



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009 HCV 06509

BETWEEN

DAVID CHIN

CLAIMANT

AND

**ATTORNEY GENERAL
OF JAMAICA**

DEFENDANT

Constitutional law – Search of Jamaican Vessel by foreign forces – Maritime Drug Trafficking (Suppression) Act – Whether law authorises search while Jamaican vessel in Jamaican port

Mr. Bert Samuels and Roxanne Mars instructed by Knight, Junor, Samuels for the Claimant

Mr. Harrington McDermott instructed by the Director of State Proceedings for the Defendant

HEARD: 23rd September 2013, 2nd October 2013 and 21st February 2014

CORAM: THE HON. MR. JUSTICE DAVID BATTS

1. In this action the Claimant seeks the relief set out in his Claim Form as follows:

1. A Declaration as to whether or not:

- a. Under the Maritime Drug Trafficking (Suppression) Act, Jamaican law enforcement officials acted unlawfully on the 20th day of November when they invited a treaty State, that is the United States of America law enforcement officials to wit the United States Coast Guard personnel to join in a search of the Claimant's vessel, which was at all material times registered under the laws of Jamaica, operating and docked in Jamaican waters;
- b. Section 9 of the Maritime Drug Trafficking (Suppression) Act is declaratory of the law regarding who can carry out the actual search of a Jamaican vessel which is found within Jamaican waters.

- c. Sections 5, 7, 8, 9 and 10 of the Maritime Drug Trafficking (Suppression) Act allow for the rights accorded to the Jamaican law enforcement officials to be varied to allow a search of a Jamaican vessel found in Jamaican waters to be searched by a treaty State that is the United States of America law enforcement officials with the consent of Jamaican law enforcement officials.
- d. The Defendants jointly and/or severally acted without reasonable or probable cause when they caused the Claimant's vessel, "Lady Lawla" to be searched by United States of America law enforcement officials.
- e. There was a breach of the Claimant's constitutional rights as protected by Section 19 of the Jamaican Constitution by the acts of the Defendants jointly and/or severally when they allowed the 4th defendant (sic) to conduct a search on the Claimant's vessel "Lady Lawla".

And the Claimant claims:

1. Damages, both aggravated and exemplary for the trespass and unlawful search of the Claimant's vessel "Lady Lawla";
 2. Special damages;
 3. Interest under the Law Reform (Miscellaneous Provisions) Act at such rates and for such period that this Honourable court deems just and proper;
 4. Costs; and
 5. Such further and other relief as the Court may deem fit."
2. On the morning of trial the Court was advised that the 2nd named Defendant (the United States of America Coast Guard) had not been served and was therefore no longer a party to the proceedings. It is I think appropriate therefore to have the United States of America Coast Guard removed as the named 2nd Defendant. I have therefore not placed it in the title to this judgment.
 3. The parties to the action agreed a bundle of documents and this was marked and admitted as Exhibit 1. The Claimant applied to amend his Particulars of Claim by inserting the Declarations claimed in the Claim Form. There was no objection and

the application was granted. In his opening statement to the Court, the Claimant's counsel emphasised that the Claimant was primarily interested in declaratory relief.

4. The Claimant gave evidence in his own cause. He called no witnesses. The Defendant called: Lieutenant (senior grade) Aceon Prescott, Captain Alvin Gayle and Noel Christie Petty Officer, all of the Jamaican Coast Guard, to give evidence. Save for one or two areas of factual dispute, the Claimant's evidence coincided with that of the Defendants. At the end of the day the issues to be resolved are matters of law and do not turn on any material factual divergence.
5. The facts as I find them to be and as gleaned from the evidence are outlined in the paragraphs below.
6. The Claimant is the owner and operator of a Jamaican flagged and registered vessel known as the "Lady Lawla". The Claimant is Jamaican and he was granted a licence by the Ministry of Agriculture Fisheries Division to fish in the Pedro Bank and to "purchase/transport" fin fish only. That licence expired on the 2nd of April 2010.
7. On the 24th of October 2009 the Claimant and a crew of 6 Fishermen left Kingston and went to Bojo Nuevo which is a fishing bank south of the Pedro Bank and outside Jamaican territorial waters. He went there to purchase fish and did buy over 30,000lbs. Upon his return to Kingston Harbour at approximately 9pm on the 20th of November 2009, his vessel was approached by a vessel of the Jamaican Coast Guard and ordered to proceed to the Jamaican Coast Guard base in Port Royal known as HMJS Cagway.
8. The interception of the Lady Lawla was on the instructions of Captain Alvin Gayle. He stated that in October 2009 intelligence sources told him that the fishing vessel "Lady Lawla" was believed to be in South America and was planning to bring a cargo of cocaine to Jamaica. On the 20th of November 2009 he was informed that the "Lady Lawla" was approaching Kingston Harbour and was suspected of having cocaine on

board. The vessel was intercepted by CG 134 and escorted to HMJS Cagway and secured at Berth C at 2100 hours.

9. At 2200 hours a “routine board and search” operation commenced. This involved JDF Coast Guard, Jamaica Customs Contraband Enforcement and the Jamaica Constabulary Force Narcotics Division. That search made no discovery of contraband however bilge spaces, water tanks and fuel tanks were filled so the team could not gain access.
10. The crew of the Lady Lawla was instructed to dewater the water tanks and bilge spaces. He complied. The owner was told that he could begin selling fish. This he did not do.
11. On the 21st November, the vessel was again searched. Fuel tanks were not searched as they contained fuel. JDF divers also searched beneath the hull and found nothing. They called off that search for 3 reasons:
 - i. Fuel tanks had fuel and could not be searched
 - ii. Fish hold had fish and could not be searched
 - iii. There were 2 unaccounted for spaces which could not be searched due to lack of “specialist equipment”
12. The Claimant was unable to sell any fish while his boat was at HMJS Cagway because his buyers did not want to travel that distance. He made efforts to contact them by telephone but they declined to go to Port Royal. On the 23rd of November 2009 the Lady Lawla was allowed, while under JDF Coast Guard escort, to go to the fishing complex in downtown Kingston. The escort team then became a boarding team and supervised the sale of fish by the Claimant. At 1330 hours the Claimant was ordered to cease the sale of fish on that day.
13. On the 24th of November 2009 at a meeting between the Coast Guard, JCF Narcotics Division and Lieutenant Colonel Cole (JDF Legal Officer), the possibility was explored of getting the assistance of a United States Coast Guard boarding team to render assistance. It was said that they had the necessary equipment and expertise

to adequately analyse the spaces unaccounted for. The evidence from Captain Alvin Gayle's witness statement is worth quoting:

"21. Commander Douglas made the decision to invite a United States Coast Guard ship to take part in a ship rider.

22. A formal request was made to JDF headquarters by Commander Douglas for a ship rider operation to be undertaken with the US Coast Guard vessel Resolute. This would allow the United States Coast Guard to board a Jamaican vessel in Jamaican waters. It was also decided that the Lady Lawla would be allowed to continue selling the fish. I told this to Mr. Chin via telephone at about 1100 hours that day.

23. The United States Coast Guard vessel Resolute arrived in Jamaican waters at approximately 0830hours on November 27 2009 and Lieutenant Prescott was assigned as the Jamaica Law Enforcement Detachment Commander and led the joint JDF and US Coast Guard boarding team. On Completion of the briefing exercise conducted by Commander Douglas, Lieutenant Prescott and the US Coast Guard boarding team proceeded to the Lady Lawla with an intention of boarding the vessel and commencing a search of the vessel.

24. When the joint boarding team attempted to board the Claimant's vessel to commence the search a strong objection was lodged by Mr. Chin who informed the boarding team that he was going to call his lawyer. The United States Coast Guard personnel expressed that they were uncomfortable with the situation and returned to the Resolute without going on board the Lady Lawla."

14. In point of fact and as confirmed in the evidence of Lieutenant Aceon Prescott, the Claimant objected to the presence of US Coast Guard members on his ship and contacted his Attorneys. His lawyer (Mr. Bert Samuels) also attended and protested. These protests were reduced to writing, see pages 6, 8 and 10 of Exhibit 1. As a result on the instruction of Commander Douglas, the matter was handed over to the Jamaica Constabulary Narcotics Division and both the JDF Coast Guard and US Coast Guard were asked to assist them.
15. The Constabulary obtained a search warrant and detective Sergeant Brown served it on Mr. Chin. After the warrant was served, the Constabulary asked the United States

boarding team for assistance to carry out the boarding. The US Coast Guard team agreed to assist and proceeded to board Lady Lawla.

16. The search by the US boarding team commenced and, according to the witness statement of Lieutenant Commander Aceon Prescott, the following equipment was used by them: "certain breathing apparatus," and a camera.
17. On the 23rd of November 2009 at approximately 1116 hours a JCF Narcotics representative asked the US Coast Guard boarding team for assistance. Another search was done also with nil findings. The JCF Narcotics Division was also the lead agency when the search was done.
18. On the 29th of November 2009, The JDF Coast Guard searched the port fuel tank which had been emptied. No contraband or hidden compartments were found. On the 30th of November 2009, the JDF Coast Guard searched the starboard fuel tank and again no contraband was found. On the 19th of December 2009, the fish hold was searched, as the quantity of fish on board was then small enough to allow a search. This search also resulted in nil findings.
19. It is important to note that Petty Officer Noel Christie did not, in his witness statement, describe or particularise any special equipment used by the US Coast Guard whilst conducting their search. He was the JDF Coast Guard officer present when the US Coast Guard members were on board the Claimant's vessel. He also stated at paragraph 26 of his witness statement that the US Coast Guard made no checks of the fuel tanks. This corresponds with the evidence of the Claimant who said that no equipment was used. It however contradicts the oral evidence of the Defendant's witnesses who stated special breathing apparatus was used to enter the ballast tanks by the US Coast Guard. It is noteworthy that the Jamaica Coast Guard did not enquire of the Fire Department for on land breathing apparatus. Further, the search warrant was addressed to constables.
20. I find as a fact that the US Coast Guard did use breathing apparatus to assist the search of the ballast tanks. I find however that this was not necessary. In the first place the JDF Coast Guard was able to search the fuel tanks without such assistance and therefore ought to have been able to do the same for the ballast tanks, the former being the more risky to search . Secondly no effort was made to borrow the equipment from the Jamaican Fire Brigade or from the US forces themselves. I find

as a fact that it was not necessary to have US Coast Guard personnel aboard the Claimant's vessel.

21. In the final analysis however, my decision does not turn on this matter of necessity. The Defendant seeks to deny liability with a submission that since for liability in trespass a "direct" act is required, there can be no liability as the trespass was by the United States Coast Guard not the JDF Coast Guard. The difficulty the Defendant has is that this is not a claim for trespass. It is a claim for Constitutional relief in the form of a Declaration and Damages consequent on a trespass by foreign forces on his vessel. That trespass being at the invitation of agents of the Jamaican State. The foreign forces were acting on the instructions of and hence as agents of the Jamaican forces. Were the Defendants to be correct, it would mean that any unlawful conduct by foreign forces operating under sections 8 and 9 of the Maritime Drug Trafficking (Suppression) Act would be without an effective remedy. Any, for example, unlawful shooting of a Jamaican would put the Jamaican Claimant to the expense of a suit against the foreign State. I hold that in the circumstances of the case it is no defence to say that the, or any alleged, trespass to the Claimant's vessel was done by agents of a foreign State. Indeed that is exactly the circumstance which gave rise to the complaint.

22. The Defendant submitted also that the conduct of its agents inviting assistance from US forces was authorised by the Maritime Drug Trafficking (Suppression) Act, and in particular sections 7, 8, 9 and 10. The sections read as follows:

7.-(1) The Central Authority may request assistance from a treaty State for the provision by that State of law enforcement vessels to effectively carry out patrols and conduct surveillance in Jamaican waters for the prevention and detection of illicit traffic.

(2) Where a treaty State agrees to provide assistance in response to a request made under subsection (1) the Central Authority shall request the treaty State to provide the following information-

- a) the name and description of the law enforcement vessel;
- b) the date when and the period during which it will be made available;
- c) the name of the Commanding Officer; and
- d) such other information as the Central Authority considers relevant.

8.-(1) The Central Authority may designate law enforcement officials who may, for the conduct of law enforcement operations for the prevention, detention and

suppression of illicit traffic by vessels in Jamaican waters, embark on law enforcement vessels belonging to a treaty State.

(2) The law enforcement officials may, while embarked on law enforcement vessels belonging to a treaty State-

- a) enforce the laws of Jamaica in Jamaican waters, and seaward therefrom in the exercise of the right of hot pursuit, or otherwise, in accordance with international law; and
- b) authorize the entry of the law enforcement vessels into and their navigation within Jamaican waters.

9. Any law enforcement action, including boardings, searches or seizures, detentions and the use of force, whether or not involving weapons, carried out pursuant to section 8, shall be the responsibility of and carried out by Jamaican law enforcement officials in accordance with Jamaican law.

10. Where Jamaican law enforcement officials are embarked on a law enforcement vessel of a treaty State those officials shall carry out law enforcement action as described in section 9 so, however, that-

- a) crew members of the treaty State's law enforcement action if expressly requested to do so by the vessel may assist in any such law enforcement action by Jamaican law enforcement officials in command but only to the extent and in the manner requested; and
- b) any such assistance shall be rendered in accordance with the relevant Jamaican laws, to the extent that those laws are not inconsistent with the laws of the Treaty State.

23. I hold that the effort to rely on those provisions to justify what was done in this case is misplaced. It is important to record that Jamaica is a Sovereign State. Its Constitution affords its citizens certain rights and freedoms cardinal among which is the protection of the law. It is important to record also that International law forbids the boarding of foreign flagged vessels by military forces where that vessel is in international waters or in its own territorial waters. Such conduct can be regarded as hostile.

24. It is for this reason that in its fight against drugs, the United States has entered into the properly called "Ship Rider" Agreements. They have done so with several other

nations. In the case of Jamaica, the Ship Rider Agreement was given effect to in domestic law by way of the Maritime Drug Trafficking (Suppression) Act. That Statute represents an exception to the constitutionally prescribed search of property (see Section 19 of the Jamaica (Constitution) Order in Council 1962 (as the 2011 amendments to the Bill of Rights had not yet come into effect). It has not been suggested that the Maritime Drug Trafficking (Suppression) Act was not reasonably required in the interest of defence, public safety, and public order or otherwise. The sole issue therefore is whether the activity described earlier in this judgment is sanctioned by that Act. Before answering the question I pause only to observe that the Act (and the Treaty) deal only with illicit substances. It must be a matter of some regret that the prevention of trafficking in guns was not at that time also made the subject of the statute.

25. On a true construction of the Act, it is fair to say that what was intended was cooperation between the security forces of the United States and the security forces of Jamaica. It allows Jamaican naval vessels whilst in international waters or upon entering the waters of the United States to, in certain circumstances, board and search vessels flagged by the United States. Similarly and conversely, it allows United States naval vessels in similar circumstances to board and search Jamaican flagged vessels.
26. I hold that the Act does not contemplate, and has no provision dealing with, the boarding and search of a Jamaican flagged vessel while it is berthed in a Jamaican port and already in the custody and control of Jamaican security forces. Manifestly, the detailed provisions of Sections 8, 9 and 10 relate to operations aboard or from a United States vessel whether it be within Jamaican territorial waters or not. These sections allow for Jamaican security personnel to be deployed on the United States vessel. In that context they can solicit the assistance of the crew of the vessel to undertake the military or security operation. Even in that context, section 9 makes it clear that “boardings, searches, seizures, detentions and the use of force” shall be

the “responsibility” of and carried out by Jamaican law enforcement officials in accordance with Jamaican law.

27. In the case at bar, the “Ship Rider” appears to have been a contrivance. The Jamaican vessel returned from the sea to port. It was intercepted in port by Jamaican security forces, seized and searched. It was only thereafter that a decision was taken to have a “Ship Rider” by placing Jamaican Coast Guard personnel aboard a US vessel. These personnel then asked the US personnel to assist in the search of the Claimant’s vessel. The United States naval vessel played no role in the interception or boarding of the Claimant’s vessel, which had already been intercepted and boarded. In other words, it is clear that contrary to the express wording of Section 8 of the Act, these Jamaican forces did not,

“While embarked on a law enforcement vessel belonging to a treaty state, enforce the laws of Jamaica.”

28. I find it significant that the US Coast Guard personnel felt uncomfortable when the Claimant voiced his objection and that they withdrew. They perhaps recognised the inappropriateness of the conduct and perhaps were well aware that foreign forces would not in their own country be invited to board a ship of their nation, while it was safely in port and under the control and custody of U.S. law enforcement officials. That was not what “ship rider” was about.
29. Which leads me to another reason why the Defendant must fail even assuming the Act has the meaning proposed by Counsel for the Attorney General in, what I must say, was a very well structured and presented legal submission. This is because the evidence does not disclose that this was a search and boarding conducted by law enforcement officials “embarked” on the Resolute. This factual condition is a prerequisite to the applicability of Sections 8, 9 and 10.

30. The evidence is that after the objection by the Claimant, the U.S. Coast Guard personnel withdrew. The matter was placed under the control of the narcotics police (Detective Corporal Brown in particular) who obtained a search warrant. It was he, then armed with the warrant who invited the U.S. Coast Guard personnel on board the Claimant's vessel. The Defendant's witnesses were emphatic in their witness statements about this. There is no evidence, nor was it suggested, that Detective Corporal Brown was a law enforcement officer embarked on the Resolute. That being the case it takes the fact situation of this case out of the Maritime Drug Trafficking (Suppression) Act, and Detective Corporal Brown had no authority to invite foreign forces anywhere. We have already seen that the warrant was addressed to no one but Constables and was issued under and by virtue of the Dangerous Drugs Act.
31. In the course of his submissions, I asked the Defendant's Counsel where would he draw the line if, as he submitted, the Act authorised such action by foreign forces anywhere in Jamaican territorial waters including in a port whilst a vessel was already in the custody and under the protection of Jamaican forces. I asked him whether assistance might be sought in Jackson Town and the foreign forces helicoptered to assist; or whether to a vessel in dry dock alongside the sea. I might well have asked him what if assistance was required on the Black River in Upper St. Elizabeth might not foreign forces be similarly brought in?
32. Counsel's response was that so long as the vessel to be boarded was afloat it was fair game. The vessel in dry dock couldn't be searched but the vessel in the water beside it could be. This court respectfully disagrees. The line is to be drawn in two places. Firstly the application of Sections 8, 9 and 10 presupposes an activity connected to the operation of the vessel on which Jamaican forces are embarked. This is so because the purpose of the "Ship Rider" is to allow the operation of foreign forces lawfully within Jamaican territorial waters. Any search, boarding or other authorised activity must be as a consequence of the operation or activity (or connected to such operation or activity) by the United States vessel. Secondly such

operation must be in Jamaican waters as defined in Section 4 of the Maritime Areas Act, the archipelagic waters as defined in Sections 5 and 7 in the said Maritime Areas Act and the territorial sea as defined in section 12 of that Act. Those sections of the Maritime Areas Act do not mention ports or jetty. Nor do they say that when a ship is docked in a harbour port or a jetty, it is in the internal waters or the territorial sea. Indeed in common or ordinary parlance, a vessel which is docked is no longer considered to be at sea. I hold that sections 8, 9 and 10 of the Maritime Drug Trafficking (Suppression) Act do not apply to a vessel which is safely docked in a port or harbour and is therefore no longer at sea in territorial or inland waterways. Once safely docked it is accessible by land and the need for assistance from a “foreign law enforcement vessel” within the meaning of section 7 will have disappeared. This is the *raison d’être* of the assistance as stated in Section 7, i.e. “patrols and surveillance in Jamaican waters” to prevent and detect illicit traffic. So much more is the case when the vessel to be boarded is already in the custody of Jamaican law enforcement officials and safely docked.

33. For the reasons stated in paragraphs 26, 30 and 32 the Claimant is entitled to succeed. The Defendant has acted in a manner which is *ultra vires* the Maritime Drug Trafficking (Suppression) Act. What remedies are appropriate? The Claimant seeks damages for loss of fish and maintenance of the vessel as well as general damages for breach of his constitutional right. There is no doubt that the unlawful act by the US Coast Guard officials was induced and facilitated by the agents of the Jamaican State. This was sanctioned it seems, by high levels of authority within the military establishment. Ultimately as we have seen, it was a police officer armed with a warrant that is to blame. Nevertheless it is the Defendant who is vicariously responsible for the constitutional breach because its servants and/or agents encouraged, allowed, invited and facilitated the unlawful conduct by the US Coast Guard personnel.
34. This breach occurred for a few hours only and within a 2 day period. The vessel had been in the custody of the Jamaican authorities for almost 2 months. Such

maintenance costs and loss of fish as occurred could not therefore be heaped on the conduct complained of. There is no suggestion in this action that the activity of the Jamaican law enforcement officials was unlawful or became unlawful due to the period of time taken to effect the search. Nor could there be, given that a search was impossible whilst fish was on board and fuel and ballast in the tanks. I therefore hold that the conduct of the US Coast Guard caused no loss of fish and no maintenance costs.

35. Complaint is made that as a result of the conduct complained of, legal costs were incurred as Mr. Bert Samuels was retained and did attend at the time of the unlawful search. The evidence of this is at page 1 of Exhibit 1. It is a receipt of \$450,000.00 dated the 29th of December 2009. This claim commenced on the 9th of September 2010. I am therefore, on the evidence, prepared to find that some part of the payment of \$450,000.00 related to the legal services at the time of boarding. The Attorney not only attended in person, but wrote letters of protest. I am prepared to award 50% of that amount, as Special Damages consequent on the breach of constitutional right.
36. Insofar as General Damages are concerned, the Claimant objected to foreign forces on his vessel even while making it clear he had no objection to a search by Jamaican forces. His sense of national pride was clearly offended. His national pride was hurt. In these circumstances, the Crown submits that nominal damages are appropriate as no harm was done in the end. Is this really so? I was very nearly convinced by the submission until I asked myself: what price does one place on National pride? An inadequate analogy may be found in the assessment of one's loss of expectation of life. There the courts selected a conventional figure meaning it is applicable to all. It is not nominal neither is it excessive. In the circumstances for the injury to national pride, I award \$500,000.00 in damages.
37. Jamaica is a financially poor country with balance of payments and budgeting challenges. Crime is high and the trade in guns and drugs threaten to overwhelm the

security forces and our national institutions. In the matter of *Hemans v the Attorney General 2009 HCV 02800* I stated that the constitutional rights our citizens enjoy were the result of a history of struggle and sacrifice. I repeat in part what I said then,

“Our country, notwithstanding its challenges, will continue to be enriched so long as we maintain the rule of law respect for our Constitution and national pride in our institutions.”

38. In the result therefore, there is judgment for the Claimant against the Defendant and

i. It is Declared that Jamaican law enforcement officials acted unlawfully on the 20th and 21st days of November 2009 when they invited law enforcement officials of a Treaty State to wit United States Coast Guard personnel to join in a search of the Claimant’s vessel which was at all material times, safely docked in a Jamaican port and already safely under the control of Jamaican law enforcement officials.

ii. The Defendant, its servants and/or agents acted unlawfully and/or without reasonable or probable cause when they caused the Claimant’s vessel the “Lady Lawla” to be searched by law enforcement officials from the United States.

iii. Damages for breach of the Claimant’s constitutional rights as follows:

Special Damages:

- Legal fees reasonably incurred: \$225,000.

General Damages: \$500,000.00

iv. Costs of this action to the Claimant to be taxed if not agreed.

v. Interest will run on the General Damages at 3% per annum from the 20th of November 2009 until the date of this judgment.

vi. Interest will run on the Special Damages at 3% per annum from the date of service of the Claim Form until the date of this judgment.

David Batts
Puisne Judge
21st February 2014.