

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV 2006/0259

BETWEEN

COSMOS WILLIAM

Claimant

AND

THE COMPTROLLER OF CUSTOMS
THE ATTORNEY GENERAL

Defendants

Appearances:

Mrs. Lydia Faisal for Claimant

Mr. Dwight Lay for the Defendants

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2008: JULY 29
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JUDGMENT ON ASSESSMENT OF DAMAGES

Mason J

- [1] On 18th December 2002 the first Defendant confiscated the Claimant's motor vessel.
- [2] In spite of an order for its return made by the District Court on 8th May 2003, the first Defendant continued its retention as a consequence of which the Claimant filed a

constitutional motion on 6th April 2006 for breach of his rights under sections 6 (1) and 6 (2) of the Constitution of Saint Lucia.

[3] On 30th October 2006 Edwards J (as she then was) in entering judgment for the Claimant postponed determination of the level of compensation to be awarded in order to allow the parties to negotiate a settlement. There having been no agreement, the court ordered the parties to file submissions with respect to assessment of damages.

[4] The Claimant is seeking the following:

- a) special damages in the sum of \$148,500.00 which represents loss of income at the rate of \$900.00 per week for the period 8th May 2003 to 24th March, 2006 - a total of 165 weeks*
- b) general damages in the sum of \$13, 000.00;*
- c) replacement value of the vessel in the sum of \$30,600.00*
- d) interest; and*
- e) costs*

Special Damages

[5] The Claimant is claiming net loss of earnings of \$900.00 per week which translates to \$3,600.00 per month or \$43,200.00 per year from the date of the wrongful detention of the vessel which was his source of income. Counsel for the Claimant suggests that in order to estimate the extent of the Claimant's loss of earnings, the court ought to take into

consideration the fact that the Claimant was repaying the loan obtained for the purchase of the vessel at the rate of \$910.00 per month; that until seizure of the vessel, he had not been in arrears of that loan, but as a result of the retention, arrears as well as interest have now accumulated.

[6] Counsel for the Defendants submits that whenever a Claimant seeks to recover special damages, the onus is on that person to strictly prove the loss. Counsel contends that the information contained in the Appraisal Report of August 2000 (prepared for the purposes of securing the loan) was merely an analysis of projected income and not evidence of actual pecuniary loss sustained by the Claimant.

[7] It is therefore the Defendants' opinion that the Claimant has failed to prove his entitlement to the special damages claimed.

[8] I am in only partial agreement with the arguments of Counsel for the Defendants.

[9] It is accepted that the Court makes an award of special damages in respect of any consequences reasonably arising from the breach complained of but that those special damages must be averred specially and proved strictly. Special damages are such as the law will not infer from the nature of the act because they are generally capable of substantially exact calculation. There is thus the obligation to particularise the claim for damages, since loss of use of an income earning chattel is a species of special damages. The onus is therefore on a claimant to prove strictly not only his loss but the quantum of it. It is my view however that while as much certainty and particularity must be insisted upon

as is reasonable having regard to the circumstances and to the nature of the act complained of, the remedy available to a defendant presented with insufficient particularity in the claimant's statement of case is to raise a request for further information under Part 34.1 CPR.

[11] Taking into account the demands of the Rules in general and more particularly of the overriding objective, it must be assumed that the Defendants were satisfied with the Claimant's method of proving the level of damages which he was seeking.

[12] That having been said and not to be seen to be departing from the general principle of particularity in the pleading of special damages, I am of the view that it is not enough for the Claimant to nonchalantly claim that he earns \$900.00 net per week from the operation of the vessel or that his entitlement to damages ought to be based on his loan repayment. There must be evidence about the expenses incurred in earning that net income of which he speaks. Except for the project appraisal report prepared in the year 2000 for the purposes of securing the loan to purchase the vessel, there have been no personal records or other documentation produced in support of his claim.

[13] At first blush it would seem then that the Claimant is bereft of any redress. However the Defendants have in effect accepted malfeasance on their part by agreeing to the vessel being "deemed a constructive total loss" and this having been caused by their continued retention of the vessel for a period of three and a half years.

[14] In accepting the Claimant's difficulty in establishing the specific loss he suffered, the court is obliged in those circumstances to do its best on the very limited available evidential basis to recompense the Claimant. As stated by the Privy Council in the Trinidad and Tobago case of Carlton Greer v Alston's Engineering Sales and Services Ltd (2003), when the necessary evidence is not provided but the circumstances warrant it, it is open to the court to give consideration to an award of nominal damages.

[15] As seen from Mc Gregor on Damages 17th edition at paragraph 10-004:

"Nominal damages may be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss. In the present case the problem is simply one of proof, one not of absence of loss but of absence of evidence of the amount of loss.

That paragraph quite aptly sums up our case.

[16] Nominal damages however does not mean small damages but it is the duty of the court to recognize it by an award that is not out of scale. By this I take it to mean that the quantum of damages awarded while not reaching the level requested by the Claimant ought in the court's mind to be sufficiently reflective of his loss.

[17] In the premises I deem that an award of \$50,000.00 should be made. And I so order .

General Damages

- [18] The Claimant considered that an award of \$13,000.00 to be a reasonable sum to be paid as compensation for the breach of his rights to his property.
- [19] On the other hand, Counsel for the Defendants, while admitting that an award of damages should acknowledge the significance and sanctity of the Claimant's constitutional rights, submits that a sum within the range of \$1,000.00 and \$3,500.00 would be adequate.
- [20] Both Counsel made reference to a number of West Indian cases dealing with breach of constitutional rights and in which were considered the general guidelines to be used in assessing damages in constitutional motions but none specifically similar to the present one. In one such case, Christopher Lezarre and Others v Attorney General of Trinidad and Tobago HCA Cv 2098 of 2002 Stollmeyer J summarized these guidelines as follows:

"Awards of monetary compensation for breach of a constitutional right appear based upon three principle factors. First, they are compensatory to the individual whose constitutional right has been breached. This is well recognized (see e.g. Maharaj). Second they acknowledge the significance and sanctity of that right and the need for its strict preservation (see Russell). Third, they can, and should where appropriate, be regarded as some form of deterrent to the state against committing, or permitting, recurrences"

"An award of damages must be commensurate with the right that has been breached, the manner in which it is breached and the consequences that flow

from the breach. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of substantial damages may be called for in addition to the declaration. The quantum of an award will reflect the seriousness of the right that has been breached, the manner in which it was breached and the consequences flowing from the breach, including the element of distress and inconvenience. The quantum will vary from case to case, and will depend upon an assessment of these factors"

"It is inappropriate to award damages for breach of a constitutional right solely by reference to what award might be made in a writ action claiming the equivalent relief, because the latter has no reference to the constitutional right that has been breached. I accept, however, as de la Bastide CJ said in Jorsingh, that in quantifying damages payable on constitutional motions some proportion must be maintained with the levels of damages that have been awarded for wrongful deprivation of liberty, or at common law for personal injuries caused by negligence, or defamation. I also accept what was said in Russell (at page 140 g – h) that the award should not create" ... a precedent for abusive or unreasonable exploitation"

- [21] It had been earlier stated in the Jamaican case of Fuller (Doris) v Attorney General (1997) 56 WIR 337 that an award of damages made against the state for breach of constitutional rights must not amount to a windfall. Petterson JA stated:

“Where an award of monetary compensation is appropriate, the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective, an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the State itself. But that does not mean that the infringement should be blown out of all proportion to reality, nor does it mean that it should be trivialized. In like manner, the award should not be so large as to be a windfall, nor should it be so small as to be nugatory”

That case was one which involved the award of damages for inhuman and degrading treatment and for which the Court of Appeal considered US\$26,000.00 appropriate.

[22] For guidance on the scale of the award the court should make in respect of constitutional damages, Counsel for the Defendant invited the court to consider the dicta in the case of Attorney General v Bufton Civil Appeal No 22 of 2004 where Barrow JA recognized that the established remedy for being kept out of money is an award of interest. A similar award Counsel argues would be appropriate in the present circumstances. Counsel does not however suggest on what figure this court would be awarding interest. I am unable to accept that contention for it might result in the award being nugatory and deprecatory of the infringement of constitutional rights.

[23] While it is accepted that the court in awarding damages should strive to be consistent by making similar awards for similar circumstances, it is to be noted that the circumstances of the Bufton case are dissimilar to the instant case. In the Bufton case, the court was considering, inter alia, the justification for an award of \$250,000.00 made by the trial judge for deferment of payment of compensation by Government and for causing distress and emotional travail to the Claimants. (Barrow JA had cause to note that there could be no compensation for the latter). That award was reduced to \$10,000.00 which was considered as appropriate for an award of constitutional damages.

[24] After having faithfully examined the cases referenced by Counsel for the parties and the guidelines articulated above, I have come to the conclusion that given the peculiar circumstances of our case where the Defendants deliberately and intentionally deprived the Claimant of his property for an unacceptably long period despite an order of court to return it, the sum of \$8,000.00 would be a befitting award.

- a) Wife's Interest in the Business
- b) Mitigation

[25] In the absence of evidence to the contrary, I am prepared to accept the assertions made by Counsel for the Claimant that when the matter first came up for hearing on 8th February 2007 before Edwards J with respect to assessment of damages, the court rejected the Defendants' contentions in their written submissions of 30th January 2007 on these items. They will therefore not be considered here.

Income Tax

[26] While it has been established that an award of damages must not constitute a windfall to the Claimant and even in recognition of the notion that citizens coming within specific remuneration bars are subject to income tax, I make no such deductions preferring instead to leave that responsibility to be pursued by the relevant authorities.

[27] I now make the following award in favour of the Claimant:

1. *Special damages in the sum of \$50,000.00 together with interest at the rate of 6% per annum from the date of the notice of motion to the date of judgment.*
2. *General damages in the sum of \$8,000.00 together with interest at the rate of 6% per annum from the date of judgment until date of payment.*
3. *Replacement value of the vessel in the sum of \$30,600.00*
4. *Costs on the global sum prescribed in accordance with Part 65.5 CPR 2000.*

SANDRA MASON QC

High Court Judge