

[2] The power of attorney allowed the defendant to access proceeds of a policy of insurance issued by Sagicor Jamaica Limited (Sagicor). The claimant was one of several beneficiaries under this insurance policy. None of the proceeds obtained was turned over to Morris Barnett. That failure and the circumstances under which Morris Barnett came to sign the power of attorney, set in train a series of events which ultimately led to the filing of this claim and the counterclaim.

[3] The following is the substance of the claim. On 12 October 2013, Mrs Lisa Barnett, the claimant's and deceased's sister-in-law, telephoned the claimant, informing him that the defendant wished to speak with him and provided him with a telephone number for the defendant. The claimant dialled the number provided and the defendant answered, identifying himself by his christian and surnames. In this telephone conversation, the defendant is alleged to have identified himself to the claimant as a lawyer. The defendant disclosed that the claimant was required to sign documents relevant to Miss Barnett's medical bills. The defence accepts that medical bills were mentioned but adds that funeral expenses were also mentioned. The parties agreed to meet the following day at Up Park Camp, the claimant's place of work.

[4] They met, as agreed. Mrs Lisa Barnett was present. The meeting took place in the defendant's car. Both men sat in the front and Mrs Lisa Barnett sat on the back seat. The defendant informed the claimant that he, along with Mr Flash, Miss Barnett's friend, would have to sign documents to pay Miss Barnett's medical bills. He was presented with a document, which he signed on each page. He also handed over his driver's licence to the defendant for the purpose of taking a photocopy of it. The defendant and Mrs Lisa Barnett left with the defendant's driver's licence for that purpose. Both the defendant and Mrs Lisa Barnett returned shortly after and the claimant's driver's licence was returned to him.

[5] That would have been the conclusion of the matter between the parties, but for the claimant being contacted by an officer from the Organized Crime Investigation Division (OCID) on or about 14 November 2013. That led to the claimant going into the office of OCID. There questions were raised about the document the defendant presented to him to sign at Up Park Camp. He told OCID officers that he did not know what a power of

attorney was and that he had signed the document in reliance on representations made by the defendant. Neither was he aware that he was a beneficiary under the insurance policy, to the tune of \$882,332.48. The claimant gave a statement at OCID to that effect.

[6] Some days after the claimant's visit to OCID, the defendant went to Sagicor to make enquiries about funds disbursement for another beneficiary. When the defendant left Sagicor's offices he was arrested by members of OCID. He was taken into custody for questioning for fraud. Later that day the defendant took part in a question and answer session, in the presence of his Attorney-at-Law, Mrs Carolyn Reid Cameron.

[7] Following the question and answer session, the defendant was escorted to his home by the police. The police conducted a search of his home in his presence. The police seized several documents during the search. No charges were laid against the defendant.

The claim

[8] It was against that background that the claimant filed his claim and particulars of claim on 8 August 2014. He claims damages for fraudulent misrepresentation made by the defendant between 13 and 14 October 2013. Additionally, he claimed, together with collateral claims, repayment of the sum of \$882,332.48. The allegations of fraudulent misrepresentation were particularized in his statement of case.

[9] In sum, the claimant alleged the fraudulent misrepresentations. Firstly, the defendant misrepresented himself as a lawyer. Secondly, the defendant failed to disclose that the claimant was a named beneficiary under Sagicor policy number 002343885 on the life of Joan Barnett. Thirdly, the defendant did not disclose that the document he was signing was a power of attorney but instead led him to believe the document was for the purpose of paying medical bills.

[10] The foregoing particulars are comprehensively captured in paragraph 17 of the particulars of claim. I quote:

“At all material times it was known to the Defendant (sic) but not to the Claimant (sic) that the document which was presented to the Claimant (sic) for the Claimant’s (sic) signature on Monday 14 October 2013 was a Power of Attorney bearing date 14 October 2013. Although the Claimant (sic) signed all pages of he said document he did not read it because he was acting in reliance on and was induced by the repeated false representations that the Defendant (sic) was a lawyer and that the document existed to pay his deceased sister’s medical bills”.

[11] The defendant denied identifying himself to the claimant as a lawyer. He disputed the assertion that the claimant never read the document. On the contrary, the claimant spent some time going through the document and called and spoke with his mother during that exercise. He told the claimant that the document was a power of attorney which was drafted by Miss Barnett. He also told the claimant that he had to sign the document to facilitate obtaining monies from her life insurance policy to settle her funeral and medical expenses. The defendant asserted that all the money he obtained was used solely for Miss Barnett’s funeral expenses.

The counterclaim

[12] The defendant went beyond denying the claim. He filed an Amended Defence and Counterclaim on 15 May 2017. I recite the counterclaim below:

- a. *Damages for malicious prosecution of civil proceedings;*
- b. *Damages for false imprisonment by the Police (sic) for over 9 hours by virtue of the Claimant making a malicious report;*
- c. *Damages for defamation, and damage to the character and integrity of the Defendant, by virtue of the Claimant filing the instant Suit (sic) and alleging gross misconduct by the Defendant who is a Senior Public Officer;*
- d. *Damages for the search of the Defendant’s home by the police in the presence of his family;*
- e. *Aggravated damages on the footing that the Claimant deliberately and/or wilfully and/or spitefully and/or maliciously filed the instant suit against the Defendant knowing that there was no truth to the Particulars of Claim and that there was no cause of action;*
- f. *Damages for mental and psychological distress, anguish, emotional trauma and suffering, caused by making a false*

report to the police, the false imprisonment, and the filing of the instant suit by the Claimant;

- g. General damages;*
- h. Costs and Attorney-at-Law costs;*
- i. Such further and/or other reliefs as this Honourable Court deems fit.*

I will discuss the claim before considering the counterclaim since they raise discreet issues, although both have the same factual genesis.

Issues for determination on the claim

[13] As both sides submitted, in a broad sweep, the issue for determination on the claim is whether the defendant is liable to the claimant for fraudulent misrepresentation. To put the matter squarely, did the defendant represent himself to the claimant as a lawyer?

Discussion and analysis

[14] A useful definition of this tort is to be found in **Clerk & Lindsell on Tort** 19th edition, at para 18-01:

“Where a defendant makes a false representation, knowing it to be untrue, or being reckless as whether it is true, and intends that the claimant should act in reliance on it, then in so far as the latter does so and suffers loss the defendant is liable for that loss”.

Winfield & Jolowicz on Tort 18th edition, at para 11-3 summarises the ingredients of the tort, the equivalent of the common law tort of deceit, as follows:

- 1. There must be a representation of fact made by words or conduct.*
- 2. The representation must be made with knowledge that it is or may be false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true.*
- 3. The representation must be made with the intention that it should be acted upon by the claimant, or by a class of persons which includes the claimant, in the manner which resulted in the damage to him.*

4. *It must be proved that the claimant has acted upon the false statement.*
5. *It must be proved that the claimant suffered damage by so doing.*

[15] The above statement of the law comports with the law as cited by the Attorneys-at-law for both sides. Both sides relied on the first instance decision of ***Phyllis Gordon v Pamela Gordon*** [2017] JMSC Civ 125 of Jackson Haisley J (Ag) (as she then was). At paragraph [53] of that case the learned judge referred to the judgment of Harrison J (as he then was) in ***Bevad Limited v Omad Limited*** (unreported) Court of Appeal, Jamaica (Supreme Court) Civil Appeal No. 133/05, judgment delivered 18 July 2008, in which he reviewed the authorities, including the much cited ***Derry v Peek*** (1889) 14 App. Cas. 337, and distilled the identical principles recited at para [14] above.

[16] Counsel for the claimant submitted that the actions of the defendant fall squarely within the foregoing elements of the tort. Particularly, the defendant made a false representation of fact by representing himself as a lawyer. Although the defendant would occasionally prosecute in the several courts of Jamaica, he is not a lawyer. Counsel charged that the defendant's indifference in communicating the full facts or circumstances of the document and the concealment of the claimant's entitlement under the insurance policy, can only be considered a false representation of the facts. The defendant made these representations knowing them to be false as he is not an attorney-at-law. Further, he knew that the power of attorney would give him authority to collect proceeds to which the claimant was entitled, a fact concealed by the defendant. The representation concerning his occupation was made, it was argued, to lull the claimant into a false sense of security and trust, ultimately to sign the power of attorney.

[17] Respectfully, these submissions commence at a point beyond where the principles and logic dictate that the analysis should begin. The conclusions upon which the submissions rest all assume facts which the court must first find proved. In this regard, the submissions are unhelpful as they offer no assistance concerning why the evidence of the claimant should be preferred to that of the defendant. with that said, I turn to the principles established and accepted in ***Gordon v Gordon***, *supra*.

[18] These principles or ingredients, make it plain that the first hurdle the claimant has to cross is to prove, on a balance of probability, the alleged representations of fact. In the context of this case, it boils down to the which of the two parties the court finds more credible. The principal and only positive representation it is alleged the defendant made was that he was a lawyer. The other two are representations by omission. That is, he concealed the character and legal effect of the document which he required the claimant to sign; in short, he concealed that the document was a power of attorney. Lastly, the defendant allegedly concealed or failed to disclose the fact that the claimant was a beneficiary under the policy of insurance. I will discuss them in that order.

Issue #1: Did the defendant represent himself to the claimant as a lawyer?

[19] And so I come to the first issue. Did the defendant represent himself to the claimant as a lawyer? Both in his witness statement and his statement to the police, recorded on 14 November 2013 (exhibit 1), the claimant alleged that the defendant told him on the telephone that he was a lawyer. The claimant accepted that representation unquestioningly. Was that reasonable in the circumstances in which their paths initially crossed?

[20] To answer that question those circumstances must be examined. In wake of Joan Barnett's death, the claimant received a call from Mrs Lisa Barnett, his sister-in-law, "saying a man named Omar wanted to speak to him". Mrs Lisa Barnett did not attach any title to the defendant. He was simply, "a man". Therefore, not having been alerted to Omar's profession, it seems reasonable to expect that a person placed in the position of the claimant would have made an enquiry of Mrs Lisa Barnett in this regard.

[21] The reasonableness of that position comes from the ordinary way in which people communicate. That is, were he a lawyer, Mrs Lisa Barnett would have said a lawyer named Omar wanted to speak to him. If that is acceptable, since he got no such indication from Mrs Lisa Barnett he ought to have been put on inquiry when the defendant made that representation, if he is to be believed. To have blindly and blithely gone along is the

way of the gullible and naive. However, the claimant I observed under cross-examination was neither.

[22] Since he was not assessed as being neither naïve nor gullible, I considered whether he could have been simply mistaken about the representation concerning the defendant's occupation. That consideration stemmed from the name of the document he eventually signed the following day, a power of attorney, as well as the defendant's contention. Among lay persons, lawyers are sometimes simply referred to as 'attorneys'. So that, a reference to the document could easily have been confused with a reference to occupation. However, there was no allegation that the "documents" requiring the claimant's signature were named in the telephone conversation, on the claimant's account. Indeed, the claimant disavowed any knowledge that the document he later signed was a power of attorney. There could therefore have been no such confusion. And if no such confusion, the allegation of the representation boils down to an outright fabrication. However, the defendant alleged that he told claimant that he wished him to sign a power of attorney in the telephone conversation the night before the Up Park Camp meeting. I will return to this point below.

Issue #2: Did the defendant conceal the character and legal effect of the document he required the claimant to execute?

[23] Although the defendant did not represent himself to the claimant as a lawyer, did the defendant conceal or otherwise fail to make the claimant aware of the nature of the document requiring his signature? In sum, the claimant alleged that he signed the documents without reading them, in complete reliance on the defendant's representations. He was induced to sign each page by the trust he reposed in the defendant, inspired by the representation that he was a lawyer.

[24] At the heart of the allegations here is the claimant's contention that he did not know what he signed. However, as was submitted by counsel for Mr Guyah, the evidence revealed that the document was conspicuously headed "Power of Attorney". Apart from

that fact, the claimant is contradicted by both his oral evidence and the unsigned affidavit given by Mrs Lisa Barnett.

[25] Leaving Mrs Lisa Barnett's evidence aside for the moment, I will examine what the claimant said under cross-examination. Under cross-examination he admitted that he read the document. However, he circumscribed that by adding that his reading of the document was not in its entirety. It seemed a tad convenient that he could not remember what parts he read. I bear in mind, however, that the trial was taking place upwards of seven years after the events giving rise to the claim.

[26] I return to Mrs Lisa Barnett's unsigned affidavit (entered into evidence as a document created by Mrs Carolyn Reid Cameron QC). Mrs Lisa Barnett said the defendant not only gave the claimant the documents to sign, their purpose was explained to him. In Mrs Lisa Barnett's expression, the defendant told the claimant "these were needed in order for him (Omar) to obtain money from Joan's insurance policy so that he (Omar) could pay for funeral expenses in New York". According to Mrs Lisa Barnett, the claimant reviewed the documents before signing and asked no questions of the defendant.

[27] Mrs Lisa Barnett's unsigned affidavit supports the defendant's account of what took place inside the motor vehicle between the parties at Up Park Camp. The defendant asserted that he explained the document to Mr Morris Barnett and what he was signing. It is to be noted that Mr Guyah's evidence is that he had told the claimant that he needed him to sign the power of attorney in the telephone conversation the previous night. This strikes me as the normal and natural thing to have done. It is the evidence that I accept, supported as it is by Mrs Lisa Barnett's unsigned affidavit. In weighing the credibility of these two men, it is Mr Guyah that I find credible. I find that the claimant knew the character and legal effect of the document he signed. I reject his evidence to the contrary as patently false.

Issue # 3: did the claimant know that he was a beneficiary under the policy of insurance at the time he signed the power of attorney?

[28] Among the claimant's averments in his particulars of claim is the assertion that he would not have executed the power of attorney, had he known that he was a beneficiary under his deceased sister's life insurance policy. That averment was supported by evidence in his witness statement (filed 19 September 2017) that that fact was not disclosed to him by the defendant. Indeed, if nothing else, this was the consistent position of Mr Morris Barnett, underlined by his statement to the police dated 14 November 2013 (exhibit 1). Cross-examination did not result in the claimant changing course in relation to his ignorance of his status under the policy.

[29] Even after paragraph two of the power of attorney was read to him, he remained steadfast in his disavowal of knowledge of being a beneficiary. I quote the first sentence of paragraph two, "[w]hereas I am listed as one of the five beneficiaries in this said Sagicor Life Insurance Policy number 002343885." Although he admitted understanding the sentence, that was as far as the he would commit himself.

[30] The claimant's reluctance to frankly admit anything that he did concerning the power of attorney, serves only to weaken his credibility. Mrs Lisa Barnett, who the claimant admitted could have heard the conversation between himself and the defendant, does not speak specifically to the disclosure of the claimant's beneficiary status in her unsigned affidavit. What she says is that the defendant "explained about the insurance policy Joan had left to take care of her funeral and medical expenses". That is amorphous language that covers a multitude of sins. However, when that is juxtaposed with Mr Guyah's evidence on the point, it becomes more likely than not that the explanation included disclosure of the claimant's beneficiary status. In any event, having accepted that the claimant read the document before signing it, I reject as highly improbable that that paragraph would have escaped his notice. So, at the time he executed the power of attorney, the claimant knew he was a beneficiary under the policy of insurance.

[31] Having seen and observed Mr Morris Barnett, I find myself unable to accept him as a credible witness. He was lacking in frankness and promptitude in answering under cross-examination. His poor demeanour, together with the multiple inconsistencies in his

evidence, convinced me he was rather sparing in telling the truth. I will highlight some of the inconsistencies in his evidence.

[32] Mr Morris Barnett would have the court believe that he had a close personal relationship with his deceased sister. However, that close bond did not admit of knowledge of the close relationship she had with the defendant. Indeed, he did not know the defendant before her passing. While this is not germane to the issues, it demonstrates the incredulity of Mr Morris Barnett's evidence.

The counterclaim

Malicious Prosecution

[33] The attorneys-at-law appearing for both sides made extensive submissions on the availability of the tort of malicious prosecution arising from civil proceedings, for which I am grateful. That I do not rehearse those arguments in this judgement, I hope, does not convey the false impression that I have not given due consideration to them. At the risk of oversimplification, both sides agree that the tort has been known to the common law from time immemorial. They agree also, that the previous restrictions, artificially limiting its application, have been swept away in the modern era. To this end ***Gregory v Portsmouth City Council*** [2000] 1 AC 419; ***Crawford Adjusters and others v Sagicor General Insurance (Cayman) Limited and another*** [2013] UKPC 17 (***Crawford Adjusters***); and ***Willers v Joyce and another (No 1)*** [2017] 2 All ER 327 (***Willers v Joyce***), were cited for the court's consideration.

[34] In ***Willers v Joyce***, at page 332, it was accepted that all the necessary elements of the tort were present. Firstly, that it was the defendant who had brought the claim against the claimant. Secondly, the claim had been terminated in the favour of the claimant. Thirdly, that the claim was brought without reasonable or probable cause. Fourthly, that the defendant was actuated by malice. Fifthly, that the claimant had suffered damage as a result of the filing of the claim.

[35] In order to succeed on this aspect of his counterclaim, the defendant has to prove all the ingredients, on a balance of probability. There is no dispute that Morris Barnett brought this claim against the defendant. Furthermore, having found for the defendant on the claim, it has been established that the claim brought by Morris Barnett against Omar Guyah, was determined in favour of the latter. Hence, the focus will be on the other three ingredients. A failure on any one limb will be absolute as the ingredients represent a composite of the tort. As was observed in *Willers v Joyce*, at page 47, the burden on Mr Guyah is a heavy one because he has to prove both an absence of reasonable and probable cause as well as an absence of a bona fide reason for bringing the claim against him. I will discuss the ingredients in the order in which they are listed at paragraph [34] above.

[36] And so I commence with the third ingredient, that the claim was filed without reasonable and probable cause. Mr Morris Barnett brought this claim to recover from the defendant \$882,332.48 that he was advised should have been his share of the proceeds of the policy of insurance. He filed his claim on 8 August 2014. To synopsise Mr Morris Barnett's claim, he contends that he was deceived into signing a power of attorney, giving Mr Guyah access to his portion of the proceeds of an insurance policy. Mr Guyah's answer to that claim was that Mr Morris Barnett executed the power of attorney after it had been explained to him and the purpose for which it was needed. Concerning appropriation of the funds, a single payment to the funeral home was US\$8,200.00, along with other payments, exhausted the funds received from Sagicor.

[37] Ms Wong argued that Mr Morris Barnett acted in reliance on the circumstances that existed which caused him loss. Further, that he held an honest belief that the defendant so acted to cause him loss. She advanced that an honest man placed in the position of Mr Morris Barnett would have acted in a similar manner in instituting the present proceedings. Accordingly, the counterclaim for malicious prosecution ought to fail. Miss Wong relied on the definition of reasonable and probable cause in *Hicks v Faulkner* (1881-82) 8 QBD 167.

[38] The defendant's attorneys-at-law submitted that having regard to the circumstances of the case, Mr Morris Barnett should be found liable to the defendant for malicious prosecution in civil proceedings.

[39] Hawkins J in *Hicks v Faulkner* has been credited with the hallowed definition of reasonable and probable cause. At page 171 he declared that reasonable and probable cause is:

"An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed".

I agree with Miss Wong that although this definition emanated from the criminal law arena, it may be adapted to civil proceedings. Accordingly, Mr Guyah must establish circumstances from which it may be inferred, in the absence of direct evidence, that Mr Barnett had no reasonable and probable cause to file the claim.

[40] Reasonable and probable cause therefore depends upon the information and belief of Mr Morris Barnett. That information and belief must measure up to the standard of the reasonable man, placed in Mr Morris Barnett's position. Therefore, mere assertion or suspicion of a state of circumstances will not carry the day. Whatever the accuser's belief, which need not be true just honestly held, it must be based upon reasonable grounds. This reasonable man standard gives no quarter to the imprudent and incautious. So that, the reasonable man is one who will not rush to judgment but will, as a counsel of prudence, test his belief by perhaps making discreet enquiries before imputing wrongdoing.

[41] Mr Morris Barnett was unswerving in his belief that Mr Guyah is accountable to him in the sum claimed. The critical question is, what was the information which grounded his belief that Mr Guyah had defrauded him of his inheritance? In other words, what was his state of knowledge, actual or imputed, at the time he filed his claim?

[42] The most appropriate point from which to assess Mr Morris Barnett's state of knowledge is the execution of the power of attorney. I have already found that he knew that the document he was signing was a power of attorney. At that time, he also knew that he was a beneficiary under the policy. Although he disclaimed this state of knowledge at the time of executing the power of attorney, his frank admission was that he was so aware from 14 November 2013.

[43] Therefore, being seized with these two bits of information, Mr Morris Barnett understood, or must be taken to have understood, that by the act of signing he was giving (or had given, if I take his later date) Mr Guyah the authority to take the money and use it in Miss Barnett's cause. Although I find that he was told about funeral and medical expenses, he insisted the purpose told to him was the payment of medical bills.

[44] Since he was authorizing the use of his share for the payment of medical bills, did he become aware of information that could have coloured his belief in Mr Guyah's probity? Although this was not how the case for Mr Morris Barnett was pitched, he alleged in his particulars of claim (at paragraph 22) that after the encounter with Mr Guyah he was made to understand his sister's medical bills were paid by "Sagicor Life Jamaica Limited and Medicaid, a US based social health care program". Consequently, it was his further understanding that Mr Guyah paid none of those medical expenses.

[45] When pressed about his source of knowledge concerning the averments in paragraph 22 of the particulars of claim, he gave two answers. First, he did not remember. Second, without further prompting, it was his mother who had told him that a sum was left to take care of things. He, however, did not ask Sagicor to provide any information about the settlement of the medical bills.

[46] It seems to me, that a reasonable person placed in the position of Mr Morris Barnett would have made enquiries of Sagicor since he now had two conflicting sources of information concerning the payment of the medical bills. If he got no, or insufficient information, from Sagicor, he could have enquired of the police who had contacted him

from 14 November 2013. I find that it was reasonable for Mr Morris Barnett not to have made these or any enquiries before filing his claim.

[47] Before filing his claim, Mr Morris Barnett knew that he was not the only beneficiary who was so affected. His evidence is that Deputy Superintendent of Police Gary Flash (DSP Flash) had signed over his portion of the proceeds of the policy to pay medical expenses. This is perhaps the nub of Mr Morris Barnett's allegations against Mr Guyah, his disappointment in not receiving his share. But I will return to this at paragraph [52] below. Knowing that at least one other beneficiary had signed over his portion of the proceeds ought to have put Mr Morris Barnett on inquiry. Was DSP Flash also crying foul? And what of the other beneficiaries? Had they been similarly duped, as he was claiming he had been? These are all questions the ordinary prudent and cautious man would have asked himself in order for any suspicion he had concerning Mr Guyah's probity to ripen into a full conviction.

[48] For whatever reason Mr Morris Barnett did not pursue those lines of inquiry. But how about asking Mr Guyah? Before filing the claim, he did not contact Mr Guyah and ask what he had done with the money. Taxed about this failure, Mr Morris Barnett's response was characteristic of his prevarication throughout the trial. He first falsely contended he did not have a number for Mr Guyah; giving the equally false impression that he thought about it but could not follow through because he did not have the facility to do so. He had recorded Mr Guyah's number on a piece of paper. Supposedly, that piece of paper could not be found. However, skilled cross-examination exposed that when he gave his witness statement on 18 September 2017, four years post the filing of his claim, he included a telephone number which he attributed to Mr Guyah. That was the very telephone number he had received from Mrs Lisa Barnett to contact Mr Guyah in October 2013.

[49] It is therefore not surprising, on the one hand, that having failed to make any inquiries of Mr Guyah, Mr Morris Barnett's evidence is that he was not aware that Mr Guyah received any [personal] benefit from the money obtained under the insurance policy. On the other hand, this evidence strikes at the heart of any contention that Mr

Morris Barnett held an honest belief that Mr Guyah was probably guilty of any wrongdoing concerning his entitlement under the policy of insurance. Since his understanding was that the money was to be applied to the payment of medical bills, and not being aware that Mr Guyah obtained any personal benefit from the money, how does this even raise suspicion about the appropriation of the funds? This ignorance of Mr Guyah's receipt of any personal benefit is compounded by its inconsistency with the alleged information that the medical expenses were independently settled from insurance sources.

[50] On the question of personal benefit from the insurance proceeds, the evidence is in quite the opposite direction. There are multiple, and unchallenged, instances of Mr Guyah disbursing his personal funds in the name of expenses for travel and visa application for several members of Miss Barnett's family. The evidence paints a picture of a man who did not pinch pennies or, to resort to another expression, spare any expense, in accommodating members of Miss Barnett's family to travel to and from the United States of America at the material time. There is no evidence either that he asked for or was offered any reimbursement of the considerable sums he expended. To call a spade a spade, he was, in common parlance, a stand-up guy.

[51] More to the point of not obtaining a personal benefit, Mr Guyah exhibited documents that he paid US\$8,200.00 in settlement of the funeral home expenses. After some vacillation, Mr Morris Barnett accepted this fact. However, when it was suggested to him that despite this knowledge he went ahead with the lawsuit, he fell back on the bald assertion that a sum was left to bury his sister. He added, "[n]ot my portion of the money" (Mr Morris Barnett's share was said to be the equivalent of US\$8,000.00). I will return to this addendum shortly. To complete the point, this assertion of money being left for funeral expenses was carried no further than a "guess" that it was from the Sagicor policy.

[52] I return to the addendum quoted above, "[n]ot my portion of the money". Having sat through this trial I formed the view that a possible explanation for Mr Morris Barnett's about face, after meeting with the police, is his disappointment in not coming into this sizable windfall. As I understood him, Mr Guyah was free to appropriate the share of other

beneficiaries under the policy towards the settlement of funeral expenses, just not his share. All this from a man who never offered to pay anything in settlement of those expenses.

[53] So that, nothing could dilute the fervour of Mr Morris Barnett's irrational belief that Mr Guyah stole his money. Asked whether he would be sorry were he to find out Mr Guyah did not steal his money, his answer, given with rare promptitude, was, "he took the money!" To the very end Mr Morris Barnett maintained he had a "righteous case" against Mr Guyah. All these assertions were made against the background of his doubtful evidence that he did not know that police questioned Mr Guyah, closed their file and released Mr Guyah. Even if Mr Morris Barnett were to be given the doubt in these matters, something I decline to do owing to his lack of veracity, these were pertinent inquiries he should have made.

[54] In light of all the foregoing I make the following further findings. Firstly, Mr Morris Barnett did not have an honestly held belief that Mr Guyah stole from him. The foundation of the claim that Mr Guyah misrepresented himself as a lawyer and he in reliance on that signed in ignorance the power of attorney, without knowing that he was a beneficiary, is patently false. Secondly, there was no reasonable ground to support the belief that he was defrauded, as he averred in his statement of case and swore to. Thirdly, the evidence disclosed that he did not make any enquiries such as an ordinary prudent and cautious man would have made. He, on the contrary, was driven by irrational feelings akin to those of a jilted lover. Meaning, he was a disappointed beneficiary. Nothing in name of reason could have driven Mr Morris Barnett to the conclusion that Mr Guyah was probably guilty of fraudulent misrepresentation. In short, he had no reasonable and probable cause to file this claim.

Malice

[55] The attorneys-at-law for Mr Guyah, in their written submissions, advanced two bases upon which they say the ingredient of malice is established. Firstly, the ill-will of the claimant, together with an abuse of the court's process, is demonstrated by the filing of his claim without reasonable and probable cause. Secondly, together with the pleadings, the request for information, filed by the claimant, sought to stain the reputation of Mr Guyah as being dishonest and fraudulent.

[56] Miss Wong, for the claimant, did not pointedly respond to these submissions that were made on behalf of Mr Guyah. She was contented to raise two matters of law for the court's consideration. Relying on dicta from Lord Wilson's judgment in **Crawford Adjusters**, *supra*, she pointed to what that learned lord described as a good working definition of malice and, that proof of malice in civil proceedings is just as stringent as in matters arising from criminal proceedings.

[57] I begin the analysis with the following quotation from the learned authors of **Clerk & Lindsell on Torts** 19th edition, at para 16-37:

"Malice in this context has the special meaning common to other torts and covers not only spite or ill-will but also improper motive..... Mere absence of proper motive is generally evidenced by the absence of reasonable and probable cause".

The learned authors go on to list three other indicators of malice. The first is the absence of belief in the merits of the case brought. The second is the lack of good faith in the proceedings. The third is any indication of a desire to concoct evidence or procure a conviction at any cost. According to **Winfield & Jolowicz on Tort** 18th edition, at para 19-11, malice may be inferred from a want of reasonable and probable cause where the jury has concluded that there was no honest belief in the accusation made.

[58] I have already found that Mr Morris Barnett did not have an honest belief that Mr Guyah defrauded him out of his inheritance. It should therefore be clear that I accorded no weight to his denial of the suggestion that his filing of this lawsuit was out of malicious intent. I do not believe the second part of the suggestion that he wanted to hurt Mr Guyah.

This part of the suggestion I appreciate to have its roots in the particulars of claim which alleged that Mr Guyah was facing charges involving elements of dishonesty in the Parish Court for the corporate area. In the same vein, the scandalous matters raised in the claimant's request for information are disregarded.

[59] It seems to me that those questions emanated from overzealous, but ill-advised litigation strategy. Although Mr Morris Barnett was such a prevaricating and vacillating witness, I accept the following evidence. It was suggested to him that all the questions were asked in an effort to make it seem that Mr Guyah was such a criminal that there was no doubt that he had stolen his money. To that Mr Morris Barnett responded, "I don't know Mr Guyah that way. I don't know him".

[60] While this evidence shows that Mr Morris Bennett was not motivated by such strong desire to destroy Mr Guyah, unlike the defendants in **Crawford Adjusters**, *supra*, his motive was certainly not innocuous. On my finding, he concocted the evidence that Mr Guyah misrepresented himself to him as a lawyer and lied that he neither knew what he was signing nor that he was a beneficiary. To then seek to give life to those concoctions in the filing of a claim cannot be characterized as anything but malicious. This leaves the question of damage.

Damage

[61] Mr Guyah is required to prove, finally, that the institution of these civil proceedings resulted in damage (see **Saville v Roberts** 1 Ld. Raym. 373). A summary of the law on the point is provided by **Winfield & Jolowicz**, *supra*, at para 19-2:

"The action for malicious prosecution being a cause of action on the case it is essential for the claimant to prove damage, and in Saville v Roberts Holt CJ classified damage for the purpose of this tort as of three kinds, any of which might ground the action: malicious prosecution might damage a person's fame (i.e. his character), or the safety of his person, or the security of his property by reason of his expense in repelling the unjust charge".

[62] Mr Guyah, at para 28 of his amended defence and counterclaim, filed 15 May 2017, asserted the following:

“The Defendant has suffered emotional trauma, psychological distress by the actions of the Claimant in filing these malicious proceedings. Further, the mounting financial burden of legal fees and treatment for depression and mental anguish has resulted in significant detriment to the Defendant”.
Emphasis as in the original.

In his amended reply to the amended defence and counterclaim, at paragraph 5, the claimant put “the defendant to strict proof of the allegations made therein”.

[63] Neither side made submissions under this head. The attorneys-at-law for Mr Guyah leapfrogged to aggravated damages but that is an entirely different consideration for the court. Mr Guyah did not speak to the question of damage as a result of institution of malicious civil proceedings in his witness statement. That may be understandable since his witness statement was filed on 30 March 2017, well in advance of the filing of the counterclaim.

[64] Although the defendant was allowed to amplify his evidence contained in his witness statement, he gave no evidence in support of the averments of damage. The cross-examiner asked him about the mental and psychological distress, anguish, emotional trauma and suffering he alleged in his statement of case. He responded that while he sought medical attention, he never requested a report. On the state of the evidence, I cannot attribute any distress Mr Guyah experienced to the filing of this claim. I will return to the allegation of mental and psychological distress below.

[65] Leaving the question of mental and psychological distress aside for the moment, I will now look to see whether there is any evidence that Mr Guyah suffered damage to property. Mr Guyah adverted in his statement of case to “the mounting financial burden of legal fees”. However, legal fees would be an item of special damages. Consequently, this required particulars and proof. Neither was forthcoming. The only evidence which was given about legal fees came from Mrs Carolyn Reid Cameron QC. The invoice (exhibit 4 in the sum of \$815,000.00) for legal services rendered by counsel pertained to things antecedent to the filing of this claim and, consequently, is not properly referable to its filing. The defendant has therefore failed to demonstrate that he suffered damage to property as a result of the filing of this claim.

[66] That leaves one head of damage, namely, damage to his reputation, or fair fame in the language of **Saville v Roberts**. Reputational damage must be both alleged and proved. The defendant alleged in his statement of case that the filing of the claim “caused significant damage to [his] reputation, character and integrity”. However, no evidence was led in support of this allegation. From the language of the pleadings and the submissions, it appears that the defendant’s position is that the mere fact of the filing of the claim is a sufficient scandal on the defendant’s reputation. If that is a correct view of the case for the defence, then the proof of reputational damage was left as a matter of inference from the fact of the filing of the claim. No authority was cited for that proposition.

[67] A perusal of the cases relied in support of extending the tort to these proceedings, does not provide any direct support for the defendant’s position. In **Gregory v Portsmouth City Council**, *supra*, **Crawford Adjusters**, *supra* and **Willers v Joyce**, *supra*, the issue of reputational damage was not left to a matter of inference. In all those cases there was actual publication of material capable of resulting in reputational damage. Indeed, in **Willers v Joyce** the question of damage was taken a step further in the averment of a specified sum for legal expenses. In this case, as I showed above, the only legal fees which were proved related to a matter in advance of and unconnected to the filing of this claim. So, there is no precedent for inferring damage to reputation from the mere fact of filing the claim. In the absence of authority, and anything to suggest that the filing of civil proceedings alleging fraud carries with it the notoriety of the commencement of criminal charges, I would hesitate to make any such inference.

[68] I therefore find the claim for malicious prosecution has not been proved. I will now consider the counterclaim for false imprisonment.

False Imprisonment

[69] The defendant alleged in his amended defence and counterclaim, at paragraph 25, that as a consequence of the report made by the claimant, the defendant was arrested in the presence of his family and arrested for over nine hours. In their submissions under

this head, Mr Guyah's attorneys-at-law merely repeated the allegation of a false claim of the claimant leaving to Mr Guyah's arrest and imprisonment for the period alleged.

[70] Mr Guyah spoke to the circumstances of his arrest in his witness statement. Upon leaving the offices of Sagicor Jamaica Limited he was arrested and placed into custody by members of the Organized Crime and Investigations Division (OCID). He asserted that that was based on a complaint made by the claimant. Cross-examination did not reveal any further material for consideration.

[71] Bodily restraint of any person which is neither expressly nor implicitly lawful, is sufficient to satisfy this tort: *Winfield & Jolowicz on Tort*, *supra*, at paragraph 4-15. It requires two ingredients only to be established: the fact of imprisonment and the absence of lawful authority (see *Clerk & Lindsell on Torts*, *supra*, at paragraph 15-23).

[72] In this counterclaim, the allegation is that Mr Guyah was falsely imprisoned by the police, through the agency of Mr Morris Barnett. This is not an allegation which finds support in the evidence. The only event with a faint colour of support is the chronological taking of a statement from Mr Morris Barnett before Mr Guyah was arrested. That, however, is part of a bigger story and does not even represent its beginning.

[73] Ms Wong is quite correct in her submissions that it was Sagicor that set the law in motion. Having become involved at the instance of Sagicor, the police then contacted Mr Morris Barnett. So that, it is fair to say Mr Morris Barnett's interface with the police was part of a larger investigation being undertaken by OCID. That being the case, it is idle speculation that the decision to arrest Mr Guyah was based solely on Mr Morris Barnett's statement. In passing, Mr Guyah gave no evidence that his arrest was in the presence of his family. That is only academic as this head of his counterclaim must fail.

Search of the defendant's home

[74] In his statement of case the defendant averred that he had to endure the search of his home by the police. As in the case of the claim for false imprisonment, there is no evidence that the search was independent of the wider investigations OCID undertook,

at the instance of Sagicor. At the close of the case for the defendant, it remained a bald assertion that the search was carried out as a result of the claimant's report to the police. Accordingly, this head of the counterclaim fails on its own inanity.

Defamation

[75] The defendant, at paragraph c of his amended defence and counterclaim, claimed:

"Damages for defamation, and damage to the character and integrity of the Defendant, by virtue of the Claimant filing the instant Suit and alleging gross misconduct by the Defendant who is a Senior Public Officer".
Emphasis as in the original.

His attorneys-at-law, consistent with the pleading, submitted that the mere filing of the claim "caused significant damage to his reputation, character and integrity". They argued that damages should be assessed in accordance with the principles in ***Percival James Patterson v Cliff Hughes and Nationwide News Network*** [2014] JMSC Civ 167.

[76] Ms Wong submitted that the claim for defamation must fail for the failure to plead in the counterclaim the exact words which would make the claimant sufficiently certain of the defamatory words allegedly said by him. That failure, Ms Wong argued, has also left the court hamstrung in its capacity to assess the words for their meaning, to whom they were published and the impact on the reasonable man in how the defendant was regarded upon the publication of the words. The following authorities were cited in support of those submissions: ***British Data Management plc v Boxer Commercial Removals plc and another*** [1996] 3 All ER 707; ***Best v Charter Medical of England Ltd and another*** [2001] EWCA Civ 1588.

[77] Ms Wong's submissions resonate with the court. The defendant made no attempt to particularise the claim for defamation as required by the Civil Procedure Rules r. 69.2. I quote:

"The particulars of claim (or counterclaim) must, in addition to the matters set out in Part 8 –

(a) give sufficient particulars of the publications in respect of which the claim is brought to enable them to be identified; and

(b) where the claimant alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, give particulars of the facts and matters relied on in support of such sense; and

(c) where the claimant alleges that the defendant maliciously published the words or matters, give particulars in support of the allegations”.

What the defendant has done, to adopt and adapt a phrase, is tantamount to throwing the claimant’s statement of case at the head of the court and say, you figure out which parts are defamatory and award me damages. It cannot be left to the court to comb through the pleadings to isolate precisely the offending words.

[78] Even if that had been done, the head of the counterclaim would still fail. Failure is the inevitable result in the absence of evidence of publication of the offending words, whatever those might have been found to be. In their written submission, the defendant’s attorneys-at-law “that these pleadings are of general public availability and that they have caused substantial damage to his reputation and character”. In other words, every statement of case filed in the registry of the Supreme Court which is available to the public, is a publication to the public. So that, what I am being asked to say is that the offending statement of case, from the fact of filing, was published to at least one person other than the defendant. The defendant himself could not say whether any member of the public had accessed the claimant’s statement of case. In my opinion it would be no ordinary leap to equate general public availability with actual dissemination. Any such speculation on the part of the court would be an injudicious rush into a domain where even angels fear to tread.

Mental and Psychological Distress, Anguish, Emotional Trauma and Suffering

[79] At paragraph 27 of his amended defence and counterclaim, the defendant alleged the following:

“The Defendant has suffered severe emotional trauma, psychological distress by the actions of the Claimant in filing these malicious proceedings. Further, the mounting burden of legal fees and treatment for depression and mental anguish has resulted in significant detriment to the Defendant”.
Emphasis as it appears in the original.

The defendant therefore claimed:

“Damages for mental and psychological distress, anguish, emotional trauma and suffering, caused by the making of a false report to the police, the false imprisonment, and the filing of the instant suit by the Claimant”.
Emphasis as it appears in the original.

[80] The only evidence from Mr Guyah in proof of these averments came under cross-examination. He said he sought medical care for the mental and psychological distress and the other ailments averred. Although he saw a psychiatrist, he did not produce a report from the psychiatrist. At the time he was experiencing distress from another and unrelated source but, he asserted, this claim aggravated his distress.

[81] Ms Wong argued, correctly in my view, that these complaints cannot be exacted and attributed to the claimant. In other words, the defendant has failed to establish a causal link between the filing of this claim and his mental and or psychological ailments. This aspect of his counterclaim has not been proved.

Conclusion

[82] In respect of the claim for fraudulent misrepresentation, it was entirely without merit. The claim failed at the first hurdle namely, whether the alleged representations were made. The proof of this ingredient depended on credibility. This turned out to be Mr Morris Barnett’s Achilles heel. But for the defendant’s failure to prove resultant damage, I would have found the filing of the claim to be malicious civil proceedings. The other heads of the counterclaim were not meritorious. The upshot is that I enter judgment for the defendant against the claimant on the claim. On the counterclaim, judgment is entered for Mr Barnett against Mr Guyah.

Orders

[83] I make the following orders:

1. The claim for damages for fraudulent misrepresentation is dismissed and judgment is entered for the defendant Omar Guyah against the claimant Morris Barnett.

2. Costs on the claim are awarded to Mr Guyah against Mr Morris Barnett, to agreed or taxed.
3. The counterclaim for damages for: malicious prosecution of civil proceedings; false imprisonment; defamation; search of the defendant's home; mental and psychological distress, anguish, emotional trauma and suffering is dismissed. Judgment is entered on the counterclaim for Mr Morris Barnett against Mr Guyah.
4. Costs are awarded on the counterclaim to Mr Morris Barnett against Mr Guyah, to be agreed or taxed.

Postscript

[84] The defendant closed his case on 27 January 2021. Orders were made for the claimant to file and serve his written submission on or before 26 February 2021, while the defendant was ordered to file and serve his written submissions on or before 30 March 2021. The parties were allowed until 13 April 2021 to file a reply, if that became necessary. The delivery of judgment was then reserved to 18 June 2021.

[85] Between the date when judgment was reserved and today's date, Capt. Paul Beswick, lead attorney-at-law for Mr Guyah died; reportedly a casualty of the global COVID-19 pandemic. The court wishes to place on record, and extends to his firm, family and friends, its sincere condolences. May his soul rest in peace.