[2015] JMSC Civ. 237

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2007 HCV 00028

BETWEEN	**GERALDINE WRIGHT**	**CLAIMANT/ 1ST ANCILLIARY DEFENDANT**
AND	**STEVE BURTON**	**DEFENDANT/ ANCILLARY CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND ANCILLARY DEFENDANT**

OPEN COURT

Garth McBean, instructed by Garth McBean and Co., for the Claimant/1st Ancillary Defendant

Audre Reynolds and Kristina Excell, instructed by Bailey, Terrelonge and Allen, for the Defendant/Ancillary Claimant

Marlene Chisholm, instructed by the Director of State Proceedings, for the 2nd Ancillary Defendant

HEARD: February 27 & 28, 2012, March 9 & 30, 2012, April 25, 2012 and October 23, 2015

BREACH OF CONTRACT – FALSE IMPRISONMENT – MALICIOUS PROSECUTION – CLAIMS FOR DAMAGES FOR FALSE IMPRISONMENT AND MALICIOUS PROSECUTION INSTITUTED AGAINST CIVILIAN COMPLAINANT

ANDERSON, K., J

Background: A Synopsis of the Claimant's Case

[1] In this matter, the claimant has instituted a claim against the defendant, for damages for breach of contract. By virtue of that claim, she is seeking to recover general damages for breach of contract and special damages, in the sum of $743,589.91. This claim was filed on January 3, 2007.

[2] The claimant has alleged that what has caused her to institute this claim, is that: By oral agreement entered into between them in about December, 2005, the parties agreed that the defendant would import into Jamaica, for the purpose of purchase by the claimant, for the purchase price of $1,100,000.00, a used Nissan X-Trail motor vehicle. At that time, the defendant was a businessman, who bought and sold, used cars.

[3] The claimant has alleged that it was an oral agreement, but it was expressly agreed to, that after he had imported the said vehicle, the defendant would have had the said vehicle repaired and put in good condition, prior to the delivery of same to the claimant. Further, it was expressly agreed to, that the defendant would have delivered the said vehicle to the claimant, in good order and condition, in or about the middle of the month of *February, 2015*.

[4] Pursuant to that agreement, the claimant paid to the defendant a deposit of US$8,000.00, at the applicable U.S. to Jamaican dollars exchange rate at that time which was $61.75, that having been in January, 2005. The claimant paid a further sum of J$400,000.00 in May, 2005, to the defendant.

[5] The defendant did not deliver the vehicle to the claimant on September 24, 2005, and was therefore, according to the claimant, in breach of the agreement and in fact, only delivered the vehicle to the claimant, after the claimant had reported the non-delivery of same, to police personnel, who had thereafter, contacted the defendant.

[6] Upon the vehicle having been delivered to the claimant, she paid over to the defendant, the balance of the purchase price for the vehicle, which was $206,000.00.

[7] The defendant also breached the said agreement by failing to have the said motor vehicle repaired and/or put in good order and condition before delivery of same to the claimant and instead, delivered same to the claimant, with several defects and missing parts and overall, not in good condition.

[8] As a consequence, the claimant incurred specific financial losses, associated with the cost of rectifying defects, replacing missing parts, renting a vehicle, loss on sale of car and cost of wrecker, to transport vehicle to Kingston. In respect of the aggregate sum of those specific financial losses, the claimant is claiming, from the defendant, for the sum of $743,589.91. The same has been claimed for as special damages in addition to which sum the claimant is claiming general damages for breach of contract, interest at the rate of 12% on the special damages sum, costs and such further and other relief as this court deems just.

A Synopsis of the Defendant's Case:

[9] In response to this claim, the defendant has filed a defence and counterclaim. In his defence, he has alleged a follows: During negotiations to purchase the Nissan X-Trail motor vehicle (hereinafter referred to as 'the vehicle') the claimant was shown a picture of the said vehicle, which showed damage and the oral agreement between the parties, was that the claimant would purchase that motor vehicle from the defendant after the defendant had effected the required repairs to the *visible damage*.

[10] The defendant contends that he told the claimant that the vehicle would be delivered in about 3-4 months' time, as is the typical delivery time for such vehicles, when ordered. The parties entered into their contractual agreement for the sale/ purchase of the vehicle, in or about December, 2005. Accordingly, it is the defendant's contention that the vehicle should have been delivered by or before the end of April, 2005 (3-4 months after December, 2005). The defendant asserts that the claimant was

kept apprised of all developments as regards the importation and repair of the vehicle, which, due to circumstances beyond his control, was not delivered until sometime in July of 2005.

[11] The defendant accepts that the claimant made the payments of US$8,000.00 at an exchange rate at that time, of $61.75 – that having been January, 2005 and a further J$400,000.00 in May 2005. The defendant though, has contended that said sum of J$400,000.00 was paid after the claimant had been informed by the defendant, that the vehicle had landed in Jamaica, on May 1, 2005. In having then made that payment, the claimant waived her right to consider the late delivery of the vehicle, as constituting repudiation or rescission of the said oral agreement/contract.

[12] The vehicle was delivered to the claimant on September 10, 2005, after all the visible defects had been repaired and also, after some mechanical defects had been repaired. Those repairs were all carried out by his servants and/or agents and at his sole expense. If therefore, the vehicle was defective, when it was delivered to the claimant, the defendant makes no admission as to same and states that he took all steps to repair the damage to the vehicle which was found and known to him and as such, had no knowledge of there having been any such defects at the time when the vehicle was handed over to the claimant. Furthermore, the claimant had been provided by the defendant with a copy of the import entry after the vehicle had been imported into Jamaica and was advised when the vehicle was cleared at customs and delivered to a garage in Top Hill, in or about the end of May, 2005, in order for those repairs to have been effected.

[13] In the circumstances, the defendant has denied that the claimant is entitled to any damages whatsoever and also, that the claimant has suffered any loss and/or damage as alleged, or that she is entitled to any interest on damages.

A Synopsis of the Defendant's Counterclaim and Further Amended Ancillary Claim

[14] The defendant has filed a counterclaim against the claimant and the substratum of that counterclaim is based on the contractual agreement between the parties and their subsequent disagreement, based on same.

[15] The defendant's counterclaim contends that on or about September 5, 2005 the claimant had wrongfully and with malice directed and procured a police officer to arrest the defendant and take him into custody on a charge of fraudulent conversion, based on the claimant's allegation, which was made to police personnel, that the defendant had fraudulently retained her money and refused to deliver the vehicle to the claimant, from his premises at Middle Street, Exchange, in the parish of St. Ann.

[16] As a consequence of the claimant having, as has been alleged by the defendant, maliciously and wrongfully, directed and procured the defendant's arrest, a police officer arrested the defendant and as such, the defendant was kept in custody at the Ocho Rios Police Station between September 5 and 8, 2005, on which latter date, the defendant attended the St. Ann's Bay Resident Magistrate's Court and the criminal charge brought against him, was withdrawn. Accordingly, the defendant was wrongfully imprisoned and deprived of his liberty for three (3) days. The claimant acted out of spite and malice towards the defendant and caused the defendant to be arrested in broad daylight, in a public thoroughfare, whereafter, according to the defendant, the claimant and/or her friends and family, maliciously and unlawfully subjected the defendant to 'a smear campaign,' in the parishes of St. Ann and St. Elizabeth and in particular, the small community of Ocho Rios in St. Ann, where the defendant lived and did business as a used car parts salesman – which was his only source of income. As a consequence, the defendant lost his used car parts business.

[17] The aforementioned actions of the claimant caused the defendant severe shock and mental anguish and subjected the defendant to ridicule and contempt, in addition to humiliation and disgrace. As such, the defendant claims damages and aggravated damages.

[18] The defendant is also pursuing a further amended ancillary claim against the claimant/1st ancillary defendant and the 2nd ancillary defendant and by means thereof, has sought indemnification from the claimant for any damages which may be awarded by this court, against the defendant/ancillary claimant, in respect of the claim for damages for breach of contract, which has been brought by the claimant/ 1st ancillary defendant, against the defendant/ancillary claimant. In the alternative, the defendant has sought, by means of that further amended ancillary claim, to obtain through this court, as against the claimant/1st ancillary defendant, such contribution as this court may deem appropriate, in respect of any damages which may be awarded to the claimant/ 1st ancillary defendant, as against the defendant/ancillary claimant.

[19] Additionally, by means of his further amended ancillary claim, the defendant/ ancillary claimant had, in that court document, which was filed on May 18, 2010, just as had been done by him, in the preceding document, that being his amended ancillary claim form, made it clear that he was seeking to recover from the 2nd ancillary defendant, damages for false imprisonment, arising from the actions of a police officer, namely: Leroy Chambers, who was then a sergeant of police and who had, on September 5, 2005, arrested the defendant and had him held in custody for three (3) days, before he was brought to court and the charge of fraudulent conversion which had been brought against him, withdrawn. As against the 2nd ancillary defendant, the defendant is also seeking damages for malicious prosecution. The defendant's ancillary claim against the 2nd ancillary defendant, was, this court was informed by the parties' counsel, during the trial, settled in terms to be endorsed on counsel's brief.

Legal and Factual Analysis of Defendant's Counterclaim and Ancillary Claim against the Claimant/1st Ancillary Defendant

[20] From a legal perspective, it is apparent that the defendant's counterclaim and ancillary claim against the claimant, significantly overlap one another. This is by no means surprising though, since the counterclaim and the ancillary claim are intended to serve the same purpose. That purpose is to make it apparent to the claimant/1st ancillary defendant, that the defendant/ ancillary claimant is claiming personally against

her, arising from his having been unlawfully imprisoned and maliciously prosecuted as he has alleged.

[21] This court is of the view that it was entirely unnecessary for the defendant to have filed an ancillary claim against the claimant. This is so because our rules of court provide that, 'an ancillary claim' includes a counterclaim, '*by a defendant against the claimant...*' As such, since the defendant had filed a counterclaim against the claimant, it was unnecessary for him to have also filed an ancillary claim. In that counterclaim, he could and should simply have set out the reliefs which he was seeking, that being aggravated damages and an indemnity, or a contribution (as the case may be). A 'counterclaim,' is an 'ancillary claim,' for the purposes of our rules of court (see: **rule 18.2 (1))**. Indeed, under our existing Civil Procedure Rules (CPR), the term – '*ancillary claim*' is to be used in reference to that type of court document which had been filed by the defendant and described as a '*counterclaim and claim to set off.'*

[22] The defendant's counterclaim and ancillary claim against the claimant, can thus and will be merged by this court, for the purposes of their factual and legal consideration by this court.

[23] In that respect, firstly, this court has noted with some concern, that both the ancillary claim and the counterclaim against the claimant, as brought by the defendant, are not as well drafted as they perhaps could and should have been. This is so stated, particularly because neither of those documents, unlike as was done with the ancillary claim against the 2nd ancillary defendant, that having been a claim which now stands as having been withdrawn, has set out in simple and clear terms, the cause (s) of action being pursued.

[24] A short description of the nature of the claim was required. See**: rule 8.7 (1) (a**) **of the CPR** in that respect. Of course though, the omission to do so, can and will be rectified by this court, pursuant to this court's discretion to do so, in accordance with **rules 26.9 (3) and (4) of the CPR.**

[25] Also, the defendant, although having made claim against the claimant for damages and aggravated damages, an indemnity, or a contribution, has not specifically made claim for either general or special damages. The term 'damages' is too broad a term to make it clear to any opposing litigant, or to the court, what type or types of 'damages' are actually being sought. To my mind, general and special damages should have been sought by the defendant as specific reliefs. Once again though, this court can and will rectify that procedural error, since by virtue of **rule 8.7 (1) (b) of the CPR**, whilst a claim form should specify any remedy which the claimant is seeking, this does not limit the power of this court, to grant any other remedy to which the claimant may be entitled.

[26] With all of this in mind, this court has not only treated with the defendant's ancillary claim and counterclaim against the claimant, as a singular document, but also, had treated with same, as constituting a claim by the defendant against the claimant, for general and special damages and also, an indemnity or contribution. The special damages sum being claimed, is specified in the particulars of special damages, as being: Loss of earnings – $300,000.00 per month, for the period, September of 2005 to January of 2006 – $1,500,000.00. The defendant's causes of action against the claimant are: false imprisonment and malicious prosecution. The defendant is, of course, as earlier stated, also seeking to recover from the claimant, costs, interest at a commercial rate and such further or other relief as may be just. Collectively, for the purposes of ease of reference, this court will hereafter refer to the defendant's ancillary claim and counter claim, as 'the defendant's/his claim against the claimant.'

The law as regards malicious prosecution, in respect of a claim brought against a private individual who is a complainant

[27] The circumstances are rare, in which a person who is a complainant to the police, concerning the alleged conduct of another, whereupon, a police officer or a prosecutor, decides to cause the person against whom that complaint was made, to be arrested and criminally charged and subsequently prosecuted before a court, upon that criminal charge, can properly be held liable to the person that was arrested, or criminally

charged or criminally prosecuted, for either false imprisonment, or malicious prosecution.

[28] This court has addressed its mind to those particular circumstances, in at least two cases – **Warrick Lattibeaudiere and Jamaica National Building Society and Catherine Brown an Joscelyn Campbell** – Claim No. 2005 HCV 01066; and **Donovan McMorris and Maurice Bryan** – [2015] JMSC Civ. 203 (hereinafter referred to as, 'the McMorris case').

[29] All of the applicable legal principles have been set out in some detail, in both of those cases and as such, this court will not regurgitate same in any great detail, for the purposes of this judgment.

[30] As was stated in the **McMorris** case (*op.cit*.), '*there are circumstances in which a complainant may properly be considered by a court in this jurisdiction, as having prosecuted a complaint made by him against someone else. It does not though, by any means, automatically follow that because a person makes a false complaint against another individual and because that complainant did do, solely activated by his malice towards the party against whom he has made that complaint, that the said complainant is to be treated as the 'prosecutor' of that complaint, for the purposes of the law governing malicious prosecution.*' The House of Lords' judgment in **Martin v Watson** [1996] 1 A.C. 74 (hereinafter referred to as 'the Martin case') and some important subsequent decisions of the Court of Appeal of England, collectively address the complex question of who should be held responsible for initiating a prosecution when the police and public prosecutors act on information offered, or charges preferred by a private person. The judgment in **Martin v Watson** clearly establishes that the claimant must demonstrate that the defendant acted in such a manner as to be, 'directly responsible for the initiation of proceedings.' (para. 4)

[31] In response to his claim against her, for reliefs based on the torts of false imprisonment and malicious prosecution, the claimant has filed a 'defence to

counterclaim'. In para. 1(a) of that defence, the claimant has stated that she made a report to the police, who acted entirely on their own initiative in arresting and charging the defendant. Further, at para. 1(c), the claimant has stated that at no time did she direct, incite, encourage, procure or assist the police in arresting and charging the defendant/ancillary claimant and having him brought before the St. Ann's Bay Resident Magistrate's Court.

[32] Additionally, the claimant has denied that she acted out of spite and malice towards the defendant and has stated that at no time in making her report to the police, did she allege that the defendant/ancillary claimant had fraudulently retained her money, nor did she state where the vehicle should be delivered from. Furthermore, in defence to the defendant's claim against her, the claimant has specifically alleged that prior to making the report to the police on September 5, 2005, the defendant/ancillary claimant, had, on a prior occasion, admitted to receiving money from the claimant and promised to deliver the vehicle by specified dates which had passed by September 5, 2005.

[33] The legal elements required to be proven by a claimant, in a claim for damages for malicious prosecution, are as follows:

(i) That he was 'prosecuted' by the defendant on a criminal charge; and

(ii) That the prosecution was determined in his favour; and

(iii) That said 'prosecution' was initiated without reasonable and probable cause; and

(iv) That said 'prosecution' was initiated out of malice towards the claimant, by the defendant; and

(v) As a consequence, the claimant suffered loss and damage.

[34] The claimant has understandably, put the defendant to proof as to the loss and damage which he allegedly suffered and has denied that she acted out of malice in making the complaint to the police, against the defendant/ancillary claimant. She has

alleged that there was reasonable and probable cause for her to have made the complaint to the police, which she did. She has not disputed that the prosecution was determined in the defendant/ancillary claimant's favour. Finally, the claimant has denied that she, 'prosecuted' the defendant/ancillary claimant and has, to the contrary, alleged that he (the defendant) was 'prosecuted' by police personnel.

[35] For the tort of false imprisonment to be proven, the claimant must prove that:

(i) He was imprisoned; and

(ii) He was imprisoned by the defendant; and

(iii) The absence of lawful authority to justify the imprisonment.

[36] To put it simply, 'false imprisonment' is the unlawful imposition of constraint on another's freedom of movement from a particular place.' See: **Collins v Wilcock** – [1984] 1 W.L.R. 1172, at 1178. It follows that if a person is arrested, that person is prevented whilst under arrest, from moving about freely, or in accordance with his own will and that said person is thereby, 'imprisoned'. If that imprisonment is unlawful then, the person who either carried out, or is considered in law, as being directly responsible for that imprisonment, would be liable to pay damages, arising from that, 'false imprisonment.' That is though, to be distinguished from a situation in which a complainant has merely taken the necessary formal steps, in accordance with the procedure of the court, to set its officers in motion. See: **Cooper v Harding** – [1845] 7 Q. B. 928.

[37] In the case at hand, there exists no evidence whatsoever, to even remotely suggest that the claimant had either carried out, or superintended the defendant's arrest. The defendant's arrest was carried out by a police officer, namely: Det./Sgt. Chambers and there is no evidence capable of even so much as implying, that it was the claimant who had 'superintended' the defendant's arrest.

[38] As was laid down in the **McMorris** case, '*the mere laying of information which is false in nature and perhaps even maliciously so laid, before a police/ministerial officer,*

cannot serve to render the party who laid that information, liable to the party who is later arrested as a consequence of such false or maliciously provided information, for damages for false imprisonment. Once the information was laid, it would have been for the police personnel to have taken such action based upon that information, as they saw fit.' See: **Ahmed v Shafique** – [2009] EWHC, at (87), per Sharp J. and **Davidson v Chief Constable of North Wales** – [1994] 2 All ER 597, at (28). In the circumstances, the defendant's claim for damages and other reliefs, for false imprisonment, must and does fail.

[39] For the tort of malicious prosecution, this court is of the considered opinion that it can resolve the issue as to whether judgment in respect of same, should be awarded to the claimant or the defendant, by confining itself to the issue of who prosecuted the criminal case for the charge of fraudulent conversion, that was initially instituted against the defendant and, upon no evidence having been offered against him on that charge, the same was dismissed by the court.

[40] There have been a number of judgments in recent times, which have emanated from English courts, that have specifically addressed the, question – who is a 'prosecutor' of a criminal charge? In the following cases **H v AB** – [2009] EWCA Civ. 1092; and **Ministry of Justice (sued as Home Office) v Scott** – [2009] EWCA Civ. 1215, it has been accepted by England and Wales' Court of Appeal, that 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, at least, be actively instrumental in so setting the law in motion. This involves the taking of 'active steps' to ensure that a prosecution results.

[41] Where a prosecution is conducted by an independent public prosecutor, someone who makes a criminal complaint to the police, following upon which, that independent prosecutor, prosecutes a criminal case against the person that said

complaint had been made against, the complainant will not, ordinarily, be viewed by the law, as having been the 'prosecutor.'

[42] It is only in the rare case, wherein the prosecuting authority was unable to exercise its own independent discretion as to whether or not to prosecute a particular person, such that it can properly be concluded that the complainant, 'procured' the prosecution, that the said complainant could be held liable to be ordered by a court of law, to pay damage for malicious prosecution, at the instance of the person who was unsuccessfully prosecuted. This was what was concluded by the England and Wales Court of Appeal, in the **Scott** case (*op.cit.*).

[43] The House of Lords' judgment in **Martin v Watson** (*op.cit.*) has been the most definitive, in answering the question – 'who is the prosecutor?' Subsequent Court of Appeal cases from England, have interpreted, applied and to some extent, helped to clarify the law on this point. The **Martin** case was applied in the **McMorris** case and also, in: **Warrick Lattibeaudiere and Jamaica National Building Society, Catherine Brown and Joscelyn Campbell** – Claim No. 2005 HCV 01066.

[44] The **Martin** case and subsequent cases, have collectively clarified the answer to the question – *Who is a prosecutor*? Those cases have laid down the following, which ought to be applied in Jamaica's courts:

A complainant would be regarded as the prosecutor and be liable for malicious prosecution, if the following conditions are met:

(i) The defendant falsely and maliciously gave information about an alleged crime to a police officer stating a willingness to testify against the claimant and in such a manner as makes it proper to infer that the defendant desired and intended that a prosecution be brought against the claimant.

(ii) The circumstances are such that the facts relating to the alleged crime are exclusively within the knowledge of the defendant so that it is virtually impossible for the police officer to exercise any independent discretion or judgment on the matter.

(iii) The conduct of the defendant must be shown to be such that he makes it virtually inevitable that a prosecution will result from the complaint. His conduct is of a nature that '…if a prosecution is instituted by a police officer, the proper view of the matter is that the prosecution has been procured by the complainant.'

[45] The aforementioned conditionalities ought always to be applied as aggregate and not, as separate conditionalities, so that if only one such applies, that will not be enough. There will undoubtedly occur, from time to time, borderline cases, but those can be resolved by a trial court, by means of reference to a reliance upon the burden and standard of proof. Thus, it is the party who alleges, that must prove and in a civil case, the requisite standard of proof is on a balance of probabilities. As such, in respect of the defendant's claim, it is he who must prove that the claimant prosecuted the criminal case that was instituted against him, upon the charge of fraudulent conversion. That is one of the legal elements required to be proven in a claim for relief, founded on malicious prosecution. Accordingly, since it is the defendant that is alleging same, it is he who must prove same, on a balance of probabilities, just as indeed, he must equally so prove all of the other legal elements of that tort, if he is to succeed in proof of his claim.

What was the evidence led by the parties in support of and in opposition to the defendant's claim for relief based on malicious prosecution?

[46] This court will not, at this stage, recount the evidence in any detail. Suffice it to state that the claimant had, in her evidence-in-chief, via her witness statement, set out the circumstances which caused her to make a report to police personnel, concerning the vehicle which she had paid the defendant to purchase and import from Japan, on her behalf.

[47] She related to this court, that she had agreed to purchase the Nissan X-trail vehicle, 2003, with the assistance of the defendant, who then owned and operated a business place know as: Bird Speed Auto. It was agreed between Ms. Wright and Mr. Burton ('the parties') that the vehicle would have been delivered for a cost of Jamaican

$1.1 million. The claimant paid the equivalent of US$8,000.00 to the defendant – that having at that time, been Jamaican $494,000.00 for the purchase of that vehicle from Japan and a further Jamaican $400,000.00 as importation and customs – related duties/charges and fees. The defendant called the claimant in May of 2005 and then informed her that the vehicle was in Jamaica. It was after she had been so informed, that the claimant had paid the aforementioned $400,000.00.

[48] On June 24, 2005, the claimant received a telephone call from Mr. Burton, who told her that the vehicle was cleared and it would take about two and a half (2½) weeks to be repaired and delivered to her. The defendant then requested the balance of payment. After that telephone call had ended, shortly thereafter, the claimant called back the defendant and informed him that she was aware that she had a payment balance for him, but because of the frustration and lack of communication that she had experienced with him, she was not prepared to give him any further payment, until the vehicle was delivered to her in good working condition, as per their agreement. After that conversation, she did not hear anything further from Mr. Burton, until sometime in July, 2005, when in order to satisfy herself that the defendant had in fact imported the vehicle, she called the defendant and requested from him, some documents, to show that the vehicle was 'here.'

[49] The claimant thereafter received from the defendant's office, a customs import entry form for the vehicle. An agreed document, which was entered into evidence, shows that the sum of $400,000.00 was paid to the defendant on May 6, 2005. This, it should be recalled, was paid to him, to cover the import/customs – related costs.

[50] On July 22, 2005, the claimant called the defendant and asked when the vehicle would be delivered to her and he then told her that it was not ready.

[51] It was in that context that the claimant's evidence, as given during her examination-in-chief, was that on August 18, 2005, as a result of not having either, by then, received the vehicle, or heard anything further from Mr. Burton, that she made a

report to police officer – Det./Sgt. Chambers who had, there and then, made contact with Mr. Burton and told him to come to the police station.

[52] The defendant went to the station while the claimant was still there that day and upon his arrival there, the claimant introduced him to Det./Sgt. Chambers and then presented to Det./Sgt. Chambers, various documentation showing the amount of money paid to the defendant, when such payments were made and the customs import entry form.

[53] There and then, the defendant told the claimant, in the presence of Det./Sgt. Chambers, that the vehicle was located in Top Hill, St. Elizabeth. The defendant then called someone, in the presence of the claimant and Det./Sgt. Chambers, and the claimant promised that the vehicle would be delivered on August 26, 2005. According to the claimant, in evidence-in-chief, as per her witness statement, the defendant there and then, also wrote a promissory note, which was witnessed by Det./Sgt. Chambers. That promissory note was not produced to this court, as an exhibit, during trial.

[54] The vehicle was not in fact delivered on August 26, 2005. Instead, on that date, the defendant called the claimant and told her that the vehicle was not ready. In response to that, the claimant told the defendant to call Det./Sgt. Chambers. It was on September 3, 2005, that the claimant visited the police station at Ocho Rios, St. Ann and gave a statement. The vehicle was not delivered to the claimant until September 10, 2005. The claimant agreed with defence counsel, while she was undergoing cross-examination, that even though she had, in her witness statement, stated that the vehicle had been delivered on September 24, 2005, the same had in fact been delivered on September 10, 2005.

[55] The claimant gave no evidence during her ‘chief,’ that she even knew when the defendant was arrested, or that she had insisted that he either be arrested or charged. She also gave no evidence at that stage of the trial proceedings, of having been even so much as aware that the defendant had been criminally charged. As such therefore,

as at the close of the claimant's evidence-in-chief, there existed no evidence capable of even remotely suggesting that the claimant had 'procured' the defendant's prosecution. Clearly, the investigating and arresting officer – Det./Sgt. Chambers, would have had reason to believe, that if as of August 26, 2005, the defendant had not yet delivered the vehicle, this even though by then, he had been paid a significant sum of money for same, that at least, there existed reasonable suspicion that the defendant may very well not have intended to ever deliver the said vehicle. Whether an arrest was warranted is neither here nor there, as far as the defendant's claim is concerned. Equally so, whether a criminal prosecution on a charge of fraudulent conversion, was warranted. Clearly, the police were able to do and in fact did some investigation, before there was any arrest of the defendant, or any criminal charge/prosecution initiated against him.

[56] The claimant was the only person who testified in support of her claim and defence to the defendant's claim against her. She was cross-examined by defence counsel. She did not contradict herself, during cross-examination, except as regards the date when the vehicle was delivered to her and she agreed with defence counsel's suggestion to her in that regard.

[57] During cross-examination, the claimant gave evidence that she did not know that Det./Sgt. Chambers was going to arrest and charge the defendant and said that she did not give her statement to the police, for the purpose of having the police, arrest and charge the defendant. Instead, she gave the statement, so as to have the vehicle delivered to her. She stated that it was not her decision to file criminal charges. According to her, she was trying to recover her vehicle and so, it became necessary to take action, since she had paid her money and did not get what she had paid for. She sought legal advice, after she had made her formal statement and after the defendant had been arrested. She said that she went to the police station and Det./Sgt. Chambers was available. When asked whether she had expected Det./Sgt. Chambers to 'act' on the complaint which she made to him, her response was that she expected the law to take its course. She also testified that she did not know Det./Sgt. Chambers before she had gone to the police station and complained. Finally, on the issue of what led to the

arrest and criminal charging of the defendant, the claimant admitted that she had gone to the defendant's hearing in the criminal court and also, admitted that she had not so stated, in her examination-in-chief evidence, as per her witness statement.

[58] Once again therefore, during cross-examination, the claimant's evidence came nowhere close to disclosing that she had 'procured' the defendant's prosecution on the criminal charge of fraudulent conversion.

[59] This court has carefully borne in mind, that the burden of proof rested on the defendant to prove his claim. The nature of the claimant's defence to his claim, was nothing other than a denial of same, in particular, a denial that she had ever prosecuted the defendant in respect of any criminal charge or for that matter, directly caused him to be either arrested or criminally charged. In the circumstances, the claimant had nothing to prove, in terms of her defence to the defendant's claim. As such, since, to this court's mind, the defendant gained nothing at all in terms of evidence-in-proof of his claim, through the evidence given by the claimant, it would have been incumbent on him to have proven his claim, if he could have, via the evidence brought before the trial court, on his behalf.

[60] The defendant testified and also, his wife, testified on his behalf. She was not cross-examined and her witness statement, with no amplification, was accepted as her evidence-in-chief. At the close of the defendant's case, there was admitted into evidence, as an agreed statement, the witness statement of Det./Sgt. Chambers. That witness statement had been prepared for the purpose of reliance thereon, by the 2nd ancillary defendant, but since the defendant's claim against the 2nd ancillary defendant was withdrawn during the trial, both the claimant and the defendant were entitled to rely on that witness statement. Same was admitted into evidence during the defendant's case and was not objected to, by the claimant.

[61] This court will now therefore address its mind to the witness statement of Det./Sgt. Chambers and the evidence of the defendant's wife – Maxine Burton. Ms.

Burton's evidence was limited and cannot really assist this court in resolving the critical issue at this time, which is whether the claimant, 'prosecuted' the defendant. She gave evidence that a week before the defendant was arrested, on September 5, 2005, a police officer and another man, whom she had seen before, at Birdspeed Automotive, along with, 'another lady', came and looked at the vehicle and checked the engine and chassis number for it. Prior to that visit, Ms. Burton was informed by the defendant that she should expect a police officer and the boyfriend of the purchaser of the Nissan X-Trail vehicle, to look at the vehicle, which was in the yard. Ms. Burton also gave evidence that the defendant was arrested in September 5, 2005

[62] She saw when the police actually detained him, at his home – police officers had arrived there and enquired as to the defendant's whereabouts, shortly whereafter, the defendant arrived there, in a separate vehicle and was then detained/arrested. Clearly therefore, the vehicle was only delivered to the claimant, five (5) days after the defendant had actually been arrested. This, it must be recalled, was after the defendant had promised both the claimant and Det./Sgt. Chambers, that the said vehicle would have been delivered to the claimant on August 26, 2005.

[63] Clearly too, Ms. Burton's evidence does show that some investigation was conducted by the police, into matters concerning the vehicle. Thus, the police came and checked to make sure as to where the vehicle was located. No doubt, that is why the police officer was checking the vehicle's engine and chassis number – so as to identify it as the vehicle. The fact that the claimant's friend at that time, was present when that particular aspect of the investigation was conducted, does not at all suggest that the police had no discretion to do anything other than arrest or prosecute the defendant.

[64] The witness statement of Det./Sgt. Chambers, suffice it to state, has disclosed the investigation that he conducted into the matter of the payment by the claimant to the defendant for the vehicle, the subsequent importation of the vehicle by the defendant and the defendant's failure to hand over the vehicle on August 26, 2005, as he had

promised. Even then, Det./Sgt. Chambers called the defendant on August 26, 2005, at which time, he was informed by the defendant that the vehicle was sprayed and needed to be buffed, but would be at his shop at White River, by August 29, 2005. On August 29, 2005, Det./Sgt. Chambers went to Birdspeed Auto and saw neither the defendant nor the vehicle. Again, on August 31, 2005, he returned to the defendant's business place, but even as of then, the vehicle was not then there. On September 2, 2005, Det./Sgt. Chambers again went to Birdspeed Auto and looked for the vehicle, but once more, without success. In the final analysis, he obtained an arrest warrant and arrested and charged the defendant.

[65] There is inconsistency between Det./Sgt. Chambers' account as to where and when and who was present when he (Det./Sgt. Chambers) checked the chassis and engine number of the vehicle. This court accepts Ms. Burton's evidence as to same and thus, does not accept Det./Sgt. Chambers' account as to same. That this is so though, does not at all assist this court in determining whether the claimant, 'prosecuted' the defendant.

[66] The defendant was arrested pursuant to an arrest warrant. That means therefore, that he was arrested on the authority of a judicial officer. Once a person is detained on an arrest warrant, it is the law that the person who made the criminal complaint, which ultimately created the scenario whereby an arrest warrant was later issued, cannot be held liable in trespass, for false imprisonment. See: **Austin v Dowling** – [1870] L.R. 5 C.P. 534, at 540, per Willes J and the **McMorris** case (*op.cit.),* at para. 29. That a person is arrested pursuant to an arrest warrant though, does not, in and of itself, preclude a complainant from being successfully sued in a claim for damages for malice prosecution. On this point, see again: **Austin v Dowling** (*op.cit.*), at 540, per Willes J.

[67] This court will not recount the defendant's evidence in any detail. Suffice it to state that it details the basis for the defendant's contention, that the claimant acted falsely and maliciously in having reported his actions as regards the vehicle, to the police. It also details the financial loss caused to the defendant, by the claimant's action

in having allegedly caused him to be arrested and criminally charged. This court will, when addressing the claimant's breach of contract claim, consider his evidence further, but for present purposes, suffice it to state that his evidence does not at all suggest that the police did not act on their own discretion, in having charged him with and prosecuted him for, the offence of fraudulent conversion.

[68] As earlier stated, the making of a false and malicious report to the police, does not equate with the making of an arrest, or even the causing of an arrest, or the prosecution of the party against whom that false and malicious report was made. Instead, it may constitute a basis upon which the tort of abuse of civil process can properly be pursued and could succeed. This though, for reasons as yet unknown to this court, is a tort claim which is rarely, if ever, pursued in Jamaica. See: **Gregory v Portsmouth City Council** – [2000] 1 AC 419; and **Grainger v Hill** – [1838] 4 Bing, N.C. 212; and **Speed Seal Products Ltd. v Paddington** – [1985] 1 WLR 1327. In the circumstances, the defendant has failed to prove his claim for reliefs, founded upon the tort of malicious prosecution. The defendant's counterclaim/ ancillary claim therefore, fails in its entirety and the costs of that claim will be awarded to the claimant.

The claimant's claim for damages for breach of contract

[69] When the vehicle was delivered on September 10, 2005, the claimant paid to the defendant, the remaining sum of $206,000.00 that had, up until then, been owing for same. As such, in total, the claimant paid to the defendant the sum of $1.1 million – which was the agreed upon purchase price for same.

[70] Whilst there was evidence given by the parties, as to the vehicle having been delivered later than expected, that was not, as far as this court is concerned, the primary foundation for the claimant's claim for damages for breach of contract. What is the primary foundation of that claim, is that the vehicle, when delivered, was seriously defective – in terms of either missing or defective parts. The secondary foundation is that the vehicle was delivered late. Paragraphs 7 and 9 of the claimant's particulars of

claim, make it clear that those two aspects constitute the contract breaches being alleged in this claim.

[71] There is no doubt that the vehicle was delivered later than expected. Whilst both parties have agreed, in their respective statements of case, that the parties had orally agreed to make the vehicle sale/purchase transaction and that said oral agreement had been entered into in December, 2005, this court does not accept that. Instead, this court accepts that the said oral agreement was entered into in December, *2004*. That is why the vehicle was delivered on September 10, *2005.*

[72] This court does not accept the defendant's evidence that the claimant was kept updated as to everything concerning the importation, clearance and repairs to the vehicle. This court does though, accept his evidence that that at the time when the parties made that oral agreement, the defendant had told the claimant, that the vehicle would have been delivered in three (3) to four (4) months' time. That evidence is consistent with the claimant's evidence on that point.

[73] Clearly, even if there were importation problems or parts availability problems, that cannot serve to excuse the defendant from compliance with his agreement with the claimant, that the vehicle would have been delivered to her within 3-4 months. Clearly, the vehicle was not in fact delivered until five (5) months later – September 10, 2005. Whether or not the claimant is entitled to any remedy though, based on non-compliance with that aspect, depends on whether that aspect – the statement that the vehicle would be delivered in 3-4 months constituted a term of the party's contractual agreement, or a representation designed to induce the parties to enter into their contractual agreement.

[74] The distinction between terms and representations is important, as the breach of a binding term, gives rise to the usual remedies for breach of contract – damages, rescission, whereas, failure to conform to a mere representation, though in some circumstances giving the right to rescind the contract, will not be remediable by damages unless: -

i) the representation was deliberately false, or in other words, fraudulently made, or

ii) there was a special relationship between the parties and the representation was negligently made, in which event, an action for damages may lie in tort.

[75] The distinction between terms and representations, is all the more significant in this particular case, because the claimant never sought to rescind the contract, due to the delay in the delivery of the vehicle to her. This court agrees with the learned defence counsel's submission that she instead, affirmed the contract, when, upon the vehicle having been delivered to her, late in time, she made the final payment to the defendant, for purchase of same.

[76] In any event though, the claimant has not, in her particulars of claim sought the relief of rescission of contract, nor has she sought any relief, founded upon either fraudulent or negligent misrepresentation. She has instead, rested her case on that which she has alleged, is the defendant's breach of contract in having delivered the vehicle to her, at a later time than the vendor had, on the day of negotiations for the purchase of the vehicle, suggested that same would have been delivered.

[77] '*On some occasions it may be difficult to treat a statement made in the course of negotiations for contract as a term of the contract itself, either because the statement was clearly prior to or outside the contract or because the existence of the parole evidence rule prevents its inclusion. Nevertheless, the courts are prepared in some circumstances, to treat a statement intended to have contractual effect as a separate contract or warranty, collateral to the main transaction.*' See: Chitty on Contracts**,** Volume 1, 26th ed. [1989], at para. 774.

[78] A contract can only arise if there is the '*animus contrahendi'* between the parties. That quoted latin term means: an intention to contract. If therefore, as a consequence of a statement made by a party during the course of negotiations, the parties intended to contract and do in fact enter into contractual agreement based, to some extent, upon

that statement, or if, collateral to the main contract, a party makes statement which the parties intended to be relied on, collateral to the main contact, then, in either such case that statement will be considered as either a term or warranty and if there is a failure to comply with same, such failure may constitute a breach of contract.

[79] In **Oscar Chess Ltd. v Williams** – [1957]1 WLR 1370. Denning, L.J. said – *'…when the seller states a fact which is or should be within his own knowledge and of which the buyer is ignorant, intending that the buyer should act on it and he does so, it is easy to infer a warranty'*

[80] In the case at hand, the claimant's evidence lacked sufficient clarity as to the precise stage of communications as regards the purchase/sale of the vehicle, when the defendant made the statement to her, that the vehicle would be delivered in three to four months' time. As such, from her evidence, it is unclear as to whether that statement was made before or after the contractual agreement had been reached between them, for the sale/purchase of the vehicle.

[81] This court accepts the evidence given by the defendant and undisputed by the claimant, that negotiations pertaining to the sale/purchase of the vehicle, had been taking place over time and that those negotiations began in December, 2004 This court also accepts the defendant's own evidence, as given by him as part and parcel of the examination-in-chief, as per his witness statement, that pursuant to their agreement, in or around January, 2005, the claimant paid the deposit of US $8,000.00 and it was agreed that the claimant would make a further payment at the vehicle clearance stage and then, a further payment to repair the vehicle. The defendant told the claimant that the vehicle would be delivered in approximately 3-4 months. This was, based on his experience in the business, the time it may take for vehicles to be imported, cleared and delivered when they are ordered.

[82] This court has drawn the conclusion that such statement as to the intended/expected time period for delivery, was made after the parties had reached

contractual agreement for the purchase/sale of the agreement and pursuant to that agreement, the claimant paid to the defendant, the deposit for same. This court is of the view that said statement was intended to and did have contractual force and effect. This court considers it as having been a collateral warranty, which was breached by the defendant.

[83] The claimant though, has wholly failed to prove that any specific financial loss resulted to her, as a consequence of the late delivery of the vehicle. Consequently, since the measure of damages for the breach of contract, is to place the claimant in the position in which he would have been, if the contract had been duly performed, it follows that, if the claimant fails to show any actual loss arising from non-performance, she is only entitled to recover nominal damages. See: **Robinson v Harman** – [1848] 1 Exch. 850, at 855 and **The Medianna** – [1900] AC 113, at 116.

[84] In the circumstances, this court has concluded that the defendant breached his contract with the claimant, in respect of the sale/purchase of the vehicle and the delivery of same to the claimant within a stipulated time, but with the claimant having failed to prove any actual loss as having arisen from same, she will only be awarded nominal damages for same, in the sum of $30,000.00. Interest is not recoverable on nominal damages and thus, no interest on same will be awarded.

[85] The primary alleged aspect of breach of contract claim though, concerns the alleged delivery by the defendant to the claimant of a vehicle which was according to the claimant seriously defective in several respects. According to the defendant though, there were only two parts remaining to be installed, as at August 26, 2005, those being the roof rack extension and a vehicle light. Those two items though, were installed by September 10, 2005, which is when the vehicle was in fact delivered.

[86] As part of her evidence-in-chief, as per her witness statement, the claimant gave evidence of the defects that existed with respect to the vehicle, when it was delivered to her. She was permitted to and did amplify, as regards those alleged defects. It should

be noted that the claimant is seeking to recover damages, via this claim, for the repair work that she had to do, to put the vehicle in reasonably good condition. That repair work would have, no doubt, involved the purchase of parts and also, the engagement of an appropriate mechanic and/or vehicle bodywork technician, to install those parts. Thus, the claimant, in her evidence-in-chief, gave evidence via her witness statement, that, separate costs were incurred for the replacement of missing parts and the cost of, 'rectifying defects.'

[87] The claimant is also seeking to recover for the diagnostic cost – this even though, she had provided to this court, no evidence as to who performed that, 'diagnostic.' She is also claiming for the loss which she allegedly incurred, upon the sale of the vehicle, this even though, she has given no details concerning the sale of the vehicle, particularly as to why it was sold at a loss. Furthermore, there exists no evidence whatsoever, capable of even remotely suggesting that at the time when the contract for purchase/sale of the vehicle was entered into between the parties, either party then expected/knew that the vehicle was then being purchased by the claimant for the purpose of resale at a profit, rather than for her personal usage, over time.

[88] The claimant is also claiming damages for renting a vehicle for six (6) days. No receipt has been provided to this court, to support her claim for loss suffered due to that alleged vehicle rental. In addition, the claimant has provided no evidence to this court, as to why such vehicle rental became necessary.

[89] Overall, in support of her claim for actual loss, the claimant has fallen woefully short in proof of same. Not one receipt was produced to this court, as evidence in support of the alleged actual losses. The claimant admitted this, during cross-examination and further, then told the court that Exhibits 15 'F' to 'I' are just general quotations. Surely, she should have either produced to this court, each receipt, or at the very least, explained why they either were not, or could not have been produced to this court, as exhibit evidence. She had, after all, insisted, during cross-examination that even though she had no receipts, she had purchased the items.

[90] Accordingly, the claimant's evidence of her actual losses, is unproven and she has given no evidence as to any capability that she personally possesses to estimate costs of replacement of parts or rectifying either mechanical or bodyworks – related, defects, pertaining to a vehicle. Whilst she has produced to the court, quotations for vehicle parts, those quotations pertain to new parts rather than used parts. In the circumstances, this court has been constrained to conclude that the claimant has wholly failed to prove her actual loss. This court does not accept the claimant's evidence that the vehicle was defective, either in terms of missing body parts or internal mechanics, when it was delivered to her. This court is instead, of the view that at the time of delivery, the vehicle was in what may be described as 'merchantable quality.' It was a used vehicle and this court holds the view that it was never either agreed upon between the parties, or expected by the parties, that the vehicle would have been delivered in a condition, 'like new.' It would have been useful, from an evidentiary perspective, if photographs of the alleged missing parts/defects at the time vehicle delivery had been taken and produced to the trial court. The lack of supportive evidence surrounding the alleged defects, in circumstances where such evidence ought to have been available to the claimant, has caused this court to conclude that the claimant has failed to prove her claim for damages for breach of contract, in that respect.

[91] That being the factual finding of this court, it inexorably follows that this court has concluded that there was no breach of contract by the defendant, in that respect. Accordingly, this court has not considered the pertinent provisions of the Sale of Goods. Act, nor has it given any serious consideration to the issue as to whether or not it was the defendant's responsibility, pursuant to the contractual agreement between the parties, to only repair the visible damage to the vehicle, which had been depicted in the photographs of the vehicle which were shown to the claimant and consequently admitted as evidence at trial.

[92] This court has not given any serious consideration to that issue, because, it is this court's factual conclusion, that not only was the vehicle in good and working condition when it was delivered, but also, it is this court's conclusion that there were

then, no such missing parts as specifically alleged by the claimant which incidentally, were for the most part, missing parts which would have been visibly noticeable, such as broken bracket of left headlamp, twisted rim, two mismatched headlamps, missing radio, damaged roof rack, twisted chassis, window visors missing and some of the other defects specifically alleged by the claimant in para. 25 of her witness statement.

[93] In the circumstances, it is this court's final conclusion that the defendant has wholly failed to prove his claim for reliefs and damages, founded upon the torts of false imprisonment and malicious prosecution. The claimant, on the other hand, has partially failed to prove her claim for damages for breach of contract. She has, in respect of same, failed to prove that she was delivered a damaged/defective vehicle with missing parts and or/mechanical defects. She had though, proven that the defendant breached the contract, by having delivered the vehicle significantly later in time than, as this court has concluded, he had warranted. As the claimant has failed to prove any actual loss as a consequence thereof though, she can and will only be awarded nominal damages of $30,000.00 for same. Interest on nominal damages cannot be awarded. This court will order that each party bear their own costs.

Judgment Orders

i) The claimant is awarded judgment on her claim for damages for breach of contract and is awarded nominal damages in the sum of $30,000.00.

ii) The defendant's ancillary claim and counterclaim against the claimant for reliefs and/or damages, based on the torts of false imprisonment and malicious prosecution, are entirely denied and judgment on same, is awarded in favour of the claimant.

iii) Each party shall bear their own costs.

iv) The claimant shall file and serve this order.

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Hon. K. Anderson, J.