[2014] JMSC Civ. 139

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 2885

BETWEEN	**DELIA BURKE**	**CLAIMANT**
AND	**DEPUTY SUPERINTENDENT CAROL MCKENZIE**	**1st DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2nd DEFENDANT**

Aon Stewart instructed by Knight, Junor & Samuels for the claimant

Ms Marlene Chisholm instructed by the Director of State Proceedings for the defendants

Heard: 10 & 11 July & 19 September, 2014

TORT – FALSE IMPRISONMENT – TRESPASS – AWARD OF AGGRAVATED AND EXEMPLARY DAMAGES – AWARD OF SPECIAL DAMAGES – NOMINAL DAMAGES – APPLICABLE PRINCIPLES

MCDONALD–BISHOP, J

The parties

[1] The claimant was, at all material times, a bank manager residing in the parish of Saint Andrew. The 1st defendant was at all material times a member of the Jamaica Constabulary Force at the rank of Deputy Superintendent and attached to the Constant Spring Police Station in the parish of Saint Andrew. The 2nd defendant is joined in these proceedings by virtue of the Crown Proceedings Act on the basis that the 1st defendant was at all material times a servant or agent of the Crown acting during the course of his employment.

The claimant's case

[2] During the period 28 January 2008 to 20 February 2008, the claimant visited Phil's Hardware situated at Constant Spring Road, Kingston 10, in the Parish of Saint Andrew and purchased building materials for use at her premises in the Kingston 20 Area. She obtained receipts from Phil's Hardware evidencing her purchase, which she retained in her custody and control.

[3] Upon concluding her purchase, the claimant secured the services of a neighbour who operated a haulage business to assist her in the delivery of the materials to her home. The delivery was made sometime in the evening of 20 February 2008. The material was placed in her driveway and on her front verandah in clear view of the main road.

[4] At or around 9:30 p.m. that said night, the claimant, after having retired to bed, was awakened by loud shouts outside her premises. She heard her aged and infirmed mother saying "coming" in response to the loud request being made to "open up". She went outside to investigate the source of the noise. There she found her house was totally surrounded by numerous police cars with more than fifteen police officers strategically blocking both her gates. The 1st defendant was the commanding officer of the operation.

[5] The 1st defendant and other officers were on the premises and demanded to look around her premises. She asked for the reason to allow them entry to her property. The 1st defendant continued shouting that he needed to come inside to look around and that it would be necessary for the claimant to accompany him to the Constant Spring Police Station where she would be charged for the items in her possession. This was on the basis that they had received report that a woman had fraudulently purchased building materials from Phil's Hardware that day. This was already brought to the claimant's attention earlier in the day by her neighbour who took the materials she had bought to her house. Having received that information, she sent her mother for her handbag that

contained her receipts as she was commanded not to go back in the house before opening the gate to allow the officers in.

[6] The claimant took out the receipt for the goods purchased, her debit card used to conduct the business and the debit card receipt she received from the hardware and was showing them to the 1st defendant. The receipt from the hardware bore numbers corresponding with the receipt from her debit card transaction. The 1st defendant refused to look at the receipts and / or debit card but, instead, ordered her to go to the Constant Spring Police Station for further investigations to be conducted. The 1st defendant was not interested in any explanation and he proceeded to threaten to arrest and charge her for the building materials that were on her premises. She also said that he told her that he could not verify the receipts because he did not have his glasses.

[7] The 1st defendant produced no search warrant even though asked by the claimant if he was in possession of one. As a result of the 1st defendant's conduct, she was embarrassed, humiliated, intimidated. Due to the nature of her mother's illness and to prevent any further embarrassment and humiliation with the convergence of onlookers and neighbours, she, against her will, opened her front gate. The police then barged into her premises without her permission and consent. A female officer was ordered to take her to the confines of her bedroom for her to change from her nightwear for her to be taken to the police station. She was told that this was necessary because she was a flight risk.

[8] The claimant was detained and taken under police escort to the Constant Spring Police Station in a waiting police service vehicle. Her neighbour who had transported the materials to her house earlier that evening was also ordered to accompany them to the police station. She described the ride to the police station and that she was embarrassed and humiliated by those actions in light of the fact that she knew she had done nothing illegal and she had repeatedly indicated to the 1st defendant that she could provide the receipts for the materials on her premises.

[9] At the police station, the claimant contacted her friend and attorney-at-law, Mr Bert Samuels, who attended the station. He had discussions with the 1st defendant. The claimant was then released without being charged when the 1st defendant was told that she was the wrong person detained in relation to the purchase at Phil's. An officer then apologised to her.

The claim

[10] The claimant seeks against the defendants, by her claim form and particulars of claim filed on 4 June 2009 and amended on 10 July 2014, the following reliefs:

a. Damages for false imprisonment
b. Damages for Trespass
c. Aggravated and exemplary Damages
d. Legal Costs of $120,000.00
e. Interests
f. Costs
g. Further and such other relief as the court may deem fit.

[11] The claimant's averments are that the 1st defendant wrongfully and maliciously and without reasonable and probable cause trespassed upon her property, including her house and bedroom, for over five hours. That the 1st defendant maliciously and without reasonable and probable cause arrested her in the full view of all her neighbours and took her to the Constant Spring Police Station where she was held for approximately four hours without being charged for any offence. The 1st defendant, she averred, was actuated by malice in imprisoning her and not by a desire to bring a criminal to justice but in callous disregard for the rights of the citizen. She complained that by reason of the circumstances, she was greatly injured in her credit, character and reputation and suffered anguish and pain and embarrassment among her family and neighbours as a direct result of the action of the 1st defendant and other officers.

[12] The claimant set out the particulars of the bases on which she is seeking aggravated and exemplary damages that related to the conduct of the 1st defendant and his party which she described as being high-handed, insolent, disrespectful and embarrassing to her.

The defence

[13] The 1st defendant is the sole witness for the defence. His evidence is summarized as follows. On 20 February 2008, he received information from his Commanding Officer that Phil's Hardware had made a report of building materials that were allegedly purchased fraudulently by a woman. He later received information from an intelligence officer, Detective Sergeant Orlando Lewis, that they had located the delivery truck alleged to have delivered the building materials in the Pembroke Hall area. As a result, he called for police assistance and deployed police personnel to the location.

[14] On arrival at the location, he saw a truck that was pointed out to him by Detective Sergeant Lewis as the vehicle the police had been following earlier. He saw no building materials on the truck. He was, however, shown a house on the other side of the road with building materials in the yard. This was the claimant's yard. After speaking to the claimant's mother to open up the grill for them to gain access into the house, he saw and spoke to the claimant. He enquired of her whether the building materials were hers. She said they were hers and that she had bought them at Phil's Hardware. She told him that she had the receipts to prove it. He informed her that he could not verify the receipts at that location and that it was necessary for her to attend the station for further investigations. While the claimant was being taken to the vehicle by a female officer, he asked of intelligence officers whether she matched the description given of the woman who made the fraudulent purchase. He did not, however, indicate whether he got a response to that query.

[15] After Mr Samuels arrived at the station, shortly after they got there, he explained to Mr Samuels the reason for taking the claimant to the station. He requested the

attendance of the Intelligence officer who had taken the photograph of the woman. It was at that point that Det. Sergeant Lewis advised him that he had the wrong person. He apologised and released her. They were at the claimant's premises for one hour and to the best of his recollection the time spent at the CIB office was forty - five minutes. He gave no instructions for the building materials to be removed from the claimant's premises.

[16] The defendants deny that the claimant was falsely imprisoned or entitled to any aggravated and exemplary damages on the bases alleged or at all. Their averment is that the 1st defendant did not maliciously and without reasonable and probable cause arrest the claimant. According to them, the 1st defendant honestly believed that he had the right person based on a photograph he was shown.

[17] Both parties were thoroughly cross-examined. That evidence is duly noted and taken into account but will not be detailed unless and until the need arises during the course of my analysis and findings.

The issues

[18] There are several areas of factual dispute between the parties, particularly, as they relate to the conduct of the 1st defendant and his party towards the claimant at the material time. I have identified the main ones to be as follows:

(i) whether the 1st defendant used foul language and shouted at the claimant and her mother;

(ii) whether the 1st defendant had said that the claimant was a flight risk and on that basis had her guarded by a female officer in her bedroom while she dressed for the police station;

(iii) how long the police had the claimant in their custody;

(iv) whether the 1st defendant demanded that the claimant accompany him to the police station; and

(v) the reason the 1st defendant did not look at the receipts at the claimant's house.

[19] The major issues of law are extracted and formulated as follows:

(i) whether the claimant was falsely imprisoned by the 1st defendant;

(ii) whether the 1st defendant trespassed on the claimants' property;

(iii) whether the claimant has managed to establish that the 1st defendant acted with malice or without reasonable or probable cause;

(iv) whether the claimant is entitled to damages claimed under the several headings particularly aggravated and exemplary damages; and

(v) if the claimant is entitled to damages, in what quantum?

Findings on material/disputed facts

[20] Before determining whether the claimant has discharged her burden to prove on a preponderance of the probabilities that the defendants are liable in law as claimed, I have sought to establish the accepted facts on which the findings of law should be based. It is recognised that the resolution of the factual areas of dispute rests squarely on the credibility of the parties. As such, their evidence as well as their demeanour has been closely scrutinised and assessed in my quest to find wherein the truth lies.

[21] I accept and do find as a fact that the 1st defendant did attend upon the claimant's house with a party of no less than ten officers, including a female, armed with weapons. I do accept as true that they went inside her house. I accept that the claimant did not consent to the police entering her premises especially inside her house.

[22] Since no particulars is given by the claimant as to what is described as foul language, I will give the 1st defendant the benefit of the lack of specificity and say that I am not satisfied that he used foul language. This is so because I was not placed in a position to objectively determine whether the language allegedly used could be reasonably viewed by this court as being foul language. I believe, however, that he shouted or spoke in strong terms to the claimant in the light of her initial resistance to the intrusion on her premises and her response to the allegations made against her.

[23] I accept that the 1st defendant did not produce a search warrant to the claimant for entering her premises in the circumstances and that he did proceed to enter her house without her consent. I believe that upon being asked for the search warrant, he did respond in a dismissive manner.

[24] I believe the claimant that she was accompanied to her bedroom by the female officer because she was told by the 1st defendant that she was a flight risk. My belief is strengthened by the 1st defendant's own evidence that he was treating the claimant as a suspect. It is expected that with such a state of mind, he would have had an interest in ensuring that the clamant was kept in view of the police at all times.

[25] I find that the claimant was detained by the 1st defendant as the 1st defendant himself admitted that she was not free to leave. Her liberty was, therefore, admittedly, restrained from she was at her house. She was imprisoned from that stage.

[26] I believe the claimant too that she was demanded by the 1st defendant to accompany the police to the police station. The 1st defendant had in *viva voce* evidence denied that he demanded that she accompany him to the police station but his pleadings are to the contrary. There he averred that he demanded the claimant to accompany him to the police station, which is in keeping with the claimant's evidence. The inconsistency between the 1st defendant's pleadings and his evidence has given me another ground to doubt the credibility of his evidence that he did not make a demand for her to attend the station. This only serves to strengthen the claimant's credibility on the issue. His demand would have been consistent with his view and treatment of her as a suspect.

[27] The 1st defendant admitted that he did not look when the claimant showed him the receipts by her house in order for him to verify her purchase and to show that she did not steal the material. The reason he advanced in *viva voce* evidence for not doing so was that the light at the premises was bad. However, in his witness statement he said, that he told her he could not verify the receipts at the location and that she would

need to go to the police station for further investigations. The claimant, on the other hand, said he told her he did not have his glasses with him. The 1st defendant denied that. I reject the explanation proffered by the 1st defendant that the lighting at the premises was bad. I believed he refused to look because he had already viewed the claimant as the culprit and so he had no interest in her receipts at the time. He simply refused to take them in his possession and to listen to anything the claimant had to say because he had no *bona fide* interest in the claimant's account having already formed the view that she was the person he was looking for.

[28] The claimant gave *viva voce* evidence as to the time she left her premises and how long she remained at the station. In the light of her evidence upon being cross-examined in this regard, her evidence in her witness statement that the police spent five hours at her house does not add up. On account of that, I reject her evidence contained in her witness statement that the police stayed five hours at her house. The time would have been much shorter based on her evidence in court of it being around one hour.

[29] She accepted too that her lawyer arrived at the station within a short time after she got there. There is no evidence that she was locked up or detained awaiting any lengthy verification process. I cannot see from the evidence what could have taken them another three hours or more at the station before her release. I would in the circumstances have her detained at her home for no more than one hour (based on her evidence) and at the station for more or less the same time. The 1st defendant said it lasted, maybe no more than forty-five minutes. I would place her at no more than one hour at the station. I would make allowance for no more than half-an-hour duration of the ride to the police station. It would have been between two and a half to three hours. I do not believe her detention lasted longer than three hours. The claim of nine hours restraint of her liberty is, therefore, rejected.

[30] Having traversed the disputed and material facts, I find that I am more impressed with the claimant as a forthright and more credible witness than I am with the 1st defendant. This is so although I have refused to accept certain aspects of the

claimant's evidence. That having been established, I will now turn to consider whether as a matter of law the claimant has proved her case, that is to say, whether the defendants are liable in tort for false imprisonment and trespass, thereby entitling her to the damages she is seeking.

[31] I do accept, as submitted by Miss Chisholm for the defendants, that Section 13 of the Constabulary Force Act affords a police officer power of arrest in circumstances where he honestly and on reasonable grounds believes a crime has been committed. I do accept further that by virtue of section 33 of the Constabulary Force Act, the claimant has the burden of not only pleading but proving on a balance of probabilities that the tortious acts complained of against the 1st defendant were done either maliciously or without reasonable or probable cause. The section reads:

> *"Every action to be brought against any Constable' for any act done by him in execution of his office, shall be an action on the case for tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause; and if at the trial of any such action the plaintiff shall fail to prove such allegation, he shall be non-suited or a verdict shall be given for the defendant."*

The claimant has the burden of proving that the 1st defendant either acted with malice or in the absence of reasonable or probable cause.

Malice

[32] In **Sitre v Waldrum** [1952] Lloyd's Rep 431, 451, it was stated:

> *"Malice means the presence of some improper and wrongful motive- that is to say, an intent to use the legal process in question for some other than its legally appointed and appropriate purpose."*

So, in order to prove malice, the claimant might either show what the motive was and that it was wrong, or that the circumstances were such that the only explanation for the detention by the 1st defendant was some wrong or improper motive towards her. See

Brown v Hawkes [1891] 2 Q.B. 718, 722. It is also said that often (even if not always) the absence of reasonable and probable cause is itself sufficient evidence of malice.

Absence of reasonable or probable cause

[33] As reminded by Mr Stewart, a clear and concise definition of "*reasonable and probable" cause* was provided by Hawkins J in **Hicks v Faulkner** (1878) 8.Q.B.D 167,171, where he said:

> *"I should define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded on reasonable grounds of the existence of a state of circumstances which, assuming to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed."*

False imprisonment

[34] The tort of false imprisonment is defined by the authors of **Winfield & Jolowicz on Tort,** 14th edition, page 63, as being, *"the infliction of bodily restraint which is not expressly or impliedly authorized by the law".* In simple terms, false imprisonment arises where a person's liberty is restrained, that is, he is detained against his will without legal justification.

[35] In **The Attorney General v Glenville Murphy** [2010] JMCA Civ 50, Harris JA instructed:

> *"The burden is on the claimant to prove that the police had no lawful justification for his arrest. However, if it is shown that the arrest was unjustifiable and the period of detention unjustifiably lengthy, the onus shifts to the defendant to show whether in all the circumstances, the period of detention was reasonable – see* ***Flemming v Det. Cpl. Myers and The Attorney General.***"

[36] The claimant contended that the circumstances of the case clearly show that she was falsely imprisoned within the meaning of the law. Mr Stewart, in his submissions, highlighted several facts grounding this contention. The evidence of the 1st defendant amounts, however, to a concession that the claimant's liberty was restrained from at her house until she was released at the police station. There can be no dispute now that she was imprisoned within the meaning of the law. The material question arising from the fact of her detention is whether that detention was wrong in the sense that it was neither expressly nor impliedly authorised by law.

[37] It is beyond controversy that the claimant was wrongly detained in the sense that she had committed no arrestable offence or had done anything wrong when she was detained. She was an innocent person whose liberty was restrained on the basis that she had committed a criminal offence. The critical question now arises is whether the 1st defendant had reasonable or probable cause or acted out of malice in detaining her. Mr Stewart has distilled, for my benefit, the several facts from the evidence on which the claimant is relying to prove her case that the 1st defendant so acted. Ms Chisholm, on the other hand, has identified the facts on which she seeks to point out that the 1st defendant had reasonable and probable cause in detaining the claimant and that he did not act maliciously.

[38] Ms Chisholm reminded the court that in addressing the issue as to whether the first defendant had reasonable or probable cause, regard must be had to the principle that the test is partly subjective and partly objective. Her contention is that the court is not required to look beyond what was in the officer's mind, since it was the grounds that were in the officer's mind at the time that are relevant. She pointed to the cases of **Ohara v Chief Constable of the Royal Ulster Constabulary** [1997] 2 WLR 1 and **Attorney General v Glenville Murphy** as clear authorities for this proposition that the test is partly subjective and partly objective. I am, indeed, guided by the authorities cited by learned counsel.

[39] Having examined all the evidence against the background of the applicable legal principles, my finding is that the 1st defendant had no reasonable and/or probable cause to detain the claimant in the manner and in the circumstances he did. There is no reasonable ground on which he could honestly have believed that the claimant had fraudulently purchased goods from Phil's Hardware and that she was the culprit he was looking for. I have reached this conclusion from my analysis of the facts that I will now outline.

[40] The 1st defendant, from before entering the premises, had made up his mind that the claimant was the person implicated in the theft. The surrounding of the premises by the police and their stance in positioning themselves at her gate and on her premises suggested all that.

[41] Even though the 1st defendant had a right to rely on hearsay evidence as going to his state of mind, the information he received that led him to the claimant's premises lacks grit and substance, in my view, to lead him to a conclusion that the item on the claimant's premises were stolen. Without speaking to the claimant and listening to her account, he had made a 'quantum leap' from viewing the truck as the suspected conveyance to suspecting the claimant as the person who fraudulently received the materials from Phil's Hardware. I would expect that if a report were made of fraudulent purchase, then, the method of payment would have been disclosed to the police. This is basic information that ought to have been in the knowledge of the police before they sought to act. The defendants have failed to disclose the fraudulent nature of the purchase the police were investigating. If they failed to have such information, then they would have had insufficient basis to act against the claimant in the first place, particularly, when they were being shown proof of purchase and her method of purchase. On the other hand, if they had such information, then the 1st defendant would have acted unreasonably in not examining the claimant's documents to see whether there is anything in them to assist in their investigation.

[42] The claimant said she told him who she was, how she purchased her material and the source of her funds. She had her debit card that was indicated on her receipt as the method of payment and she was showing it to the 1st defendant. If someone had bought the materials by fraudulent cheques and someone is showing a debit card purchase, then good sense would dictate that you first examine the receipts tendered to see if the purchase is, verified, even *prima facie,* as having been done by the method being asserted by the person accosted.

[43] Furthermore, the defendants only spoke to report of fraudulently acquired materials. The description of the materials they were looking for have not been disclosed on the evidence so that they could say that materials fitting the description of materials fraudulently acquired were in the claimant's possession. I believe that a prudent and reasonable course for a well-thinking officer to take would have been first to ask the occupant of the premises for proof of purchase of the materials, particularly, in the absence of the description of materials allegedly stolen from the hardware. This, the 1st defendant failed to do.

[44] The claimant was in possession of cogent evidence of her purchase of the materials that were on her premises. She attempted to bring that evidence to the police at the time. The claimant sought to assist the investigations at her house but she was dismissed summarily. The 1st defendant's explanation that the lighting was bad is rejected as untrue. His lack of interest in the claimant's receipts that would have stood as documentary proof as to how she came in possession of the materials is one factor that rendered his actions unreasonable.

[45] Another aspect of the 1st defendant's evidence that I find rather implausible and incredulous is his assertion that he had seen a photograph of the woman who fraudulently purchased the goods that was taken by an intelligence officer and that the photograph bore a resemblance to the claimant. This, he said, when he was asked a question by the court based on his pleadings as to his reason for honestly believing the claimant was the woman they were seeking. Now, although this was set out in his

defence at paragraph 10, it is noted that in his evidence contained in his witness statement, his assertion was not that he had seen any photograph that led to his belief but instead that:

> *"As the Claimant was taken to the vehicle by the female officer, I enquired from the Intelligence officers whether she fitted the description of the woman who had allegedly made the fraudulent purchase."*

[46] Nowhere did he say that any officer had verified her identity then. He gave no indication of any response to his alleged query. Furthermore in his evidence- in - chief, he did not indicate having seen any photograph of the woman in keeping with his pleadings. This is what he said in his witness statement:

> *"I explained to Mr Samuels the reason why we took his client to the station. I requested the attendance of the Intelligence officer who had taken a photograph of the woman. It was at that point Detective Sergeant Lewis informed me that I had the wrong woman."*

[47] The departure from his pleadings is a sign that he is not being forthright on this issue. Furthermore, the defendants have produced no photograph that could have led the 1st defendant to such a belief. The officer who he claimed had taken the photograph is not a witness. I also find it so coincidental that the truck allegedly followed by the police led to the same premises on which building materials bought from Phil's Hardware were found and in those same premises was a woman who just happened to resemble the culprit. It is hard to believe.

[48] Furthermore, even if I were to believe that the 1st defendant was led to detain the claimant partly on the strength of this photograph, the question that arises is, why did he not take the photograph into his possession so that he could safely rely on it during the course of his investigation? This is the technological age with the sharing of photographs being as easy as the clicking of a button. If he was acting as a careful and prudent police investigator, he could have had the photograph for use during the course of his enquiries. Even more so, when he went to the claimant's house and the claimant

was insisting that she had lawfully purchased her goods, why did he not contact the officer in question to bring the photograph for verification? There is nothing on the evidence to say that could not have been done.

[49] The story the 1st defendant related on this issue of his use of a photograph is so implausible that it renders his evidence unworthy of belief. I do not believe that he saw any photograph before he went to that house and detained the claimant. I am not at all persuaded to the view that the correct identity of the claimant as the person in question had factored at all in the scheme of things that night when the 1st defendant was at the house. If it did, he would have taken precautionary measures to ensure that the claimant was the person. As far as I see it, any woman in those premises who had gone to Phil's and made a purchase earlier on 20 February was already a suspect. Her physical attributes had nothing to do with the suspicion. It was the presence of building materials on the premises in the proximity of where the suspected truck was that was the determining fact for the police that night. I reject the 1st defendant's evidence that his belief was influenced by a photograph of the woman he saw.

[50] Even if he had seen a photograph, he would still have gone about treating the situation the wrong way. I find that he acted recklessly by not looking at the claimant's receipt from the outset and by failing to seek verification of her identity and purchase on spot at her house, which he could have done before restraining her liberty. I find that the 1st defendant had no rational basis or reasonable grounds on which he could have honestly believed that the claimant was the person who had made the fraudulent purchase.

[51] On the totality of the case, I find that the 1st defendant, in the face of the claimant's insistence on her innocence with evidence to prove it, turned his back or, rather, a blind eye to potentially exculpatory evidence and in so doing acted without reasonable and/or probable cause. He acted without lawful justification or excuse for depriving the claimant of her liberty.

[52] I cannot say, however, with any conviction, that he acted from malice that is to say that he had "*an intent to use the legal process in question for some other than its legally appointed and appropriate purpose.*" I do accept that he was investigating a report and materials purchased from the hardware in question were, indeed, on the claimant's premises. I do not believe he acted maliciously. However, on the wording of section 33, even if malice is not proved, the claimant, nevertheless, succeeds in satisfying section 33 because she has proved the absence of reasonable and probable cause.

[53] I am propelled to a conclusion that, in fact and in law, the defendants are liable to the claimant for false imprisonment.

Trespass

[54] I now turn to consider the claim in trespass. It is, indeed, trite law, as Mr Stewart submitted, that an entry upon another's land without his consent is tortious whether or not the entrant knows that he is trespassing: In **Conway v. George Wimpy Co. Ltd** [1951] 2 KB 266, 273-274, Lord Denudin's definition of a trespasser was re-asserted as *"one who goes on the land without any invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to."* It is also well settled that trespass to land is actionable *per se, i.e. whether or not the plaintiff has suffered any damage*: **Entick v. Carrington** [1765] 2 Wils K.B 275, 291.

[55] The claimant's evidence in support of this claim which I accept as true was to the following effect.

> *"I kept asking for a reason why I should allow the police access to my premises. The shouting continued by the Officer in charged who insisted that he needed to come inside to look around and that it will be necessary for me to accompany him to the Constant Spring Police Station where I would be charged for the items I had in my possession."*
>
> *"Due to the nature of my mother's illness being Hypertension and Diabetes and to prevent any further embarrassment and*

humiliation with the convergence of onlookers and neighbours, I against my will opened my front gate."

"Immediately thereafter DSP McKenzie along with a number of personnel from the Jamaica Constabulary Force and/or Island Special Constabulary Force then barged unto my premises and into the house without my permission or consent, shouting orders to the male and female police officers who accompanied him."

"I asked the officer in charge for a search warrant and he in a high handed manner vehemently dismissed by request."

[56] There is no question that the entry of the police was done in the face of the claimant's objection. It is clear from the evidence of both sides that the police party led by the 1st defendant had no lawful authority to enter the property of the claimant. They had no search warrant, no lawful justification and they did not have her consent. They had no reasonable or probable cause to enter and to remain on the claimant's property in the light of the insufficient information they apparently had concerning allegedly fraudulently obtained materials and the ability of the claimant to prove her innocence. The entry done in the absence of reasonable or probable cause, without lawful authority under a search warrant and without the consent of the claimant was an unlawful one. I conclude that the defendants are liable to the claimant in trespass.

[57] The claimant succeeds against the defendants on the issue of liability for false imprisonment and trespass. The questions left to be addressed relate to the nature and quantum of damages to which she is entitled.

DAMAGES

False imprisonment

[58] Ms Chisholm pointed out to the court the approach to be taken in the assessment of damages for false imprisonment as explained in **McGregor on Damages**, 13th edition, page 864 at paragraph 1263, and as restated in **Everton Foster v The**

Attorney General and Anthony Malcolm Suit No CL F-135/1997, 18 July 2003, (unreported) as follows:

> *"The details of how damages are worked out in false imprisonment are few: generally it is not a pecuniary loss but a loss of dignity and the like, and is left much to the jury's or judge's discretion. The principal heads of damages would appear to be injury to liberty, i.e. the loss of time considered primarily from a non pecuniary view point, and the injury to feelings, i.e. the indignity, mental suffering, disgrace and humiliation with any attendant loss of social status. This will be included in the general damages which are usually awarded in these cases."*

[59] Gilbert Kodilinye in **Commonwealth Caribbean Tort Law**, 3rd edition at page 45, with reference to **McGregor on Damages**, 15th edition, paragraph 1619, noted:

> "*There are a few established rules as to assessment of damages in cases of false imprisonment, and the quantum is left very much to the judge's discretion. The main heads of damage appear to the following:*
>
> - *loss of liberty;*
> - *injury to feelings (that is, the indignity, disgrace, humiliation and mental suffering arising from the detention);*
> - *physical injury, illness or discomfort resulting from the detention;*
> - *injury to reputation;*
> - *any pecuniary loss which is not too remote a consequence of the imprisonment (for example, loss of business, employment or property)."*

Claimant's submissions

[60] Mr Stewart, in an effort to assist the court on the issue of the damages to be awarded for false imprisonment, relies on two decisions of our Court of Appeal. The first is **The Attorney General of Jamaica & Cons Ransford A Fraser v Harvey Morgan** SCCA No. 11 of 2003 delivered July 18, 2003 (unreported). In that case the appellant

was imprisoned for a total of ten hours and the Court of Appeal adjusted the award of the lower court and substituted the award of $124,000.00 for damages for false imprisonment. Mr Stewart noted that the figure when adjusted, using the current CPI, would yield the figure of $217,932.99.

[61] The second decision counsel cited was that of **Nicole-Ann Fullerton v The Attorney–General** Claim No. 2010 HCV 1556 delivered 25 March 2011(unreported). The claimant was imprisoned for approximately twenty-four hours and an award of $800,000.00 was awarded by this court. Mr Stewart submitted that if the court divides the said sum by one- third, it would yield the figure of $266,666.66. When that figure is adjusted using the current CPI, it would translate to the sum of $340,556.63. The claimant is, therefore, asking for an award of $340,000.00.

Defendants' submissions

[62] The defendants, through Ms Chisholm, rely on **Everton Foster** in which an award of $40,000 was made on 18 July 2003 for false imprisonment that lasted three hours. That sum, when updated, would now be in the region of $124,000.00 applying the current CPI. Ms Chisholm pointed out that the court in making the award in that case took into account the claimant's standard of living and loss of his liberty for three hours and found that there was clear injury to dignity. Reference was also made by counsel to **Kerron Campbell v Kenroy Watson and the Attorney General of Jamaica** – Suit No CLC 385/1998 delivered on 6 January 2005. In that case, the court awarded $70,000 for false imprisonment that lasted for two and a half to three hours. That figure when updated with the applicable CPI would now stand at or around $179,200.00.

[63] Ms Chisholm invited the court to take into account that the claimant in the instant case was not placed in a cell or was handcuffed. There is no evidence of loss to her reputation, employment or standing in the community, she continued. Ms Chisholm submitted on those bases that the claimant should be awarded a sum between

$124,000.00 and $179,200.00 for the period she was deprived of her liberty at her home and at the station.

Discussion

[64] Having paid due regard to the contending views of both sides and having examined this case on its own facts, while taking into account the prior awards made on the facts of the cases cited, I do prefer the cases cited on behalf of the defendants as providing a better guide. I endorse the views of Ms Chisholm that the instant case is distinguishable from the cases being relied on by the claimants in terms of nature, duration and overall circumstances of the detention. The range suggested by Ms Chisholm more accords with the period of the detention of this claimant as I had found it to be and so provides a better starting point for comparison.

[65] I must state, however, that none of the cases cited is a perfect precedent. Each case has to be judged on its own peculiar facts and circumstances. I cannot ignore the law that injury to liberty is not the only consideration. The claimant's feelings upon being detained and any injury to her reputation as a result are also relevant considerations in considering the quantum of the damages.

[66] The claimant described the period of her detention in graphic details that have been enumerated by Mr Stewart for my consideration. I have considered it all. She gave detailed evidence of the conduct of the 1st defendant and his party of police that wounded her feelings in keeping with her pleadings. I believe she suffered from wounded feelings and loss of dignity. I do admit, however, that although she said that her reputation had suffered, there is no proof of that. She is still employed in a similarly prominent position in the financial sector. So, professionally, she seemed not to have been affected. Also, she spoke to being respected in the community but there is no evidence that anyone in the community had held her in such light and has now changed their view of her because of the detention. I find there is no evidential basis on which an award of damages could be made on account of any loss of reputation.

[67] I must state that although the period of detention might have been shorter than in the cases cited by Mr Stewart and the claimant was not handcuffed or placed in a cell, it nevertheless, had peculiar features in the manner and circumstances of its execution. I have not overlooked the number of officers involved in the operation, the fact that they were armed and the fact that the claimant had to be supervised in her own bedroom in getting dressed. Her right to privacy was infringed. She was taken away in the view of her neighbours by armed police in police vehicles and I cannot ignore the effect this must have had on her feelings and pride as a manager of a financial institution living in the community for so many years. This must have been rather difficult for her particularly, knowing that she was innocent and that she had the information at her fingertip to establish her innocence there and then. Her detention was totally unnecessary and unwarranted from the very start.

[68] In the **Attorney General v Glenville Murphy** [2010] JMCA Civ 50, Harris, J.A. made reference to the dicta of Carey P (Ag) in **Flemming v Detective Corporal Myers and the Attorney General** (1989) 26 JLR 525 at 530, where he stated:

> *"Where the person arrested is released, upon proof of his innocence or for lack of sufficient evidence before being taken to court no wrong is done him. Where however he is kept longer than he should, it is the protracted detention which constitutes the "injuria". This abuse of authority makes the detention illegal ab initio. I see nothing either in principle or in authority to prevent an action for false imprisonment. Indeed, it is a valuable check on abuses of authority by the police."*

[69] I have not at all ignored, to the defendants' benefit, the fact that the claimant was released as soon as the error was brought to the attention of the 1st defendant. She was not held unduly longer than was necessary at the police station and she was certainly released before any charges were brought against her. I find, however, that the overall detention in the circumstances that obtained in this case was long enough and longer than was necessary. There was no right in the 1st defendant to detain her at her premises much more to remove her under armed police escort in the full view of her

community members as he did when there was evidence to point to the innocence of the claimant from then. Even if it was not as prolonged as in the cases cited, it was long enough to justify an award of damages that take into account the special features of her case.

[70] Taking the base period of the claimant's detention as being no more than three hours, and taking into account the effect on her mentally, having been guided by earlier authorities, I find in all the circumstances that an award of **$200,000.00** would be fair and reasonable as general damages for false imprisonment.

Damages for trespass

[71] In relation to assessing damages for trespass, I have duly noted that trespass to land is a tort actionable *per se.* In this case, the claimant has proved no damages flowing from the trespass complaint of to warrant an award of substantial damages. She is entitled only to nominal damages. Nominal, however, does not mean contemptuous. Mr Stewart had suggested $100,000.00 while Ms Chisholm argued that $58,100.00 would be adequate. Ms Chisholm cited the case of **Linneth Vassell and Cyril Vassell v The Attorney General**, (1996) 33 J.L.R. 1. In that case, the sum of $10,000.00 was awarded on 19 January 1996 for trespass that now updates to a figure somewhere in the region of$58,100.00.

[72] In **Beaumont v Greathead** (1846) 2 C.B. 494 at 499, Maule, J is reported to have said "nominal damages means a sum of money that may be spoken of, but that has no existence in point of quantity." "It is a mere peg on which to hang costs": **McGregor on Damages** 17th edition at paragraph 10-006. The learned authors noted that the English courts had for centuries awarded nominal damages for no more than £1 until it was increased from that to £2 and then to £5. These cases show that where no loss is proved as emanating from the trespass a substantial sum ought not to be awarded. It would appear that the awards from our courts in cases for trespass without injury or losses might have started out on the high side as nominal damages. But in an effort to maintain uniformity and consistency in awards and having looked at the nature

and extent of the trespass in this case, which took the police in the bedroom of the claimant, I would award $**65,000.00** for damages for trespass.

Aggravated damages

[73] The claimant has claimed aggravated damages in addition to general damages for false imprisonment and trespass. It is settled as a matter of law that aggravated damages are compensatory in nature and are awarded to a claimant for the mental distress, which he suffered owing to the manner in which the defendant has committed the tort, or his motive in so doing, or his conduct subsequent to the tort. So, the manner in which the false imprisonment or trespass was effected may lead to aggravation or mitigation of the damage, and hence damages: See L.J. in **Walter v. Alltools** [1944] 61 T.L.R. 39 at 4. In relation to false imprisonment, aggravating features that may exist include the humiliation and embarrassment the claimant was forced to suffer; any high handed, insulting, malicious and oppressive conduct by the defendants during the detention and what the claimant might have suffered as a result of "wounded feelings". See Luckoo J.A in **Douglas v Bowen** 22 WIR 333 at pg. 339.

[74] The particulars relied on by the claimant in the particulars of claim in pleading this head of damages are:

- disregarding the plea of the claimant to look at her receipt in proof of her lawful possession of the goods found at her home;
- shouting at the claimant in her home in the presence of her retired mother;
- entering the claimants home without proof of a warrant to search and refusing to show any search warrant;
- threatening to place the claimant in jail for the night while not looking at her receipts that they would be looked at in the day as he could not see in the night; and
- taking the claimant from her home and arresting her without regard to her proof of purchase of the said goods.

[75] Mr Stewart's contention is that there is sufficient evidence before the court for it to make an award for aggravated damages in the light of the facts presented by the

claimant. I do agree. The damages awarded for false imprisonment is modest and do warrant an added component to show the recognition that the claimant cannot be adequately compensated by the sum awarded for basic general damages for false imprisonment. I find that the manner and circumstances in which the detention was effected were such as to lead to an aggravation of damages.

[76] The claimant's counsel submitted that a proper award under this head would be $1,601,166.48 relying on the decision of Sykes, J in **Sharon Greenwood-Henry v the Attorney General** Claim No. CL G 116 of 1999 delivered 26 October 2005 (unreported). Ms Chisholm submitted that an award of aggravated damages is not warranted, however, if the court should think otherwise and sees it fit to make such an award, it would be appropriate to award $150,000.00 under this head.

[77] I have examined the case of **Sharon Greenwood-Henry**, cited by Mr Stewart, and I find it strongly distinguishable from the circumstances of this case. It is, therefore, not considered a suitable guide. In that case, the claimant was, among other things, subjected to cavity search, taken to a hospital where she was forced to take laxative and blood tests in a search being conducted on her person for drugs that she did not possess. The claimant's detention in this case was far shorter in duration, less physically intrusive, less mentally disturbing and less humiliating. There is nothing in this case to justify a similar award as proposed by Mr Stewart. There is also evidence that an apology was made to the claimant when the incorrectness of her imprisonment was brought to light. This would go to some extent in mitigation of the damages, even if slight. It would serve to dilute some of the aggravation albeit not as much as it would have done had the apology been made publicly in the presence of the community members who witnessed her being taken away from her home.

[78] In determining an appropriate sum, I do accept the directive of the UK Court of Appeal in **Thompson v Commissioner of Police of the Metropolis** [1997] EWCA Civ 3083, 9 and as adopted by Mangatal, J (as she then was) in **Maxwell Russell v The Attorney General** Claim no. 2006HCV4024 delivered January 18, 2008. The court

directed that the award for aggravated damages should not be more than twice the award for basic damages except perhaps where on the particular facts, the basic damages are modest.

[79] Taking everything into account, I find that Mr Stewarts' proposition of over a million dollars is rather ambitious. The award would more be in keeping with Ms Chisholm's proposal. I believe looking at everything in the round and bearing in mind that there was no loss to her reputation that an award of **250,000.00** for aggravated damages would be a fair award in the circumstances.

Exemplary Damages

[80] The claimant also seeks exemplary damages relying on the same particulars set out to justify an award of aggravating damages. It is well known by now that the House of Lords in **Rookes v Barnard** [1964] A.C.1169 at pages 1225 – 1227 has laid down three categories of cases in which exemplary damages may be awarded. Summarised these categories are: (1) oppressive, arbitrary or unconstitutional action by the servants of the government; (2) where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the claimant; and (3) where exemplary damages are authorised by statute.

[81] It goes without saying that in this case, the first category identified in **Rookes v Barnard** would be the applicable one for consideration, that is, whether there was oppressive, arbitrary or unconstitutional conduct on behalf of the 1st defendant and his party of police on the night in question to justify an award for exemplary damages.

[82] Lord Devlin in **Rookes v Bernard** pointed to the situations in which such damages should be awarded. His Lordship explained that those are situations in which exemplary damages can serve a useful purpose in vindicating the strength of the law. Such damages seek to effect retribution and to deter the defendant from repeating the outrageously wrongful conduct and to deter others from acting similarly. They also

convey the disapproval of the court to make the statement that tort does not pay. So, they are punitive in nature.

[83] In **Douglas v Bowen** [1974] 12 JLR 1544 and **The Attorney-General v Noel Gravesandy**, it was made clear that our courts have adopted the categories of cases in which exemplary damages might be awarded under the **Rookes v Barnard** guidelines.

[84] It is against this background that I have examined the claimant's averments. The claimant described the 1st defendant's attitude, among other things, as insolent but the conduct that would warrant such a description had not been properly ventilated before me for me to form my own objective view as to whether what was done amounted to insolence that would warrant punitive measures. I, therefore, would not act on the evidence of the claimant in this regard.

[85] I do believe, however, that the 1st defendant acted high-handedly on the basis of the facts particularised by the claimant in seeking exemplary damages and in all the circumstances as shown on the evidence of the claimant that I accept. Also, the claimant has a right to be free from arbitrary arrest and unjustifiable deprivation of her right to liberty. The 1st defendant violated that right. I believe that the conduct of the 1st defendant in imprisoning the claimant was arbitrary and oppressive in the light of the circumstances that prevailed at the time. The ultimate question is whether such conduct on the facts pleaded would justify an award of exemplary damages

[86] I have paid due regard to the dicta of the Court of Appeal in **The Attorney-General v Noel Gravesandy** in which the court, after a review of the key authorities on the subject, including **Broome v Cassells & Co. Limited** [1972] 2 W.L.R.645 and **Rookes v Barnard,** established the following principles:

(i) The fact that the trial judge may find the conduct to be oppressive and arbitrary does not *ipso fact* lead to an award of exemplary damages. It is not in every case in which the conduct is found wilful or wanton that exemplary damages should be awarded.

(ii) The judge must first rule whether evidence exists which entitles a jury to find facts bringing a case within the relevant categories. The mere fact that the case falls within the categories does not of itself entitle the jury to award damages purely exemplary in character.

(iii) The judge must be careful to understand that nothing should be awarded unless he is satisfied that the punitive or exemplary element is not sufficiently met within the figure which has been arrived at for the plaintiff's solatium which is the subject of the compensatory damages in the assessment of which aggravated damages will be awarded.

[87] I have looked at everything in the round bearing in mind that the claimant was not detained for any prolonged period at the police station and was released with an apology (even if it was an half - hearted one as the claimant would want me to think). She was not physically abused. I, however, accept that the invasion of one's privacy by agents of the state in the sanctity of his or her home, especially at night, and to restrain that person's liberty without lawful authority, justification or excuse under such circumstances, is serious enough for the court to penalise such conduct and to take steps to deter such conduct in the future. The police should serve and protect and not seek to violate the rights of the citizens, particularly, in the sanctity of their homes, without good and justifiable reason and to do so in a high-handed and oppressive manner.

[88] The sum awarded to the claimant as compensatory damages for her *solatium* is not sufficient in my view to cover the punitive or exemplary elements of damages. An award of exemplary damages is warranted. I would award the sum of **$250,000.00** for exemplary damages to show the disapproval of the court with such conduct and to vindicate the strength of the law.

Special damages

[89] The claimant claims as special damages legal costs in the sum of $120,000.00 allegedly incurred in dealing with her detention on the night in question. Her evidence is that she paid that sum to Mr Bert Samuels, her attorney-at-law and friend, for attending the police station after she called him to provide legal representation for her on the night

in question. She specifically pleaded it and in her effort to strictly prove it, as required by law, she produced a receipt purportedly evidencing payment of that sum to counsel. The receipt was disclosed on the day before trial and an application was made for it to be tendered pursuant to section 31E of the Evidence (Amendment) Act. An objection was taken initially on the late disclosure of the receipt as well as on the basis of late service of the notice of intention to adduce hearsay document albeit that the sum claimed was pleaded.

[90] The claimant explained that she had a difficulty finding the receipt and so it was found just two days before the trial. Mr Stewart relied on section 31E (6) of the Evidence (Amendment) Act to say that the court has discretion to waive the 21 days notice period prescribed by the section for reliance to be placed on the hearsay document. The section provides:

> *"(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)."*

[91] I see no reason in this case why the waiver could not have been granted given that the defendants would have had notice from the filing of the claim of the sum being claimed as legal fees. That notwithstanding, I recognise that the claimant would still have had to surmount the hurdle of section 31E(4) which provides that she would only not be obliged to call the maker of the document if one of the conditions laid down in the subsection is satisfied. There was no evidence satisfying that provision.

[92] So, in the light of the objection and the provisions of section 31E (4), I proposed that Mr Samuels be called so he could attend to be subject to cross-examination as the maker of the receipt. Ms Chisholm, however, indicated that Mr Samuels need not attend as she had no desire to cross-examine him because whatever she had to say concerning the receipt could properly be dealt with by way of submissions. In the end, there was no longer any objection to the receipt being admitted into evidence and so it was admitted.

[93] Ms Chisholm, however, subsequently submitted that I should not award the sum claimed for special damages as evidenced by the receipt because it seems unreasonable as legal costs given (a) the duration of counsel's presence at the police station, (b) the fact that the claimant was not arrested and (c) that the claimant was a friend of counsel. She recommended the sum of $80,000.00 as reasonable.

[94] There is no scale of legal fees for such services brought by Ms Chisholm to guide me in the circumstances of the case to say the cost is exorbitant and ought not to be allowed. Neither did she cite any authority for her arguments. In considering the point raised by her, however, I have been guided by the discussion on the subject in **McGregor on Damages**, 17th edition at paragraph 37-010. There it is shown that there are authorities for the principle that the claimant's costs incurred in procuring his or her discharge from imprisonment may be recoverable as damages. See **Pritchet v Boevey** (1833) 1 Cr. & M. 775. So too, the learned authors indicate that there will be no recovery in respect of costs unreasonably incurred. **Foxall v Barnett** (1853) 23 L.J.Q.B. 7 at 8 is cited as authority for this point. In that case, Lord Campbell is reported to have made it clear that in order for damages to be recovered under that head, the action must have been one that was necessary to gain release. See too **Bradlaugh v Edwards** (1861) 11 C.B. (N.S.) 377 cited as demonstrating the application of this principle.

[95] While, there is nothing to doubt the veracity of the claimant that she paid that sum as claimed, the question on the authorities is whether it was reasonably incurred in procuring her release from detention. It is upon an objective view of the evidence, and in all the circumstances of the case, that this question can be resolved. Mr Samuels, in his receipt, had shown no breakdown as to how he arrived at his fees. This, however, is not critical because it is not what counsel would have subjectively considered it fit to charge for his services but what the court, in all the circumstances, believes reasonable costs incurred in gaining release would be.

[96] The evidence shows that counsel was called while the police were at the claimant's house. The conduct of the 1st defendant had of course necessitated the claimant to seek legal representation to procure her release because at the time she was being taken from her home, she would not have known that she would have been released on the word of the police themselves. Contact with counsel in the circumstances was quite reasonable. He would have been engaged to protect her interest and to procure her discharge at the station. He had to disrupt his schedule to attend on the police station at that time of the night, which would have been outside of normal working hours.

[97] There is no evidence, however, that it was due to his intervention that the claimant was released. The evidence is that the claimant was released when the error in her apprehension was pointed out by a police officer who was summoned to the station by the 1st defendant. There is no evidence that Mr Samuels was instrumental in procuring the attendance of this officer to say so. There is thus no evidence that she was at the police station in detention and Mr Samuels was substantially active in procuring her release. The claimant's release was obviously prompted and procured at the instance of the police themselves. I am not comfortable in accepting that $120,000.00 was reasonably incurred in procuring her release in the circumstances. I am attracted to the arguments of Ms Chisholm and will award the sum of $80,000.00 proposed by her as a reasonable sum.

Judgment

[98] Judgment is entered for the claimant on her claim as follows:

(1) General damages:

(i) false imprisonment:	**$200,000.00**
(ii) trespass:	**$ 65,000.00**
(iii) aggravated damages:	**$250,000.00**
(iv) exemplary damages:	**$250,000.00**
Total:	**$765,000.00**

(2) Special damages: **$80,000.00**

(3) There shall be interest payable on general damages (excluding exemplary damages) in the sum **$515,000.00** at 3% per annum from date of service of the claim form, 5 June 2009, to the 19 September 2014, date of judgment.

(4) Interest on special damages being the sum of **$80,000.00** at 3% per annum from 20 February 2008 to 19 September 2014, the date hereof.

(5) Costs to the claimant to be agreed or taxed.