

EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NUMBER: BVIHCV 2013/0195
BETWEEN:

SHAWN CHINNERY DBA KEY
RENTALS AND CHARTERS

CLAIMANT

AND

DEPARTMENT OF CUSTOMS
ATTORNEY GENERAL

DEFENDANTS

Appearances:

Ms. Karen Reid along with Ms. Ayanne Humphrey of Counsel for the Claimant
Ms. Natalie Sandiford of Counsel for the Defendants

2015: May 6; September 15;
November 16

ASSESSMENT OF DAMAGES

- [1] **GLASGOW, M:** On October 27, 2014 judgment was entered for the claimant (hereinafter the applicant) on the question of liability. At the time of granting the judgment, the court gave directions for evidence to be filed and exchanged and for the hearing of the assessment of damages. The subject of this ruling is the amount of damages that the applicant is entitled to receive as compensation for his losses. The first hearing on damages was conducted on May 6, 2015. At that hearing the parties agreed to attempt an amicable settlement of the issue of damages. It was ordered that the parties should file written submissions if the matter was not settled by July 31, 2015. The court would then consider the matter on the written submissions of the parties. There was to be no further oral hearing as the parties both dispensed with the need to cross examine the witnesses. This ruling follows the parties' disagreement on the quantum of damages to be awarded.

Background Facts

- [2] The applicant is the owner of a registered 38 foot outboard engine boat for which he is licensed to offer tour and charter services to and from the several islands comprising the British Virgin Islands. The facts reveal that he had so plied this trade for over a decade when on June 6, 2013 he was informed that the vessel had been taken by either or both members of the department of customs and/or the Royal Virgin Island Police Force. Following interventions by his then attorney at law, the applicant was told by letter dated June 14, 2013 that the vessel had been seized by officials of the customs department and that it was being held at the Royal Virgin Island Police Force Marine Base as "part of an ongoing investigation". The vessel was said to be an "exhibit" in the investigation.
- [3] On June 17, 2013, the applicant visited the Road Town Police Station where he was arrested for the offence of importing a controlled substance to wit cocaine. After being held for about an hour, he relates that the charge sheet was torn up in his presence and he was released. No further action was taken against the applicant as it relates to this arrest.
- [4] Although the applicant was released without further action by the police or customs, his boat remained under confiscation until December 10, 2013. The boat was returned to the applicant without any further legal action taken by either of the defendants (hereinafter the respondents). The applicant thereafter issued this claim seeking declarations and damages in respect of the wrongful seizure and detention of his property, detinue, trespass, conversion, wrongful arrest and false imprisonment. Following the respondents' concession on liability at the case management conference, judgment was entered for the claimant with damages to be assessed.

EVIDENCE AND SUBMISSIONS FOR THE APPLICANT

Expenses and Lost Income

- [5] The evidence for the claimant was provided by himself, Rasheed Frett, Dwight Callwood and Phyllis Evans. In his evidence the claimant recites that the vessel is his principal source of income. His business offers full and half day charters, full and half day sport fishing trips, "pick-up and drop off" trips, dinner trips and boat rental services. The loss of income suffered during the period is enumerated at paragraph 29 of the applicant's submissions as follows –

- (1) Full day charter trips around the Virgin Islands - \$1,500.000 per trip plus overtime and tips;
- (2) Full day charter trips to Anegada - \$2,000.00 per trip plus overtime and tips;
- (3) Half day charter trips - \$800.00 to \$1,000.00 per trip plus overtime and tips;
- (4) Half day fishing trips - \$1,100.00 per trip plus overtime and tips;
- (5) Full day fishing trips -\$2,500.00 per trip plus overtime and tips;
- (6) Pick - up and drop off trips -\$500.000 to \$1,000 per return trip plus overtime and tips;
- (7) Dinner trips -\$1,000.00 per trip plus overtime and tips;
- (8) Boat rentals without a captain - \$3,000.00 per day;
- (9) Trips to carry employees of the BVI Electricity Corporation \$500.00 to \$1,000.00 depending on the wait time for the trip;
- (10) Overtime was charged at \$50.00 per hour. Tips were received at the discretion of the client.

[6] The applicant pleads that he is a sole operator whose plies his trade seasonally. His business is, for the most part, a cash only enterprise in the sense that there are very little records kept of the transactions done. Evidence was filed to show that in some instances corporate clients like the BVI Electricity Corporation (hereinafter the corporation) issue invoices for the business conducted with the applicant. The court is urged to adopt the approach of Barrow J. in **Joseph et al v Charles et al**¹ where his Lordship accepted "*reasonable and informed estimations*" as proof in a case involving loss of income from the services of a mini bus.

[7] In support of the rates pleaded by the applicant, Dwight Callwood gave evidence that he is also engaged in the same trade and that he is employed from time to time as the captain of the applicant's boat. He collects the fares from the passengers and as such he is quite familiar with the rates charged by the applicant. Mr. Callwood also gave evidence of the rates he charges when he captains his own vessel. He admits that his vessel is somewhat smaller than the applicant's boat. However, the cited rates are well within the range of the sums charged by the applicant. Mr. Callwood also depones that the business is largely a cash enterprise.

¹GDAHCV Claim No. 2002/0077

[8] Mrs. Evans, who is also a tour and charter operator, gave evidence of her rates which, like those of Mr. Callwood, are somewhat within the range of those charged by the applicant. Mrs. Evans admits that her boat is also smaller than that of the applicant and as such her rates, like Mr. Callwood's, are slightly lower than the applicant's rates. Mrs. Evans also indicates that she subcontracted work received from the corporation to the applicant. The rates she recites for such trips are consistent with the rates set out by the applicant in his evidence. Mrs. Evans' evidence is that the frequency of the trips undertaken by the applicant on behalf of the corporation may increase during the hurricane period or where there is bad weather or a big event on the island of Jost van Dyke. She confirms that the applicant undertook two trips for the corporation on June 4th and 5th, 2013 just before his vessel was seized and detained by the respondents.

[9] In terms of his actual loss of income, the applicant states that on average he conducted 1 - 2 charters per week during the months of April to September which are the slow months for charter business. The charter season commences in October when the average number of charter trips ticks up to about 2 - 3 trips per week. The high volume season stretches from November to March and during that time the applicant claims that the number of charters amounted to more than 5 trips per week. Business with the corporation was done mainly between Jost Van Dyke and Tortola. The trips involved taking corporation employees to and from those islands. During the hurricane season the corporation's demand for his services was on average of 3 - 4 trips per week. Sometimes the employees had to be taken to and from these islands twice in one day. There was an extra charge if he had to wait for the employees.

[10] The applicant asks the court to take all the variables into consideration including the cash nature of his trade and its seasonal engagement. He offers the following figures as his income in an average week –

- (1) Two full day charters - $\$1,500.00 \times 2 = \$3,000.00$;
- (2) One half day charter - $\$900.00$;
- (3) One full day fishing trip - $\$2,500.00$;
- (4) One vessel rental - $\$3,000.00$;
- (5) Two pickup and drop off trips for the corporation with a 2 hour wait time $\$600.00 \times 2 = \$1,200.00$;

(6) Two pickup and drop off trips otherwise - $\$750.00 \times 2 = \$1,500.00$

The total average weekly income would be \$12,100.00.

[11] The applicant supplies the following average weekly sums to be deducted from the foregoing average weekly income as expenses incurred in earning his income –

(1) Fuel costs which is pegged at \$4.60 per gallon. The fuel capacity of the vessel is 360 gallons. The applicant estimates that each 100 gallon of gas permits 3 - 4 full day trips or 10 or more pick – ups and drop off trips. He says that a full tank would be sufficient to operate the full average weekly trips submitted at paragraph 10 above. His weekly fuel costs amounted to \$1,656.00 per week;

(2) Assistant fees. The applicant's evidence is that he utilised Mr. Callwood's services as an assistant on trips where the group is very large or on full day trips. While the assistant's services were not required on every trip, the applicant asks the court to accept 2 average weekly full day trips and 1 full day fishing trip as the occasions on which an assistant would be required. The assistant was paid in the range of \$150.00 to \$200.00 per trip. The average weekly cost for an assistant is suggested as \$525.00 (a median of \$175.00 x 3 trips);

(3) Captain's fees. Mr. Callwood was also called upon to captain the vessel from time to time. He was paid in the range of \$250.00 to \$500.00 for these services for full day trips and \$150.00 to \$200.00 for half day trips. He was not hired as an assistant and captain at the same time. The applicant assesses this cost as \$175.00 (median average) x 2 trips = \$375.00;

(4) The applicant also accepts that there would be costs associated with cleaning and maintaining his boat. He estimates this cost to amount to about \$500.00 per month or \$125.00 per week;

(5) The total average weekly expenses to operate for one week would therefore be \$2,656.00. The total average weekly expenses were deducted from the total average weekly income to produce a total average weekly income of \$9,444.00 ($\$12,100.00 - \$2,656.00$).

Period of Loss

[12] In terms of the period for computing the loss of income, the applicant states that the vessel was seized on June 6th 2013 and returned on December 10, 2013 in a damaged condition. He spent 8 days cleaning and repairing the same. The full extent of the damage to the boat was not apparent until December 28, 2013 when he attempted to use it to ferry passengers. The boat was then taken to Mr. Rasheed Frett, a certified marine technician who rendered his assessment on January 2, 2014. The assessment found that the damage to the boat was caused by improper removal, salvage and storage. The following issues were identified –

- (1) Three (3) direct injectors for the port engine were not functioning and needed to be replaced;
- (2) The propellers and shaft of the port engine, centre engine and starboard engine were all bent and had to be replaced;
- (3) The lower unit of the starboard engine was damaged and had to be replaced.

Mr. Frett gave evidence in these proceedings.

[13] The applicant's evidence is that since he had lost his principal source of income, he could not complete the necessary repairs to the vessel until July 2014. He had to fix the vessel in a piecemeal fashion over this time when he earned income from other work. He submits that he accepts that he had an obligation to mitigate his losses by seeking the soonest repairs to the primary source of his income. He posits however that '*... where a claimant delays carrying out repairs because of impecuniosity the claimant will not be prejudiced by his circumstance.*'² He concedes that he ought to have acted with more alacrity and requests that the court finds that he ought to have completed the repairs in a 3 month period beyond December 2013 rather than July 2014. This would mean that the repairs should have been completed by March 31, 2014. The period of loss of income would then flow from June 6, 2013 when the vessel was detained until March 31, 2014 (a period of 43 weeks) when it ought reasonably to have been repaired and returned to full commercial use. The loss of income claimed is therefore \$9,444.00 (the average weekly income) x 43 weeks (the period of loss) for a total loss of income of \$406,092.00.

² Joseph et al v Charles et al GDAHCV 2002/0077 at paragraph 15

Additional Loss of Income and Other Expenses

[14] There is an additional sum claimed for lost income. When the applicant received his boat on December 10, 2013 he spent 8 days cleaning and making repairs to it. He expended \$1,359.00 on cleaning materials and \$3,700.00 making repairs to the gel coating. Notwithstanding these repairs, the vessel was non functional on December 28, 2013. As a result the applicant was forced to forego a full day trip to Anegada and 3 (pick- up and drop off trips between Cane Garden and Jost Van Dyke. The total lost income from these trips amounted to \$5,000.00. As stated above the vessel was taken to Mr. Frett whose diagnostic testing was billed at \$2,373.48. The remedial works were estimated at \$11,467.65

Loss of Use

[15] The applicant relies on the case of McMaster v Attorney General et al³ where an award of \$5,000.00 was granted for a 60 day loss of use of a fishing pirogue. The applicant argues that his vessel is larger, more sophisticated and would have provided greater use and enjoyment. He argues for an award of \$15,000.00

Wrongful Arrest and False Imprisonment

[16] The claim for an award under this remedy is said to be based on awards in similar cases. The applicant relies on Everette Davis v the Attorney General⁴ where the claim was brought for breaches of the claimant's constitutional rights. The court in that case ruled that in cases of long detention a fixed sum should be awarded for the initial detention and a further sum should be given for each day that the wrongful detention continued. The sum of \$20,000.00 was awarded for the initial detention and the sum of \$500.00 for each day of detention thereafter.

[17] In Rhymer v Commisioner of Police⁵, the court granted the sum of \$20,000.00 as damages for unlawful detention and \$1,000.00 for wrongful arrest where the claimant was detained for 3 hours. The applicant seeks an upward adjustment of the sum awarded on the grounds that this case is more than 10 years old.

³ SVGHVC2009/0326

⁴ SKBHCV 2013/0220

⁵ BVICA 1997/0013

- [18] In the case of George v O'Brien⁶ , the claimant was allowed the sum of \$60,000.00 in damages for false imprisonment and \$10,000.00 in exemplary damages after his 19 hour unlawful detention. In Shanniod Bass v Attorney General⁷, the claimant was awarded the sum of \$30,000.00 for false imprisonment of more than 7 hours and \$10,000.00 as aggravated damages.
- [19] The applicant in this case urges the court to award the sum of \$20,000.00 for his unlawful arrest. He claims that his situation was aggravated by the fact that he was arrested after voluntarily visiting the police to give information about the seizure of his boat. There was no basis for his arrest on charges of trafficking in cocaine. Should the court disagree with him, he asks the court to award a sum of at least \$10, 000.00 to \$15,000.00

RESPONDENT'S EVIDENCE AND SUBMISSIONS

- [20] The respondent's evidence is set out in two witness statements filed by Pamphil Prevost and Simon Power. Both witnesses are officers of the Royal Virgin Islands Police Force. The evidence of both police officers is largely a repetition of the history of what transpired from the time the vessel was seized to the time of its release. Their evidence does not offer much help in resolving the question of whether the applicant is entitled to damages and if so, the quantum of such damages.
- [21] Mr. Power offered some insight on the question of damages at paragraph 21 of his witness statement where it is recounted that the vessel was inspected by Caribbean Marine Surveyors Limited on August 23, 2014. A valuation report dated September 11, 2013 is said to have been prepared thereafter by Caribbean Marine Surveyors Limited on the state and condition of the vessel. Mr. Power also disputes the assertion that the vessel was damaged while in the custody of the police. He claims that every precaution was taken in moving the vessel and as such "*there was no way possible that the damage occurred during its removal.*"⁸ In fact he asserts that during the time that the vessel was stored at the police marine base it was never placed in a position to cause any technical or mechanical damage to the same.

⁶ DOMHCV 2010/0013

⁷ SKBHCV 2010,0312

⁸ Paragraph 23 of the witness statement of Simon Power

[22] I can attach little weight to what Mr. Power says about the state of the boat during its time at the police marine base or upon its return to the applicant. For one thing, the report from Caribbean Marine Surveyors Limited has not been produced to this court. Even if the report was placed before the court I am not certain how much weight could be attached to the findings of an inspection conducted in August 2013 when the vessel was thereafter detained until December 2013. Further, Mr. Power's account flies in the face of expert evidence placed before the court from Mr. Frett. There is nothing to suggest that Mr. Frett's assessment and conclusions were anything but fair and sound. Compounding this all is the fact that the respondents never confronted Mr. Frett on any of his testimony regarding the inspection of the vessel.

[23] Regarding whether the applicant is entitled to damages and how much should be paid, the respondents argue that special damages should only be awarded in the sum of \$16,841.13 which is supported by the receipts attached to the applicant's affidavit in support of the assessment of damages. It is said that special damages must be specifically pleaded and proved. As it relates to damages for wrongful seizure and detention of the vessel, this head of loss is also challenged by the respondents. The respondents make the claim that the applicant is unable to prove his losses hereunder because he has not complied with the terms of the Virgin Islands Merchant Shipping (Caribbean Small Commercial Vessels) Regulations No. 7 of 2004 (hereinafter the regulations). While it is acknowledged that the applicant is a licensed tour and charter operator, the respondents contend that he has failed to exhibit a certificate of inspection as required by section 7(2) of the regulations or that he has been exempted from the requirement to obtain the certificate (regulation 4). Regulation 11 makes it illegal for a small commercial vessel to proceed to sea or attempt to proceed to sea on a voyage or excursion unless it has a certificate of inspection. A vessel to which the regulations apply must have in command a person who is the holder of a Boat Master's Licence. The respondents asks the court to reject the applicant's claim for damages for lost income based on the wrongful detention of his boat since he has provided no evidence of compliance with the regulations.

[24] The respondents however go on to submit that if the court does award damages for loss of income, the award must be a nominal award of the sort granted in **McMaster v Attorney General**⁹ where

⁹ SVGHVC2009/0326

the claimant failed to prove his losses. Costs incurred as usual expenses along with sums due under the Payroll and Income Tax Act must then be deducted. The respondents' proposal for an award for loss of income is –

Period of Loss - June 7 to December 10, 2013

Day Charters

\$700.00 per day x 2 trips per week (\$1,400.00 X 26 wks) = \$3,6400.00

Pick up and Drop off services

\$600.00 x 3 trips per week (\$1,800.00 x 26 weeks) = \$4,6800.00

Fishing Trips

\$2000.00 x 1 trip per month \$2,000.00 x 6 = \$1,2000.00

Total \$95,200.00

Deductions

Expenses

Fuel (\$1,656.00 x 26 weeks) \$43,056.00

Captain's fees for boat charters (\$150.00 x 26 weeks) = \$7,800.00

Cleaning and maintenance (\$100 per week x 26 weeks) = \$2,600.00

Captain fees for fishing trips (\$500 x 6 months) = \$3,000.00

Captain fees for pick up/drop off (\$150.00 x 3 trips per week x 26 weeks) = \$11,700.00

Taxes

Payroll tax @ 10% \$9,520.00

Social security @ 8.5 % \$8,092.00

Total deductions \$74,968.00

Total loss of income \$20,232.00

- [25] In respect of loss of use and enjoyment, the respondents point out that this was not pleaded on the statement of claim and as such nothing should be awarded. Regarding false imprisonment, the respondents rely on the following quote from the decision in Belfon v CPL #48 Alex Fletcher and others¹⁰

"This loss covers loss of liberty, injury to feelings, the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status and injury to reputation caused by the false imprisonment. There was little evidence provided as to the injury suffered and

¹⁰ [2014] ECSCJ NO 35

none opposing, I am satisfied that the incident would have caused shock to the equilibrium of the claimant, the incident being unjustified and in a public place and in the presence of family and friends. The defendant had to be bailed by his mother which would have caused the claimant some embarrassment. Damages for false imprisonment are to be considered before any basis for aggravation. While there is little guidance on the calculation of an appropriate award, I borrow the guidance of the English Courts in Thompson v The Commissioner of Police of the Metropolis and HSU v Commissioner of Police of the Metropolis [1998] QB 498 CA where a sum of £500.00 was held to be appropriate for the first hour, with the sums to be awarded after the first hour being on a progressively reducing scale, such that for a 24, hour period an award of £3,000.00 should be appropriate. I am inclined to use a similar application. The claimant, from the evidence, was in custody for no longer than a 12 hour period. It is appropriate in the circumstances to award the claimant under this head the sum of \$1500.00"¹¹

- [26] The respondents distinguish the **Belfon** case from the present situation on the grounds that the claimant in that case was detained for nearly twelve hours. The applicant in this case was not charged, was not bailed and his arrest did not take place in a public place. The respondents further point out that there is no evidence before the court of any injury to the applicant's feelings or reputation that would justify the type of award made for false imprisonment in the **Belfon** case or indeed any award for aggravated or exemplary damages. They suggest that the court award the sum of \$1,000.00 for the wrongful arrest and detention. If the court is minded to award any sum for aggravated or exemplary damages, this sum ought to be limited to \$3,000.00.

FINDINGS AND AWARD

Loss of income

- [27] The parties dispute whether an award should be made under this head of loss and how much should be awarded. The respondents' position is that the applicant must both plead and prove his losses. He has not shown how he has suffered loss beyond the amount set out in the receipts attached to the affidavit in support of the claim of damages. It is their view that the applicant is not entitled to any loss of income or any expenses beyond the sum of \$16,841.13 set out in the statement of claim. Additionally, no award should be made due to the applicant's failure to show that he has complied with the certification conditions dictated by the regulations. The respondents suggest that if the court is minded to award anything under the head of loss of income, the approach of the court in the **McMaster** case is commended. The court in **McMaster** awarded loss

¹¹ [2014] ECSCJ NO 35 at paragraph 15

of income based on a rate of loss of \$1,000.00 per week as pleaded on the statement of claim where the claimant failed to provide evidentiary material to support the claim on the assessment of damages for a rate of loss of \$1,200.00 per week.

Failure to comply with the regulations

[28] I agree with the respondents that the applicant must comply with the laws of the territory if he is to ply his trade. However, there is no evidence before the court that the applicant failed to comply with the regulations. Indeed the applicant has produced to this court a copy of his business licence issued by the Department of Trade & Consumer Affairs which licence permitted him to ply his trade of boat rentals and charters. The licence shows that it was current at the time of the seizure and detention of the boat. It is quite clear that he ought to have his boat inspected and issued with a certificate of inspection before going on any voyage to sea. The captain of the vessel would also have to be similarly certified. The regulations make it an offence to proceed on a voyage without the requisite certifications in respect of the applicant's boat and its captain. Having produced his licence to trade, I believe the respondents should have taken the opportunity to cross examine the applicant or produce evidence that he failed to comply with the regulations. There is no such evidence before the court. I am to assume that the applicant would be aware of this statute and the attendant repercussions for non compliance therewith. As matters stand at this juncture, there is evidence before this court that the applicant was validly licensed to conduct the trade for which he has claimed loss.

Lack of proof of special damages

[29] In terms of the respondents' charge that the applicant should not be awarded his claim for loss of income due to a paucity of evidence in that regard, there is no such basis for the court to proceed in this case. Indeed in **McMaster** the learned master, after noting the "*inadequate and unreliable*" evidence in support of the claim for loss of income, went on to observe that

*"the fact that the claimant is unable to prove his earnings by way of salary slips etc, is no bar to him recovering special damages, Although he cannot prove loss of earnings, so long as he has shown that he has suffered a loss, he can still be awarded a nominal sum."*¹²

[30] The respondents argue that this court should award loss of income based on the same nominal award approach. I am more inclined to adopt the approach taken by the court in **Joseph** based on the facts before me. In the **McMaster** proceedings there was a palpable lack of evidence or simply unreliable evidence which hampered the court's effort to assess the claim for losses in relation to expenses and loss of income. There was great variance between the allegations set out on the pleadings and what was provided as evidence at the assessment of damages. In some instances, the court found the evidence to be *"bare and ... not very helpful..."* The court in **Joseph** had no such difficulty with the evidence which was accepted as *"reasonable and informed estimations"* which ought to be accepted as proof in the absence of specific documentation and in the absence of contrary facts. The learned judge relied on the decision of the Trinidad and Tobago court of appeal in **Grant v Motilall Moonan Ltd**¹³, where the court of appeal ruled on the question of lack of receipts produced by the appellant at assessment and found that

*"although special damages must be proved strictly the appellant had prima facie established the cost of the articles and as the respondent had not attempted to challenge the values placed on them the only courses open to the master were to accept the appellant's claim in full or to apply her mind judicially to each item and its value; and as the values were not unreasonable they would be allowed in full."*¹⁴

¹² SVGHVC 2009/0326 at paragraph 29

¹³ (1998) 43 WIR 372. The claim in **Grant v Motilall** was brought for damage to property. At the assessment of damages, the appellant provided a list of the items damaged along with their prices. The list of items was compiled on the day of the accident. She could not provide the court with the receipt for the goods that were damaged or the dates when the goods were purchased. She also admitted that she had not engaged a valuator to assess the value of the goods. The respondents insisted that the appellant had to provide strict proof of the special damages. The master agreed with the respondents and disallowed the claim for the lost items. An ex gratia payment was granted. On appeal of this ruling, the court of appeal found that the prima facie evidence of the cost of the articles coupled with the failure of the respondents to challenge the evidence was sufficient to propel the court at assessment to consider the claim in full or to apply her mind judicially to each item and its value. The court of appeal overruled the decision of the master and allowed the claim for special damages in full.

¹⁴ **Joseph et al v Charles et al** GDAHCV 2002/0077 at paragraph 7

[31] The applicant's evidence in support of these claims has been set out above in this judgment. There has been no cross examination or challenge to what he claimed to be the expenses he has incurred or to his loss of income. In addition to his own evidence of his usual charges for his charter and other services, he has presented witnesses who are engaged in the very trade to state their experiences and what they charge for similar activities. They have all given cogent and consistent written testimony which has assisted this exercise. I have no hesitation in accepting their statements along with the statements made by the applicant as candid and reasonable estimates of the rates charged by the providers of boat rental and charter services during the period under review. I will therefore allow in full the applicant's evidence of the rates to be applied in determining the loss of income.

Period of loss

[32] In respect of the period of loss of income, the applicant's evidence is that the boat was detained from June 6, 2016 and released in December 2013, a period of just over 6 months. He was unable to complete the repairs thereto until July 2014, some 7 months after the date of its release. He accepts that he had a duty to act more expeditiously to mitigate his losses. He requests that the court allow a 3 month rehabilitation period after his boat was returned to him in December 2013. I find the applicant's disposition regarding the applicable period of loss to be quite realistic and consistent with the approach appropriate in determining mitigation of loss.

[33] The respondents do not propose any assessment beyond the period for which the vessel was detained, that is to say, from June to December 2013. I assume that this posture is entirely consistent with the view expressed by Mr. Prevost that there was no damage to the vessel. I have already expressed the view that I attach very little weight to Mr. Power's contentions. Expert evidence given by Mr. Frett has been placed before this court and I have accepted the same. Mr. Frett's evidence is quite elucidatory of the state of the boat conducted after an assessment performed contemporaneously with its return by the respondents to the applicant. A reasonable period for assessment and repairs must therefore be allowed when the period for loss of income is being computed under this head of loss. Having regard to the extent of the damage found by Mr. Frett coupled with the fact that this vessel was the primary source of the applicant's income, I will

accept the period of 3 months to facilitate repairs as proposed by the applicant. This means that the period of loss would total 42 weeks, that is to say, from the time of the detention until the time that the applicant ought to have completed the repairs.

Award for loss of income

[34] The applicant's average weekly trips are also accepted as reasonable estimations of his weekly voyages. I also accept the applicant's evidence regarding the expenses for fuel, maintenance and other fees. These expenses must be deducted to arrive at an accurate figure to award for loss of income. The total weekly expenses amount to \$2,656.00. The figure for loss of income would therefore be \$12,100.00 (total average weekly income) minus \$2,656.00 (the sum for average weekly expenses) multiplied by 42 weeks (the period of detention of the boat plus a reasonable period allowed for repairs thereto) which gives a total of \$398,648.00. There is an additional loss of income for a full day trip to Anegada and 3 pick-up and drop off trips between Cane Garden and Jost Van Dyke which could not be conducted on December 18, 2013. Based on the applicant's proposal of average weekly losses, I assess this figure at \$4,250.00 (\$2,000 for a full day trip to Anegada and 3 pick-up and drop off trips at \$750.00). The respondents ask me to deduct income tax and social security from the award for loss of income. The applicant is aware of his obligations to pay taxes on his income and is expected to comport himself accordingly. No deductions for taxes or social security will be made at this juncture.

Other Expenses

[35] The applicant has exhibited evidence of the costs of diagnostic testing being \$2,373.48, costs of repairs to the propellers, shafts and lower unit being \$11,467.65, costs of cleaning the boat and repairing its gel coating being \$3,700.00 and the cost of cleaning materials being \$1,359.00. These sums are awarded as claimed. These expenses total \$18,900.13.

False Imprisonment

[36] The applicant was arrested for the offence for the serious charge of trafficking in cocaine. He was released after one hour without further action by the state. No reasonable basis or reason was

given for this police conduct. It is quite evident that he was wrongfully arrested and detained. He must be compensated accordingly.

[37] It can be safely concluded that the process of awarding damages for the tort of false imprisonment is an imprecise exercise of judicial discretion where the court principally weighs the

*"injury to liberty, i.e. the loss of time considered primarily from a non – pecuniary viewpoint, and the injury to feelings, i.e. the indignity, mental suffering, disgrace and humiliation with any attendant loss of social status and injury to reputation."*¹⁵

[38] Damages may also be considered for "any resultant physical injury, illness or discomfort..."¹⁶ and "any pecuniary loss which is not too remote..."¹⁷

[39] Circumstances which aggravate or mitigate damage may also form part of the deliberation when determining the amount of an award of damages.¹⁸ Exemplary damages may also be granted along the now familiar Rookes v Barnard¹⁹ categorization.²⁰ Awards made in similar cases usually guide the exercise of the discretion given to the court in these circumstances.

[40] The position of the parties on the quantum of damages to be awarded for the tort has been set out above. I do not agree with the applicant that his situation warrants an award of \$20,000.00. He has presented no evidence of public humiliation or other injuries to feelings and the entire affair ended in just about an hour. Notwithstanding, it is quite clear that it must have been quite distressful and embarrassing to be wrongfully arrested by the police and detained by them for whatever period of time. I would award the applicant the sum of \$10,000.00 as damages for his wrongful arrest and detention.

¹⁵ McGregor on damages, 18th edition at paragraph 37-011

¹⁶ Ibid at paragraph 37-014

¹⁷ Ibid at paragraph 37-015

¹⁸ Ibid at paragraph 37-017

¹⁹ [1964] AC 1129

²⁰ Lord Devlin's classification of the award in instances of oppressive, arbitrary or unconstitutional conduct by government servants, conduct calculated to result in profit and statutory imposition.

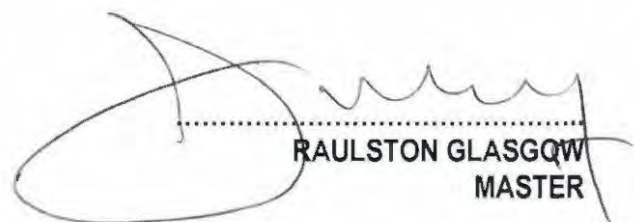
[41] There is no evidence of aggravating elements in this case and as such no aggravated damages are awarded. On the question of exemplary damages, I find equally that none should be awarded. At the highest the conduct of the police ought to attract severe censure for unwarranted overzealousness and inexcusable overreaching. However, I do not find that their conduct reached the level of oppressive, arbitrary or oppressive conduct for which an award is usually made in cases of false imprisonment. In **Belfon**, the learned master granted exemplary damages in a case where the claimant was severely beaten, wrongfully arrested and unlawfully detained for several hours by police officers. The claimant was taunted and insulted by officers while he was at the police station. He had to later receive medical attention for injuries received at the hands of the police. It was plain that the conduct in that case attracted an award of exemplary damages. The conduct in this case, while egregious, has not descended to a standard which might, in other cases, be properly condemned by an award of exemplary damages.

Loss of Use and Enjoyment

[42] There has been no basis set out in the pleadings or the applicant's application for the assessment of damages for an award of the sort granted in **McMaster** and as such none is granted.

Interest, Costs and Total Award

[43] The total award before interest and costs is \$431,798.13. The respondent suggest an award of interest at 3% from the date of the incident, that is June 6, 2013, to the date of this award, November 16, 2015 and interest at 6% thereafter along the lines of the award of interest in the **Belfon** case. I would adopt this approach. Interest at 3% per annum from June 6, 2013 to November 16, 2015 would amount to \$31,607.62 for a total of \$463,405.75. The applicant is entitled to prescribed costs in the sum of \$39,456.52. The applicant is therefore awarded total damages of \$502,862.27 with interest accruing at 6% per annum until payment. I thank counsel for all their assistance in this exercise.


RAULSTON GLASGOW
MASTER