[2016] JMSC Civ 149

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 HCV 01144

BETWEEN	**JANECE GREENWOOD**	**CLAIMANT**
AND	**ZEPHENIAH AARONS**	**1st DEFENDANT**
AND	**MILTON GREY**	**2nd DEFENDANT**
AND	**THE ATTORNEY-GENERAL OF JAMAICA**	**3rd DEFENDANT**

IN OPEN COURT

Mr. Sean Kinghorn instructed by Kinghorn & Kinghorn for the Claimant

Mr. Garth McBean Q.C. and Mrs. D. Johnson instructed by Garth McBean & Co. for the 1st Defendant

Ms. Marlene Chisolm and Mrs. Vanessa Young instructed by the Director of State Proceedings for 2nd & 3rd Defendants

February 29th, March 1st & September 14th 2016

Malicious Prosecution - Whether complainant to be considered prosecutor - Whether officer to be considered prosecutor in circumstances - Whether prosecutor had reasonable or probable cause - Damages - Aggravated Damages - Exemplary damages - Vindicatory damages

McDONALD J

Introduction

[1] On 30th November 2005, the Claimant, Janece Greenwood was arrested and charged with larceny as a servant by the 2nd Defendant Constable Milton Grey, following a question and answer session at the flying squad in relation to a complaint made by her former employer, 1st Defendant Mr. Zephaniah Aarons, that she stole a considerable sum of money from his business. Proceedings against her were instituted and commenced in the Corporate Area Resident Magistrate's Court before Her Honour Mrs. Bertram Linton (as she then was), on 13th December 2005, but due to a series of adjournments and other setbacks, trial did not commence until 7th October 2008. Subsequently, the Claimant was discharged on 5th February 2009, when the crown offered no further evidence against her.

[2] Ms. Greenwood now seeks damages for Malicious Prosecution against the Defendants for her ordeal, alleging that she was unlawfully, maliciously and without reasonable and/or probable cause, charged with the offence of Larceny as a Servant.

Factual Background

[3] The Claimant, who, by the time of trial was a teacher, was at the material time an accountant by profession. She was born on the 23rd November 1980 and at the material time would have been about 25 years old.

[4] The 1st Defendant is and was at all material times Manager and proprietor of a travel agency known as Distinctive Travel and Tours Limited (DTT), as well as the manager and proprietor of a business known as Jamaica Metal Limited.

[5] The Claimant at all material times was employed to Distinctive Travel and Tours Limited in the capacity of accountant, the 1st Defendant being her employer.

[6] The 2nd Defendant, who is now a corporal of police, was at all material times a Constable employed to the Jamaica Constabulary Force, and at all material times

purported to act as an agent of the Crown in the performance of his duties as a Constable of Police.

[7] The 3rd Defendant is joined pursuant to the Crown Proceedings Act.

[8] On the 16th November 2005, the 1st Defendant attended the Fraud Squad and made a complaint to the 2nd Defendant alleging that Ms. Greenwood had stolen a sum of money from Distinctive Travel and Tours Limited.

[9] An audit of the company's accounts was conducted, the result of which is contained in a report dated 21st November 2005, prepared by Mr. Bremnolee Harbajan, Accountant at the Auditing Firm F.C. Swaby & Co. This report was entered into evidence as exhibit 1. The Report concluded that, inter alia, a sum of $635,451.00 could not be accounted for. It also concluded the following:

> *(a) "Based on our examination we note significant weaknesses and breakdown of the company's systems of control as it relates to the above and as such, we do not believe that the systems and procedures in place were sufficient on which any reliance could be planned". (pg. 1, para. 3)*
>
> *(b) "Based on our analysis of sales invoice with cash receipts a list of outstanding invoices were detected. Further enquiries indicate that many of these outstanding invoices were actually paid up. This resulted from sales agents being allowed to collect cash/cheques with no adherence to the system in place to ensure that such collections were accounted for or reported." (pg. 10, paras 4 & 5)*
>
> *(c) "Lodgments [sic] to the bank were not being made promptly and intact. Lodgment [sic] was being prepared by the same individuals issuing receipts who also prepared the daily cash report. In some instances copy of lodgment [sic] slips were not seen." (pg. 10, para. 6)*

[10] It is in issue whether this report was presented to Officer Grey prior to the Claimant's arrest.

[11] On the 30th November 2005, the Claimant attended the Old Harbour Police Station accompanied by her attorney-at-law, where she was questioned by the 2nd Defendant. At the end of that session she was arrested and charged with Larceny as a Servant. The charge in the information, in evidence as exhibit 8, states as follows:

> *"The information and complaint of Constable Milton Grey…who said that on divers days in the year 2005 one Janece Greenwood…being a Clerk or Servant employed to Distinctive Travel and Tours Limited stole money to wit $635,451 belonging to the said Distinctive Travel Tours Limited her employer."*

[12] On December 13th 2005, the Claimant was brought before the Corporate Area Resident Magistrate's Court.

[13] A statement was taken from Mr. Harbajan on the 14th December 2005 (exhibit 5), reinforcing the information in his 21st November 2005 report and outlining information including the terms of reference of the audit, the manner in which the audit was conducted and the findings of the audit. Therein, Mr. Harbajan indicated discrepancies between receipts and lodgements, and noted that, as a result of these discrepancies, the company was suffering a loss of over $400,000.00, but that:

> *"It was not possible to identify the individuals responsible for these discrepancies because the cashier function was carried out by more than one person during the period. There were not adequate seggregation (sic) of duties. The system was sometime overridden by management. The internal systems of control and approval was not adhere to (sic).*

[14] Trial commenced on 7th October 2008, at which time the 1st Defendant commenced giving evidence. The matter was adjourned and the Defendant was slated to complete his evidence on the next occasion, however he never returned.

[15] On 5th February 2009, the Crown offered no further evidence against the Claimant and the case was dismissed.

[16] The Claimant now seeks, via Claim Form filed 9th March 2010, not only special and general damages, but also aggravated and vindicatory/exemplary damages.

LAW & ANALYSIS

[17] It is well established in Jamaican law that to be successful in an action for malicious prosecution the Claimant must prove the following on a balance of probabilities:

i. That the law was set in motion against him on a charge for a criminal offence;

ii. That he was acquitted of the charge or that otherwise it was determined in his favour;

iii. That when the prosecutor set the law in motion he was actuated by malice or acted without reasonable or probable cause;

iv. That he suffered damage as a result. [**Keith Nelson v Sergeant Gayle and The Attorney-General of Jamaica**, Claim No. 1998/N-120];

[18] There is no doubt that the law was set in motion against Ms. Greenwood on a charge for a criminal offence. This is established by the Information and Indictment entered into evidence by agreement between the parties as exhibits 8 and 10 respectively, by which the Claimant was charged with the offence of Larceny as a Servant.

[19] It is equally clear that the criminal case against Ms. Greenwood was determined in her favour as the case was dismissed on the 5th of February 2009 when the Crown offered no further evidence. This is also a fact agreed by the parties.

[20] Where the parties disagree however is on the question of who was the prosecutor that actually set the law in motion, and, whether said prosecutor acted with malice or without reasonable or probable cause.

[21] Several issues of fact also arise and I will deal with them as they come up in dealing with the issues of law.

Who was the prosecutor? Who set the law in motion?

[22] The Claimant asserts that both the 1st Defendant and 2nd Defendant are to be liable as the prosecutors, as the 1st Defendant joined with the 2nd Defendant in the

prosecution of this Claim. Mr. Kinghorn for the Claimant submits that there is no question that the 1st Defendant ought properly to be regarded as being instrumental in setting the law in motion against the claimant, as it is the conduct of the 1st Defendant that influenced the 2nd Defendant in his decision to prosecute, and, that the 1st defendant wrongfully set the law in motion by resorting to the use of the power of the Crown to cause damages to the claimant. The claimant relies on the authority of **Warrick Lattibeaudiere v The Jamaica National Building Society et al** [2010] JMCA Civ 28 in which the court cites with approval the English locus classicus authority of **Martin v Watson [1995] 3 W.L.R. 318**,

[23] In respect of the 1st Defendant, the Claimant asserts that the evidence clearly establishes malice, particularly that the 1st Defendant when making his complaint conveniently omitted to tell the police several pieces of vital information germane to establishing the innocence of the Claimant. This, along with the pursuit of the complaint by the 1st Defendant in the face of the clear findings of the Auditor, is an obvious indication that the 1st Defendant's actions influenced the 2nd Defendant to charge the Claimant.

[24] The 1st Defendant however submits that it is the 2nd Defendant who exercised his own independent discretion to initiate criminal proceedings after conducting independent investigations. He says the information he gave to the police was honestly believed by him to be true and that he did not influence the 2nd Defendant in any way to arrest and charge the Claimant, as:

a. upon receipt of the report and documents from the 1st Defendant the police independently investigated the said report and the 2nd Defendant by employing his own independent discretion laid the charges against the Claimant.

b. there is no other evidence that the 1st Defendant incited, encouraged, procured, instructed or in any other way influenced the 2nd Defendant to

charge the Claimant and institute the said criminal proceedings against the Claimant for the offence of Larceny as a Servant.

[25] Conversely, the 2nd & 3rd Defendants submit that whilst it was the 2nd Defendant Officer Grey who arrested and charged the Claimant, it was the 1st Defendant who was instrumental in setting the law in motion, the 1st Defendant having made a report to the 2nd Defendant of facts solely within his knowledge, these facts being the Claimant's responsibilities as his employee, her transactions, and the identification of the accounting records signed by her. They too rely on the authority of **Martin v Watson [1995] 3 W.L.R. 318** and submit that the 2nd Defendant could not have exercised any independent discretion given that the 1st Defendant had provided the documentary evidence relevant to the discrepancies highlighted in the accountant's report.

[26] It is posited that the 1st Defendant by his actions wanted the Claimant to be charged for the unaccounted funds which he desired to recover. They highlight the evidence of the 1st Defendant at trial that he discovered the irregularities, engaged the services of the accountants, and having received the accountant's report after the complaint was first made against the Claimant, still pursued the complaint.

[27] Based on the evidence, the 2nd and 3rd Defendants ask this Court to draw the inference that the 1st Defendant at all material times intended to pursue the recovery of the unaccounted funds revealed by the audit through the Court. It is interesting to note that the 2nd and 3rd Defendants, whilst not explicitly stating so, allude to a position that the 1st Defendant may have presented false information to the 2nd Defendant that would have influenced the 2nd Defendant to prosecute.

THE LAW

[28] Who is to be regarded as the prosecutor in matters of this nature is concisely set out in ***Clerk & Lindsell on Torts (19th Edition), 2006***. The prosecutor is the person who is actively instrumental in setting the law in motion, and the law is only set in motion by the person who makes an appeal to some person clothed with judicial authority.

Ordinarily, where the accused is charged by the police, the prosecutor is the police officer who lays the charge and goes before the magistrate for the warrant. At paragraph **16-08** the learned editors state the following:

> *"…To prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question, and to be liable for malicious prosecution, a person must be actively instrumental in so setting the law in motion…if a charge is made to a police constable and he thereupon makes an arrest, the party making the charge, if liable at all, will be liable in an action for false imprisonment…But if he goes before a magistrate who thereupon issues his warrant, then his liability, If any is for malicious prosecution."*

[29] There are however circumstances in which the law recognizes that a private citizen may be found to have set the law in motion and thus be liable in a case of malicious prosecution, even though it was a police officer who technically set the law in motion by laying the charge.

[30] The Jamaican Court of Appeal authority of **Warrick Lattibeaudiere v The Jamaica National Building Society et al** [2010] JMCA Civ 28 is applicable. Therein, Harris JA noted the following at paragraph 20:

> *"In determining the question as to who was actively instrumental in commencing the prosecution, it is not sufficient to say that the law was set in motion by the police. Although it is true to say that all criminal offences are initiated and prosecuted by the police, this too is not enough. In assessing liability the court is required to adopt a close analytical approach to the circumstances of each particular case.*
>
> *The cases show that in doing so, consideration should first be given to all the circumstances surrounding the issuing of the information to the police. Thereafter, the question for the court should be whether in all the circumstances of a particular case, the defendant ought properly to be regarded as being instrumental in setting the law in motion against the claimant. The conduct of a defendant must be such that it is shown to have influenced the police in their decision to prosecute.*
>
> *The test therefore is whether the defendant wrongfully set the law in motion by resorting to the use of the power of the Crown to cause damage to the claimant."*

[31] Relying on the authorities of **Martin v Watson** [1996] AC 74; [1995] 3 W.L.R. 318, **Pandit Gaya Parshad Tewari v Sardar Bhagat Singh** (1908) 24 T.L.R. 884,

Commonwealth Life Assurance Society Ltd. v Brain 53 C. L.R. 343; (1989) 3 NZLR 187, and **Commonwealth Union Assurance Co. of New Zealand Ltd. v Lamont** (1989) 3 NZLR 187, the learned Judge at paragraph 19 derived the following principles as being applicable in assessing the liability of a private citizen in malicious prosecution cases:

> *"Where a civilian gives information to the police which he honestly believes to be true and as a consequence, the police, employing their own independent discretion, initiate criminal proceedings, even if the information proves to be false, no liability can be attributed to the citizen. If however, he deliberately supplies the police with information which he knows to be untrue, then, liability as a prosecutor may be ascribed to him. He may also be said to be the prosecutor where he withholds information which if disclosed, the police would not have prosecuted; or where he suborns witnesses; or where, he, by some other dishonest means brings about the prosecution of a claimant. As shown, an essential feature of the tort is that the informant engaged in some act which rendered the prosecution of a claimant an unwarranted exercise."*

[32] She goes on in para [20] to say:

> *"where a private citizen gives information to the police which results in charges being brought against a claimant, this does not in itself make the informer a prosecutor. But if it is proven that he intentionally brought about the prosecution as a result of his own misdeed, then he cannot escape liability.*

[33] In ***Warrick*** *(supra)* the Applicant sought damages for malicious prosecution against the Respondents, who were private citizens, on the basis that the 2nd and 3rd Respondents had made a report to the police that he had conspired with another to defraud the 1st Defendant, the Jamaica National Building Society, to which he had been employed. The evidence before the Court was that complaints had been made by customers which led the 2nd Respondent to make internal investigations. The investigations uncovered discrepancies on certain vouchers which bore the appellant's signature. A complaint was made to the police which resulted in the appellant being charged with conspiracy to defraud. The appellant was tried and acquitted of the charge. The appellant made heavy weather of accusations he says were hurled at him in front of the police by the 3rd Respondent which he argued showed that the 3rd Defendant was technically the prosecutor rather than the officer. On appeal challenging the Court's judgment in favour of the Respondents, the Court of Appeal in dismissing the appeal found that the officer was the prosecutor and not the respondents. There

was evidence of discrepancies at the JNBS and the proper course was indeed for the matter to be reported to the police. There was cogent evidence before the lower Court of allegations of irregularities at JNBS in which the appellant was involved, which supported the fact that there would have been reasonable and probable cause to initiate proceedings for his prosecution. Thus, it was held that the trial judge had been correct in finding that the Detective was in fact the prosecutor, having exercised her own independent discretion and acted on her own initiative in bringing the proceedings.

[34] The Appellate Court in ***Warrick*** also found that there was no evidence that the circumstances which led to the arrest of the appellant were peculiarly within the knowledge of the 3rd respondent which would have made it virtually impossible for the Detective to rely on her own judgment in preferring the charge against the appellant. The accusation made by the 3rd respondent that the applicant had stolen money did not make him the prosecutor since there were discrepancies in accounts at the JNBS and the respondent had taken the proper course which was to report the matter to the police. The Detective would have embarked on her own investigations which would obviously include an examination of the impugned documents. The Detective had also interviewed the appellant prior to the service of the summons.

[35] In **Martin v Watson** (*supra*) the defendant made a complaint of indecent exposure against the plaintiff, after which a detective constable laid an information before the justices, who issued a warrant for the plaintiff's arrest on a charge of indecent exposure. At trial, the prosecution offered no evidence and the charge was dismissed. The plaintiff brought an action against the defendant for malicious prosecution and was successful, but on appeal by the defendant the trial judge's decision was reversed. On appeal to the House of Lords, in allowing the appeal, the House said the following at pages 326H -327A:

> *"where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was the*

> *position here, then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant."*

[36] It is clear that officer Grey, having actually laid the charge, set the law in motion and is technically the prosecutor. However, as to the question of whether the 1st Defendant should be held liable as being instrumental in setting the law in motion, it seems to me, that from the foregoing authorities, the Court must determine the following:

i. whether Mr. Aarons had an honest belief in the complaint, or whether instead, he gave false information to the police knowing said information to be false; withheld information which if disclosed the police would not have prosecuted; or, employed some other dishonest means to bring about the prosecution of the Claimant;

ii. whether the facts relating to the offence were solely within Mr. Aarons' knowledge, rendering it impossible for the police to act on its own independent discretion or judgment; and

iii. whether the conduct of Mr. Aarons actually influenced the police to prosecute the Claimant.

[37] The 1st Defendant submits that he did honestly believe the complaint he made to be true. His evidence is that he first became suspicious in early 2005 when Ms. Greenwood, in his opinion, was asking him to reimburse to the company more than that which he had taken out from petty cash for his personal use or for the purposes of Jamaica Metals. As confirmed by the Claimant in her evidence, these disbursements would be recorded by her, or Mr. Aarons would sign for them. He would reimburse the money and another note would be made by the Claimant. The Point of Sale system would generate a series of all ticket sales done throughout each day and would identify all transactions as well as the identity of the person who issued the ticket. Mr. Aarons gave evidence that the Claimant always completed the lodgement and cross-checked

the day's sales. The 1st Defendant relies on the Claimant's evidence that although she was not responsible for the intake of cash and amounts disbursed on all occasions, she would have accounted for same, and that on occasions when she was not present at work to prepare the deposit slips, they would be prepared by one of the agents or his brother and she would eventually be provided with same.

[38] Upon becoming suspicious, Mr. Aarons said he discovered irregularities in the company's receipts and lodgements and discussed the issue with Ms. Greenwood, at which point he indicated to her his intention to do an audit. Consequently, in May 2005 he engaged the services of F. C. Swaby & Co. to conduct an audit. After the audit, he had a second meeting with Ms. Greenwood, Mr. Harbajan (the auditor) and himself, at which he discussed the shortage of funds. It was only thereafter that he reported the matter to the police.

[39] He asserted that he pursued the report to the Police even after receiving the Accountant's report because all the receipts for the sales of tickets, lodgements to the bank, petty cash vouchers that he received, all of which had the Claimant's signature, were not corresponding, in that it did not add up to the daily report on the point of sale.

[40] The foregoing evidence tends to show that it is possible Mr. Aarons honestly believed that the Claimant was guilty. The fact that he took the time to discuss the irregularities, inform her of the audit and again discuss with her for a second time after the audit, shows that he didn't immediately jump to the conclusion that she was guilty without more investigation. This to my mind is an argument that defeats the notion that there was malice.

[41] However, the evidence also clearly shows that Mr. Aarons was untruthful in his complaint. The statement he gave to Officer Grey (exhibit 2) reveals, as Mr. Kinghorn outlined in his submissions, that Mr. Aarons omitted to tell the officer important information that would have likely caused the officer to believe that Ms. Greenwood may not have been guilty, or at the very least, incited in him a need to conduct further investigation into the veracity of the complaint. Mr. Aarons did not tell the police that

several persons were performing the cashier function as was revealed by the accountant's report and statement (exhibits 1 and 5 respectively). He also did not tell the police that there was a person in May Pen by the name of Indira Scott who collected payments and made lodgements into DTT's accounts, that there was a second bank account to which lodgements in respect of DTT were made, and that salary cheques were cashed in house and kept in the vault or safe at the office.

[42] In fact, Mr. Aarons specifically told the Officer that the company had seven (7) employees, the functions of which did not interchange at any time. This we now know to be false based on the evidence of the accountant's report which I find to be credible, and Mr. Aaron's own evidence at trial. Mr. Aarons admitted under cross-examination that during the relevant period, there was no cashier and that all sales agents were authorized to and did collect cash payments and issue sales' receipts. He admitted that Ms. Greenwood was not the only person at DTT that would make lodgements. In addition to Indira Scott, according to Mr. Aarons, a person by the name of Susan Hartley would also make lodgements, and Mr. Aarons himself would sometimes make payments (but not lodgements). If persons other than Ms. Greenwood did lodgements at the bank, it would not always be that their names would appear on the lodgement slip, as sometimes the slip would be written up from the office. He also admitted that on occasions where customers made deposits directly into the company's account there would be no deposit slip to attach to the cash sheet, and, that he did not tell the police that the company had a second account at the Bank of Nova Scotia named Aaron's Travel, to which money earned from the business would sometimes be lodged. It was Mr. Aaron's evidence that all debit and credit card transactions would go directly to that account.

[43] Mr. Aarons further neglected to tell the officer about Ms. Greenwood's employment at Jamaica Metal where she also worked as the senior accountant. Under cross-examination he denied that Ms. Greenwood worked at his two companies during the same period and so would have been absent at DTT in order to be present at Jamaica Metals to work. However, a letter of employment admittedly signed by Mr.

Aarons' wife, (exhibit 7), dated 16th December 2004 confirms that Ms. Greenwood had been employed to Jamaica Metal for the previous six (6) months whilst she was employed to DTT (where she started working in October of 2004). Mr. Aarons himself accepted that the letter was correct. The implication of this dual employment would mean that there would be, as Ms. Greenwood asserted in her statement, times when she would be present at Jamaica Metal instead of DTT, and as such someone else would be required to perform her functions in her absence until she returned. These omissions in my estimation amount to a deliberate attempt on the part of Mr. Aarons to mislead the officer into believing that Ms. Greenwood as the accountant was the only person inextricably linked with the handling of cash, and thus, most likely the culprit of the missing cash. The aforementioned evidence makes it clear that Mr. Aarons 'desired and intended' that Ms. Greenwood be prosecuted.

[44] I cannot however say that, given the totality of the evidence, this definitively means that he did not have an honest belief in her guilt (no matter how unreasonable such belief may have been). Ms. Greenwood in her witness statement did allude to another dispute between herself and Mr. Aarons relating to a car, however this was not explored at trial so as to provide the court with sufficient evidence of malice on Mr. Aarons' part. She also averred in her statement that Mr. Aarons had before confronted her about missing money and asked her to repay it, to which she refused. That in my opinion shows that prior to the complaint he may have honestly believed that she had stolen money.

[45] I also cannot find that the fact Mr. Aarons did not return to the Resident Magistrate's Court to complete his evidence means that the complaint was a farce or that he did not believe in it. Mr. Aarons gave evidence that the reason for his failure to return was that he was told by the Clerk of Court that she would contact him when he was required to return to Court. This he said she never did. On the other hand, Ms. Greenwood gave evidence that she remembered there may have been an issue with obtaining original documents to substantiate the claim, but could not say definitively the reason the trial could not go on. Officer Grey's evidence is that he was outside at the

time and so could not offer this court any assistance in this regard. The fact remains that there is no concrete evidence as to the reason the Crown offered no further evidence and as such I don't think it fair for the Court to, without more, draw any inference adverse to Mr. Aarons.

[46] The pertinent question is whether Officer Grey relied on the untruthful information provided to him by Mr. Aarons and whether he was influenced by said information to prosecute.

[47] In **Commercial Union Assurance Co. of NZ Ltd v Lamont** [1989] 3 NZLR 187 (as recounted in **Martin v Watson**), the Court of Appeal of New Zealand at page 196 noted the following:

> *"In the difficult area where the defendant has given false information to the police that in itself is not a sufficient basis in law for treating the defendant as prosecutor. That conduct must at least have influenced the police decision to prosecute."*

At page 199, the Court stated further that:

> *"The core requirement is that the defendant actually procured the use of the power of the State to hurt the plaintiff. One should never assume that tainted evidence persuaded the police to prosecute. In some very special cases, however, the prosecutor may in practical terms have been obliged to act on apparently reliable and damning evidence supplied to the police. The onus properly rests on the plaintiff to establish that it was the false evidence tendered by a third party which led the police to prosecute before that party may be characterised as having procured the prosecution."*

[48] In his witness statement, Officer Grey outlined the information that led him to prosecute. He stated at para 8:

> *"I formed the view that given Mr. Aaron's complaint, the nature of Ms. Greenwood's employment and the responsibilities attached thereto as well as the discrepancies I observed between certain cash sheets and deposit slips and the information received from the firm which conducted the audit, that there was a case for Ms. Greenwood to answer in relation to the missing money."*

[49] It is Officer Grey's evidence that having received the complaint on the 16th November 2005 he commenced investigation into the matter. He took statements from both Mr. Aarons and Mr. Harbajan. Issue was raised as to when Mr. Aaron's statement

was taken. Though, the officer initially stated he took Mr. Aaron's statement on the day he made the complaint, November 16, 2016, later under cross-examination by Mr. Kinghorn, it was revealed that the statement was dated 16th January 2006. The Officer accepted that he had recorded the statement and signed it, but denied that January 16th was the correct date that he recorded the statement. On being probed by Mr. Kinghorn the Officer gave evidence that it was the first time he was realizing the date on the statement.

[50] He further stated that he was not aware that the accountant's report was dated 21st November, 2005, and he was no longer sure, after seeing the report in the witness box, that he received the report from Mr. Aarons when he first made the complaint on 16th November 2005, as he had previously stated. However, he had received it before charging Ms. Greenwood. I find that Officer Grey's evidence in relation to the above is plagued with inconsistencies and as such is unreliable. I thus find that the date Mr. Aaron's statement was taken is the date imprinted thereon, 16th January 2006, and that the date the accountant's report was generated was the 21st of November 2005 as imprinted thereon, and as such it could not have been given to Officer Grey on the day the complaint was made. The result being that prior to charging Ms. Greenwood, the Officer did not have the benefit of a written statement from Mr. Aarons or Mr. Harbajan. I do however believe that, on a balance of probabilities, even though he did not have the accountant's report on the day Mr. Aarons made his oral complaint, prior to charging Ms. Greenwood, he did have the benefit of it.

[51] It is the officer's evidence that he attempted to contact the accountant who had conducted the audit, however that person was unavailable. He spoke with someone at the auditing firm who told him the outcome of the audit but he could not remember the name of that person. He then made arrangements to take a statement from that person at a later date. He also stated that when the complaint was made he received copies of the relevant cash sheets and lodgement slips from which he observed discrepancies. He placed them in envelopes, labelled them, placed them on the file and submitted them to the Resident Magistrate's Court. Those actions, clearly, in my mind, show that

the officer took steps independent of what Mr. Aarons told him in order to investigate. He thought it important to obtain substantiating evidence from the auditor. Also, instead of just taking Mr. Aarons' word, he examined the documents for proof of the discrepancies that Mr. Aarons had complained of. Mr. Kinghorn argued that neither this Court nor the Court below has seen these alleged documents and that they have not been disclosed by either defendant, and that, as a result it would be in contravention of the Civil Procedure Rules (CPR) and an affront to the Claimant's right to natural justice if the Court were to consider them in its decision. However, the 2nd Defendant has maintained throughout this trial, that the relevant documents (cash sheets and lodgement slips) that he received in support of the charges from the 1st Defendant were placed by him in envelopes, labelled, placed on the file and submitted to the Clerk of Courts in the court below. The 1st Defendant's evidence corroborates the 2nd Defendant's evidence that he gave said documents to the Officer upon making his complaint.

[52] I am of the view that, notwithstanding the failure of the defendants to produce said documents to the Court, it is within the purview of the Court to infer, based on all the circumstances, and to so find, that the documents did in fact exist, and did in fact form part of the material on which the 2nd Defendant acted. In coming to this decision, I accept the evidence of the 1st and 2nd Defendants as outlined above as more probable than not. I also bear in mind that though the 2nd and 3rd defendants are the parties that assert the existence of the documents, the Claimant has the burden of proof to show want of reasonable cause. I cannot accept the Claimant's submission that simply because they weren't produced in this Court that this means they do not or did not exist, especially in light of the terms of reference and discrepancies revealed by the auditor's report which appear to accord with that which the Defendants allege was revealed by the documents. Additionally, it is the Claimant's own evidence that she provided certain documents to the auditor in order for him to conduct the audit and at no time has she challenged their validity. In fact, she relies on it. I further consider that the duty to disclose, in **CPR 28.2,** in light of the definition given in **CPR 28.1,** places on a party only a duty to reveal the existence (current or previous) of a document which is or has been

in the control of that party. This both Defendants have done. I therefore find that Officer Grey did in fact have the benefit of the relevant documents.

[53] In my estimation, had Officer Grey been advised of the facts Mr. Aarons conveniently neglected to tell him, he quite probably would have investigated the matter further. I do not however believe that Mr. Aarons' dishonesty absolves Officer Grey of his duty as a police officer to investigate. I find that the circumstances of the complaint were not solely within the knowledge of the complainant, since there were other means of testing the veracity of the complaint, the most convincing being the evidence of the Auditor Mr. Harbajan. Had Officer Grey waited on that statement red flags would have been raised as to the truthfulness of Mr. Aarons' complaint, particularly that Ms. Greenwood was not the only person handling cash as Mr. Aarons had claimed. Officer Grey made the choice of his own volition not to wait on Mr. Harbajan's statement before proceeding to arrest Ms. Greenwood. He exercised his own discretion. There is no evidence that Mr. Aarons pressured him to do so.

[54] Given the above findings it would be even more apparent that the officer acted independently of Mr. Aarons complaint.

[55] In the circumstances, I find that, as reprehensible as Mr. Aarons conduct was, Officer Grey acted upon his own independent discretion and thus was solely the prosecutor.

When the prosecutor set the law in motion, did he act with malice or without reasonable or probable cause?

[56] It is settled law that the Claimant must prove either of the two criteria under this head. The Court of Appeal judgment of **Peter Flemming v Det. Cpl. Myers and the Attorney-General** (1989) 26 JLR 525 is instructive. The Court approved the common law test laid down in the landmark House of Lords' case of **Glinksi v McIver** [1962] 1 All ER 696, but made a distinction specific to Jamaican law. Forte J.A. noted at pg. 535

that, though Lord Devlin stated that 'the plaintiff must prove both that the defendant was actuated by malice and that he had no reasonable and probable cause for prosecuting', **Section 33** of the **Constabulary Force Act** requires, that in an action against an officer for malicious prosecution a Claimant must prove that the defendant acted *either* maliciously *or* without reasonable and probable cause.

[57] In ***Glinski v McIver***, Lord Devlin described 'malice' as including not only spite and ill-will, but also any other motive than a desire to bring a criminal to justice. This was approved in ***Flemming***. It is also settled law that though malice is often times inferred from want of reasonable and probable cause, the two are not inextricably linked, and malice or improper motive is not a ground for saying there is no reasonable or probable cause (**Flemming**, pg. 539; **Glinski v McIver**, pg. 710). There is no evidence before the Court, express or implied, that Officer Grey acted with malice. Indeed, the undisputed evidence is that he did not know of either the Claimant or 1st Defendant prior to Mr. Aaron's oral complaint on the 16th November 2005. Nor are there any allegations of any personal vendetta against the Claimant by the Officer. However, malice may be inferred from the absence of reasonable and probable cause. Viscount Simonds in Glinski v McIver at pg. 700 noted:

> *"Since Johnstone v Sutton, and no doubt earlier, it has been a rule rigidly observed in theory if not in practice that, though from want of probable cause malice may be and often is inferred, even from the most express malice, want of probable cause, of which honest belief is an ingredient, is not to be inferred."*

Reasonable and Probable Cause

[58] On this issue I would first like to make an important clarification. The burden of proof is on the Claimant to put evidence before the Court to show that there was no reasonable or probable cause [**Glinski v McIver**].

[59] Reasonable and probable cause involves both a subjective and an objective component; an honest belief in the existence of circumstances (subjective) that would lead a reasonable man (objective) placed in the same position to believe that the suspect may be guilty, and that there is a proper case to put before the Court.

[60] In the recent case of **Greg Martin v Detective Sergeant Halliman and the Attorney General of Jamaica** Claim No. 2007 HCV 01096, delivered September 19, 2011, my brother Sykes J, in discussing what is required, stated the following at para X:

> *"It is well established in Jamaica that a police officer, while not required to believe that a person is guilty, must have an honest belief founded on reasonable grounds that the person charged or about to be charged may be guilty of the offence charged or about to be charged (see Flemming). There must be the actual belief by the police officer and that belief must be reasonable. To speak only of the subjective part of the test…would have the effect of undermining a very important safe guard against abuse. The objective component is the real and effective protection against arbitrary arrests."*

[61] In that regard, I think it important to note that though reasonable and probable cause was defined in the case of **Hicks v Faulkner (1881) 8 QBD 167** at pg.171 as *'an honest belief in the guilt of the accused and that …'*, and was later approved by the House of Lords in subsequent cases, Lord Denning in **Glinski v McIver** at pg. 709 noted that, though that definition was apt in that case and may fit in several others, it does not fit the ordinary run of cases, and it would be a mistake to treat it as a touchstone. The Learned Judge commented that the use of the word 'guilty' is misleading and clarified that, in truth, an officer is only required by law to be satisfied that there is a proper case to lay before the Court. A determination of guilt or innocence is for the tribunal and not for the prosecutor [pg. 710].

[62] Lord Devlin in the same case defined 'reasonable and probable cause' to mean that *'there must be sufficient grounds for thinking that the plaintiff was probably guilty of the crime imputed, but not necessarily that the prosecutor has to believe in the probability of conviction'* [pg. 695].

Thus, what is required of the officer is only to ensure that there is a case fit to be tried or that there is a proper case to be laid before the Court.

[63] Lord Denning in **Glinski v McIver** at page 710 adumbrated the following:

> *"Honest belief in guilt is no justification for a prosecution if there is nothing to found it on. His belief may be based on the most flimsy and inadequate grounds, which would not stand examination for a moment in a court of law. In that case he would have no reasonable and probable cause for the prosecution. He may*

> *think he has probable cause, but that is not sufficient. He must have probable cause in fact. In this branch of the law, at any rate, we may safely say with Lord Atkin that the words "if a man has reasonable cause" do not mean "if he thinks he has", see Liversidge v Anderson.*
>
> *These reasons are, I trust, sufficient to show that the question and answer as to " honest belief" should not be used in every case. It is better to go back to the question which the law itself propounds: Was there a want of reasonable and probable cause for the prosecution?*

[64] His Lordship then went on to state the following at pg. 711:

> *"It depends on his state of mind when he launched the charge. If he honestly believed that the facts were as he stated, then, even though it turned out to be a mistaken belief, he would have reasonable and probable cause to prosecute: but if he had no such honest belief and was consciously putting forward a false case, he would, of course, have no cause to prosecute."*
>
> *"…where the prosecutor is not himself personally involved but makes the charge on information given to him by others. The issue again appears simple. If the information was believed by him to be trustworthy, there was good cause for the prosecution. If it was known by him to be untrustworthy and not fit to be believed, there was no cause for it. Here again much depends on the state of mind of the prosecutor."*

[65] The Court must therefore examine what was operating on the mind of the Officer when he made the decision to charge the Claimant. Did he honestly believe in the existence of circumstances and as a consequence that these circumstances meant that there was a proper case against the Claimant to be put before the Court? Were these circumstances such that would reasonably lead an ordinarily prudent and cautious man put in the same position to conclude that there was a proper case to be put before the Court?

[66] The Claimant asserts that the Defendants have failed to present any evidence showing that the 2nd Defendant had an honest belief in the guilt of the Claimant in respect of the charge laid in the information, and even if the 2nd Defendant did have an honest belief, no evidence has been shown that this honest belief was founded on reasonable grounds or probable cause in fact. The Claimant highlights four (4) factors given by the 2nd Defendant in paragraph 8 of his witness statement as to why he charged the Claimant and submits that these fail to show reasonable and probable cause. These include: (1) Mr. Aaron's complaint; (2) the nature of Ms. Greenwood's

employment and responsibilities; (3) the discrepancies between the cash sheets and deposits; and (4) the information received from the Auditor.

[67] The Claimant argues that Mr. Aaron's complaint is unhelpful for the primary reason that the complaint was based on Mr. Aaron's perception and interpretation of the facts as an untrained lay person, and, that a complaint is simply the process by which an investigation is initiated and launched and cannot form the basis of a reasonable belief. Secondly, it is submitted that if the 1st Defendant is to be believed, the Auditor's report was submitted to the police as a part of his complaint, and this Report is clear and damning against any sincere and reasonable case being made out against the Claimant. Thirdly, the complaint of Mr. Aarons was encapsulated in his statement which is dated the 16th of January 2006, some two months after the Claimant had been charged. Consequently, when the 2nd Defendant charged the Claimant, no formal complaint had been captured in writing for him to consider prior to the charge.

[68] In relation to the nature and responsibilities of Ms. Greenwood's employment as accountant, it is essentially submitted that this is similarly unhelpful in establishing probable cause as there was no inextricable nexus between the missing money and Ms. Greenwood. This nexus would have to have been provided by evidence from the audit or otherwise, and there would have had to be established systems of accounting in place and breaches revealed. Then the 2nd Defendant would have been required to have evidence that these breaches were solely and uniquely committed by the Claimant.

[69] In relation to the discrepancies between the cash sheets and deposit slips, the Claimant asserts that no Court (whether Resident Magistrate's Court or the Supreme Court) has ever seen these documents, the Claimant has never seen them, and that the documents were not disclosed or relied on by any of the Defendants at this trial. Further, no attempt was made to obtain, disclose and produce copies. This they posit is particularly disturbing since the Court made a specific order for disclosure against the Defendants by Case Management Order of 19th July 2012 as follows:

> *"Specific disclosure of copies of cash receipts from Distinctive Travel and Tours Limited, as well as lodgement slips from Distinctive Travel and Tours Limited for the period January to April 2005."*
>
> *Inspection of the documents on or before the 9th November 2012".* **[Orders 2 & 3]**

[70] In that regard, the Claimant submits that the failure to disclose is fatal to the Defendants' attempt to rely on the documents to prove that the 2nd Defendant had reasonable and probable cause, and invokes Civil Procedure Rule (CPR) 28.14 in support thereof. This rule provides that:

> *"A party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available at the trial".*

[71] Further, it is submitted, the denial to the Claimant of the opportunity to see and challenge these documents, they assert, runs counter to the rules of Natural Justice.

[72] The Claimant cites the 1989 case of ***Peter Flemming*** for the notion that this type of evidence is essential to the Court in assessing the state of mind of the Officer.

[73] In this vein, it is asserted that the Defendants have presented no evidence of what informed the mind of the 2nd Defendant to have given him reasonable and probable cause that the Claimant was guilty of stealing the sum in question and at the end of this matter, the Court is unaware of the details of this alleged discrepancy between the deposit slip and cashbook that the 2nd Defendant claims existed.

[74] Finally, in relation to the documents, the Claimants highlight the evidence of the 1st Defendant which they view as being in 'stark contrast' to the evidence of the 2nd Defendant, particularly paragraph 12 of Mr. Aarons' witness statement where he states that he handed over the originals of the documents to Constable Grey when he made the report, as opposed to the evidence of Constable Grey in his witness statement where he states that Mr. Aarons gave him copies of the relevant documents detailing the discrepancies complained of. Also noted was the officer's evidence under cross-examination by Queens Counsel Mr. Garth McBean that he did not remember whether the documents given to him at the time the report was made were original documents;

he could not recall that at any time at Half Way Tree the judge had called for the production of original documents; when he was giving evidence at Half Way Tree he was outside of the Court; he would not have been aware of any exchange between Counsel and the judge when he was outside; and that at no time while the proceedings were pending at Half Way Tree was he aware of any problems locating any documentary evidence.

[75] In relation to the information Constable Grey says he received from the Auditor that he relied on to justify the charge, the Claimant asserts that there is serious doubt as to whether the officer actually obtained the information prior to charging the Claimant, and if he did not, then he would have had no reasonable and probable cause to charge her. Further, it is noted that the Statement of the auditor Mr. Harbajan (exhibit 5) was not collected until the 14th of December 2005, meaning that the 2nd Defendant charged the Claimant without first obtaining a statement from the auditors as to their findings.

[76] The Claimant highlights Officer Grey's evidence under cross-examination as to the Auditor's report, wherein he testified that when he took the statement from Mr. Aarons Mr. Aarons gave him an accountant's report from FC Swaby & Co; that he recorded the statement from Mr. Aarons on the 16th of November 2005; that he was not aware that the accountant's report is dated the 21st of November 2005; that upon looking at the report he was no longer sure if he got the document on the 16th of November, 2005; and lastly that he did not remember when he got the accountant's report.

[77] It is hence argued that, if at the time of charging the Claimant the 2nd Defendant recklessly did not obtain the findings of the Auditors into the accounts of Distinctive Travel and Tours Limited then the 2nd Defendant's would have had no "probable cause in fact". This position, it is asserted, is made out even more poignantly if the 2nd Defendant did in fact have the Auditor's findings at his disposal prior to charging the Claimant, since the auditor through their report and statement found essentially that it was not possible to identify the individuals responsible for the discrepancies in the company's accounts.

[78] Alternatively, it is argued that, if in fact the 2nd Defendant did consider the findings of the Auditor prior to charging the Claimant, it is undoubtedly clear that he had no reasonable and probable cause to have charged the Claimant.

[79] The 2nd and 3rd Defendants, on the other hand, submit that the Claimant has failed to discharge the burden of proving that the 2nd Defendant preferred the charges against her either maliciously or without reasonable and probable cause. It is posited that the Claimant has failed to demonstrate that the 2nd Defendant did not honestly believe or had no sufficient basis for such an honest belief that the Claimant had committed an offence under the *Larceny Act*. In this vein, it is noted that the 2nd Defendant relied mainly on the 1st Defendant's complaint, the nature of the Claimant's employment and responsibilities as reported by the 1st Defendant and the discrepancies he observed from the documentary evidence presented by the 1st Defendant.

[80] The 2nd and 3rd Defendant essentially submit that the 2nd Defendant had at the time the charges were laid, documentary evidence, including cash sheets and lodgement slips given to him by the 1st Defendant at the time the complaint was made, along with the Accountant's Report (exhibit 1), upon which the 2nd Defendant acted. Despite the absence of the originals of these documents at this trial (excluding the Accountant's Report), the Court is being asked to draw the inference that these documents were in fact available to the 2nd Defendant at the time the charges were laid. In this regard they note the evidence of the Claimant, particularly that even though the Claimant had said she recalled that the Judge in the Court below had requested them, she did not know if they had been produced, and she could not recall whether the problem was during or after the 1st Defendant gave evidence, she went on to identify what documents could not be found, including the daily reports, cash receipts, lodgement slips and disbursements. It is also noted that the Claimant, when asked whether she was aware that prior to going to the Half Way Tree Resident Magistrate's Court that her attorney had received a number of documents, her response was that she was not so aware, yet at the commencement of her claim she attached a copy of the accountant's report and the Information, exhibits 1 and 8 respectively. The 2nd and

3rd Defendants thus ask the question whether the Claimant has failed to disclose these documents.

[81] In relation to the accountant's report, the 2nd and 3rd Defendants highlight several material discrepancies that were found by S.C. Swaby upon an examination of the company's accounts, with specific cash receipts, expenditure, accounts receivables, bank lodgements and disbursements, manifesting in a shortfall of cash in hand unaccounted for. It is submitted that the unchallenged evidence is that when specific documents relating to dates the discrepancies were noted in the cash summary were put to the Claimant by the 2nd Defendant, the Claimant exercised her right not to answer.

[82] Other elements of the Claimant's evidence were highlighted, including that she had knowledge of the complaint that cash receipts were not corresponding with the lodgements and disbursements but that there might have been a few occasions where she had informed the 1st Defendant of any discrepancies. It was also noted that the Claimant in her evidence agreed that if there were no notations on the cash sheets, it would raise some suspicion.

[83] Ultimately, they say, that although the Claimant was not responsible for all cash that came into the business daily, she accepted that based on her basic knowledge of accounting she would have accounted for it at the end of the day.

Analysis

[84] Based on the way in which the submissions have been made, I think it important to first reiterate that the burden of proof in proving want of reasonable and probable cause lies with the Claimant [***Glinski v McIver***].

[85] As to the question of what was operating on Officer Grey's mind when he made the charge, it is imperative to deal with certain issues of fact. The first thing that the 2nd & 3rd Defendant rely on is the complaint. Mr. Kinghorn objects to reliance on this based on the fact that the written statement was taken, as I have found earlier in this judgment,

on the date stated thereon, January 16th 2006, which is about one and a half months after the Claimant was arrested. I cannot however agree. I have found no requirement in law, in the **Constabulary Force Act** or elsewhere, that an Officer must act only pursuant to a complaint contained in a written statement of a complainant. Indeed, section 13 of the aforementioned Act gives the officer the authority, inter alia, to apprehend any person he finds committing an offence or reasonably suspects of having committed an offence. **Section 50H (1)** requires that every complaint made by or concerning a person arrested or detained shall be recorded in the station Diary. There, however is no similar requirement as to the taking of a written statement from the complainant, though it may in fact be best practice and proper police protocol. In fact, there are several circumstances in which it would not be prudent for an officer to take a statement prior to charging an offender or an alleged offender. In my estimation, the written statement of a complainant provides evidence that an officer may or may not have had reasonable suspicion, and though the failure to take such statement may in certain circumstances be a breach of police protocol, I cannot find that it would be fatal to any charge. I am fortified in this view by the finding of our Court of Appeal in **Richardo Robinson v the Attorney General et al** [2016] JMCA Civ 3, that the submission that the arrest of the appellant was before Ms. Brown's written statement was taken was immaterial to the question of whether the officer had acted maliciously or without reasonable and probable cause, and that, in effect, it was sufficient that he had acted on the complainant's oral complaint.

[86] As a part of the oral complaint also, Officer Grey asserts he relied on the nature of Ms. Greenwood's employment as the accountant as relayed to him by Mr. Aarons. Outside of this there was no other evidence to corroborate Ms. Greenwood's duties.

[87] As to the issue of whether the Officer had the benefit of the Auditor's report and the Auditor's statement prior to charging the Claimant, I have already found at paragraph [50] for the reasons stated therein, that, on a balance of probabilities, the Officer had the benefit of the report but not the statement.

[88] In relation to the relevant documents relied on by the 2nd & 3rd Defendants, again, it is my finding that, as stated at paragraph [52], on a balance of probabilities the Officer had the benefit of these documents evidencing the shortfall in cash at DTT prior to charging the Claimant.

[89] In regard to the assertion that when questioned Ms. Greenwood remained silent and did not say anything in her defence, I reject the suggestion by the 2nd & 3rd Defendants that her silence would have had any bearing at all on whether the Officer had reasonable or probable cause. It is incontrovertible that an accused person has a constitutional right against self-incrimination, and the fact that Ms. Greenwood exercised that right is no reasonable justification for Officer Grey to believe that she was probably guilty.

[90] Thus the sum total of the evidence before Officer Grey, prior to charging Ms. Greenwood, was Mr. Aaron's oral complaint (including the nature of Ms. Greenwood's employment at DTT), the Auditor's Report and the relevant cash sheets and deposit slips.

[91] Issue has been raised as to whether the Officer ought to have done more to investigate the matter before charging Ms. Greenwood, particularly waiting to take the statement of the auditor. Mr. Kinghorn submits that if the 2nd Defendant recklessly did not obtain the findings of the Auditors into the accounts of DTT then he would have had no probable cause in fact. Indeed, it is apparent, as I have already stated, that had the Officer had the benefit of the auditor's statement prior to charging Ms. Greenwood it is unlikely that we would have arrived at this point. Officer Grey himself, when pressed in cross-examination as to why he pursued the matter given the statement of the auditor that it was impossible to identify the persons responsible for the shortfall in cash, poignantly noted that the Claimant was charged prior to him receiving that statement. The law on this point however is clear.

[92] In the English Court of Appeal case of **Abrath v North Eastern Railway Company** [1883] QBD 11 (whose decision was affirmed on appeal to House of Lords in

the 1886 case of the same name) it was held that the prosecutor must take care to inform himself of the true state of the case. Brett MR at pages 450-451 stated:

> *"Therefore, it becomes a necessary part of the question whether there was an absence of reasonable cause, to determine whether reasonable care was taken by the defendants to inform themselves of the true state of the case, is not merely a piece of evidence to prove some fact, but it is a question which is itself to be decided by evidence, and upon which evidence to prove and disprove it may be given. It is a necessary part of the question whether there was reasonable and probable cause, because if there has been a want of reasonable care on the part of the prosecutor to inform himself of the true state of the case, then there must be a want of reasonable and probable cause."*

[93] However, Lord Atkins in the later case of **Herniman v Smith** [1938] AC 305 at page 319, on assessing whether it had been proved that the defendant failed or neglected to take reasonable care to inform himself of the true facts before commencing or proceeding with the prosecution, found that it is not necessary that the prosecutor must have tested every possible relevant fact before he takes action, nor is his duty to ascertain whether there is a defence. This was approved in **Glinski v McIver,** wherein Viscount Simonds at pg. 701 examined the question of whether the prosecutor acted with too great haste or zeal and failed to ascertain by inquiries facts that would have altered his opinion as to the guilt of the accused. In ***Herniman***, the court noted the following at pg. 9:

> *"the facts upon which the prosecutor acted should be ascertained. In principle, other facts upon which he did not act appear to be irrelevant. When the judge knows the facts operating on the prosecutor's mind, he must then decide whether they afford reasonable or probable cause for prosecuting the accused".*

[94] Thus, in assessing whether there was reasonable or probable cause, what is to be examined by the Court is not what the prosecutor did not do or what was not before him, but rather what was in fact before him. The pertinent question for the Court is then, based on all the material that was actually before him, did the prosecutor honestly believe that there was a fit and proper case to be put before the Court, or put another way, that the accused was probably guilty of the crime imputed, and, based on that same material, would an ordinarily prudent and cautious man believe same.

[95] The complaint of Mr. Aarons was damning against the Claimant, particularly the information that she was the accountant of DTT and that the duties of the employees of DTT did not interchange at any time. That information, coupled with the discrepancies in the relevant cash sheets and deposit slips, could have led any reasonable man to believe that there was an inextricable link between Ms. Greenwood and the missing cash, and that she was the most likely culprit of the missing cash. It could be argued that, at that point, there would have been no reason for Officer Grey to disbelieve what he had been told by Mr. Aarons. Although Mr. Aarons had told the officer that he would sometimes withdraw cash but it was always noted and repaid, and this could have caused speculation as to actual cause of the shortfall, a reasonable man, could still have honestly believed that there was a fit and proper case to be put before the Court against Ms. Greenwood. However, having been advised that an audit had been conducted, and having received and read a copy of the report, which indicated among other things, that the accounting system in place had significant weaknesses and a breakdown of systems of control, was unreliable, that disbursements were made from cash without appropriate approval and supporting documents, and that several persons were performing cashier functions, the Officer ought to have been put on guard that there quite possibly could have been some other person or persons responsible for the shortfall in cash. The auditing report clearly indicates that there was a shortfall in cash, but it in no way revealed who could have been responsible. In fact, it showed that several persons could have been responsible, as several persons were performing accounting functions. I am of the view that there was nothing contained therein that would have led any reasonable person to believe that Ms. Greenwood was probably guilty.

[96] Whilst, there is no direct evidence of malice or that the Officer did not honestly believe that Ms. Greenwood stole or could have stolen the money, I find it difficult to believe that having read and understood the findings outlined in the auditor's report prior to arresting the Claimant, that it was reasonable for the Officer to have believed that Ms. Greenwood was guilty or was probably guilty of stealing the money. The report provided clear evidence in contradiction of the information that Mr. Aarons told him and led him to

believe, particularly that Ms. Greenwood was the only person responsible for cash and that the duties of his employees did not interchange at any time. I therefore find that the officer did not have reasonable and probable cause to arrest the Claimant for Larceny as a servant.

ASSESSMENT OF DAMAGES

[97] Though the Claimant in her Particulars of Claim claimed special damages in the amount of one million three hundred and fifty thousand dollars ($1,350,000.000) for loss of earnings and legal fees paid, this was seemingly abandoned by the end of trial, as it was not dealt with at trial or in the Claimant's submissions by Counsel. Nonetheless I find it necessary to make a few points in relation thereto and to the award of damages in a claim for malicious prosecution.

[98] Generally, damages are recoverable, under one of the following three heads:

i. Damage to reputation;

ii. Damage to person (for eg. Where Claimant's life, limb or liberty is endangered; or

iii. Damage to property (as where he is put to the expense of acquitting himself of the crime with which he is charged}.

In the first two cases damages are implied (though they must be substantiated by grounds), however in the third case, actual damage must be pleaded and proved. [**see Atkin's Court Forms/Malicous Prosecution (Volume 25 (3))/Practice/4. Damage**; **Savile v Roberts** [1558-1774] All ER Rep 456; **Crawford Adjusters and others v Sagicor General Insurance (Cayman) Ltd and another** [2013] 4 All ER 8. The first two heads of damage are considered and incorporated into an award for general damages. Also, any actual financial loss flowing from the tort that is not too remote is recoverable [**Atkin's Court Forms** *supra]*, including loss flowing from loss of general

business and employment [**McGregor on Damages**, Sixteenth Ed., Ch. 36, Malicious Criminal Prosecutions and Cognate Torts, para. 1863; **Childs v Lewis** (1924) 40 TLR 870].

[99] The Claimant has produced no evidence proving the legal fees actually incurred in acquitting herself of the charge in the Court below. Nor has she produced evidence sufficient to prove the amount of loss of earnings claimed and that that loss was a direct result of the tort. The Claimant only tendered into evidence two pay slips for the months of March and April of 2005, bearing the amounts of $18,000.00 and $12,000.33 respectively. This is hardly proof of what is claimed.

It is trite that special damages must be specifically pleaded and proved, and thus none will be granted.

[100] The Claimant seeks General Damages in the sum of three million dollars ($3,000,000.00), comprising of one million five hundred thousand dollars ($1,500,000.00) for aggravated Damages, and one million five hundred thousand dollars ($1,500,000.00) for vindicatory damages. The terms vindicatory damages and exemplary damages have been used interchangeably in the Claimant's submissions. The Claimant relies on the case of ***Greg Martin*** (supra).

Aggravated Damages

[101] It is well established that Aggravated Damages are awarded as compensation for injury to feelings and dignity owing to the manner in which the tort was committed (see **Rookes v Barnard** [1964] A.C. 1129, per Lord Devlin). They are only to be awarded where the Court is satisfied that there were aggravating features in the defendant's conduct such as malevolence or spite, and the injury caused by that conduct would not be adequately compensated by a basic award. Thus, to avoid double counting, the Court will not award damages under this head if the 'basic award' has been adjusted to take account of aggravating factors (see **Odane Edwards v The Attorney General of**

Jamaica [2013] JMSC Civ 116, paras 61-62; **The Attorney General of Jamaica v Gary Hemans** [2015] JMCA Civ 63).

[102] Counsel for the Claimant submits that Ms. Greenwood's evidence shows she has suffered damage to her feelings and dignity, and this evidence has not been challenged by the Defendants. Additionally, it is asserted that even without this evidence it would be a natural occurrence that a trained professional who is wrongfully charged and put before the Court in public view of all would suffer great embarrassment, distress and humiliation. The Claimant relies on the authority of **Sharon Greenwood-Henry v The Attorney-General of Jamaica**, CL G116 of 1999, delivered on the 26th October 2005.

[103] The 2nd & 3rd Defendants, on the other hand, submit that no award under this head should be made, as it has not been proved that the 2nd defendant behaved in a high handed, insulting, malicious or oppressive manner that would justify same.

[104] The evidence is that, after being arrested, the Claimant was fingerprinted and subjected to the humiliation of reporting to the Old Harbour Police Station every week from her arrest through the duration of the trial, a period of almost four (4) years. Even though she was first brought before the Corporate Area Resident Magistrate's Court on the 13th December 2005, the trial did not commence until the 7th October 2008, and continued for a year after, ending on the 5th October 2009. During the trial she was out of a job and tried to seek employment but was unable to get work due to her pending matter in the criminal court. She claims she was only able to find a job teaching a month before the criminal trial ended, and this was only by hiding her employment history. The Claimant is a teacher trained in the area of secondary education which allows her to teach accounting. Her qualifications include CXC accounting and a diploma in teaching from the Ministry of Education.

[105] There is no doubt that the Claimant would have suffered humiliation owing to a charge of Larceny, particularly so because of her profession. It is not hard to see that her reputation would be tarnished and she quite likely would have been viewed as dishonest and untrustworthy in a profession which is built on fiduciary responsibilities

requiring trust and confidence. Even though the claimant was not convicted, the mere accusations, charge and arrest, with the resulting negative perceptions, would still have a negative effect on her ability to gain employment. I also take into consideration her level of qualification. I do however find her assertion of not being able to find any work for almost four years to be a bit exaggerated and unfounded, particularly considering the duty of a Claimant to take all reasonable steps to mitigate loss arising from a defendant's tort [**British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd** [1912] AC 673 at 689]. She did not provide any corroborating evidence in support of this assertion.

[106] I find however that the case of ***Sharon Greenwood-Henry*** cited by Counsel is wholly inappropriate to this case. The circumstances and aggravating features in that case (including arrest in a busy airport and cavity searches at the airport and hospital) are in no way similar to those in this case, and are far more serious. The Claimant was not incarcerated or taken anywhere against her will, nor was she abused in any way. There is no evidence of any malevolent conduct on the part of the 2nd Defendant or any motive to cause her embarrassment or other harm. I find that though Ms. Greenwood would have suffered some amount of shame from the fact of the prosecution, it would not have been due to, or worsened by, any aggravating feature of Officer Grey's conduct.

[107] In the circumstances, I am guided by the award made by my brother Sykes J in ***Greg Martin*** *[Supra]*, wherein the sum of one million five hundred thousand dollars ($1,500,000.00) (which updates today[1] to $1,993,615.79) was awarded for malicious prosecution on the basis that there was no basis for the criminal charges against the claimant and that he had been subjected to a hopeless prosecution for a period of at least nineteen months. The learned Judge compared the circumstances in that case to those in the case of ***Keith Nelson*** *[supra]*, in which the Claimant was an engineer by

[1] Calculations made using the CPI for May 2016.

profession with a tertiary education and had to endure the humiliation of a prosecution for three months. Mr. Nelson was awarded four hundred thousand dollars ($400,000) in April of 2007, which had updated to $647,746.88 in June 2011 (updates today to $890,184.65). In ***Greg Martin*** however, Mr. Martin was not educated to the tertiary level, as is the case with Ms. Greenwood.

[108] Taking into consideration all these similarities and differences with the circumstances of the present case, I find an award of one million nine hundred thousand dollars ($1,900,000.00) to be adequate as a basic award, and that there is no basis for an award of aggravated damages.

Exemplary damages

[109] It is well settled that in Jamaica exemplary damages are to be awarded in the three categories of cases adumbrated by Lord Devlin in **Rookes v Barnard** (see **Jamaica Observer Ltd. & Anor v Gladstone Wright**, para. 47; **Douglas v Bowen** (1974) 22 WIR 333). These are where (1) there is oppressive or unconstitutional action by servants of the government, (2) the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable, (3) such an award is expressly authorized by statute. Exemplary damages are punitive in nature and are only to be awarded where the sum awarded as compensatory damages (including aggravated damages) does not contain any punitive element or is inadequate in that respect (see **Odane Edwards v The Attorney General of Jamaica** [2013] JMSC Civ 116, para 61).

[110] I find that the circumstances of this case do not warrant any such award. In particular, there is no evidence that the Claimant was treated in any high-handed, unconstitutional or oppressive manner.

[111] I further wish to make a final point. Exemplary and vindicatory damages are two separate and distinct heads of damage. Vindicatory damages may be awarded as relief for the breach of a constitutional right of the claimant, for the purpose of vindicating that

right, where the awards of basic, aggravated and exemplary damages are inadequate relief for the impugned conduct of the defendant (see decisions of **Siewchand Ramanoop v The Attorney General of Trinidad and Tobago** (2005) 66 WIR 334; **Greg Martin v Halliman and the Attorney General** (Supra); **Odane Edwards v The Attorney General of Jamaica** *(supra)*; **Sharon Greenwood-Henry v The Attorney-General of Jamaica** *(supra)*). It is not punitive in nature as are exemplary damages, and it must be specifically pleaded, with evidence in support thereof arising on the facts.

[112] In the case at hand, as I have already found no constitutional breach, there is no basis for such an award.

[113] I therefore make the following order:

ORDER

(a) General Damages are awarded to the Claimant in the sum of $1,900.000.00 as against the 2nd and 3rd Defendant.

(b) Interest is awarded on General Damages at the rate of 3% per annum from the 11th day of March 2010 to the date of this judgment.

(c) Costs are awarded to the Claimant against the 2nd and 3rd Defendant to be agreed or taxed.

(d) Costs are awarded to the 1st Defendant against the Claimant to be agreed or taxed.