IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. C.L. B 015 OF 2001

BETWEEN	**B & D TRAWLING LIMITED**	**CLAIMANT**
AND	**CPL. RAYMOND LEWIS**	**FIRST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**SECOND DEFENDANT**

Mrs. Jeneice Nelson-Brown instructed by Chancellor and Company for the claimant
Mrs. Nicole Foster-Pusey and Miss Tasha Manley instructed by the Director of State Proceedings for both defendants

October 12, 13, 14, 28, November 4, 18, 25, December 2, 9, 2005 and January 6, 2006

MALICIOUS PROSECUTION AND DETINUE

SYKES J

The issues

1. Had anyone been at sea on the evening of Saturday, July 15, 2000, in the vicinity of Bonner Reef, Pedro Banks, he would have seen Lieutenant Steve Batchelor of the Jamaican Coast Guard and his boarding party, boarding two vessels, the Caribbean Queen (CQ) and the Geronimo. The observer would have also seen the Lieutenant's interaction with the captain and crew of both vessels. If he were close enough to hear the conversations, the observer would have heard that the captain of the CQ was Mr. Leonardo Chavalier and Mr. Nelson Cooper, the captain of the Geronimo. If the observer remained for sometime after the vessels were boarded, he would have seen approximately 20,000lbs of conch on board the Geronimo but none on board the CQ. Later, he would see the Lieutenant examining the licences of both vessels and realize that the Geronimo had an expired fishing licence whereas the CQ had a valid one. One

of the last things the observer would have seen is the Lieutenant communicating with Coast Guard Cutter, Belmont Point, that was stand to, nearby. Finally, he would see the Belmont Point escorting both vessels back to mainland Jamaica because the Lieutenant formed the view that the vessels were fishing illegally.

2. It is agreed, between the parties, that the Geronimo had no licence to fish for conch. The vessels were owned and operated by B & D Trawling Limited (B & D), the claimant in this matter. B & D is a company engaged in fishing and exporting sea food. Mr. Roderick Francis is the managing director and life blood of the company. He testified on behalf the claimant in this matter. B & D operates in an industry that is regulated by the Fishing Industry Act (FIA) and other legislation.

3. To return to our narrative. Both vessels were escorted back to Port Royal, Jamaica. It was slow going. They did not arrive at Her Majesty's Jamaica Ship Cagway, Coast Guard Headquarters, until Sunday, July 16, 2000. Little did the Lieutenant or indeed anyone foresee that a seemingly routine interdiction by the Coast Guard would become a legal quagmire in the hands of Sergeant Lewis. That the Sergeant got himself into an unnecessarily difficult position was in no small part due to the improper exercise of statutory powers vested in the Licensing Authority and subsequent attempts to disguise this fact with a view to making the decisions appear legitimate. This left Mrs. Foster-Pusey and Miss Tasha Manley the unenviable task of trying to succeed where all the King's horses and all the King's men had failed.

4. By way of informations dated November 14, 2000, the claimant was charged with three offences. These were (a) information number 12412/2000 charging B & D with "unlawfully operated an unlicensed vessel to wit MV – Caribbean Queen a fishing boat without the said boat been (sic) licensed by the Licensing Authority contrary to section 8(3) of the Fishing Industry Act" (the CQ information); (b) information number 12413/2000 charging B & D with "unlawfully operated an unlicenced vessel to wit MV – Geronimo a fishing boat without the said boat been (sic) licenced by the Licensing Authority contrary to section 8(3) of the Fishing Industry Act" (the Geronimo information) and (c) information number 12414/2000 charging B & D with "did fish for conch during the open season but without a quota issued by the Minister of Agriculture contrary to the Fishing Industry (Conservation of Conch) Regulation (sic) (March 2000)

Reg # 4 (sic) made pursuant to 25 (sic) of the Fishing Industry Act" (the quota information).

5. The CQ information was withdrawn by the prosecution on December 28, 2000. There is no question that this was a sufficient determination of the criminal matter in the claimant's favour on which it could base the claim for malicious prosecution. Based up on my analysis of the legislation set out below, the prosecution had no choice in the matter because the purported cancellation of the licence issued to the CQ by the letter dated May 26, 2000, did not and could not, in law, amount to a valid exercise of the statutory power vested in the Licensing Authority.

6. On the Geronimo information, B & D entered a plea of guilty on December 28, 2000. The sentence was a fine of JA$200 or thirty days imprisonment. I must pause to observe that the alternative to the fine was irregular because a company cannot be imprisoned. The guilty plea is consistent with the claimant's position that the Geronimo never had a licence to fish for conch.

7. The conch quota information was adjourned sine die on January 4, 2001. According to Mr. Francis, the reason for this was that the power of the Minister to issue conch quotas was challenged in Suit No. M 32 of 2002 which was before the Supreme Court. Mr. Francis said that the learned Resident Magistrate was of the view that given the challenge that had been made to the Regulations made under the FIA it would not be wise to proceed on the criminal charge. This explanation was not challenged by the defendants. The claimant also used adjournment sine die to support his claim for malicious prosecution.

8. The issues in this case are whether Sergeant Raymond Lewis maliciously prosecuted B & D in respect of the CQ and quota informations and whether he wrongfully detained the CQ. Mrs. Foster-Pusey has raised the issue of whether the adjournment of a case sine die is a sufficient determination in favour of the claimant to support an action for malicious prosecution. All these issues will be dealt with in this judgment. It is important to understand the legal framework in which the claim arose in order to understand the significance of the evidence.

The legal framework

(a) The regulation of the fishing industry

9. The FIA was passed in 1976 to regulate the fishing industry. The Act contains a licensing regime for both fishermen and fishing vessels. It also speaks to the management of fishing areas. Under section 4 of the FIA the Minister (meaning the Minister of Agriculture) may designate a public officer to be the Licensing Authority. The person so designated, for the purposes of this case, was Mr. André Kong, Director of Fisheries. When the person is so designated, that person has the power to grant licences on such conditions as he sees fit. Under section 5 of the FIA fishermen who wish to use any of the fishing methods stated in the schedule to the Act must be licensed. There are two types of licences. The difference between the two is this, if the licence is not a temporary one then it continues in force for two years or such longer period as the Authority may specify, whereas the temporary licence continues in force for such period as may be stated in the licence. By virtue of section 8 of the Act boats engaged in fishing must be licenced, unless exempted by the Minister. Here too, the licence is granted by the Licensing Authority if the applicant has met the statutory requirements. To engage in certain types of fishing activity the law requires the licensing of both fishermen and fishing boats. Section 15 of the FIA confers on the Licensing Authority power to refuse to grant, cancel or suspend licences. Any person aggrieved by the exercise of the power granted to the Licensing Authority may invoke the appellate procedures set out under section 16 of the Act.

10. Section 15 states three bases upon which a licence may be revoked. These are where the licensee (a) fails to comply with the Act; (b) fails to comply with any of the regulations made under the Act or (c) commits a breach of any of the conditions of his licence. Section 16 permits an appeal to the Minister in cases of cancellation or suspension of licences. Significantly, section 16 (3) says that the cancellation or suspension of the licence shall not take effect until the expiration of thirty days or on the determination of any unsuccessful appeal. In order to make the appeal meaningful, section 16(2) requires that the Licensing Authority communicates his decision, together with the reasons, to the licensee. This is nothing more than elementary natural justice. Thereafter the licensee has thirty days after the decision and reasons have been communicated to him to appeal to the Minister.

11. The effect of this is that when a licence is granted to either a fisherman or in respect of fishing vessel under the FIA, the power to cancel or suspend the licence is circumscribed. Any cancellation or suspension has to be for one of the reasons set out in section 15. The cancellation or suspension does not take effect immediately. The thirty-day period begins only from the date of the communication of the decision and reasons to the licensee and not from the date of the decision to cancel or suspend the licence. In the absence of any deeming provision in the FIA, it seems that the Licensing Authority ought to have proof that its decision and reasons were communicated to the licensee, if it wishes to take action against a licensee for continuing any activity after the license has been revoked. It would seem to me that this must be so because criminal sanctions may follow after cancellation of the licence. Further, should the licensee appeal, the cancellation or suspension does not take effect until the appeal has been heard and a decision made by the Minister to uphold the decision by the Licensing Authority to cancel or suspend the licence.

12. Any one who wishes to fish for conch has to be licensed under the FIA. That is to say, the fishermen and the boat must be licenced. Apparently, in the world of conch fishing, two vessels are required. One is known as a housing vessel and the other, the catching vessel. The former accommodates the fishing crew, fishing canoes, fishing equipment and other, necessary crew such as the captain, cook and so on. The housing vessel cannot store any of the conch caught by the fishermen. Indeed it cannot engage in the actual catching of conch. The catching vessel, as the name suggests, catches and stores the conch.

13. Mr. Kong testified that any one who wishes to fish for conch also needs to have what is known as an individual conch quota or conch catch quota. The quota is issued by the Minister. The other preconditions before actual conch fishing can begin are (a) the Minister has to declare the fishery management area open and (b) these areas have to be gazetted. The purpose of these two requirements is to indicate the areas where conch fishing can take place.

14. The claimant and the defendants agree that before 2000 no regulations were issued that authorised the Minister to issue conch quotas. It is agreed that such a power is not in the FIA. Consistent with the understanding that the FIA did not grant the power to issue conch quotas regulations were passed in 2000 to fill this gap. Prior to 2000, the

issuing of conch quotas was based upon a "gentleman's agreement" between the Minister and the conch harvesters. The conch harvesters "accepted" the quotas because they recognised the desirability of not over fishing the conch stocks. I also understand from the evidence that established conch harvesters did not have to go through the rigorous licensing process. It got to the point where licences were issued to established fishermen unless there was some good reason not to do so. Additionally, the established harvesters, over the years, had come to "know" what their quota would be even before it was granted. This knowledge was based on previous years' allocations.

15. This brings me now to the Fishing Industry (Conservation of Conch) (Genus Strombus) Regulations, 2000. According to Mrs. Nicole Foster-Pusey, these Regulations confer on the Minister the power to issue conch quotas. Mrs. Foster-Pusey agreed that the Regulations have not in express terms conferred the power on the Minister to issue conch quotas. How then does one arrive at the position that the Regulations give the Minister this power? Mrs. Foster-Pusey submitted that the power is necessarily implied from the body of the Regulations and section 25 (f) of the FIA. That section gives the Minister power generally to make regulations for a variety of matters including paragraph (f) that speaks to conservation of fish. Fish is defined in the FIA to include conch. She says that the issuing of individual conch quotas is a conservation measure. She next referred to articles 2, 3 and 4 of the Regulations.

16. Article 2 contains definitions. Article 3 says that the maximum weight of 50% cleaned conch which may be landed during the period outside of the closed season (for conch) shall not exceed the National Allowable Catch. Article 4 speaks to a certificate as evidence of the individual catch quota. The licensed fisherman cannot catch more than the quota allocated to him and the quota allocated shall not be transferable. On any reading, these three and other articles, in the Regulations, are predicated on the existence of the power to issue individual conch quotas, since they do not in terms confer the power to issue any conch quota.

17. To meet the implications of this conclusion, Mrs. Foster-Pusey, uncharacteristically sought refuge in that oldest of fallacies – petitio principii (begging the question). Her analysis goes like this: neither the FIA nor the Regulations gives the Minister power to issue individual conch quotas. The Regulations speak to individual conch quotas, therefore the power to issue individual quotas exists. This leaves us to assume the

power exists when it is very thing that is being established. This point is all the more critical when it is realised that criminal sanctions are imposed for a breach of the Regulations. An offender may be fined, imprisoned or both. It is a remarkable thing for a person to find himself in prison on the basis of Mrs. Foster-Pusey's analysis. I do not have to decide on the validity of the Regulations because the claimant withdrew its challenge to them in closing submissions.

(b) The law on malicious prosecution in Jamaica

18. At this point, I need to go to the law and remind myself of certain basic principles. The first one being that in a claim for malicious prosecution it is not for the defendant to prove that he had reasonable and probable cause for the prosecution, though if he succeeds in doing this it is a complete defence. The burden is on the claimant to prove a negative, namely, the absence of reasonable and probable cause. The second thing (and as far as Mrs. Foster-Pusey is concerned the law in Jamaica on this issue is in a deplorable state) is that the claimant may succeed if he proves either the absence of reasonable and probable cause **or** malice (see ***Flemming v Myers and The Attorney General*** (1989) 26 J.L.R. 525 C.A.). Mrs. Foster-Pusey was quite passionate about this decision of the Court of Appeal of Jamaica. She submitted that it has changed the traditional understanding of the tort of malicious prosecution. She urged me to "return" to the conventional understanding which was that the claimant has to prove (a) that he was prosecuted by the defendant; (b) the prosecution was determined in his favour; (c) the prosecution was without reasonable and probable cause; (d) the prosecution was malicious and (e) damage. She submitted that section 33 of the Constabulary Force Act does not remove the requirement for the claimant to prove all the elements just stated. She said that the effect of ***Flemming*** is that police officers were placed in a worse position than civilians. To understand this submission I need to set out the material parts of section 33

> *Every action to be brought against any constable for any act done by him in the execution of his office, shall be an action on the case as for a tort, and in the declaration it shall be expressly alleged that such act was done* ***either maliciously or without reasonable and probable cause****...*(my emphasis)

19. The Court of Appeal in ***Flemming's*** case decided to give the statute the meaning that appears on the face of reading the section. I am bound by this decision. I cannot take up Mrs. Foster-Pusey's invitation. Furthermore, the wording seems so deliberate that it would difficult to say that the legislature was not making it easier to succeed in the tort of malicious prosecution against police officers. It could hardly be contended that the legislature was unaware of the existence of the tort of malicious prosecution when enacting this provision in 1935. Before leaving this aspect of the case I must say that it is more than troubling that I, a trial judge, am asked to ignore a decision of the Court of Appeal. The decision has been in existence for sixteen years and as far as I know no attempt has been made to have it reversed by our highest court or by legislation. Since ***Flemming's*** case the House of Lords has reaffirmed the common law ingredients of the tort in ***Martin v Watson*** [1996] A.C. 74. That case is now ten years old. The House specifically approved ***Clerk & Lindsell on Torts***, 16th ed. (1989), p. 1042, para. 19-05. There is the judgment of that great West Indian jurist Wooding CJ in ***Wills v Voisin*** (1963) 10 W.I.R. 50. There is more than ample grist for the Attorney General's mill. If the Attorney General disagrees with the Court of Appeal he should take it to the Judicial Committee of the Privy Council or seek to reverse it by legislation rather than inviting lower courts to disapply the decision. I hope that this is the last time such submissions are made in these courts.

20. It is convenient to deal at this point with the issue of whether an adjournment sine die is a sufficient determination in favour of the claimant to ground a claim for malicious prosecution. Mrs. Foster-Pusey submitted that it is not. I do not agree with her. All the reasons she articulated could apply to a nolle prosequi yet no one has suggested that a nolle prosequi is insufficient to ground the tort of malicious prosecution. A nolle prosequi does not finally determine the guilt or innocence of the accused. Indeed, he can be prosecuted even after the entry of a nolle prosequi. If that is so, why isn't an adjournment sine die sufficient? The defendant can still be prosecuted. I therefore conclude that the adjournment sine die of information 12414/2000 (the quota information) is a sufficient determination in favour of B & D to enable them to initiate the action for malicious prosecution.

21. From what has been said so far it is clear that two requirements have been met so far in this action. These are (a) the claimant was prosecuted by Sergeant Lewis and (b)

there was a determination in favour of the claimant. The issues on this aspect of the claim are whether (a) there was an absence of reasonable and probable cause or presence of malice in relation to the CQ and quota informations and (b) damage.

22. Mrs. Foster-Pusey has put forward the familiar quotation from Hawkins J in ***Hicks v Faulkner*** 8 Q.B. D. 167. However, for the reasons given by Lord Denning (as he then was) in ***Glinski v McIver*** [1962] A.C. 726, 758 – 762, I prefer not to use the formulation of Hawkins J. It is misleading and bristles with the potential for error in analysis. As Lord Denning pointed out, honest belief in the guilt of someone is of very little moment if there was nothing on which a proper case could be laid before the court. The honest belief is not so much related to the guilt of the accused (for that is not a matter for the police or prosecutor but the courts) but rather to whether there was an honest belief in the facts as he understood them at the time the charge was laid even if those facts turn out to be untrue or mistaken. If the police officer had no honest belief that the facts put forward by him were true, then clearly, he would not have reasonable and probable cause. At this point, I should say that in the law of malicious prosecution the question is not simply whether the facts as alleged, on an objective view, would cause a reasonable person to launch a prosecution. The mind of the prosecutor is relevant because a prosecution is not put on by an abstraction. Someone has to take responsibility for the prosecution. Equally, an honest belief in the charges laid is no protection if it turns out that the charges were based up on the flimsiest and most inadequate of grounds.

23. Mrs. Foster-Pusey raised the issue of legal advice allegedly received by the Sergeant from Miss Malahoo, then Crown Counsel in the Office of the Director of Public Prosecutions (DPP). The submission was to the effect was that the officer had reasonable and probable cause to lay the charges because he received legal advice and this act of seeking legal advice is evidence of his bona fide belief in the charges he laid.

24. There is not much authority on the effect of legal advice in this area of law. However such authority as there is suggests that the person relying on legal advice has a lot of ground to cover. Lord Radcliffe in ***Glinski's*** case said that "*if his belief is said to rest on legal advice, I think that the court is entitled to know positively, not merely by inference, what the advice was and upon what instructions it was obtained*" (see page 756). Viscount Simonds in the same case said that he would find it difficult "*to say that [the]*

officer acted without reasonable and probable cause" if that officer through out acts upon competent advice assuming "*throughout that he has put all the relevant facts known to him before his advisers*" (see page 745). I adopt these statements as correct. Merely to say, "I was advised to lay the information by so and so", is insufficient. The Sergeant had to prove by affirmative evidence the facts he placed before Miss Malahoo or any other prosecutor. There is no evidence of what was told to Miss Malahoo, therefore the Sergeant cannot rely on this principle. In any event, as I shall make clear in my analysis of the evidence, I do not believe the Sergeant contacted Miss Malahoo or any prosecutor and specifically sought advice about the charges to be laid. I now turn to the law relating to detinue.

(c) Detinue in the context of a seizure by law enforcement officials

25. Waddington J.A. in ***George and Branday Ltd v Lee*** (1964) 7 W.I.R. 275, 277 delivering the judgment of the Court of Appeal, said that "*the gist of the cause of action in detinue is the wrongful detention, and in order to establish that, it is necessary to prove a demand for the return of the property detained and a refusal, after a reasonable time, to comply with such demand. The authorities establish that a demand must be unconditional and specific*".

26. Donaldson J (as he then was) in ***Alicia Hosiery v Brown*** [1970] 1 Q.B. 195, 207 provides a succinct and accurate statement of the law relating to detinue.

> *A claim in detinue lies at the suit of a person who has an immediate right to the possession of the goods against a person who is in possession of the goods and who, upon proper demand, fails or refuses to deliver them up without lawful excuse.*

27. These two passages capture the essence of the law of detinue and state the ingredients the claimant must prove in order to succeed.

28. In the case before me it is accepted that B & D had the immediate right to possession of the boat. The issues are whether the CQ was in the possession of Sergeant Lewis and, if so, whether there was a proper demand and wrongful refusal. Possession here means custody or control of the defendant with knowledge that he so has it. There is the further sub-issue of how the law of detinue operates in the context of detention by law enforcement officers; an issue I now address.

29. The law is quite clear that the ability of the law enforcement officials to seize and retain items is not unlimited. There is no law that confers on any law enforcement

personnel indefinite powers of indefinite detention of property. The legal position in relation to goods allegedly involved in or to be used as evidence was stated unambiguously by Lewis J.A. in ***Francis v Marston*** (1965) 8 W.I.R. 311 (Court of Appeal of Jamaica), where he said at page 312

> *There is no doubt that at common law the police have in certain circumstances power to seize and retain property which may afford evidence of the commission of a crime. The cases show that on the lawful arrest of a person the police are entitled to take and detain property in the possession of the arrested person which may form material evidence on the prosecution of any criminal charge; that where a seizure of property would be otherwise unlawful the interests of the State will excuse it if the property ultimately proves to be capable of being used as evidence on the trial of some person for a crime committed by him; and that where the taking of property is thus excused the police may retain it until the conclusion of any charge with respect to which it is material.*

30. His Lordship then went on to state the juridical basis of this power. He said

> *The basis of these powers is the necessity of ensuring that material evidence is available on the prosecution of the person charged and that his trial is not rendered abortive by the inability to produce such evidence as maybe in his possession.*

31. The learned Justice of Appeal stated a constraint on this awesome power. Lewis J.A. stated

> *But this presupposes that either at the time of the seizure or at least promptly thereafter some person is arrested or charged for an offence on the trial of which the property seized is material evidence. No case was cited to the court in which such seizure has been excused where it is not accompanied by an arrest but is followed sometime later by the issue of a summons and I express no opinion on this point.*

32. The Court of Appeal of England and Wales had reason, within five years of the Jamaican Court of Appeal's decision, to examine the powers of detention of goods by police officers. Lord Denning M.R. came to the same conclusion as Lewis J.A. ***Ghani v Jones*** [1970] 1 Q.B. 693 decided that the police cannot and must not keep an article longer than is reasonably necessary to complete investigation or preserve it for evidence (see page 709). The very learned Master of the Rolls added "*[a]s soon as the case is over, or it is decided not to go on with it, the article should be returned*" (see page 709). This decision was approved by the House of Lords in ***Regina v Commissioner of Police of the Metropolis*** [2002] 2 A.C. 692. This statement by Lord Denning is very significant because it is stating explicitly that there is an affirmative duty on the police to return the goods if they are not going to use it as evidence in the case or is no longer relevant to their investigations. The citizen therefore is doubly protected. The police

must return the goods once it is determined that they are not going to use it for evidential purposes and the citizen can demand the return of his good. If Lord Denning is correct, and I accept that he is, then it seems to me that the continued detention by the police of a chattel after they have decided not to use it for any purpose relating to the investigation becomes unlawful at that point. In light of this affirmative duty on the police, it seems to me that once it becomes clear to the police detaining the chattel that the citizen is claiming the property, the police cannot adopt an indifferent stance. They either release or detain for a lawful purpose connected to the case under investigation. It may be that the law has developed to the point that in relation to detention of goods by law enforcement personnel an action for unlawful detention can be grounded in either (a) the failure to comply with their affirmative duty to return the goods or (b) a proper demand and wrongful refusal to deliver up the goods. The case before me has been presented as one of proper demand and wrongful refusal.

33. The most difficult aspect of the instant case is determining, from the evidence, whether there was a demand and refusal of the vessel. The question of whether there has been a demand and refusal is a question of fact and is therefore subject to the rules of evidence. No authority has been cited to me to say the demand must take a particular form of words. Equally, no case has been cited to me to indicate that a demand cannot be inferred from the circumstances of the case.

34. I believe that the best way to resolve this issue of demand and refusal in this particular case is look at the matter teleogically. That is to say to look at the reasons and policy behind the development of the rules applicable to an action in detinue to see if the policy and purpose of the law have been met in the circumstances of this case. Why does the law say that the demand must be specific and unconditional?

35. In the law of detinue *specific* means that the demand has to be for specific goods and not goods in general (see ***Nixon v Sedger*** (1890) 7 T.L.R. 112). The rational for a specific demand had to do with the forms of judgment possible in an action for detinue and the enforcement mechanisms available to the successful claimant. Diplock LJ (as he was at the time) in ***General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd*** [1963] 1 W.L.R. 644 stated that there are three forms of order in an action for detinue. These are (1) for the value of the chattel as assessed and damages for its detention; or (2) for return of the chattel or recovery of its value as assessed and

damages for its detention; or (3) for return of the chattel and damages for its detention. This was the situation after the passage of section 78 of the Common Law Procedure Act of 1854.

36. Section 78 states

> *The Court or a Judge shall have Power, if they or he see fit to do so, upon the Application of the Plaintiff in any Action for Detinue of any Chattel, to order that Execution shall issue for the Return of the Chattel detained, without giving the Defendant the Option of retaining such Chattel upon paying the Value assessed, and that if the said Chattel cannot be found, and unless the Court or a Judge should otherwise order, the Sheriff shall distrain the Defendant by all his Lands and Chattels in the said Sheriff's Bailiwick, till the Defendant render such Chattel, or, at the Option of the Plaintiff, that he cause to be made of the Defendant's Goods the assessed Value of such Chattel; provided that the Plaintiff shall, either by the same or separate Writ of Execution, be entitled to have made of the Defendant's Goods the Damages, Costs, and Interest of such Action.*

37. Rowlatt J (as he then was) explained in ***Bailey v Gill*** [1919] 1 K.B. 41, 43

> *"Before the Common Law Procedure Act, 1854, where an action was brought for the wrongful detention of a chattel, the form of the judgment, if for the plaintiff, was that "the said A. B. do recover against the said C. D. the goods and chattels aforesaid or the said sum of - l. for the value of the same," and the Common Law Courts had no power to compel the defendant to adopt the alternative of returning the goods. The defendant could always satisfy the judgment by paying the assessed value. By s. 78 of the Act of 1854, a new form of execution of that judgment was introduced, the Court being empowered to "order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed." But the form of the judgment remained as before in the alternative, giving the defendant an option of paying the value, so that the form of execution did not necessarily follow the judgment".*

38. The defect in the procedure before the Act was that there was not much the court could do to compel the defendant to deliver up the chattel *in specie* despite the order of the court. The court could order the return of the goods but defendants could thumb their noses at the court. Malevolent defendants could elect to pay the value rather than return the good – an attractive option if the chattel might increase in value over time. This defect has led some commentators to say that the defendant had an election to either deliver the goods or pay the value. This is erroneous. It was the lack of an effective enforcement mechanism that "gave" the defendant a choice. If the claimant wanted the goods *in specie* he had to go the Courts of Chancery (see Diplock L.J. in ***General and Finance Facilities Ltd v Cooks*** at page 651). The innovation brought by the Act was that the Common Law Courts could now order delivery up of the chattel *in*

specie without giving the defendant the option of paying its value backed up by draconian enforcement measures. This new method of execution was designed to put pressure on the defendant to deliver up the chattel *in specie*. The new method of execution did not do away with the necessity to assess the value of the chattel because it was possible that the defendant could not or would not produce the good. Thus the power given to the common law courts under the Common Law Procedure Act had little impact in the actual form of judgment given in practice. In any event, the claimant was always entitled to damages for detention of the goods, hence the three forms of judgment mentioned above. I have not been able to find, in the time available, any provision, in Jamaica, similar to section 78 of the Common Law Procedure Act. These, then, are the implications of the word *specific* in detinue – the defendant must know what specific good he is accused of detaining and should return. He would also know the value of the good he might be asked to pay should judgment be given against him.

39. What may amount to a demand can be a close thing as the following two cases show. Although these cases were actions in trover, where conversion and not detinue is the claim, there is nothing to suggest that demand and refusal in detinue and trover have different meanings. In the case of ***Needham v Rawbone*** 115 ER 291 the evidence before the court was that the defendant entered the premises of the claimant, took an inventory of goods, locked up the room and prevented the claimant's servants from having access to the rooms. Lord Denman CJ non-suited the claimant on the basis that there was no evidence of conversion. Admittedly, the report is not fulsome but the case has been understood since then to show that Lord Denman wrongly withdrew the case because there was some evidence of demand and refusal fit to be left to the jury (see ***The English and Empire Digest*** Vol. 46 (Repl) pg 478 para. 238. The case was applied in ***Thorogood v Robinson*** 115 ER 290). This understanding is possible only on the hypothesis that the attempt by the servants to enter the room with all of what that entails, in all the circumstances, was sufficient to raise for the consideration of the jury the issue of whether there was a demand and refusal for the goods. Similarly, in ***Smith v Young*** 170 ER 1014, in an action in trover, the claimant verbally required the defendant to deliver up the lease. The action failed not on the ground of there being no demand but because it was not within the power of the defendant to comply with the demand at the time it was made. A question posed by Lord Ellenborough in the ***Smith***

case suggests that it is the effect on the defendant's mind that is important. He asked if the words spoken upon this occasion were sufficient to convey to the defendant's mind the demand and the terms of it, without reference to the paper writing, to which the witness responded in the affirmative.

40. A demand for the return of the goods is essential because it allows the person who is detaining the goods to determine the validity of the claim of the person who is claiming the goods. This becomes even more important when the person making the demand purports to be a representative of the person who is entitled to immediate possession. It is possible that the defendant may have acquired possession of the goods ignorant of the claimant's claim. It is for these reasons why the person in possession does not have to return them the instant the demand is made (see Fletcher Moulton L.J. in ***Clayton v LeRoy*** [1911] 2 K.B. 1031, 1051 and Dambrot J in ***Musson v Memorial University of Newfoundland*** Docket no 01-CV-205261 (judgment of the Ontario Superior Court delivered February 21, 2002)). These reasons indicate why the clearer the evidence of demand the easier it is to sustain a claim for detinue, assuming that other requirements are met such as the defendant being in possession of the chattel at the time the demand is made or estopped from denying that he had possession and the person making the demand is entitled to immediate possession. But it does not necessarily follow that absent ideal evidence the claimant is destined to fail. So much for the legal context. I now turn to the factual context and the evidence.

Evaluation of the evidence

(a) Malicious prosecution

41. Even though I have placed the evidence under sub-headings, this does not suggest that the analysis under one heading has no bearing on the other. Both are intimately connected and should be so read. The purpose of the division is more for ease of understanding.

42. On March 31, 2000, DYC Fishing Limited obtained an ex parte injunction. The result of the injunction was dramatic. The entire conch exporting business came to a standstill. The injunction effectively prevented the Minister from issuing any conch quotas until the validity of the Regulations was determined by the court. The parties reached a settlement without any resolution of the validity of the Regulations.

43. Mr. Roderick Francis in his witness statement states that on April 14, 2000 the CQ received a licence to fish for conch. This was fourteen days after the granting of the injunction. It is agreed that Mr. André Kong, the Director of Fisheries and the Licensing Authority, issued the licence. The licence expired on July 31, 2000. Under this licence, the CQ was permitted to fish in the Pedro Banks area only. The only condition imposed was that she could take part in fishing only as a housing vessel. The letter of April 14, 2000, to Mr. Francis indicated that fishing for conch could not take place until (a) the Minister under section 12 of the FIA had declared which areas were open to fishing; (b) the gazetting of the production areas and (c) all crewmen met the requirements of the Veterinary Division.

44. On May 12, 2000, Mr. Kong granted fishing licences to 39 Dominican fishermen. This was approximately six weeks after the injunction was granted. These men were to assist B & D in harvesting conch. Mr. Francis received a letter, dated May 19, 2000, from Mr. Kong purporting to suspend the licences of the Dominican fishermen. The reason given in the letter was that an injunction had been granted by the Supreme Court prohibiting the Minister of Agriculture from issuing conch quotas. There was no allegation that the licensee had committed any of the breaches stated in section 15 of the Act that would authorise the Licensing Authority to suspend or revoke the licences of the fishermen. The letter also purported to suspend the licences with "immediate effect", a decision that was contrary to section 16 of the FIA which unambiguously states that the suspension of a licence shall not take effect until the expiration of thirty days after the receipt of the Licensing Authority's decision and reasons. In any event, by letter dated May 25, 2000, B & D appealed to the Minister. The effect of this letter was to delay the coming into effect of the suspension until the Minister heard and determined the appeal.

45. Mr. Kong wrote a second letter dated May 26, 2000, which Mr. Francis contends he never received. This letter purports to cancel the licence granted to the CQ with "immediate effect" because of (a) the present level of confusion in the fishing industry and (b) the current suit against the Ministry of Agriculture. B & D was informed that it was to surrender its fishing licence within five working days of receipt of the letter. Section 15 of the FIA does not provide any power, express or implied, to cancel a licence for the reasons stated in the May 26 letter. Even Mr. Kong admits this. The consequence

of this is that the licences of the Dominican fishermen and the CQ were valid and effective up to and including July 15, 2000.

46. Mr. Francis provides convincing testimony surrounding the issuing of these licences after the Supreme Court had issued an injunction restraining the Minister from issuing any conch quotas. He said there was a meeting in or around April 2000, shortly after the injunction was granted, involving the Minister of Agriculture and other Ministry officials, including Mr. Kong and other conch fishermen (Mr. Sydney Francis and Mr. Tunkoo) and a decision was taken to permit them to harvest, store but not export conch because the view was that the injunction would soon be lifted. This was the solution devised because some of the conch harvesters had brought in fishermen from overseas at great expense. The strategy had another component. This was to be fought on the legal front. The product was to be held "until the Attorney General's lawyers [had] the injunction lifted, then on this being successful we would then be issued quota and export quota". This was the plan, Mr. Francis says, that led to the issuing of licences to the CQ and fishermen. This April meeting also led to the understanding that the quota, when issued to him, would be around 200,000lbs. It was not entirely clear whether this was the export or catch quota but on a balance of probabilities I conclude that it was the catch quota. This would have been an after-the-fact quota because B &D was to be "allowed" to reap 200,000lbs during the currency of the injunction and to hold it until the injunction was dissolved. Therefore since the injunction would soon be lifted, the issuing of licences was only a step on the road to full resumption of conch fishing. The impression conveyed to me by Mr. Francis, which I accept, was that the prevailing mood in the Ministry of Agriculture was that a Supreme Court injunction "was no big thing". The injunction was a "minor irritant" that would soon be removed. This is a much better explanation than Mr. Kong's feigned ignorance.

47. Mrs. Foster-Pusey submitted that this is a collateral issue and has nothing to do with the claims. I say that no case arrives in court without a larger context. A legal dispute is nothing more than the inability of the persons to resolve their difficulty without judicial determination. If there is admissible evidence that sheds light upon the dispute, subject to questions of how much of the background is admissible and relevant, a court should not deprive itself of valuable information. In my opinion, the context in this case has

enabled me to assess the credibility of the witnesses who testified before me. Credibility does not exist in a vacuum. I set out, for contrast, Mr. Kong's version.

48. I reiterate that Mr. Kong was the Director of Fisheries and Licensing Authority at all material times. He denied that there any such meeting in April 2000. He says he was in Jamaica during the period March 31, 2000 to April 14, 2000. He said that he would know of any matter affecting the industry over which he presides. One would be hard-pressed to find a more critical matter affecting an industry one supervises than an injunction from the Supreme Court that effectively closed down the industry. He asserts, remarkably, that he first became aware of the injunction in mid to late April or early May 2000. This means, on his version, that he did not know of the injunction when he granted the licence in respect of the CQ – an assertion that requires me to possess extraordinarily high levels of credulity and naiveté. Happily, I am possessed of neither. He says that when he issued licences to the fishermen he believes he was aware of the injunction. When asked by Mrs. Nelson-Brown why he issued the licences to the fishermen if he knew of the injunction he replied, "It has been the common practice by the Fisheries Division in facilitating industry members to issue licences as long as certain basic requirements are met". In answer to the Court, he said that when he issued the licences to the fishermen he regarded it as only a step in the process for legal conch fishing. This explanation invites the question, why would Mr. Kong issue licences after he knew of the injunction if it were not as Mr. Francis said, the attitude at the Ministry was that the injunction would soon be lifted so the preparations for fishing during 2000 would continue?

49. Mrs. Foster-Pusey sought to undermine the credibility of Mr. Francis by referring to an affidavit, dated June 26, 2000, which he swore in support of the Ministry's efforts to dissolve the injunction. This affidavit refers to the withdrawal of the fishing licence by the Minister of Agriculture and B & D's inability to harvest and sell conch because of the injunction. He said in cross examination that he did not understand that he could not fish for conch unless he had a conch quota and he never understood that his fishing licence was withdrawn. He said that the licence in paragraph 6 of his affidavit was referring to the licences of the fishermen. This explanation makes sense because the only letter he had received was the one purporting to revoke the licence of the Dominican fishermen.

Without the fishermen B & D could not engage in fishing. Mr. Francis said as much when pressed in cross examination.

50. So candid was Mr. Francis that he admitted that he was fishing for conch before he received the May 19 letter. There was no gazetting of the fishing areas during 2000. He said that when he was contacted and asked to support the Ministry's application to dissolve the injunction his boats were fishing at sea. The more he was cross examined the more he explained why he always understood that he could catch, clean and store conch but not export it. He was totally frank and open with the court.

51. Lieutenant Bachelor's evidence has already been summarised. I accept it as true and accurate. I only add the following matters. It is accepted that, on Sunday, July 16, 2000, he handed over the vessels and fishermen to Sergeant Raymond Lewis, who was then a Corporal of Police. Lieutenant Bachelor testified that when he told the two captains that they would be escorted back to Kingston, it was "basically an order to come to Kingston" and it was not open to them to say that they were not coming. It is safe to say that the CQ was detained by the Coast Guard from the time it was told to accompany the Coast Guard vessel back to Kingston to the time it was handed over to Sergeant Lewis.

52. I continue with Mr. Francis' evidence. Mr. Francis said that all the fishermen and the two captains were charged by Sergeant Francis with fishing without a licence. The fishermen were placed before the Resident Magistrate's Court for the Corporate Area, for the first time, on July 21, 2000. They appeared in court again on July 28 and August 8, 2000, when, on the latter day, the DPP entered a nolle prosequi dated August 4, 2000, in respect of twenty four of the fishermen. The nolle prosequi of the DPP was in respect of informations 7831/2000 to 7954/2000. For the reasons already stated, the charges against the fishermen were not sustainable in law.

53. I now examine the evidence of the interaction between Mr. Francis and the police officer. According to Sergeant Lewis, he took over the matter on July 16. He spoke to Mr. Francis on the same date. This was about 5 or 6 o'clock in the afternoon. He agrees that Mr. Francis told him that he had a licence for the CQ. Mr. Francis gave him a copy and he told Mr. Francis that he would check it out. The Sergeant alleges that he called Mr. Kong on July 17 (the Monday) and Mr. Kong told him that the licence was withdrawn. The Sergeant claimed that, on the Monday, Mr. Kong showed him the letter which stated that (a) the licence was withdrawn and (b) Mr. Francis should return the

documents within five days of the receipt of the letter. He added that after speaking to Mr. Kong he formed the view that Mr. Francis had not received the revocation letter, yet he honestly believed the licence was withdrawn.

54. On the other hand, Mr. Francis while agreeing that he showed the Sergeant the licence regarding the CQ, he asked why the CQ was being arrested or brought in when it had a valid licence. He says that the Sergeant laughed and said "What dis going on here?" and then told him that he was going to "check it out". This reaction of the Sergeant suggests something was irregular. Mr. Francis insists that the Sergeant spoke to him later the same day and told him that he (Sergeant) had spoken to Mr. Kong who said that the licence had been revoked.

55. According to the Sergeant, Mr. Francis never asked him why the CQ was being detained when they spoke on the Sunday. In my view this seems a bit far fetched because it would difficult to explain why Mr. Francis would be showing the police officer the licence unless an issue arose over the lawfulness of the detention of the CQ. Unless Mr. Francis was questioning the detention of the CQ and had spoken to the officer about it why would the officer take a copy of the licence in order to "check it out"? The resolution of this conflict is critical to the claim of detinue. I now say more about the officer's testimony to show why I do not accept his account on this issue and other issues generally.

56. The officer lacked credibility on certain specific issues which I now set out in some detail. The effect of this is that I do not accept Sergeant Lewis as a reliable witness. The officer testified that when he spoke to Mr. Kong on July 17 (the Monday) he had formed the view that fishermen did not have any licence to fish for conch. When asked why he didn't charge the fishermen on the Monday, he replied that he was carrying out further investigations. When asked if he believed Mr. Kong when Mr. Kong spoke to him on the Monday he said he did. If he believed Mr. Kong, it is impossible to see what further investigation needed to be carried out; after all had not the Licensing Authority said that the fishermen did not have any licence? I say this because there is no evidence that any question was raised with the officer concerning the validity of the fishermen's licences at any time, so there would no need to delay charging the fishermen if the officer is truthful. When the lack of logic became apparent to the officer, he altered his account to say that on the Monday Mr. Kong told him that the men were exempt. As the pressure of

cross examination increased, the officer had to shift the day from July 17 (Monday) to July 18 (Tuesday) as the date when he got from Mr. Kong all the information he needed to charge the fishermen. Thus his final position, in relation to the fishermen, was that he did not receive the information about the fishermen until the Tuesday. He sought to explain the shift from Monday to Tuesday by saying that when he made enquiries about the fishermen on the Monday, Mr. Kong told him that he (Kong) would provide him with a list on the Tuesday (July 18). The situation was further compounded by the officer saying that Mr. Kong never told him on the Monday that the fishermen did not have any licence. If this is correct, then on what reasonable and rational basis could the officer have said, in his evidence, that he formed the view on the Monday that the men did not have fishing licences? According to the officer, the reason why he called Mr. Kong on the Monday was to enquire whether the men had licences. This was necessary because no Coast Guard officer had told him whether the men had licences. The officer added, for good measure, that on the Monday Mr. Kong had shown him the letter revoking the CQ's licence.

57. It is convenient to set out Mr. Kong's evidence concerning his communication with the police in this matter. In his witness statement Mr. Kong said that he received a call from the Marine Police on July 15 (the Saturday). This is unlikely because there is no evidence that the Coast Guard had contacted the Marine Police before the Sunday, after the vessels had come back to Kingston under Coast Guard escort.

58. There is no evidence from Mr. Kong regarding any conversation between himself and the officer on the Monday. Significantly, Mr. Kong does not mention showing the officer any letter regarding the revocation of the licence of the CQ or telling the officer that the fishermen were exempt or that he would provide a list to the officer by the Tuesday.

59. There is a further body of evidence that in my view demonstrates the unreliability of the police officer. In cross-examination Sergeant Lewis stated that the CQ, Geronimo and quota informations were originally laid in July 2000. He was then shown paragraph ten of his second witness statement which stated that he laid all the "information (sic) in relation to the M/V Geronimo, the M/V Caribbean Queen, B & D Trawling Limited and the crew member of the vessel were laid in July 2000". The three informations we now know are dated as being laid on November 14, 2000. When the officer was asked about this clear inconsistency he stated that the CQ and quota informations were laid in July but

were substituted because of discrepancies. No records from the Resident Magistrate's Court were produced to support this assertion. His evidence was that the substitution only occurred in respect of the CQ and not the Geronimo. He added that the Geronimo information should have a July date. He gave all this evidence before the informations were shown to him. When the informations were shown to him (which he agreed he wrote) he still insisted that he wrote them up in July. If it were so then it is virtually impossible to explain how it is that the Geronimo information has a November date since that information, on the officer's evidence, was not substituted and so should bear a July date. Sergeant Lewis then sought refuge in the DPP's office by saying that Miss Malahoo, instructed him to lay the November informations as substitutes for the July informations. In my opinion this sounds like a tall tale, particularly when there is no evidence indicating what the discrepancies were that necessitated the substitution of the informations. I do not believe Mr. Lewis that any of the three informations was laid in July. I find as a fact that they were laid for the first time on November 14, 2000. I also conclude that Mr. Kong did not show the Sergeant the revocation letter on either the Monday, July 17 or the Tuesday, July 18. I find that when the Sergeant told Mr. Francis that he had spoken to Mr. Kong who told him that the licence was revoked that was not true. This latter finding is made on Mr. Francis' version. I conclude that purpose of telling Mr. Francis this was to justify the detention of the CQ. At this point in the sequence of events, there was no need for the police officer to mislead Mr. Francis about the issue. The Sergeant was entitled to conduct such enquiries as necessary within a reasonable time to determine whether the CQ had been involved in a breach of the law. He was not obliged to return the CQ right there and then on the Sunday afternoon.

60. The officer said that he did not detain the CQ because there was some controversy about the licence and the men were living on the boat. I find that the failure to lay the charges in July was the product of the Sergeant's lack of honest belief that the CQ did not have a licence. This was not an expression of truth. As I have already pointed out, if the officer spoke to Mr. Kong even by the Tuesday and had come to the conclusion that the licence was revoked, what possible explanation can there be for not laying the CQ information in July? By the Tuesday, the officer had all the "facts", on his account, to have laid the charge in respect of the CQ. Mrs. Foster-Pusey submitted that if I analyse the evidence in this way, I have a difficulty because the informations against the

Geronimo were laid in November as well and so the delay in respect of the CQ information ought not to count against the police, should I conclude that it was laid in November. This submission is not acceptable because it ignores two vital differences between the CQ and the Geronimo. First, the claimant has always accepted that the Geronimo did not have a licence and so, there was not much exploration of the officer's conduct regarding the Geronimo. In fact, Mr. Francis' evidence was that he expected to be charged in respect of that vessel. Second, the claimant from the outset was asserting that he had a valid licence for the CQ. It seems to me that it was this insistence by B & D that induced doubt in the mind of the Sergeant about the CQ. Despite his assertion that he believed the CQ did not have a licence his conduct was not consistent with this belief. I conclude that Sergeant Lewis had no reasonable and probable cause for laying the CQ information against B & D. I would add to this that by November the case against some of the fishermen had been discontinued. Legally, there was no difference between the unlawful revocation of the licence of the fishermen and the CQ. If the prosecution against the fishermen did not continue, on what basis could the Sergeant have honestly believed that the licence of the CQ had been validly revoked thereby clearing the way for the criminal charge laid in November?

61. In respect of the quota information there was inordinate delay between July and November 2000. The Sergeant says that the exhibited information in this case was the substituted information, implying that the information was laid in July. I do not accept his testimony. The officer has been proven to be unreliable. I do not believe, as he says, that he received any instruction from the Office of the Director of Public Prosecutions to lay this information. What had clearly happened was that by November the prosecution was in disarray and that the November charges were an attempt at saving face rather than out of a genuine desire to enforce the law. This is against the back drop of Mr. Kong's misuse of his statutory power. I conclude that the laying of the Geronimo information in November along with the other informations was designed to camouflage the illegitimacy of the CQ and quota charges. This is evidence malice and I find that there was malice.

62. Mrs. Foster-Pusey optimistically submitted that I should find that the Sergeant had reasonable and probable cause to charge the claimant with the quota and CQ informations. She draws great strength from Mr. Francis' testimony that the Sergeant

told him (Francis) that Mr. Kong had said that the CQ did not have a licence. This shows, according to Mrs. Foster-Pusey, that Sergeant Lewis must have spoken to Mr. Kong and Mr. Kong's disclosure provided the officer with reasonable and probable cause to lay the CQ information and the fact that it was laid in November does not gain say the point. This evidence proves no such thing. All it establishes is that Mr. Francis said that the Sergeant said that he spoke to Mr. Kong.

63. Mr. André Kong testified for the defendants. He outlined the several steps that one ought to take before one can export conch. He spoke of the licences to be issued under the FIA. He testified about the quota system and management of the conch resources. According to him, before anyone can fish for conch there are four conditions that must be met. The first is that they must have a conch quota; second, they must have a fishing licence; third, the Minister of Agriculture has to declare the fishery management areas open and fourth, the Veterinary Services Division of the Ministry of Agriculture must approve the vessels to be engaged in fishing for conch. In his witness statement, he testified that a necessary precondition for a fishing licence was an individual catch quota. Mr. Kong eventually conceded, after much pressure in cross examination, that when he stated so categorically in his witness statement that the licensee must have a catch quota that was not true. He agreed with Mrs. Nelson-Brown that established persons in the industry were given licences with the "understanding" that they would be issued a catch quota. This was the way in which the industry operated up to and including 2000. This reluctant agreement came after Mr. Francis had stated in quite emphatic terms how licences and quotas were granted up to 2000. Mr. Kong also accepted that issuing a fishing licence in respect of a vessel presupposed that the vessel had met the requirements of the Veterinary Services Division.

64. During cross-examination, Mr. Kong was forced to concede that by 2000 a practice had developed whereby persons with an established history in the conch industry would be granted a catch quota. When confronted with the fact that B &D had a licence for the CQ before B & D had been issued with a conch catch quota, Mr. Kong admitted that Mr. Francis' account is true, that is to say, a licence was issued to the CQ before the individual conch quota was issued. I therefore accept that it was the practice up to and including 2000 to issue licences to established conch harvesters before they were issued a conch quota. These admissions had to be wrung from Mr. Kong by Mrs. Nelson-Brown.

65. Mr. Kong allowed non-nationals to be deprived of their liberty, arrested, charged and a citizen to be deprived of his property when he knew that his purported revocation of the licence was unlawful and not in accordance with the statute. To put it bluntly, Mr. Kong knew that what he was doing was wrong and having set in train a series of events he simply sat back and allowed costs to be incurred by B & D in defending a case that he knew had no foundation because the revocation of the licences were not in accordance with the law. Is there an explanation for this conduct? There is and it comes from Mr. Francis. He said that he spoke to Mr. Kong about the letter revoking the fishermen's licences and Mr. Kong told him that he "had instructions". This seems to be an acceptable explanation for conduct which Mr. Kong himself acknowledged to be outside the statutory framework.

66. Mrs. Foster-Pusey relies on the May 26 letter purporting to revoke the licence of the CQ to ground the reasonable suspicion of the police officer. I am not convinced the officer saw any letter from Mr. Kong. The truth does not come readily to the Sergeant. I shall now state some of my conclusions about this letter. The conduct of the State officials do not inspire confidence in any conclusion that the letter actually came into existence on May 26 and if it did, that its contents were communicated to the claimant. If the contents of the letter had been genuinely communicated with the claimant, the conduct I am about to describe in this paragraph and the next is inexplicable. I say this in light of the clear legal requirement that the decision to revoke the licence and the reasons for revoking the licence must be communicated to the licensee. I do not accept that it was sent to or its contents communicated to Mr. Francis before July 2000. Mr. Francis has always maintained that he has never seen this letter. He stated that at a meeting held at the Ministry of Agriculture at which he, his lawyers, representatives from the Attorney General's Chambers and the Ministry of Agriculture were present, Miss Joy Crawford, the legal officer produced a document which was supposed to be the letter revoking the licence granted to the CQ. The letter only came after his attorneys began to gather their papers to leave the meeting. Mr. Francis says that the letter was read by a number of persons including his attorney. During this trial, while Mr. Kong did not confirm the threat of the walk out he did agree that there was a meeting at which the letter purporting to revoke the CQ's licence was discussed. He recalls that Miss Crawford was asked to produce the letter which she did. Mr. Kong said he had not posted the

letter personally but he gave instructions for it to be done. There is no proof before me that the letter was posted or brought to the attention of Mr. Francis. Mr. Francis said that the meeting was held in July after the CQ was detained. This is not the only evidence on this letter of May 26, 2000. There is more which I now tell.

67. B & D sent a most telling letter dated July 21, 2000. It was addressed to Mr. André Kong. This letter was written on the same day of a court appearance following the arrest and charge of the fishermen and ships' captains. The letter, in summary, complained about the fact that reference was made in court to a letter of May 26, 2000, purporting to withdraw the licence of the CQ. In the July 21 letter, B & D complained that it had never seen the letter and was not aware of its existence until "today". The "today" I interpret to mean July 21, 2000. B & D's letter goes on to say that after the meeting Mr. Forrest, B & D's attorney, asked to be shown the letter but before it could be read Miss Joy Crawford, protested B & D and its attorney reading the letter. The letter of July 21 further alleges that the May 26 letter seen at court had at the top a facsimile indicator that it was sent from the Ministry of Agriculture on July 18, 2000. It is further alleged in the letter that Miss Crawford is alleged to have said that it was an internal communication between the departments of the Ministry. B & D's letter of July 21, 2000, makes the specific charge against Mr. Kong that he admitted that it was an oversight not to have the receipt of the letter acknowledged. This was supposed to have been said by Mr. Kong in response to the accusation that he (Kong) brought the letter to court when there was no evidence of receipt by B & D. The letter ends with this paragraph

> *Please send us immediately the original or copy of the letter referred to herein so that we may now, even at this late stage, read its original contents, bearing in mind the letter is* ***dated*** *(sic) May 26, 2000.*

68. Mr. Kong, in cross-examination, stated that he can recall something happening as is recorded in Mr. Francis' July 21 letter but that it did not happen at court. He went further to say that he recognised the events recorded in the letter. I conclude that Mr. Kong is accepting that after court adjourned on July 21, 2000, B & D's lawyer, Mr. Forrest, spoke to him about the May 26, 2000 letter. Mr. Kong is also taken as accepting that Miss Joy Crawford took the letter from Mr. Francis and his lawyer before they could read it properly. I cannot understand this behavior if the May 26 letter was indeed sent to B &

D. I conclude and so find that Mr. Francis was not told about the revocation of the licence for the CQ until, possibly July 21, 2000, at the earliest.

(b) Detinue

69. In order to deflect the conclusion that the CQ was detained the Sergeant outlines in his witness statement of October 12, 2004, the elaborate procedures that are activated whenever vessels are seized. This was to show what would be done if the boat had been detained. The inference being that if these were not done then the boat was not detained. However this line of reasoning fell flat. He agreed that although he detained the Geronimo, he did not follow any of the procedures to the Geronimo. This means that one cannot look to the police procedures or records to determine whether the CQ was detained. He said that he detained the Geronimo because it had on exhibits, specifically the conch. He then said the conch and the boat were exhibits. In the very next breath, he declared that the conch was an exhibit separate and apart from the boat. He agreed with Mrs. Nelson-Brown that the charge against the captain of the Geronimo, that is, operating an unlicenced vessel, would, in and of itself, have made the boat an exhibit. Almost immediately he changed that to say that the charge would not have made the vessel an exhibit. I ask myself why was the officer twisting in the wind? I believe that the officer realized that if he agreed that the charge of operating a vessel without a licence would have made the Geronimo an exhibit, the next obvious question would be, why wouldn't the charge against the CQ not also make it an exhibit and so be detained until trial or until released by the court? The difficulty faced by the Sergeant did not stem from any inherent lack of ability to articulate his thoughts but rather out of a desire to avoid the conclusion that he detained the CQ. Contrary to the suggestion of Mrs. Foster-Pusey, this suggests that the officer had no thoughts about his powers of detention under the FIA or even his common law powers of detention.

70. He attempted to explain the lack of records concerning the Geronimo on the bases that (a) it had conch on board; (b) the conch was not "bagged out" and (c) the police did not have storage facilities for the conch. This explanation was further tested under cross examination and this is what was unearthed. He said that he returned the Geronimo to Mr. Francis and told him to keep the boat and he must present it to the court if it was needed. He gave Mr. Francis permission to store the conch. It is obvious

that these explanations cannot and do not explain the absence of records concerning the detention of the Geronimo.

71. The credit of the police officer was further tested by Mrs. Nelson-Brown who established that the officer was not accurate when he stated that he told the Resident Magistrate's Court for the Corporate Area, in his police statement, that the Geronimo was detained. He said that he wrote this in his police statement. When the police statement was shown to him there was no mention of the Geronimo being detained.

72. I need to refer to the defendants' pleadings in this matter. The amended defence defined the terms of the contest. They pleaded that the vessel was not detained by the police officer. They also stated that the claimant did not make any request to the defendant to deliver up the vessel. Finally, they said that the vessel was fishing in contravention of the law and after July 17 it was not under the control of the Marine Police.

73. If the defendants say that after July 17 the vessel was not under the control of the Marine Police, isn't this an implicit concession that Sergeant Lewis had control of the CQ from July 16, when it was handed over to him, to July 17? During the period July 16 to July 17, the fishermen were living on the boat. If this is so, it means that one of the reasons advanced by the police officer for saying that he had not detained the boat, namely, that had he detained it the men would have had to leave, does not stand scrutiny. The men living on the boat could not be a determining factor of detention in this case because the men were on the vessel from the evening of July 16, after the vessel had come into the custody of the Sergeant to Monday, July 17. It also means that the answer the Sergeant gave indicating that there was another place to house the men had the vessel been detained is beside the point because this facility existed from July 16, yet the fishermen were not taken there at anytime between July 16 and 17, 2000, or indeed at any time up to the time they were bailed. I make these points because Mrs. Foster-Pusey sought to say the vessel was not detained for the reason that the fishermen still had access to it, they had the key and they were living on it. The evidence of Mr. Francis which I accept is that he asked and received permission from the Sergeant to remove the boat from where it was moored, to the pier and eventually to her dry dock facility. At all times Mr. Francis regarded the vessel as being in the possession of the Sergeant. The Sergeant's grant of permission is consistent with that understanding.

Whatever the motivation for this arrangement, what is clear is that the Sergeant found it easier to secure and manage the vessel by allowing the crew to remain on board.

74. Mrs. Foster-Pusey also sought to rely on the powers of detention found in the FIA to justify the Sergeant's detention. The difficulty with this position is that the defendants have never asserted that they were relying on the statutory powers of detention found in the FIA. If the police had exercised their powers under the FIA, they must determine, after a reasonable time, whether the CQ was going to be used as evidence or release it. There is no evidence before me that the police officer had determined to detain the CQ for use as an exhibit in any possible charge either at the time possession was handed over to him by Lieutenant Batchelor or shortly after. Therefore, assuming the CQ was being used in breach of the law, that fact without more, does not bar an action in detinue. Illegal or unlawful use of an object, without more, does not confer up on the police or any person acting in a similar capacity power to detain a chattel indefinitely.

75. It seems to me and I so find that what was happening here was that the Sergeant detained the vessel but permitted the crew to remain on board. In effect, until the men's freedom was restored when they were bailed, the State had the benefit of a floating detention facility.

76. I find that the purpose and policy behind the law of detinue were met in this case. I conclude that there was a specific unconditional demand and refusal. It is clear that Mr. Francis was demanding the return of the specific good, the CQ. The Sergeant knew the basis on which Mr. Francis was claiming the return of the vessel. Mr. Francis was saying, "You have no right to detain the boat because there is a valid licence in place." I would say that a reasonable time for the police to check on the validity of the claim by Mr. Francis would be two clear days from July 16, 2000. There is no issue that B & D was entitled to immediate possession of the vessel. There is evidence which I accept that on September 18, 2000, Mr. Francis applied for the return of the vessel to the Resident Magistrate's Court for the Corporate Area. The learned Resident Magistrate imposed a condition for its return. I believe that the judicial order interrupted the continued detention of the vessel by Sergeant Lewis. This is so because any demand on the Sergeant after September 18 could not be complied with because the court had laid down conditions for the release of the boat (see ***Smith v Young***). Therefore the period

for the purposes of this case would be from July 18 to September 18. This leaves the question of damages for both the malicious prosecution and detinue.

Assessment of damages

Malicious prosecution

77. The special damages have been agreed at $92,000. I would award the sum of $100,000 for general damages.

Detinue

78. In the case before me, no evidence was led on the value of the CQ and so that value cannot be assessed. It is agreed that the vessel was returned sometime in late 2000 or early 2001. There is no evidence of any diminution in value. The claimant only attempted to prove loss arising from his inability to use the chattel for the period July 2000 to December 2000.

79. In my view, the claimant's proof in this regard was woefully inadequate. The claimant is a limited liability company registered under the Companies Act. Mr. Francis said that the company keeps proper records. I would have expected the claimant to provide appropriate documentation to support its claim to damages. This it has failed to do. The receipts tendered do not relate to the period of the alleged losses. Mr. Francis said that the appropriate receipts were available and at his business place.

It may be said that within recent times there has been restatement of the law relating to proof of special damages. However, not even this restatement can assist the claimant. The Court of Appeal of Jamaica in ***Garfield Hawthorne v Richard Downer*** SCCA 12/2003 (July 29, 2005) has recently endorsed the decision of ***Grant v Motilal Moonan Ltd*** (1988) 43 W.I.R. 372 from the Court of Appeal of Trinidad and Tobago. In the ***Garfield*** case, Harris J.A. (Ag) (as he was at the time) suggested that ***Grant's*** case demonstrated that the rule that special damages must be strictly proved may be relaxed. I need to examine the ***Grant*** case to see what exactly it decided. In that case, the claimant pleaded special damages but the proof lacked particularity and it appeared that it was not supported by receipts. At the trial the claimant produced a list which she said contained the price of car parts. The list was alleged to have been made the day after the accident but at trial the receipts were not produced and the claimant could not say when she bought the parts. The defendant did not challenge the evidence or call evidence in

rebuttal. The Master disallowed the special damages but on appeal the damages were allowed. Bernard C.J. speaking for the court said that despite this lack of particularity the claim could be allowed on the following grounds (a) the method or sufficiency of proof of special damages must depend on the circumstances of the case; (b) the claimant in the particular case produced a list of the damaged parts and the costs of replacement which were not challenged. Bernard C.J. through out his judgment kept making the point that the defendants did not challenge the price list and did not adduce contrary evidence. The learned Chief Justice did not appear to be impressed with the submission that it was for the claimant to prove strictly her special damages.

80. If ***Grant*** is correct then it seems that there is a sliding scale of strict proof. Where on the scale a particular case falls depends upon the circumstances of the case. In my opinion ***Grant*** does not assist the claimant in the case. Harris J.A. (Ag) in ***Garfield's*** case warned although "*[j]udicial authorities have ... shown that there can be a departure from this principle*" a court "*must, however be very guarded in its relaxation of the rule*" (see page 11). The Court through Cooke J.A. who delivered the main judgment in ***Attorney General of Jamaica v Tanya Clarke (Née Tyrell)*** SCCA No 109/2002 (December 20, 2004) stated five principles to be derived from the cases in relation to proof of special damages. These are

- **a.** special damages must be strictly proved;
- **b.** the court should be very wary to relax this principle;
- **c.** what amounts to strict proof is to be determined by the court in the particular circumstances of each case;
- **d.** in the consideration of (c) there is the concept of reasonableness
    - i. What is reasonable to ask for the plaintiff in strict proof in the particular circumstances;
    - ii. What is reasonable as an award as determined by the experience of the court;
- **e.** although not usually specifically stated the court strives to reach a conclusion which is in harmony with the justice of the situation

81. I do not believe that in this case it is unreasonable to ask the claimant to prove his case strictly. This is not a case of lost or destroyed documents. It is a case where the claimant, for whatever reason, did not produce the documents it claimed that it had. The

claimant in quantifying its loss speaks of a United States Company known as Beaver Street Fisheries offering him US$4.15/lb for his catch, yet no correspondence between itself and Beaver Street was produced. The claimant also spoke of the average price of lobster being US$14.50/lb. This was arrived after consulting what it says was a database hosted by an entity known as Urnerberry. They are supposed to the leading setters of benchmark prices for shrimp, lobster, scallops, conch and crab. I would have thought that B &D, a company that has been in the industry for over thirty years, would have more than Mr. Francis' say so. At the risk of over emphasis, Mr. Francis did not even produce evidence substantiating the claim of US$30,000 incurred when forty airline tickets were purchased for the fishermen he employed. In these circumstances, none of the claim for expenses relating to maintaining the fishermen is recoverable. This amounted to US$77,639.75.

82. B & D also claimed US$1,278,200 for loss of income from conch harvesting. For the reasons stated this sum is not recoverable. Assuming that I was able to pluck a figure from somewhere, I would not do so in this case because there is evidence that the CQ could not have operated by itself to harvest conch. It has to have another vessel (the catching vessel) operating with it. There is no evidence that the fishing areas were gazetted. The various statutes governing the fishing industry require that regardless of whether the harvester is exporting or is targeting the domestic market he needs a permit or licence to do either of these things (see the ***Aquaculture Inland and Marine Products and By Products (Inspection, Licensing and Export) Act*** and the ***FIA***). Simply put, a licence to fish for conch does not mean that one can ignore the other legal requirements and go to fish for conch. This means that even if the vessel had been returned to the claimant it could not have gone conch fishing. There was also a claim for US$1,792,125 for loss of income from lobster fishing. This amount cannot be recovered for two reasons. First, the evidence of loss is unsatisfactory and therefore rejected for the same reasons I rejected the claim in respect of the loss of earning from conch fishing. Second, there is no evidence that B & D had licenced the CQ to fish for lobster. This licence is a necessary precondition before one can even think of launching out to sea to fish for lobster.

Conclusion

83. The defendants are liable for malicious prosecution and detinue. From what I have said it is improbable that the Sergeant believed in the truth of the allegations laid against B & D in the CQ and quota informations. As I have endeavoured to show in a claim for malicious prosecution it is not simply whether the objective facts known to a reasonable and impartial person would have provided a basis for the charges but there is the question of whether the prosecutor honestly believed in the truth of the allegation. If he did not then there is an absence of reasonable and probable cause. The late date of the charges is more consistent with salvaging the attempted prosecution than with an honest desire to enforce the law. This means that even on Mrs. Foster-Pusey's submission I find that there was malice.

84. The damages for malicious prosecution are $100,000 as general damages at six percent (6%) interest from date of the service of the writ to January 6, 2006 and $92,000 as special damages at six percent (6%) interest from December 28, 2000 to January 6, 2006. No sum is awarded for detinue. I have decided to award sixty percent costs to the claimant. I have reduced the costs because had the claimant accepted that its evidence in proof of damages was inadequate the trial time would have been much less. This not a pushcart vendor type of case but one in which the company alleges that it had the appropriate evidence but did not produce it. The Civil Procedure Rules (CPR) require that I take these and other matters into account when dealing with costs. Under the new dispensation litigants must now take a realistic view of their case and adjust accordingly so that a disproportionate share of the courts resources are not allocated to hearing futile claims or pointless aspects of claims (see rule 64.6). In accordance with percentage indicated above the parties have agreed costs to the claimant in the sum of $153,600.