[2013] JMSC Civil 177

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. C.L M 524 of 1995

BETWEEN	**DION MOSS**	**CLAIMANT**
AND	**SUPERINTENDENT REGINALD GRANT**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2nd DEFENDANT**

Mr. Ernest Smith, Ms. Nesta-Claire Hunter & Ms. Marsha Smith, instructed by Ernest A. Smith & Co. for the Claimant.

Ms. Alethia Whyte, instructed by the Director of State Proceedings for the Defendant.

Assessment of Damages – Detinue – Valuation of Aircraft – Claim for Damages – Claim for Exemplary Damages – Discretion in the Award of Interest.

Heard: July 5 & November 19, 2013

F. Williams, J

Background

[1] The claim number apart, a perusal of the document that initiated this claim, gives an indication of the age of this matter. It was commenced by way of "Writ of Summons and Endorsement" – a document that was replaced by the Claim Form in 2002. This document was filed on November 22, 1995. At that time the Honourable Mr. Justice Edward Zacca was Chief Justice. Since then, the Chief Justice who replaced him

served for some 11years and has since retired and the incumbent Chief Justice has already served for some six years. At that time also, (the document discloses), the Attorney-General's Chambers were located at 79-83 Barry Street, Kingston, a building that has long since become derelict. In this matter, too, the person bringing the action is referred to as "plaintiff" and not "claimant" as we now do, since 2002.

[2] As might be expected, this protracted period of time has affected the matter in a number of ways – for example, evidence which might have been available in 1995 – that is, some 18 years ago - is no longer available, thus affecting the parties' and the court's approach in dealing with the matter.

[3] Happily, however, the long history of this matter has now come to an end with this assessment of damages (barring the filing of an appeal on some aspect or the other of this judgment).

The Claim

[4] The plaintiff in this matter is and was at all material times a Bahamian National and a licensed commercial pilot. At the material time he was the registered owner of a six-seater Piper Aztec aircraft model PA 23-250; and bearing serial number 27-4482. The aircraft bore the United States registration number N-13841.

[5] Whilst he was on a trip to Jamaica, the plaintiff was taken into custody by the police on June 26, 1995 on suspicion of narcotics trafficking. He was later informed that what were believed to be parcels of ganja had been found in his aircraft at the Boscobel Aerodrome in St. Mary. He was never charged with the commission of a criminal offence; however, on June 30, 1995, he was put aboard a flight bound for the Bahamas and, he says, told by the police that he should not return to Jamaica.

[6] The aircraft remained in police custody and, it appears, was eventually disposed of.

[7] As originally framed, the claim sought damages for what the plaintiff contends to have been the unlawful seizure and detention of his aircraft; as well as damages for false imprisonment.

[8] On June 6, 2012, however, the defendants entered a consent judgment on admission and an order was made for the matter to proceed to assessment of damages. By that same order, the claim for false imprisonment was also withdrawn.

The Damages Sought

[9] The claimant's particulars of damages in his particulars of claim set out the heads of the damages that he seeks. These are:

"PARTICULARS OF DAMAGES"

i.	Loss of income from use of aircraft June 26, 1995 to June 30, 2013@ US$1,000.00 per day, 6 days per week (312 days per year – 18 years) (Damages for Detention)	US$5,616,000.00
ii.	Replacement value of a typical 1970 Piper PA-23-250 Aztec Aircraft @ January 25, 2013	56,236.00
iii.	Costs of Market Analysis prepared by Mark Hutchens of Aircraft Appraisals Unlimited	910.00
iv.	Travelling from the Bahamas to Jamaica to secure release of aircraft 4 trips @ US$241.00 per trip	964.00
v.	Legal expenses incurred to secure release	2,000.00

from custody

vi. Loss of income of aircraft from July 1, 2013 and continuing (to be determined) _____

Total **US$5,676,110.00”**

[10] He also claims exemplary and/or punitive damages. This is being done based on his contention that the actions of the 1st defendant were actuated by malevolence or spite and thereby intended to and did intimidate him, the plaintiff, and subjected him to ridicule and contempt in public.

[11] Not unusually, he also seeks an order for costs and an award of interest on the sums awarded or ordered to be paid by the court.

The Nature of the Claim in Detinue

[12] The parties are *ad idem* in respect of the nature of the claim in detinue and as to its elements and boundaries. Their consensus revolves around the case of **Rosenthal v Alderton & Sons Ltd**. [1946] KB 374, cited by both parties.

[13] The essence of the tort of detinue was described thus (at pages 377 to 378 of the judgment):

> “It was, and still is, of the essence of an action of detinue that the plaintiff maintains and asserts his property in the goods claimed up to the date of the verdict”.

[14] In that case it was held that the measure of damages is the value of the item detained as at the date of trial or judgment, the headnote indicating:

> "In an action for detinue, the value of the goods to be paid by the defendant to the plaintiff in the event of the defendant failing to return the goods to the plaintiff must be assessed as at the date of the verdict or judgment in his favour and not that of the defendant's refusal to return the goods…"

The Claim for the Replacement Value of the Aircraft

[15] Pursuant to orders made by Lawrence-Beswick, J on February 19, 2013, an expert report dated October 25, 2012, of one Mr. Mark Hutchens was admitted into evidence. By the said order, Mr. Hutchens, a senior certified aircraft appraiser, was to be treated as an expert witness. His report comes in the form of a document described as an amended "Market Analysis".

[16] In addition to the Market Analysis, the expert also provided answers to 10 questions put to him by the defendants' attorneys-at-law.

[17] The most significant feature of this report is the fact that it is not an appraisal of an actual aircraft which the appraiser has seen and inspected. Rather, it is an appraisal of a typical 1970 Piper Aztec aircraft. In other words, it is what is known as a "desktop appraisal" and was done based solely on information provided by the client, but which has not been (and, indeed, could not have been) verified by the appraiser.

[18] The report puts the replacement value of the aircraft at US$56,236.00.

The Plaintiff's Submissions

[19] Relying on this value, the plaintiff's counsel submitted that this is the amount in which the court's award should be; as the amount was not challenged in the questions that were put to the expert. It ought to be accepted as a current and accurate assessment of the value of the aircraft.

The Defendants' Submissions

[20] Counsel for the defendants, on the other hand, submitted that the figure given in the amended market analysis should be reduced. In support of this submission, a number of reasons were advanced. For one, it was noted that some elements of the report that were factored into the final value, were subject to depreciation. For example, the value ascribed to the airframe condition; annual and mandatory inspection and avionics have all decreased since the completion of a report he had previously prepared in 2008; and an estimate of the annual rate of depreciation could be calculated by extrapolating the annual decrease in value between the first report and the present one. When this extrapolation is done, it results in a decrease in value of some US$92.30, making the actual value US$56,143.70.

[21] It was submitted further that this figure should be reduced by another 15% to take into account: (i) the fact that there was no physical inspection as a basis for the valuation; but same was based solely on information provided by the client; and (ii) the amended market analysis has expired – the expert having indicated in answer to question # 1 that the expiration date of the report was January 25, 2013.

Discussion

[22] Although the true position is that the market analysis would have expired in January of this year; the court does not regard it as valueless and will still have resort to it for some guidance as to what a reasonable value might be. That being said, the court is in agreement with the approach taken by counsel for the defendants that some discounting is in order.

[23] One reason for this view may be seen by drawing an analogy between this and the case of motor-vehicle appraisals in accident cases. In those cases, it is usual to have an estimate of repairs, which would have been prepared by a repairer who would have physically inspected the vehicle in question. That estimate, in the usual course of events, would have been reviewed by a loss adjuster whose agent would have also conducted a physical inspection and, at the end of the day, prepared what is supposed

to be an unbiased, objective report as to the true loss. The various insurance companies that deal with many, if not most, of the motor-vehicle accident claims, have panels or lists of loss-adjusting firms that they deem reliable and objective.

[24] This two-tier approach usually satisfies the court; or, at the very least, gives it a fairly-reliable guide as to a fair and just award. It is not unusual, where the second tier is absent (that is, where there is no loss-adjuster's report), for the sum ultimately awarded to be discounted by around 10% or 15%, or another figure that to the court's discretion seems reasonable and sound to take into account the possibility of inflation due to the absence of a loss adjuster's input.

[25] In the instant case, although the appraiser indicates in his report that his data are accepted by a number of corporations and agencies – such as the Federal Deposit Insurance Corporation (FDIC) and the Internal Revenue Service (IRS), and insurance companies, there is nothing that this court has to verify this independently. Even if we should accept it as objective, fair and unbiased, however, there still is one concern: it would no doubt have been more acceptable as a reliable and more-nearly-accurate guide if the appraiser had been able to see the actual aircraft and to not have had solely to rely on the information provided by the client plaintiff.

[26] The information given by the client plaintiff has figured prominently in the appraiser's consideration of the matter and his ultimate assessment. For example, the items such as exterior paint condition; interior condition and cockpit condition are all listed as "good" – based on information provided to the assessor by the plaintiff. Who is to say whether this was really so? Is it not possible that the plaintiff might have overstated the condition of these items in an effort to inflate the value that might ultimately be arrived at? There is no proof that he did. But, similarly, there is no proof that he did not. Is it likely that he would have understated the condition of his aircraft, the value of which he is trying to recover? This seems unlikely. To make allowances for such a consideration, it does appear to the court to be best to do some amount of discounting; and to discount the figure by 15% appears to the court to be reasonable.

[27] The court will, therefore, accept the submissions of counsel for the defendants that the figure that should be awarded under this head is US$47,722.14

Cost of Market Analysis

[28] Under this head of damage is the sum of US$961.00, being the cost claimed for the market analysis report. No challenge has been mounted to the court awarding this sum and so an award in the sum claimed will be made.

Travelling Expenses

[29] The plaintiff's counsel says that, based on his evidence, this claim, which amounts to US$964.00 ought to be accepted and awarded by the court. The defendants' counsel, on the other hand, is of the view that no award should be made under this head. The main reason for this is the absence or non-production of any documentary proof that this sum was in fact paid.

[30] In support of this submission, counsel for the defendants relied on the well-known and oft-rehearsed dicta of Lord Goddard CJ in **Bonham-Carter v Hyde Parke Hotel Ltd**. (1948) 64 TLR, 177 at page 178 where the learned judge opined:

> "Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying 'This is what I have lost; I ask you to give me these damages.' They have to prove it".

Discussion

[31] In his witness statement, the plaintiff states in this connection (at paragraph 39) that:

> "I came back to Jamaica on four separate occasions to meet my

> lawyer to secure the release of my aircraft. At the time he was in discussion with Superintendent Grant to secure the release of my aircraft. We were not successful in getting it back."

[32] This sparse narrative might be compared with paragraph 5 of the witness statement of the plaintiff in which he gives details of the several payments made for him to buy the relevant aircraft, giving the dates and payments and receipt numbers for the payments and stating that he is in possession of the relevant receipts. This is the sort of standard in terms of the evidence that would be expected of the plaintiff in relation to his travelling expenses. However, neither in his witness statement; nor in his *viva voce* evidence does the plaintiff attempt to explain the absence of the receipts directly; nor has he given any other evidence from which their absence might be deduced. Applying, therefore, the principle in the **Bonham-Carter** case, the claim for this item fails.

Legal Expenses

[33] Submissions similar to those made in respect of the travelling expenses were advanced in respect of the legal expenses. It will be remembered that the claim under this head was for US$2,000. It was submitted on the defendants' behalf that the sum of US$1,000 ought to be disallowed out of hand as that sum was allegedly paid by the plaintiff to his attorneys-at-law for his release from custody.

[34] The claim for false imprisonment having been withdrawn, the submission ran, this claim must consequently go as well. In relation to the other US$1,000 which he said he paid for the release of the aircraft, it was submitted that the claim for this sum should also not be granted, for the plaintiff's failure properly to prove it. It was argued that even if, as the plaintiff testified, he was unable to find the receipt for this sum, he has failed to explain what efforts he made, if any, to locate it. Further, even if he had mislaid it, he is still being represented by a firm of attorneys-at-law which represented him then and from which he could have sought assistance in locating some record of it or confirming by some means that it was paid. This he failed to do or to give any evidence of any efforts in that regard.

[35] The court finds itself in agreement with these submissions. And, again applying the principle in the **Bonham-Carter** case, the claim for this item also fails.

Claim for Damages for Detinue

The Plaintiff's Submissions

[36] Under this head, the plaintiff claims the sum of US$5,616,000.00.

[37] This sum is calculated on the basis of the loss of income from the use of the aircraft from June 26, 1995 to June 30, 2013 at US$1,000 per day, six days per week (312 days per year, for 18 years).

[38] Counsel for the plaintiff asked the court to consider that: (i) the aircraft seized was profit-earning property; (ii) the plaintiff hired it in the course of his business (and transported persons for reward); and (iii) neither the aircraft nor its value was given to the plaintiff for 18 years.

[39] It was submitted on the plaintiff's behalf that the award should reflect the sums which the aircraft could have been used to earn during the period of detention – as in the case of **Strand Electric and Engineering Co. Ltd. v Brisford Entertainment Ltd** [1952] 2 QB 246. Refreshingly, counsel, in citing this case and another, indicated not only an aspect that supports their submission; but, commendably and in the highest traditions of the bar, also pointed out for the court's consideration, an aspect that would go towards reducing any damages that the plaintiff might receive – that is, that it is permissible for deductions to be made from damages to be awarded on account of operational costs. That other case is **Workers Savings & Loan Bank et al v Horace Shields** – SCCA # 113 of 1998, in which the court of appeal considered it appropriate to deduct from the gross earnings from a loader, sums on account of maintenance, *inter alia*, in arriving at the net amount recoverable.

[40] One argument and submission that were emphasized by counsel for the plaintiff was that the damages should cover the entire period. It was pointed out, for example,

that in the **Strand Electric** case, the plaintiffs were awarded the full hiring charge over a period of 43 weeks. Another example used was the case of **The Attorney-General & the Transport Authority v Aston Burey** [2011] JMCA Civ 6. In that case the claimant was awarded loss of earnings for two years – the full period for which his vehicle was detained by the Transport Authority.

[41] At the end of the day, therefore, the award should be US$5,616,000.00 less US$300,000 on account of operational costs, resulting in the sum of US$5,313,000.00.

The Defendants' Submissions

[42] Describing the sum being claimed as "extravagant", counsel for the defendants submitted that, for several reasons, no damages ought to be awarded under this head. For one, there is no evidence that the plaintiff was legally fit to operate the aircraft or that the aircraft itself met the legally-required physical conditions. The submissions are based on answers that were given in cross-examination by the plaintiff. For example he testified that he was required to have a current medical certificate and a current certificate of airworthiness for the aircraft in order to operate legally. However, it was submitted, he did not provide the court with any of these documents or attempt to explain their absence.

[43] In addition to that, counsel for the defendants also submitted that if the court disagreed with this submission, then, in attempting to arrive at any award under this head, an average of 3 paying passengers per trip should be used in calculating the plaintiff's earnings. Further, he should not be awarded loss of earnings for the entire 18 years; but only for some three months. The main reason for this is the duty that is cast on any party claiming to have suffered a loss, to attempt to mitigate that loss. In this case, it was submitted, efforts to find alternative employment were made too late, coming only about a year and a half after the seizure of the aircraft. Besides that, there were maintenance costs that should be deducted from the sum to be awarded. These costs include such factors as changing propellers; the cost of an inspection after every 100 hours; the inspection of the aircraft's avionics; changing tyres, brake pads and so

on. In the submission of counsel for the defendants, the award under this head, if any, should not exceed US$36,288.00.

Discussion

[44] As previously pointed out, counsel for the plaintiff accept that it is permissible for deductions to be made from the gross amount of loss of earnings in order to arrive at the amount that will be ultimately awarded for the said loss. In particular, maintenance costs and other expenses may be so deducted, where the loss of earnings of a profit-earning chattel is being dealt with.

[45] What the court has to consider under this head, therefore, is the quantum to be ultimately awarded and the items that fall properly to be deducted. (It seems to the court that where, as here, there is a judgment on admission to the claim in its entirety; where, as here, the aircraft was flown to Jamaica and there is no indication that it did so in breach of any aviation law or regulation, that, on a balance, it can be accepted that the requisite permissions and documents were in place for the aircraft to have been operated and for the plaintiff to have piloted an aircraft).

[46] In relation to maintenance costs, the maintenance costs calculated by counsel for the defendants amount to at least US$501.11 per month, on average. Counsel for the plaintiff, on the other hand, proposed a maintenance cost amounting to some US$1,821.17 per month on average. On the court's review of the evidence, the figure put forward by counsel for the plaintiff is more nearly accurate and comprehensive that that proposed by counsel for the defendants, as the former figure takes into account matters such as the cost of an engine overhaul; oil changes and so on, which were not included in the calculations of the defendants.

[47] On the earnings side, the plaintiff submits that the yearly earnings would have been US$312,000, which means that the monthly earnings would have been US$26,000. These are his earnings, gross. The defendants submit that the monthly profit (that is the net earnings) would be US$12,096. But this figure was arrived at without the deductions

being subtracted therefrom. US$24,178 is what the plaintiff proposes his monthly net earnings would be: arrived at by subtracting the monthly expenses of US$1,821.17 from what the plaintiff's counsel say would be his monthly earnings of US$26,000.

[48] It appears that the submissions of counsel for the defendants are not unreasonable – in particular where it is proposed that an average of three passengers be used and that allowances be made for the highly-competitive nature of the business in which the claimant was engaged – there having been competition from sole operators, such as he, as well as the charter companies. The monthly figure proposed by counsel for the defendants for the plaintiff's earnings of US$12,096 is one that commends itself to the court.

Mitigation

[49] The submission made on behalf of the defendants that the matter of mitigation should always be borne in mind is one that also finds favour with the court. The relevant considerations are succinctly set out in **Halsbury's Laws of England**, 4th Edition, paragraph 1193:

> "**1193. Plaintiff's duty to mitigate loss**. The plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant's wrong, and, if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided." (citing, inter alia, **British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rly Co of London Ltd** [1912] AC 673 at 689, HL, per Viscount Haldane LC).
>
> "Where a defendant alleges that the plaintiff has failed to take all reasonable steps to mitigate his loss the burden of proof is upon the defendant." (citing, inter alia, **Roper v Johnson** (1873) LR 8 CP 167 at 181, per Brett J).

[50] Also of relevance is paragraph 1194:

> "**1194. Standard of conduct required of the plaintiff**. The Plaintiff is only required to act reasonably, and whether he has done so is a question of fact in the circumstances of each particular case, and not a question of law. He must act not only in his own interests but also in the interests of the defendant and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter. One test of reasonableness is whether a prudent man would have acted in the same way if the original wrongful act had arisen through his own default."

[51] In this case it is worthy of note that the plaintiff is a licensed commercial pilot, having obtained his commercial pilot's licence in the United States of America. His witness statement discloses that, before he bought the relevant aircraft, he worked various flying jobs. He has been a commercial pilot since December, 1984. His working history before he acquired his own aircraft is set out at paragraphs 2 and 3 of his witness statement:

> "2. I began my career as a Commercial Pilot in 1985. At that time I was employed to Mr. Wayne Neely of South Bimini, Bahamas. I worked with him for about three (3) years and thereafter I began working with Stuart Fishing Charters. The company provides air charter services throughout the Bahamas, Caribbean and the United States of America.
>
> 3. In 1992 I leased an Aztec Aircraft from Houlk Co., I was able to save and purchase my own aircraft between 1994-1995."

[52] To the court's way of thinking, these parts of the plaintiff's witness statement demonstrate that the plaintiff clearly was able to earn an income otherwise than through the use of his own aircraft. Unless circumstances had changed (of which there is no evidence), he could have sought and gained employment with either a sole operator or a charter company or attempted to have leased an aircraft, as he did before. He gave no evidence whatsoever of any attempt to find employment in his field of endeavour. Instead, from his evidence, he only attempted to gain employment some one year and a half after the aircraft was seized; and he did so (on his evidence) by doing "standby" work; and some five years after the aircraft was seized, as a manager of an apartment complex and some three years after the aircraft was seized, through work in the construction industry. He has not indicated in his testimony what efforts, if any, he made to obtain stable employment in the field of aviation or what difficulty confronted him as he made those efforts. He has not, in the court's finding, acted reasonably in all the circumstances in an effort to discharge the duty that is cast on him to mitigate his losses. A prudent and reasonable man would have acted with more celerity and at a much earlier point in time to keep his losses down.

[53] When one looks at the cases cited in support of the plaintiff's contention that the award ought to cover the entire period until judgment, two observations might be made. First, in those cases, the periods under consideration were much less – being 43 weeks in the **Strand Electric** case; and 2 years in the case of **Aston Burey**. In this case, the claim is for 18 years. Second, and more importantly so far as this point is concerned, is the fact that in those cases, counsel for the paying party seemed not to have raised for the court's consideration at all, the question of mitigation. Yet, from the earlier-recited excerpt from **Halsbury's Laws**, it is a consideration of general applicability, cutting across various causes of action.

[54] In all the circumstances, the court finds the claim for 18 years to be unreasonable and to be unsupportable – given the requirement of every claimant or plaintiff to take steps to mitigate his losses. A period for the plaintiff to be allowed to gather his thoughts, as it were, after the aircraft was seized and map a strategy and a plan for the

way forward, and attempt to obtain alternative (even interim) employment, is, in the court's view, three months.

[55] Additionally, the arguments as to delay that were advanced in relation to the matter of interest, also have a bearing on this issue – as the factor of delay, as well, that is not attributable to the defendants (or not the defendants alone), is another consideration that militates against an award for the full 18 years. These factors will be more carefully examined shortly.

[56] The award under this head will therefore be US$12, 096 X 3 = US$36,288.

The Claim for Exemplary Damages

[57] Under this head of claim, the plaintiff is contending that he should be entitled to an award of punitive damages, as the actions of the police were arbitrary, oppressive and unconstitutional – particularly because: (i) the plaintiff was not charged with a criminal offence; (ii) on instructions from the plaintiff, the substance found was never tested to see if in fact it was marijuana; and (iii) there was no judicial order from any Jamaican court for the aircraft to have been seized. It was further submitted that the defendants by their actions have shown a persistent and continuing disregard for the plaintiff's proprietary rights. The **Aston Burey** case was also prayed in aid in support of this claim for an award of exemplary damages. In that case the sum of $300,000 was awarded where a vehicle valued at some $3,950,000 was detained for approximately two years. It was argued that, in the instant case, an award equal to the value of the item detained would be appropriate – that is, US$56,236.00.

[58] Both parties are relying on the principles enunciated by Lord Devlin in the well-known case of **Rookes v Barnard** [1964] 1 All ER, 367, as he set out the three categories of cases in which an award of exemplary damages might be appropriate. These are: (i) oppressive, arbitrary or unconstitutional conduct by servants of the Crown; (ii) where the defendant's conduct was calculated to make a profit for himself,

which may well exceed the compensation otherwise payable to the plaintiff; and (iii) where the award of exemplary damages is expressly authorized by statute.

[59] The difference in the approach taken by counsel for the defendants, however, was to seek to emphasize that it is not every unlawful act of a Crown servant or government employee that would warrant an award of exemplary damages. In support of this approach, the case of **George Finn v The Attorney-General** (1981) 18 JLR 120, was cited, in particular, emphasis was placed on the dicta of Wolfe, J (as he then was) on the matter of exemplary damages at page 126. Said the learned judge:

> "It is my considered opinion that a distinction must be drawn between the mere abuse of authority and the demonstration of exuberance in the exercise of such authority. Abuse conveys a deliberate misuse of power, whereas in the latter case, the exercise of authority is accompanied by over-enthusiasm. I am not convinced that the actions of the officers were such an abuse of power that would qualify the plaintiff for an award of exemplary damages.
>
> In any event, exemplary damages should only be awarded in exceptional circumstances. The circumstances of this case do not permit me to hold that they were exceptional."

[60] It was also submitted that, even if (which was not admitted), the facts of this case would place it in the category of those generally eligible for an award of exemplary damages, the court should not make such an award, as these damages are to be awarded only where the damages awarded as compensation are deemed insufficient to punish the offender, exemplary damages being punitive in nature. Support for this argument was drawn from Lord Devlin's speech itself in **Rookes v Barnard**, as well as from **Cassell & Co. v Broome** [1972] 1 All ER, 801, where Lord Reid expressed himself in similar vein.

[61] Another argument advanced against the making of an award of exemplary damages is that the award is being made against a defendant – that is, the Attorney-General – who has not committed any punishable behavior: the person responsible for meeting the award is not the wrongdoer. In support of this submission, the consolidated cases of **Thompson v Commissioner of Police of the Metropolis and Hsu v Commissioner of Police of the Metropolis** [1997] 2 All ER, 762, was cited by counsel for the defendants, in particular, reference was made to page 772 (f), where it was said:

> "The fact that the defendant is a chief officer of police also means that here exemplary damages should have a lesser role to play. Even if the use of civil proceedings to punish a defendant can in some circumstances be justified, it is more difficult to justify the award where the defendant and the person responsible for meeting any award is not the wrongdoer, but his 'employer'."

[62] With a similar goal, the case of **Kuddus v Chief Constable of Leicester Constabulary**, [2001] UKHL 2**9,** was also cited – in particular where the court observed as follows at paragraph 131 (per Lord Scott of Foscote):

> "…the defendant should not be liable to pay exemplary damages unless he has committed punishable behavior. This principle leaves no room for an award of exemplary damages against an individual whose alleged liability is vicarious only and who has not done anything that constitutes punishable behavior."

Discussion

[63] In assessing these various dicta in the cases that have been cited, it is important to bear in mind the background to this matter. From all indications, parcels were in fact found by the police aboard an aircraft owned by the plaintiff and their contents suspected by the police to have been ganja. The plaintiff and other Bahamians were taken into custody on what appeared to have been suspicion of trafficking in and

possession of marijuana by members of the Narcotics Division, in what apparently were normal police investigations.

[64] Whilst the conduct of the police and the entire experience of being caught up in an investigation; and being detained and having his aircraft seized by the police would have perceived to have been an oppressive experience for the plaintiff, one is not certain that an award of exemplary damages would be appropriate in the circumstances of this case, having regard to the authorities cited.

[65] The **George Finn** case was one in which, though the court found that the plaintiff was a fleeing felon, it found that, he being unarmed, the police had used excessive force in shooting him in their attempt to apprehend him. No award was made for exemplary damages in that case (which, incidentally, the court considers to appear to be a worse case than the instant one).

[66] Adopting the approach taken by Wolfe, J in the **George Finn** case, this court is unable to hold that these circumstances are exceptional; or that this is a case of abuse of power, as opposed to over-exuberance in its exercise. The actions were taken in what appears to have been the course of attempts at legitimate policing. (In the **Aston Burey** case, no issue was taken on appeal with the award of exemplary damages; the sole ground of appeal having to do with whether the value of the vehicle should have been taken as at the date of the award or at the date of the vehicle's conversion).

[67] The other two considerations in the various cases also influence the court towards not making such an award: that is, the court is of the view that the damages being awarded in this case are sufficient to compensate the plaintiff, while, at the same time, signaling its disapproval of these unfortunate occurrences. Additionally, as the tortfeasors themselves (as suggested by the judgment on admission), are not before the court; and the damages in this case fall to be paid by the state, this seems to be one of those cases of the ilk of **Kuddus** – the liability here being vicarious – and the consolidated cases of **Thompson** and **Hsu** – the damages here being payable by the

‘employer’ of the persons who might be regarded as the tortfeasors, which, at the end of the day translates into the taxpayers of Jamaica.

[68] Additionally, when one looks at paragraph 30 of the particulars of claim and sees therein the basis of the plaintiff’s claim for exemplary damages, it is the court’s view that those bases have not been satisfactorily established. The bases were:

> “30….The Claimant will say that the actions of the First Defendant were actuated by malevolence or spite toward the Claimant and they thereby intended to and did intimidate the Claimant and subjected him to ridicule and contempt in public by reason whereof the injury to the Claimant has been greatly aggravated and the Claimant claims Damages on [the] footing of Exemplary Damages.”

[69] The court has seen no evidence of malevolence or spite. No award for exemplary damages will, therefore, be made in this matter.

Interest

[70] In this case, whereas the plaintiff has sought a payment of interest on the sums to be awarded; the defendants, on the other hand, have submitted that the court ought not to do so for the full 18 years, in light of all the circumstances of the case. An award in respect of 9 years, the submission went, would be more appropriate. A number of reasons have been advanced as to why this course should be adopted. These were summarized in the defendants’ written submissions at paragraph 53. These have to do with delays by the Registry of two years in two instances each in the matter being set for trial; delay of some two years by the plaintiff in giving security for costs as ordered by the court; having to wait some three years after the case-management conference for the matter to come on for trial; adjournments by consent on at least two occasions to facilitate discussions, with the result, in one instance, of the matter not placed back on the trial list for some two years, and so on.

[71] The court's power to award interest on damages in a case such as this is largely governed by the **Law Reform (Miscellaneous Provisions) Act**, section 3 of which is reproduced (so far as is relevant) hereunder:

> "3. In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, <u>if it thinks fit</u>, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment." (Emphasis added).

[72] This section makes it abundantly clear that the question of whether there should be an award of interest at all; and, if so, the appropriate rate; the part of the damages to which it may be applied and the period, are matters entirely within the discretion of the court. It appears to the court that the reasons put forward for the exercise of the court's discretion not to award interest for the entire period constitute quite a sound basis for the exercise of the court's discretion in the way requested. If interest should be awarded for the entire period, then that would mean that the plaintiff would in effect be allowed to benefit from, and the defendants would be saddled with, the making of added payments for periods of delay over which they had no control, to which they did not contribute and for which delay no blame can fairly be laid at their feet. That would not be just. Making an award for nine years seems to the court to strike a fair balance, having regard to the history of the matter.

[73] In light of the foregoing, these are the damages that will be assessed in this matter:

Damages assessed in favour of the plaintiff as follows:

i. The sum of US$47,722.14, being the replacement cost of the aircraft.

ii. The sum of US$910.00, being the cost of the amended market analysis.

iii. The sum of US$36,288, being the sum awarded for loss of earnings from the aircraft.

iv. Interest on the said sums at the rate of 3% per annum from June 26, 1995 to June 30, 1999; and at the rate of 6% per annum from July 1, 1999 to June 26, 2004 (a period of nine (9) years);

v. Costs to the plaintiff to be agreed or taxed.