1999, after the coming into effect of the English Civil Procedure Rules on 26 April 1999), commented on the importance of pleadings vis-à-vis witness statements in the new procedure regime. He opined that:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is

> important is that the pleadings should make clear the general nature of the case of the pleader." (Emphasis added).

[27] This court has always maintained, prior to and after the introduction of the CPR, that special damages must be specifically pleaded. The respondent contends, however, placing reliance on **McPhilemy v Times Newspaper Ltd**, that the pleadings of the loss of income is sufficient and that the fact that reference to it was included in the witness statement has obviated the need for any further pleadings. This question of the impact of the CPR on the long-standing principle concerning the pleading and proof of special damages was comprehensively examined by this court in the recent case of **Alcoa Minerals of Jamaica Incorporated v Marjorie Yvonne Patterson (Court Appointed Personal Representative of the claimant, the late Orinthia Hanson deceased)** [2019] JMCA Civ 49 ("**Alcoa**"). This court, after a review of several authorities, reinforced the principle that special damages must be strictly pleaded or be sufficiently particularised, notwithstanding **McPhilemy v Times Newspaper Ltd**.

[28] Straw JA (with whom Phillips and Sinclair-Haynes JJA agreed) opined, at paragraph [59] of the judgment in **Alcoa**, that**:**

> "[59] Even when applying **McPhilemy**, therefore, the pleadings must contain the allegations or factual basis necessary to prevent surprise and to set out the parameters of the issues to be decided between the parties. The statement of claim is to provide the allegations of facts which would reflect the general nature of the party's case, while the witness statements could serve the purpose of providing the particulars or additional particulars of the allegations set out."

[29] Straw JA also referenced the opinion of the Judicial Committee of the Privy Council in **Charmaine Bernard v Ramesh Seebalack** [2010] UKPC 15, a case originating from

the Court of Appeal of Trinidad and Tobago. Among the issues to be decided in that case was whether the claimant's statement of case had to be amended to include the claim for special damages, which was not pleaded, for such damages to be recoverable. In determining the question, the Board gave consideration to rule 8.6(1) of the Trinidad and Tobago CPR, which is in similar terms to rule 8.9(1) of our CPR. The rule provides:

> "8.6 (1) The claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies."

[30] Sir John Dyson SCJ, in delivering the opinion of the Board noted, inter alia, (after a restatement of the dicta of Lord Woolf in **McPhilemy**, which is being relied on by the respondent in this case) that:

> "16**. But a detailed witness statement or a list of documents cannot be used as a substitute for a *short* statement of all *the* facts relied on by the claimant.** The statement must be as short as the nature of the claim reasonably allows. Where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed.
>
> > **The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is 'special' in the sense that fairness to the defendant requires that it be pleaded…."** (Emphasis added)

[31] At paragraph 17, Dyson SCJ concluded:

> "**These observations are applicable to Part 8.6 of the CPR as well as to Part 16.4(1) of the England and Wales CPR**." (Emphasis supplied)

[32] In the light of the useful guidance provided by the Privy Council, Straw JA, in **Alcoa Minerals of Jamaica Iv Marjorie Yvonne Patterson**, reasoned:

> "[66] Sir John Dyson, in adopting the words of Lord Donovan in **Perestrello**, as being applicable to Part 8.6 of the Trinidad CPR, made it clear that the principles applying to the need to plead and particularize items of special damage were not made redundant by **McPhilemy**."

[33] Straw JA also referenced a passage extracted from McGregor on Damages (16th edition) at paragraph 2030, which reinforces the rationale and requirement for there to be particularity in the pleading of special damages. The learned authors stated:

> "(1) Where the precise amount of a particular item of damage has become clear before the trial, either because it has already occurred and so become crystallised or because it can be measured with complete accuracy, this exact loss must be pleaded as special damage. The prime example of this appears in personal injury cases, where earnings already lost and expenses already incurred before the action must be pleaded as special damage before proof of them may be allowed. This is clearly laid down by Lord Goddard in *British Transport Commission v. Gourley*, [1956] AC 185, at 206 and is well illustrated by *Ilkiw v. Samuels*, [1963] 1 W.L.R. 991, C.A., an action for personal injuries where, the special damages having been agreed at £77 based on four months' loss of wages after the accident, the plaintiff was held not entitled to recover for the continuing loss of wages over the eight years before the action was heard as these should have been pleaded as special damage."

[34] The authorities of the post - CPR era are clear that a claim for special damages, if it is to be allowed, must be strictly pleaded. There is no proper basis for this court to depart from this well-settled principle. In light of the foregoing considerations, the appellant has succeeded in establishing that the learned judge was palpably wrong in finding that the respondent's loss of income had been properly pleaded.

[35] Additionally, there was no amendment requested or granted to bring the pleadings in line with the evidence adduced in the witness statement. In **Michael Thomas v James Arscott & Another** (1986) 23 JLR 144, Rowe P, highlighted, among other things, the need for there to be an amendment to the particulars of claim, where the evidence concerning special damages is not in keeping with the pleadings. The learned President stated (at page 152):

> "**In my opinion, special damages must both be pleaded and proved. The addition of the term 'and continuing' in a claim for loss of earnings etc. is to give advance warning to the defendant that the sum claimed is not a final sum. When, however, evidence is led which established the extra amount of the claim, it is the duty of the plaintiff to amend his statement of claim to reflect the additional sum. If this is not done the court is in no position to make an award for the extra sum**." (Emphasis added)

[36] The principle that an amendment to the statement of case is needed to bring the pleaded case in line with the evidence (contained in the witness statement or otherwise) remains unchanged with the introduction of the CPR. This is clearly illustrated by the reasoning and conclusion of the Privy Council in **Charmaine Bernard v Ramesh**

Seebalack, which was followed by this court in **Alcoa Minerals of Jamaica v Marjorie Yvonne Patterson.** This ground, accordingly, succeeds.

Grounds b and c: proof of loss of income and documentary evidence

Summary of Submissions

For the appellant

[37] Counsel argued these two grounds together. It was submitted that the respondent had failed to prove his loss of earnings since the income-verification statement was not properly admitted into evidence pursuant to the Evidence Act. It was submitted that, in the circumstances of this case, where: (i) the maker of the document was not called to give evidence; (ii) section 31E (4) of the Evidence Act was not satisfied; (iii) an objection was taken against the admissibility of the document; and (iv) there was no ruling on the admissibility of the document, the learned judge erred in relying on it.

[38] Additionally, counsel argued that the appellant was denied an opportunity to challenge the figure claimed in the income-verification statement, having reasonably been of the view that the special damages being claimed were limited to medical expenses and legal fees.

[39] The cases relied on included **Barbara McNamee v Kasnet Online Communications** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 15/2008, judgment delivered 30 July 2009; **Paulette Robinson – Keize v Carlos Morant** [2012] JMSC Civ 147; and **Dorrett Gayle Willis v The Attorney General of Jamaica and Washington Williams** [2017] JMSC Civ 17.

For the respondent

[40] In concurring with the learned judge's finding that loss of income had been proven, counsel for the respondent submitted that the respondent's testimony in court and his witness statement filed on 13 December 2016 confirmed the loss of income to be $10,170,207.52 and provided sufficient evidence of the respondent's loss in that respect. Counsel argued that this was the position, especially where the appellant had not challenged the respondent's *viva voce* evidence of his loss of income.

[41] Counsel conceded that the learned judge had not expressly ruled on the admissibility of the income-verification statement, but submitted that it was well within her discretion to have accepted the loss the respondent alleged. As such, counsel maintained that the learned judge could have found (and properly so did) that the respondent had lost income in the sum of $10,170,207.52.

[42] Further, counsel submitted that the overriding objective dictated that the entire claim not be disallowed simply because the amount was not stated, as a procedural error ought not to be held against the respondent.

[43] The cases relied on included **Delores Elizabeth Miller v The Assets Recovery Agency** [2016] JMCA Civ 35.

Discussion

[44] In essence, these grounds raise the following inter-related issues:

i. whether the learned judge properly admitted and relied on the income-verification statement; and

ii. whether there was sufficient evidence for the learned judge to have found that the respondent had proven his loss of income.

Issue (i): whether the learned judge properly admitted and relied on the income-verification statement

[45] The written judgment contains no express statement by the learned judge that she had admitted into evidence the income-verification document, purportedly provided by the respondent's prior employer. However, her acceptance and reliance on the statement in making the award for loss of income would lead to such a conclusion. This is what the learned judge said about the matter at paragraph [71] of the judgment:

> "**[71]** Loss of earnings - $10,170,207.52
>
> Throughout the period of his prosecution, Mr. Bandoo was suspended from work. He has presented the court with verification from his past employers of what his salary would have been had he continued to work. I accept this and as such I will grant him loss of earnings of the amount claimed. The figures for the loan and his grocery bill indebtedness will not be awarded as these expenses would have been met from his earnings and so to give him both would amount to double compensation." (Emphasis added)

[46] The admissibility of a hearsay document into evidence is a matter of law as well as one of discretion. The judge's exercise of her discretion to admit the hearsay document into evidence would, upon falling to be reviewed in this court, naturally be subject to the guidance of the court expounded in the case of **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, in that, the court will be reluctant to interfere unless the decision is shown to be aberrant or demonstrably wrong.

[47] But, on the other hand, the requirement for fairness and transparency that inheres in our trial process also demands that parties be given clear rulings on objections which might well influence the further conduct of their cases. The entire circumstances of the court's treatment and use of the income-verification document must, therefore, be examined.

[48] Section 31E of the Evidence Act sets out in detail the procedure that is to apply where a party wishes to tender a hearsay document into evidence in civil matters. It contains the following stipulations:

> "31E.-(1) Subject to section 31G, in any civil proceedings, a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall subject to this section, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible.
>
> (2) Subject to subsection (6), the party intending to tender such statement in evidence shall, at least twenty-one days before the hearing at which the statement is to be tendered, notify every other party to the proceedings as to the statement to be tendered, and as to the person who made the statement.
>
> (3) Subject to subsection (4), every party so notified shall have the right to require that the person who made the statement be called as a witness.
>
> (4) The party intending to tender the statement in evidence shall not be obliged to call, as a witness, the person who made the statement if it is proved to the satisfaction of the court that such person-
>
> (a) is dead;
>
> (b) is unfit, by reason of his bodily or mental condition, to attend as a witness;

> (c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;
>
> (d) cannot be found after all reasonable steps have been taken to find him; or
>
> (e) is kept away from the proceedings by threats of bodily harm.
>
> (5) wherein any civil proceedings a statement which was made otherwise than in a document is admissible by virtue of this section, no evidence other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it.
>
> (6) The court may, where it thinks appropriate having regard to the circumstances of any particular case, dispense with the requirements for notification as specified in subsection (2).
>
> (7) Where the party intending to tender a statement in evidence has called, as a witness in the proceedings, the person who made the statement, the statement shall be admissible only with the leave of the court."

[49] The notice of intention to tender hearsay documents into evidence, filed and served on 29 November 2016, satisfied the 21-day notice requirement of section 31E(2). Following from that, in accordance with subsection (3), the appellant would have had the right to require the maker of the statement to be called as a witness. The appellant exercised that right by filing a notice to object to the admission of hearsay evidence. However, the respondent did not call the maker of the statement as a witness at the hearing of the assessment of damages. While section 31E(4) makes provision for such a witness to be excused from giving *viva voce* evidence, certain facts must be satisfactorily proven to the court to allow the admission of such a document in those circumstances.

[50] In keeping with that view, in the case of **Dorrett Gayle Willis v Attorney General and Washington Williams**, cited by the appellants, Batts J at paragraph [8] observed that:

> "The clear intention of Parliament was that in civil proceedings, provided the facts therein could have been given by the direct oral evidence of its maker, a statement was admissible in evidence if no counter-notice was served. Section 31E (4) applies only where the other side requires the maker to attend. In that event, the court has a discretion to admit the document without calling the maker if the person wishing to adduce it can establish Section 31E (4) particulars."

[51] However, in this case, no evidence was adduced before the court to satisfy any of the conditions under which a witness may be exempted from attending court and, instead, that witness' statement could be received in evidence. Absent that evidence, the learned judge had no proper basis in law on which to admit the income-verification document and so erred in relying on it.

[52] The appellant's counsel has highlighted the appellant's inability to address on the issue of the sum claimed for loss of income, in the income-verification statement, as a result of being unaware of any ruling by the judge on the admissibility of the document. Both parties were called upon to file written submissions in the hearing for the assessment of damages. Normally, it would have been open to counsel to submit on the appropriateness of the sum claimed for loss of income in the document. However, no ruling having been made on the appellant's objection, counsel for the appellant likely, and not unreasonably, would have assumed that the document was not being admitted; and so, probably would have thought it unnecessary to have submitted on that issue.

[53] To conclude on this issue, the income-verification document was not properly admitted in evidence and ought not to have formed a part of the court's consideration in determining whether loss of income had been proven. The appellant thus succeeds on this issue.

Issue (ii) whether there was sufficient evidence for the learned judge to have found that the respondent had proven his loss of income.

[54] The onus rests on a claimant seeking from the court an order for recovery of damages, to both plead and prove his special damages. Since none of the conditions of section 31E(4) were proven to the court, in order for the learned judge to have dispensed with the attendance of the maker of the document and to properly rely on the income-verification document, the evidence in support of the respondent's case in the court below would have been limited to the respondent's *viva voce* evidence and his witness statement.

[55] Below is an extract from the respondent's witness statement in relation to his employment history and loss of income:

> "74. Prior to June 5, 2005, I worked for Merrils Beach Resort as the Resort Property Manager for approximately four (4) years.
>
> 75. I am a certified Hospitality Property Manager…
>
> 76. After I was released on bail in August, 2005 I returned to work at Merrils in an attempt to regain a sense of normalcy to my life.
>
> 77. On August 20, 2005, I was given a letter from the Human Resource Manager of Merrils indicating that my

employment was suspended until the resolution of the court matter.

78. For the duration of my suspension I received no salaries from Merrils, as I was not at work.

79. While on suspension from Merrils, I tried to attain gainful employment in various hotels and in the Ministry of Tourism, however, news of my pending court matter tainted my character and no one would employ me.

80. As a result of the imposition of bail conditions my options were limited to Westmoreland. The popularity [sic] of the criminal proceedings against me made it particularly difficult to gain employment.

81. After the criminal matter was dismissed, I immediately tried to get back my job at Merrils, however, it was not until October, 2012 that I was allowed to return to work.

82. For the period spanning my detention by the police until the dismissal of the criminal proceedings against me I would have earned **Ten Million One Hundred Seventy Thousand Two Hundred Seven Dollars and Fifty, two cents ($10,170,207.52**) as salary I would have been entitled to, had it not been for the criminal proceedings.

83. Even after the dismissal of the criminal matter and upon resuming work, the Human Resource Manager at Merrils was still indicating to me that some guests and partners were still uncomfortable, as a result my regular work hours were slashed and I was only permitted to work three days per week, thereby reducing my take home salary to Fifty-Three Thousand Three Hundred Forty Dollars and Twenty-five cents ($53,340.25) per month.

84. In June, 2015, because of the constant complaints and increased pressure from the Human Resource Department and I was forced to leave Merrils.

85. Since that date I have tried to gain employment but my efforts have proven futile."

[56] At the core of these paragraphs is the averment that the respondent was gainfully employed and in receipt of emoluments, which he eventually lost, due to his criminal

prosecution. He has stated that his lost wages amounted to $10,170,207.52. However, there is only his "say so" that exists as a basis for that assertion.

[57] Thus, it falls to be considered whether, in the circumstances of this case, the court below could have properly relied solely on the respondent's *viva voce* evidence of his loss of income in the absence of documentary evidence. In **Ezekiel Barclay and another v Kirk Mitchell** (unreported), Supreme Court, Jamaica, Suit No 2000 CLB 241, judgment delivered 13 July 2001, the court considered whether it could take "judicial notice of certain factors". In that case a farmer who had received personal injuries made claims for special damages for transportation costs and the costs of engaging extra help for his farms. R Anderson J, distinguishing the oft-cited case of **Lawford Murphy v Luther Mills** (1976) 14 JLR 119, held that:

> "I believe it is open to the court to partially distinguish that decision and to take judicial notice of certain factors in this context. It would be most uncommon for a driver of hired transport to have provided receipts…Even less likely is it that the plaintiff will have receipts from any helper he had engaged to help him during his period of convalescence…"

[58] Anderson J considered whether these claims could be allowed in the absence of proof other than the claimant's testimony. He allowed the claim for the transportation cost, having found the claimant's evidence to be credible and sufficient in the circumstances. However, the learned judge rejected the claim for the employment of additional help on the basis that:

> "…**the principle that litigants must provide evidence to be tendered in proof of special damages remains sacrosanct. It is also not unreasonable to posit that**

> **the more substantial the claim the stricter the proof that is required**….In the instant case the plaintiff has not provided any credible evidence to support the claim for such significant expenditure...It is difficult to see how, in those circumstances, a claim for supervisory expenses can be maintained and in the absence of any evidence which could assist in making a rational reduction, the entire claim must be disallowed." (Emphasis supplied)

[59] In **Ratcliffe v Evans** [1892] 2 QB 524 (a matter concerning defamation), at pages 532 and 533, words complained of were held not to be actionable *per se*. Bowen LJ considered whether evidence by the plaintiff of a general loss of business, without showing that particular persons, who had heard the statement had ceased to deal with him, was sufficient proof of loss. It was held that:

> "In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

[60] The English Court of Appeal held that, based on the nature of that case, it would have been impossible for the plaintiff to give evidence other than as to the general falling off of his business. It thus found sufficient the evidence presented to support the claim for special damages.

[61] This kind of analysis would not be complete without reference to the local case of **Desmond Walters v Carline Mitchell** (1999) 29 JLR 173. That case concerned a push-

cart vendor whose claim for loss of income, unsupported by documentary evidence, had been allowed by the court below; but which was challenged on appeal. In dismissing the appeal, this court (per Wolfe JA, as he then was) observed at page 176 C that:

> "Without attempting to lay down any general principle as to what is strict proof, to expect a sidewalk or a push cart vendor to prove her loss of earnings with the mathematical precision of a well-organized corporation may well be what Bowen, L.J., referred to as 'the vainest pedantry'."
>
> This court observed in SCCA 18/84 *Central Soya Jamaica Ltd v Junior Freeman* (unreported) per Rowe, P, that:
>
> > 'In casual work cases it is always difficult for the legal advisers to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages, the Court has to use its own experience in these matters to arrive at what is proved on the evidence.'
>
> This principle is no less applicable to a plaintiff involved in the sidewalk vending trade. This is a small scale of trading. Persons so involved do not engage themselves in the keeping of books of accounts."

[62] The learning from Wolfe JA's analysis is that the decision to accept or reject loss of income claims, based solely on oral evidence, will be influenced by the type of occupation in which a claimant is engaged. So that, it might be unreasonable for one to expect, say, a street-corner-based soup vendor to provide much by way of documentary support for claimed loss of earnings; but not so unreasonable to expect such proof from a worker in an established hotel. In the instant appeal, such documentary proof, having been attached to the notice of intention to tender, was clearly available. However, the steps necessary to have had it admitted were not followed, hence, as already established, the court ought not properly to have considered it.

[63] The appropriateness of insisting on the tendering of documentary evidence to support a claim for loss of earnings was also considered in **Bonham-Carter v Hyde Park Hotel (3)** (1948) 64 TLR 177, at page 178, where Lord Goddard CJ opined that:

> "On the question of damages, I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove these damages; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages;' They have to prove it."

[64] Accordingly, this court has to consider what is reasonable in the circumstances of this case. The respondent (it is important to remember) was employed in the capacity of property and security manager for an established hotel. His claim is for a substantial sum. His position could not reasonably be considered akin to, say, that of a taxi driver or domestic helper, who would not usually be expected to give receipts when paid for services rendered. In the absence of the documentary evidence (that existed) being properly adduced, the respondent's presenting his written and oral testimony by itself, would be akin to throwing figures at the court. In the circumstances, therefore, the evidence before the court was insufficient to prove his claim for loss of income.

[65] In summary, the respondent failed to discharge his burden of proof in presenting his claim in the court below, so far as it related to this head of claim. The award for loss of income ought consequently to be set aside. The appellant, therefore, has succeeded on this issue.

The counter-appeal

[66] The respondent proffered two grounds of counter-appeal, which are as follows:

> "a. Having regard to the evidence of the Claimant, the charges against the Claimant, the length of the Claimant's prosecution and the circumstances surrounding his arrest and detention, an award of **Three Million Five Hundred and Fifty Thousand Dollars ($3,550,000.00)** for False Imprisonment and **Four Million Five Hundred Thousand Dollars ($4,500,00.00)**for Malicious Prosecution are manifestly low.
>
> b. The awards made by the learned judge are unreasonable and are inconsistent with awards made by the court in less severe circumstances."
> (Emphasis as in original)

[67] These two grounds, essentially, invite the court to consider the appropriateness of the awards made for false imprisonment and malicious prosecution.

The appropriateness of the award for false imprisonment

Summary of submissions

<u>For the respondent/counter-appellant</u>

[68] Counsel submitted that the award of $3,550,000.00 for false imprisonment is extremely low having regard to the suffering endured by the respondent. Further, counsel argued that, in the circumstances of this case, where the respondent had continued to endure harsh conditions subsequent to his initial incarceration, the learned judge was wrong to have arrived at an award by use of the principle of the reducing balance (discussed further in this judgment at paragraphs [70] and [71]).

[69] Counsel submitted that the case of **The Attorney General v Glenville Murphy** [2010] JMCA Civ 50, ("**Murphy**") provided an award that is more commensurate with the circumstances of the instant case. In that case Harris JA awarded $180,000.00 per day as being an appropriate sum to compensate the respondent for his false imprisonment. That sum, counsel contended, updates to $265,185.71 (using a CPI of 248.70 as at February 2018). As such, an appropriate award for the respondent's compensation ought to be $6,099,271.31 when Harris JA's award is upgraded and calculated for the 23-day period of the respondent's detention.

For the appellant/counter-respondent

[70] Counsel commended to us the principle of law emanating from the case of **Flint v Lovell** [1935] 1 KB 354, that this court ought to be reluctant to interfere with an award of damages made in the court below unless it could be demonstrated that that court arrived at a "wholly erroneous estimate of the damage". Counsel submitted that the learned judge properly examined the circumstances of the respondent's arrest and detention, compared those circumstances to cases of a like nature and made a well-reasoned and acceptable award, which ought not to be disturbed.

Findings of the learned judge

[71] At paragraph [31] of the judgment, the learned judge assessed the facts and found that there were 23 days of unlawful detention. In so finding, she considered that the time of first arrest was on 5 June 2005 and that the appellant was brought to court on 24 June 2005. She also accounted for – as part of the 23 days - the four days when the respondent was detained following the modification of his bail conditions until he was re-

admitted to bail. (There is no appeal by the appellant with respect to this award and the basis of computation.)

[72] The learned judge opined that, in determining an appropriate award, the instant case was to be compared with other cases of a similar nature. The learned judge also took the view (relying on **Thompson v Commissioner of Police of The Metropolis** [1998] QB 498), that damages for false imprisonment should be adjusted for future inflation. In quantifying the amount to which the respondent was entitled, the learned judge stated that the respondent's circumstances were more akin to those experienced in **John Crossfield v The Attorney General of Jamaica and Corporal Ethel Halliman** [2016] JMCA Civ 40 ("**Crossfield**"). She also found the circumstances at hand to be more severe than those in **Clayton Tyndale v Corporal Orville Clarke and The Attorney General of Jamaica** [2017] JMSC Civ 41 ("**Tyndale**").

[73] The learned judge found the case of **Crossfield** to be an appropriate starting point but was of the view that there were several factors present in this case which would increase the quantum of the award over that given in **Crossfield**. For instance, she found that the instant case entailed a more serious charge, a longer period of detention and a consideration that the appellant was acting within the scope of his duties when he had alerted the police and was arrested. The learned judge also found that the award for false imprisonment in **Crossfield** (about $150,000.00 per day) would have updated to $243,814.08 per day. She thereafter awarded $250,000.00 for the first day of detention and $150,000.00 for each day thereafter, which brought the total award for false imprisonment to $3,550,000.00.

Discussion

[74] An appropriate consideration with which to commence this discussion is to be found in the dictum of Phillips JA, in the case of **Jamalco (Clarendon Alumina Works) v Lunette Dennie** [2014] JMCA Civ 29. At paragraph [60] of that case, the learned judge of appeal distilled from the discussion the principle that:

> "(1) The Court of Appeal is hesitant to interfere with an award of damages made in the lower court and will only do so in specific circumstances."

[75] That principle is also reflected in **Stephen Clarke v Olga James-Reid** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 119/2007, judgment delivered 16 May 2008 (cited by the appellant). Harrison JA, at page 8 of the judgment, made the following observation:

> "We commence with the presumption that the decision on quantum made by the trial judge is a correct one. For the Appellate Court to vary the assessment of the trial judge it must be satisfied that the judge made a 'wholly erroneous estimate of the damage'. This means that the damage has varied too widely from the maximum or minimum figures awarded in similar cases by the Courts and therefore the Court of Appeal must intervene to make the required adjustment to achieve a reasonable level of uniformity. The exercise of looking at decided cases with the necessary adjustments, having regard to inflation and any special features of the injury or other assessable factors of the particular case, is directed at achieving this uniformity."

[76] Thus, to justify any interference with the quantum of damages awarded below, it must be demonstrated that there has been a completely wrong sum or erroneous estimate of damages having regard to awards in cases of a similar nature.

[77] In **Crossfield**, this Court increased awards of $240,000.00 and $500,000.00 for false imprisonment and malicious prosecution, respectively, to $600,000.00 and $1,500,000.00. The award of false imprisonment updates to $154,653.17 per day (using a CPI of 239.3 as at April 2017, the date of the delivery of the judgment). The circumstances of that case were that the appellant, who was employed as a security guard, was charged with drug-related and burglary offences in relation to a warehouse he was employed to guard. He was detained for a period of four days before being taken to court. Additionally, his prosecution lasted for about four years and 10 months. As deposed in his witness statement, he had been handcuffed and placed in a lock-up. He suffered abuse at the hands of other prisoners and the condition of the cell was filthy, from which he developed skin fungus. He was also embarrassed as a result of the publication of his arrest. He, however, obtained better employment at the conclusion of his criminal matter.

[78] In the case of **Murphy** the appellant was detained for one day. This court reduced the award of $600,000.00 for false imprisonment to $180,000.00 on the basis that that award was excessive. In that case, the respondent was charged with having sexual intercourse with his daughter. A medical examination conducted after that appellant had been charged, revealed that his daughter (the complainant in his case) was still then a virgin. The appellant stated that he had been treated like an animal, struck by the police, locked up without food, had to sleep on the floor of the cell and had to leave his community as a result of the charge. The award of $180,000.00 in **Murphy** would update to $256,240.33 per day (as at April 2017).

[79] In the instant case, the respondent, in his witness statement, stated that he was arrested, while acting within the scope of his employment, in full view of on-lookers. He also stated that, while in custody, he was deprived of pain medication which had been prescribed for injures received while in custody. He also alleged that he was assaulted by police during a question and answer session and that the condition of the cell in which he was kept was deplorable and led to his developing skin fungus and depression as a result of the entire ordeal. He also deposed that he had to leave his job and was unable to obtain alternative employment due to the stigma associated with his prosecution for the charge of murder.

[80] Having examined the cases relied on by the learned judge in her finding that the circumstances of **Crossfield** are more comparable to the instant case, but further aggravated by several factors, her said finding must be regarded as reasonable. However, what has created some amount of disparity is the CPI applied by the learned judge, when viewed in relation to the ultimate award. Using the CPI relevant to the period the judgment was delivered, that is April 2017, the updated award in **Crossfield** would be $154,653.167 per day and not $243,814.08 as stated in the judgment and utilized by the learned judge to arrive at the figure of $250,000.00 for the first day. Thus, when the award of the learned judge is viewed in that light, it could not reasonably be deemed erroneously low (which is the respondent's contention). The learned judge, by awarding a higher rate for the first day of detention, would have more than reasonably compensated the respondent for the more serious nature of the charge against him when compared to that in **Crossfield**. If anything, the use of a higher starting point, based on

a miscalculation, might have resulted in an award that was somewhat higher than warranted; though using the reducing-scale approach might have made the ultimate award fair overall. However, that is not the end of the matter, as even the corrected award in **Crossfield** would be lower that the award in **Murphy**. An award of $150,000.00 per day after the first day would therefore not be appropriate and fair in this case. It is to be remembered that the learned judge herself found that the instant case has aggravating features and so would be more serious and attract a higher award than that in **Crossfield**.

[81] It must also be borne in mind that the award in **Murphy** contemplated one day's detention. The court, in that case, would have been concerned with making an award to reasonably compensate the claimant for the ordeal suffered in his particular situation.

[82] In relation to the learned judge's use of a reducing-scale approach, Lord Woolf MR propounded two reasons for its use in **Thompson v Commissioner of Police of The Metropolis**, at page 515. He opined that the reducing scale was utilised to:

> "keep the damages proportionate with those payable in personal injury cases and because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested."

[83] However, while (as submitted by the respondent), his suffering would have continued throughout the period of his detention, what is important is that the award should proportionally and reasonably compensate him. In my view, the award of the learned judge is not proportionally sound and requires some adjustment. As she indicated, it takes into account a higher rate than that awarded in **Crossfield**, taking into

consideration the added aggravating factors (though she used a higher rate than intended, owing to her miscalculation). In light of the aggravating factors, however, whilst the figure of $250,000.00 for the first day of detention can remain, a sum of $180,000.00 per day for each additional day of detention thereafter, would be more just. Accordingly, the learned judge's award for false imprisonment should be set aside and substituted therefor should be an award of $4,210,000.00. This ground of the counter-notice therefore succeeds.

The appropriateness of the award for malicious prosecution

Summary of submissions

For the respondent/counter-appellant

[84] Counsel submitted that the sum awarded for malicious prosecution was extremely low, having regard to the anguish suffered by the respondent for almost seven years, in circumstances in which the criminal case was continually adjourned at the behest of the prosecution. In proffering what was submitted to be an appropriate quantum of damages, counsel commended to us the case of **Allan Currie v The Attorney GeneralFor Jamaica** (unreported), Supreme Court, Jamaica, Claim No 1989 CL C-315, judgment delivered 10 August 2006. It was submitted that this court ought to make an award for both malicious prosecution and aggravated damages. Counsel submitted that the monthly rate of the sum awarded in that case should be determined and then used to compensate the respondent for the exact period of his prosecution. As such, counsel deemed an award of $23,217,801.20, to be appropriate for malicious prosecution and aggravated damages.

[85] Counsel's cases commended to the court also included **Denese Keane-Madden v The Attorney General of Jamaica and Corporal T Webster-Lawrence** [2014] JMSC Civ 23. Using a similar method of calculation and a CPI of 248.70 as at February 2018, counsel put forward as appropriate an award of $8,068,959.41 which (it was submitted) should be increased to $10,000,000.00 in light of the greater seriousness of the charge of murder.

For the appellant/counter-respondent

[86] Counsel submitted that it was not open to this court to use the case of **Allan Currie v The Attorney General** to disturb the learned judge's award for malicious prosecution and, especially, aggravated damages, as there is no appeal against the award for aggravated damages. Counsel further questioned the correctness of the approach taken by the respondent in calculating damages for malicious prosecution. Counsel also submitted that the award made by the learned judge was not unreasonable or inconsistent with similar cases and ought not to be disturbed.

Findings of the learned judge

[87] The learned judge found that the appellant had satisfied the requirements for proving malicious prosecution. She opined that the relevant factors to be considered included the injury to the respondent's pride and dignity, and the length of the prosecution, which would assist in determining the level of injury to the respondent's feelings. The learned judge also found that damages for malicious prosecution were to be determined by having regard to comparable cases.

[88] The learned judge conducted a comparative analysis of the several cases. These included **Maxwell Russell v The Attorney General for Jamaica and another** (unreported), Supreme Court, Jamaica, Claim No 2006 HCV 4025, judgment delivered 18 January 2008, in which the claimant was awarded $250,000.00 for malicious prosecution lasting two years, for the offence of assault at common law. She also considered that in **Roderick Cunningham v Attorney General and others** [2014] JMSC Civ 30, the claimant was awarded $1,600,000.00 for a malicious prosecution lasting 19 months for the offence of illegal possession of firearm and ammunition. Regard was also had to **Allan Currie v The Attorney General** in which $2,000,000.00 was awarded for malicious prosecution and aggravated damages for charges of murder and illegal possession of firearm and ammunition. In that case, the criminal proceedings lasted approximately two years. The learned judge found that that award would update to $4,794,354.84.

[89] Having considered those cases, the learned judge, at paragraphs [42] and [43] of the judgment, concluded that:

> "[42] I am of the view that having regard to the severity of the charge and the lengthy prosecution, Mr Bandoo would have suffered more injury to his pride than the claimant's [sic] in [**Roderick Cunningham v Attorney General and others** and **Maxwell Russell v The Attorney General**]. I have given consideration to [**Allan Currie v The Attorney General**] but I am mindful of the fact that [**Allan Currie v The Attorney General's**]award spanned over two heads of damages. Nonetheless, I find [**Allan Currie v The Attorney General**] instructive as the charges were the same. As a matter of fact, I find that Mr. Bandoo's circumstances are more severe than all three cases especially since Mr. Bandoo's prosecution lasted for seven years.

> [43] It is bearing in mind these considerations why, I will award damages for **Malicious Prosecution** in the sum of **$4,500,000.00**." (Emphasis as in original)

Discussion

[90] From the reasons of the learned judge, it is clear that she was aware of the relevant legal considerations. These have also been reiterated by Morrison P in **Crossfield**, in which the learned president observed:

> "[30] So it appears that injury to reputation, injury to feelings - that is, the indignity, humiliation and distress caused to the claimant - and the overall length of the prosecution are all relevant factors in arriving at an appropriate award of damages for malicious prosecution."

[91] It is against the background of the above consideration, that I have pondered the respondent's counsel's submission that the monthly rate extracted from the awards in cases put forward in the respondent's submissions should be used and that figure applied to the number of months over which the respondent in the instant case was prosecuted. However, that methodology is not reflected in the cases.

[92] In **Manley v Metropolitan Police Commissioner** [2006] EWCA Civ 879, Waller LJ cited with approval the following dictum of Roch LJ in **Clark v Chief Constable of Cleveland Police** [1999] EWCA Civ 1357:

> "Compensation for malicious prosecution has three aspects. **First, there is the damage to a person's reputation**. The extent of that damage will depend upon the Claimant's actual reputation and upon the gravity of the offence for which he has been maliciously prosecuted. **The second aspect is the damage suffered by being put in danger of losing one's liberty or of losing property**. Compensation is recoverable in respect of the risk of conviction. McGregor

> on *Damages* 16th edition paragraph 1862 considers that an award under this head is basically for injury to feelings, unless there has been a conviction followed by imprisonment. **The third aspect is pecuniary loss caused by the cost of defending the charge**. There was no evidence of pecuniary loss in this case." (Emphasis supplied)

[93] Accordingly, compensation for malicious prosecution contemplates compensation for reputational injury, the suffering caused as a result of the risk of loss of liberty or property and the pecuniary loss of defending the charge. I bear in mind that the respondent had claimed special damages for legal expenses incurred in defence of his criminal charges. However, these were found not to have been proven before the court. The length of the prosecution is important in determining the level of hurt suffered. Therefore, the guiding considerations of a lower court in awarding damages for malicious prosecution must be those of reasonableness and proportionality.

[94] Viewed thus, cases of a similar nature are important in guiding the court in making a proportionate award. In **Inasu Everald Ellis v The Attorney General and Ransford Fraser** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 37/2001, judgment delivered 20 December 2004, Smith JA, at page 13 commented that:

> "Caution must be exercised when comparing figures of awards in other cases, the facts of one case must, in the main essentials bear comparison with the facts of another before any comparison between the awards can firstly be made – see **Singh v Toony Fong Omnibus Co. Ltd** [1964] 3 All ER 925 at 927."

[95] The learned judge's reliance on the case of **Allan Currie v The Attorney General** cannot be faulted, the charge of murder having been a common feature in the two cases. I consider (as the learned judge did) that the award in **Allan Currie v The**

Attorney General contained an element of aggravated damages and that the respondent's prosecution in the case at bar was for a much longer period. In the circumstances of this case, it would not be open to this court to make a single award for both malicious prosecution and aggravated damages as the learned judge had indeed made a separate award for aggravated damages. Further, there has been no appeal against that award.

[96] When a CPI of 239.3 (for April 2017) is applied to the award of $2,000,000.00 in **Allan Currie v The Attorney General**, it updates to $4,824,596.77. The award of $4,500,000.00 in this instance cannot be said to be fair and reasonable in all the circumstances and ought to be disturbed. The main reason for this is that the case giving rise to this appeal is worse than that of **Currie**. Currie's prosecution ran for two years; whereas the respondent's prosecution lasted for some seven years. It is to be remembered as well that the learned judge herself found that the circumstances of the respondent in this appeal are more severe than the cases of **Murphy**, **Currie** and **Crossfield**. The following are among the considerations that would call for a higher award for the respondent: (i) the offence for which he was charged was a very serious one – murder; (ii) the circumstances giving rise to it were most unfortunate and must have been personally shocking for the respondent: being charged with an offence whilst doing his lawful duty of making a report about the discovery of a body at his place of work; (iii) the impact of the prosecution on someone of his standing, the nature of his employment and the resulting effect on his reputation; (iv) the duration of the prosecution (seven years); (v) the manner in which the prosecution ended – with no evidence offered

– an indication of a lack of evidence; (vi) coupled with this and the duration of the prosecution is the fact that a preliminary examination was conducted before the matter was sent to the circuit court, requiring him to undergo two processes at the end of which no evidence was offered against him; (vii) against the background of what turned out to have been no real case against him, his fight for bail which saw his application having to be taken to the Supreme Court. In all the circumstances, an award of $6,500,000.00 would be fairer compensation for the respondent. Thus, this, the second of two grounds of the counter-notice, succeeds.

Disposition

[97] In the result, I propose that the following orders be made:

i. The appeal is allowed.

ii. The award of $10,170,207.52 as special damages for loss of income is set aside, with no order as to costs. The counter-notice is allowed, with no order as to costs.

iii. The award of $3,550,000.00 for false imprisonment is set aside; and substituted therefor is an award of $4,210,000.00.

iv. The award of $4,500,000.00 for malicious prosecution is set aside; and substituted therefor is an award of $6,500,000.00.

v. No order as to costs.

MCDONALD-BISHOP JA

ORDER

1. The appeal is allowed.

2. The award of $10,170,207.52 as special damages for loss of income is set aside, with no order as to costs.

3. The counter-notice is allowed, with no order as to costs.

4. The award of $3,550,000.00 for false imprisonment is set aside; and substituted therefor is an award of $4,210,000.00.

5. The award of $4,500,000.00 for malicious prosecution is set aside; and substituted therefor is an award of $6,500,000.00.

6. No order as to costs.