[2022] JMFC Full 04

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CONSTITUTIONAL DIVISION

CLAIM NO. 2015 HCV 04694

BEFORE:	**THE HONOURABLE MRS JUSTICE S. WINT-BLAIR** **THE HONOURABLE MISS JUSTICE A. NEMBHARD** **THE HONOURABLE MISS JUSTICE T. HUTCHINSON**	
BETWEEN	**OMAR GUYAH**	**1ST CLAIMANT**
AND	**CORDELIA BROWN**	**2ND CLAIMANT**
AND	**DEVON ROWE** **FINANCIAL SECRETARY**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**
AND	**MAJOR (RET'D) RICHARD REECE** **CHIEF EXECUTIVE OFFICER** **CUSTOMS**	**3RD DEFENDANT**

HEARD TOGETHER WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2019 CV 00456 [Formerly 2018 CD 00143]

BETWEEN	**OMAR GUYAH**	**1ST CLAIMANT**
AND	**CORDELIA BROWN**	**2ND CLAIMANT**
AND	**JACK DRUMMOND**	**1ST DEFENDANT**
AND	**WINSTON LAWRENCE**	**2ND DEFENDANT**
AND	**GREGORY FARQUHARSON**	**3RD DEFENDANT**
AND	**MAJOR (RET'D) JOHANNA LEWIN**	**4TH DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**5TH DEFENDANT**
AND	**COMMISSIONER OF CUSTOMS**	**6TH DEFENDANT**
AND	**LT. COL. SEAN PRENDERGAST**	**7TH DEFENDANT**

IN OPEN COURT

Mr Christopher Townsend and Mesdames Terry Ann Guyah, Gina Chang and Simone Gooden instructed by Guyah Tolan & Associates for the 1st Claimant

Mr Chukwuemeka Cameron instructed by Carolyn C. Reid & Company for the 2nd Claimant

Ms Althea Jarrett QC. and Mr Ricardo Maddan instructed by the Director of State Proceedings for the Defendants

Heard: July 5, 6, 7, 8, 12, 13, 14, 15, 19, 20, 21, 22, 26, 27, 28, 29, 2021 and July 26, 2022

Interdiction – Whether there should be a hearing before a public officer is interdicted – Whether there should be a hearing before salary is withheld upon interdiction - Whether salary constitutes property

Tort – Malicious prosecution – Whether the customs officers acted with malice in prosecuting the claimants – Whether the customs officers acted with reasonable and probable cause in prosecuting the claimants –

False imprisonment – Whether the claimants were falsely imprisoned – Whether the initial arrest of the 1st claimant was lawful – Whether the detention of the 1st claimant was unduly long and unexplained – Whether the customs officers acted with reasonable and probable cause in detaining the claimant – Whether the customs officers acted with malice

Misfeasance in public office – Criminal charges against the claimants dismissed for want of prosecution in the court below – Whether the plea of autrefois acquit applies

Administrative law – Administrative orders – Declarations sought

Constitutional law – Constitutional relief – Right to a fair trial within a reasonable time – Right to liberty – Right to property

Whether dismissal of criminal charge is an acquittal within the meaning of Public Service Regulations

Constitution of Jamaica – Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 – sections 14, 15, 16(2) - The Jamaica (Constitution) Order in Council, 1962 – sections 32, 125, 127 - Public Service

Regulations – 28, 32, 34, 43, 47, Revenue Administration Act – sections 6, 8 1 13 – Customs Act – sections 2, 3, 91, 203, 210, 219, Constabulary Force Act – section 13, 33

WINT-BLAIR, J

BACKGROUND

[1] These claims stem from criminal charges that were laid against the Claimants, Mr Omar Guyah and Ms Cordelia Brown, in the Resident Magistrate's Court for the Corporate Area (Criminal Division) (as it then was), in or around March 2012.

[2] On 6 February 2015, those criminal charges were dismissed for want of prosecution. The Claimants contend that crown servants from the Revenue Protection Division ("RPD") and the Jamaica Customs Department ("Customs") acted with malice, in their pursuit of the prosecution of those criminal charges. The Claimants are public officers employed to Customs. The first claimant and Ms Brown were employed to Customs as Director of Customs in the Contraband Enforcement Team ("CET") and Deputy Director of Customs, respectively. Their duties included the enforcement of the customs laws of Jamaica inter alia.

[3] In or around November 2009, a Suzuki Swift motor vehicle ("the Suzuki"), one of fourteen motor vehicles, entered Jamaica in a container on board the vessel *Zim Shanghai.* It was unloaded and placed in a bonded facility operated by the wharfinger, Kingston Logistics Centre Limited ("KLC"). The importer of the vehicle took no steps to clear it through the customs department.

[4] In 2010, customs officers, acting on the instruction of the first claimant, seized the Suzuki and thirteen (13) other vehicles in a similar situation. On 11 November 2010, the Commissioner of Customs issued a memorandum concerning the procedure for the disposal of goods under requests made by the wharfinger pursuant to section 91 of the Customs Act.

[5] On 15 March 2011, CEC Customs Brokers & Freight Forwarding Ltd, acting on behalf of Kingston Logistics, submitted a Bill of Sight for the Suzuki to the Customs Valuation Branch. The parts of the Bill relating to the value of the goods were left blank. On 17 March 2011, a CIF value of US$6,800.00 for the Suzuki was provisionally accepted by the senior valuation certification officer.

[6] On 4 April 2011, the duties and taxes payable on the importation of the Suzuki were paid to Customs using the first claimant's credit card. A receipt for that payment was issued to KLC.

[7] On 26 April 2011, the supervisor of the Queen's Warehouse issued a certificate for the Suzuki, certifying that the vehicle had been sold to KLC at public auction. No such auction had in fact taken place.

[8] By letter dated 27 April 2011, KLC notified the Jamaican tax authorities that they had purchased the Suzuki from Customs and had sold it to a Ms Audrey Carter. As evidence of the purchase, they produced the Customs Department's certificate that the vehicle had been sold to them at auction. On or about 2 June 2011, Ms. Carter had the vehicle registered in her name and licensed to be operated on the island's roads.

[9] On 15 February 2012, the Suzuki was seized by customs officers from Kerri- Ann Guyah and taken to the premises of the Customs Department.

[10] The evidence before this court in the case at bar is that the claimants were charged after an investigation by the Revenue Protection Division. That investigation led to charges of breaches of section 210 of the Customs Act, simple larceny, conspiracy and breaches of the Corruption Prevention Act. The first claimant was taken into custody on March 9, 2012 and charged with the offences aforesaid. At the time of the arrest, the first claimant was appointed in the post of Director, assigned to the Contraband Enforcement Team, and the second claimant was appointed a Deputy Commissioner of Customs.

[11] The allegations which were before the then Corporate Area Resident Magistrate's Court (Criminal Division) were set out in a document entitled:

> *Prosecution's submissions for the non-disclosure of certain documents requested by the defence*[1]. Under the sub-head *"The allegations"* the prosecution advanced the following in written submissions:
>
> *"19. In summary, the allegations are that in June 2010 and January 2011 while being the Director of the Contraband Enforcement Team of Jamaica Customs, the first claimant seized a number of vehicles from the Kingston Logistics Centre (KLC) on the basis that they were brought into Jamaica in breach of the Customs Act. These vehicles were later forfeited by the Commissioner of Customs, and as such became the property of the Crown. It is further alleged that between June 2010 and April 2011 The first claimant, with knowledge that the Minister of Finance is the only competent authority to order the disposal of goods forfeited to the Crown under the Customs Act, coordinated a scheme to unlawfully and fraudulently dispose of the 14 motor vehicles itemized in the informations laid before the Court, without the authority of the Minister of Finance.*
>
> *20. This scheme allegedly involved coordinating the unlawful removal of these motor vehicles from the customs area at Kingston Wharves, the fraudulent preparation of correspondence to give the appearance that the motor vehicles were sold by KLC, the soliciting of persons to "purchase" these motor vehicles from KLC, the use of the first claimant's position of authority at Customs to prepare correspondence purporting to authorize the entry of the motor vehicles by Customs and to process the payment of "duties" at the Queen's Warehouse in Montego Bay, in the parish of Saint James by the "purchasers" of these motor vehicles in order to make it*

[1] Agreed Bundle, page 402 at page 407-408, filed on March 10, 2014

appear that the motor vehicles were lawfully processed by Jamaica Customs.

21. Ms. Brown, who was a Deputy Commissioner of Customs is alleged to have conspired with the first claimant to defraud the Government of Jamaica of one of the motor vehicles. The evidence on which the Crown intends to rely to establish the conspiracy is the alleged use by Ms. Brown of her credit card to 'pay' the 'duties' in respect of one of the motor vehicles and the alleged receipt by Ms. Brown from Ms. Cater of a sum of money representing the refund of the sums paid in respect of the disposal of the motor vehicle as well as an additional sum of money. Ms. Carter, who is the only accused not employed to Jamaica Customs, is alleged to have been associated with the disposal of 4 of the 14 vehicles."

[12] The evidence before us disclosed that KLC had been granted free zone status by the Ministry of Industry and Commerce in 2006. Ministerial approval had been given for KLC to operate a Customs private bonded Warehouse. KLC was allowed to provide services to international customers without having to pay duties as the Free Zone is considered international space.

[13] The prosecution's case was based on correspondence and other documents prepared for the processing of the fourteen motor vehicles by Customs, which had been used by the first claimant to create the impression that the motor vehicles had been dealt with in accordance with customs laws. The first claimant had procured these documents by dishonest means and with whom the second claimant had conspired.

[14] On 6 February, 2015, those criminal charges were dismissed for want of prosecution.

[15] In October 2015 The first claimant and Ms Brown brought proceedings seeking inter alia declarations and an injunction to prevent the commencement of disciplinary proceedings against them, as well as damages. An interim injunction

was granted on 2nd October 2015, by my learned brother, Batts, J preventing the commencement of disciplinary proceedings against the claimants.

[16] On 9 March 2018, The claimants filed the instant claims by virtue of which they seek a raft of remedies, including damages for malicious prosecution, false imprisonment, misfeasance in public office, loss of Income and handicap on the labour market, aggravated, exemplary, vindicatory and punitive damages and constitutional redress, among other things.

[17] An Amended Claim Form was filed on 1 October 2018; a Further Amended Claim Form and Further Amended Particulars Claim together with a Further Amended Fixed Date Claim Form, were filed on the first date of the trial of this matter with the permission of the court.

SUBMISSIONS

THE 1st CLAIMANT'S SUBMISSIONS

[18] Learned Counsel Mr Christopher Townsend, Miss Terri-Ann Guyah and Miss Simone Gooden advanced fulsome and comprehensive submissions on behalf of The first claimant. They have been abridged of necessity and are outlined as follows:-

The 2015 Claim

1) The first claimant's constitutional right to fair hearing within a reasonable time under the Charter of Fundamental Rights and Freedoms in the Jamaican Constitution ("the Charter") was breached by his interdiction and continued interdiction from the public service and the institution of disciplinary proceedings against him with a view to dismissal;

2) The initiation of disciplinary proceedings with a view to dismissal against The first claimant is in breach of regulation 34 of the Public Service Regulations, 1961 ("PSR");

3) Having been acquitted of the criminal charges the defendants are estopped from instituting any disciplinary proceedings against them;

4) Mr Devon Rowe, acting as the Commissioner, failed to notify the first claimant of the disciplinary charges that were laid against him in breach of section 43(1)(a) of the PSR;

5) The first claimant is entitled to the plea of *autrefois acquit*;

6) The first claimant had a legitimate expectation that the government would have acted lawfully and fairly when seeking to terminate his employment;

7) Any administrative disciplinary proceedings would be unfair and severely prejudicial in nature as they touch and concern the same set of facts as in the criminal proceedings;

8) As a result of his interdiction and continued interdiction, the first claimant has not been reinstated to a commensurate post in the public service and is still receiving half of his salary;

9) The first claimant has suffered loss of opportunity and has been subject to continued embarrassment and reputational damage;

10) The first claimant has suffered and continues to suffer significant mental and psychological distress, anguish and emotional trauma as a result of the criminal proceedings; and

11) The first claimant is entitled to aggravated damages on the footing that the 1st and 3rd Defendants deliberately and/or wilfully and/or recklessly and/or maliciously abused their statutory authority by initiating criminal and disciplinary proceedings against him knowing that there were no statutory or other basis to do so.

The 2019 Claim

1) The search of the first claimant's parents' home, his private residence and his office at Customs was conducted in breach of section 13(3)(j) of the Charter;

2) The Defendants did not have reasonable and/or probable cause to search the first claimant's parents' home, his private residence or his office at Customs;

3) The search was conducted in a public and calculated manner to cause maximum embarrassment to the first claimant and his family and invade their privacy;

4) There were numerous breaches of the search warrant by the Defendants;

5) The search of the first claimant's office at Customs was conducted in breach of his right to privacy and protection under the law;

6) A search warrant was not procured for the search of the first claimant's office at Customs and the Commissioner did not give any directions permitting access to his office;

7) The Defendants contravened his right to due process under the Charter. The Defendants did not provide him with duty counsel when the searches and subsequent seizure were conducted or grant him an opportunity to seek legal advice;

8) Sergeant Gregory Farquharson breached the Firearms Act and the first claimant's constitutional right to property when he seized the first claimant's personal firearm;

9) Sergeant Farquharson failed to hand over all the items that were seized from the first claimant;

10) The Defendants did not have reasonable and/or probable cause to arrest and/or charge the first claimant;

11) The first claimant was falsely imprisoned for a period of eight (8) days. As a consequence of his imprisonment, he suffered periods of anxiety, panic attacks, depression, mental anguish, feelings of abandonment, damage to his reputation, ridicule from his peers and lost job opportunities;

12) The 2nd, 3rd, 4th and 7th Defendants owed the first claimant a statutory duty under sections 3(1), (3) and 22 (1) of the Bail Act. The Defendants breached their statutory duty and, as a result, he was deprived of his constitutional right to bail under section 14 (4) of the Charter;

13) The Defendants' cumulative actions demonstrate that they were actuated by malice and that they acted without reasonable and/or probable cause in the prosecution of the criminal matter. Their actions demonstrated their intention to use the legal process for some other purpose;

14) The Defendants failed to pay due care and attention to the preservation of the integrity of the evidence obtained in the criminal matter. The destruction or spoliation of evidence carries a presumption that the destroyed evidence would have been unfavourable to the party who destroyed it. The evidence of spoliation has not been adequately explained by the Defendants. Spoliation is an aggravating circumstance that supports malice in the instant case;

15) The first claimant's arrest for larceny and corruption resulted in damage to his reputation and character. Prior to the first claimant's arrest he was considered to be a person of unblemished character;

16) The first claimant incurred legal costs to defend the charges laid against him and this establishes damage to property;

17) The Claimants are entitled to constitutional redress under sections 14, 15 and 16 of the Charter;

18) The Defendants did not have any reasonable grounds to initiate his detention or incarceration; The procedure utilized by Sergeant Farquharson and Major

(Ret'd) Johanna Lewin to effect his imprisonment were not fair procedures established by law;

19) The first claimant was not afforded the protections of section 14 (2) of the Charter. He was not allowed to be visited by his family, denied the right to communicate with an attorney-at-law and at the time of his arrest and detention, the first claimant was not informed of the reasons for his arrest or detention;

20) The Defendants breached the first claimant's right under section 14(5) of the Charter. The first claimant was not treated humanely or with any regard for his inherent dignity.

21) The Defendants breached the first claimant's right to a fair trial under section 16 of the Charter. The Defendants failed to uphold the presumption of innocence under section 16(5) of the Charter.

22) The searches that were conducted by the Defendants violated sections 13 and 15 of the Charter. The Defendants also seized a number of items that were not covered by the search warrant issued under section 203 of the Customs Act;

23) The prosecution's conduct of the criminal matter deprived the first claimant of his right to due process and equality before the law;

24) The actions of the 1st, 2nd and 3rd Defendants constituted misfeasance in public office;

25) The Privy Council decision of **Guyah v Commissioner of Customs and Another**[2] should be treated as distinct from the instant claim as it was determined based on the evidence that was before the Privy Council at the time of the appeal;

[2] [2018] UKPC 10

26) The Court is not being asked to quash the first claimant's interdiction. The court is being asked to evaluate the process by which the decision to interdict The first claimant was made;

27) The institution of disciplinary proceedings at this time after such significant delay would infringe the first claimant's right to a fair hearing within a reasonable time;

28) The first claimant is entitled to retroactive salary and compensation for loss of utility of the sums; The first claimant is also entitled to commercial interest from the date of his interdiction to the date of payment of the sums;

29) The first claimant is entitled to incremental payments on his pay scale and damages should be assessed on a single increment from 2011 to 2021;

30) Based on the first claimant's performance, it would have been highly likely that he would have transitioned to a similar post under the Jamaica Customs Agency. Therefore, he should be awarded a salary, travel allowance, gratuity, and a performance increment that reflect the transition that he would have made to the Jamaica Customs Agency;

31) The first claimant is entitled to vacation leave during the period he was on interdiction. The Claimants should be paid salary in lieu of the vacation leave accrued prior to their interdiction and accumulated for each year of the interdiction up to the date of payment, along with corresponding travel allowance for the period's pay in lieu of leave;

32) The Commissioner of Customs withheld the first claimant's travel allowance for the period of June 2012 to May 2013 without just cause and in breach of the Financial Audit and Administration Act and the directives of the Financial Secretary of the Ministry of Finance;

33) The failure of Customs to pay the first claimant's travel allowance for the period of June 2012 to May 2013 is ultra vires and a breach of section 15(1) of the Charter;

34) The Commissioner of Customs failed to follow the provisions of the Ministry of Finance Public Service Circular No. 14, File No. 107/125 dated 2 December 2011 regarding overpayments;

35) The first claimant is entitled to receive pension in accordance with section 6(1)(ii) and (iv) of the Pensions Act, 1947. The Pension Act, 1947 was repealed and replaced by the Pensions (Public Service) Act, 2017 and this would have affected The first claimant's entitlements;

36) The 7th Defendant has failed to file any evidence in response to the claim, a finding should be made against him and damages assessed accordingly; and

37) The first claimant is entitled to:-

(i) Damages for false imprisonment and breach of statutory duty;

(ii) Damages for the unlawful seizure of his firearm;

(iii) Damages for defamation;

(iv) Damages for malicious prosecution;

(v) Special damages;

(vi) Aggravated damages;

(vii) Exemplary or punitive damages; and

(viii) Vindicatory damages.

THE 2ND CLAIMANT'S SUBMISSIONS

[19] Mr Chukwuemeka Cameron advanced similarly comprehensive submissions on Miss Brown's behalf. Miss Brown also endorsed and adopted the submissions advanced by the first claimant and added as follows: -

The 2015 Claim

1) The former Financial Secretary, Mr Rowe wrongly instituted disciplinary proceedings against her as he did not have a reasonable or evidential basis to do so.

2) The Public Service Commission ("PSC") failed to provide written charges against the second claimant;

3) The second claimant was not given the opportunity to be heard prior to the PSC's decision to institute disciplinary proceedings against her;

4) The second claimant had a legitimate expectation that the government would have acted fairly and in accordance with the principles of due process as prescribed by the Constitution and the PSR when instituting disciplinary proceedings against her. The Defendants breached this legitimate expectation;

5) The Defendants are estopped from proceeding with disciplinary proceedings against the second claimant as she was acquitted of similar charges in criminal court; Regulation 34 of the PSR and section 16 (9) of the Charter preclude the Defendants from proceedings with the disciplinary proceedings against her. The plea of *autrefois acquit* is applicable in the circumstances

6) Delay will render it impossible for the claimants to have a fair trial and it would be a further injustice to allow the disciplinary proceedings to proceed;

7) The disciplinary proceedings are an attempt by the Defendants to impeach the findings of the Resident Magistrate and to relitigate the criminal matter in a different forum;

8) The second claimant's interdiction and continued interdiction from the public service and the decision to withhold half her salary was unmeritorious, unfair, prejudicial, unconstitutional and contrary to the PSR;

The 2019 Claim

1) The 1st, 2nd, 3rd and 4th Defendants deliberately and/or wilfully and/or spitefully and/or recklessly and or maliciously abused their statutory authority to arrest and prosecute the Claimants knowing full well that there was no statutory basis to commence the prosecution;

2) The actions of the 1st, 2nd, 3rd and 4th Defendants are so abhorrent that they warrant an award of aggravated damages;

3) The Defendants abused and misused their state authority by denying the second claimant her statutory and constitutional rights;

4) Unless deterred by a sufficient award of damages, the Defendants are likely to repeat their actions against other citizens;

5) The Defendants have failed to establish reasonable and/or probable cause to commence criminal proceedings against the Claimants. The Defendants failed to set out any facts to support their assertion that the second claimant conspired with the first claimant in relation to one (1) of the fourteen (14) motor vehicles;

6) The Defendants failed to set out all the facts on which they intend to rely in their defence in breach of rule 10.5(1) of the Civil Procedure Rules, 2002;

7) The second claimant suffered psychological distress, anguish and emotional trauma as a consequence of the criminal proceedings and incurred legal costs as a result of defending the criminal charges;

8) The Defendants' actions have slandered the second claimant's good name and reputation and resulted in loss of her reputation, humiliation, shock and injury to her feelings;

9) The second clamant is entitled to retroactive salary and compensation for loss of utility of the sums. She is also entitled to commercial interest from the date of her interdiction to the date of payment of the sums;

10) The second claimant is entitled to incremental payments on her pay scale and damages should be assessed on a single increment from 2011 to 2021;

11) The second claimant would have been entitled to transition to a similar post under the Jamaica Customs Agency. Therefore, she should be awarded a salary, travel allowance, gratuity, and a performance increment that reflect the transition that she would have made to the Jamaica Customs Agency;

12) The second claimant is entitled to vacation leave during the period she was on interdiction. She should be paid salary in lieu of the vacation leave accrued prior to their interdiction and accumulated for each year of the interdiction up to the date of payment, along with corresponding travel allowance for the period's pay in lieu of leave;

13) The second claimant is entitled to receive pension; and

14) The second claimant is entitled to special damages.

THE DEFENDANTS' SUBMISSIONS

[20] Learned Counsel Ms Althea Jarrett and Mr Ricardo Maddan in their equally comprehensive submissions advanced on behalf of the Defendants, submitted as follows:-

1) Paragraphs 87 to 107 of the Affidavit of Omar Guyah which was filed on 1 October 2015 and Paragraphs 114 to 119 of the Particulars of claim of the 2019 claim should be struck out as being a collateral attack on the Privy Council decision of **Guyah v Commissioner of Customs and another**[3] and an abuse of the process of the court.

The 2015 Claim

1) The former Financial Secretary, Mr Rowe, was entitled to commence disciplinary proceedings against the Claimants after the criminal proceedings ended;

2) Regulations 32 and 47 of the PSR granted Dr. Wesley Hughes the authority to place the first claimant on interdiction pending the outcome of the criminal proceedings following his arrest;

3) The reports on which Mr Rowe relied to continue the Claimants' interdiction after the criminal prosecution ended were neither tainted with bias, malice nor indicative of prosecutorial misconduct;

4) The Resident Magistrate did not make a finding of prosecutorial misconduct on the part of the Defendants. The Claimants were never pleaded, there was no trial on the merits and the Claimants were not acquitted of the criminal charges. The dismissal of the charges by the Resident Magistrate did not amount to an acquittal. It is for this reason that Regulation 34 of the PSR does not prevent the institution of disciplinary proceedings against the Claimants;

[3] [supra]

5) The prosecution did not fail to disclose material that would exculpate the Claimants. The first claimant's suggestion that materials were withheld by the prosecution is a fabrication.

6) The remedies sought by the claimants should not be granted;

The 2019 Claim

1) The Claimants were lawfully arrested;

2) The Claimants' periods of detention were not unreasonable or unjustifiably long;

3) The Claimants have failed to discharge the burden of proof to establish that there was no reasonable and probable cause for their detentions;

4) Section 33 of the Constabulary Force Act requires the Claimants to prove that the Defendants acted with malice or without reasonable and probable cause. The Claimants must therefore prove either malice on the part of the Mr Lawrence or that when the charges were laid, he did not have reasonable or probable cause for charging them. There is no evidence that Mr Lawrence acted with malice. At the time when the charges were laid, Mr Lawrence possessed a genuine belief that the Claimants had committed the offences;

5) The Claimants' evidence does not establish that the 1st 2nd 3rd or 4th Defendants are liable for the tort of misfeasance in public office. There is no evidence that the Defendants abused their power, used their power for an improper purpose or acted dishonestly or in bad faith;

6) Mr Farquharson did not unlawfully seize the first claimant's personal firearm in breach of his constitutional rights. If Mr Farquharson is found to have interfered with the first claimant's constitutional rights, such an interference

was demonstrably justified in the circumstances as the first claimant was charged with a criminal offence;

7) The searches of the first claimant's homes at Fordyce Drive in St Catherine and Rhyne Park in St James and his office at Customs House were lawful. The first claimant's constitutional rights were not contravened;

8) The withholding of a portion of the Claimants' salary for the duration of their interdiction is lawful; The Claimants were on interdiction and as a consequence, they were not entitled to receive their full salaries;

9) The Claimants are not entitled to salary increments while on interdiction. The first claimant is not entitled to outstanding travel allowance where he does not possess or use his personal vehicle to perform his job functions;

10) The Claimants are not entitled to damages for mental, psychological distress, anguish or emotional trauma; and

11) The first claimant is not entitled to damages for loss of future income;

The Evidence

[21] The evidence before this court in the case at bar is that the claimants were charged after an investigation by the Revenue Protection Division ("RPD"). That investigation led to the charges of breaches of section 210 of the Customs Act, simple larceny, conspiracy and breaches of the Corruption Prevention Act. The first claimant was taken into custody on March 9, 2012 and charged with offences aforesaid. The second claimant was charged later. At the time of their arrest, the first claimant was appointed in the post Director of Customs, and had been assigned to the Contraband Enforcement Team ("CET"). The second claimant was appointed a Deputy Commissioner of Customs.

[22] The allegations which were before the then Corporate Area Resident Magistrate's Court (Criminal Division) were set out in a document entitled: ***Prosecution's***

submissions for the non-disclosure of certain documents requested by the defence[4]*.*

[23] Under the sub-head *"**The allegations**"* the prosecution advanced the following written submissions:

> *"19. In summary, the allegations are that in June 2010 and January 2011 while being the Director of the Contraband Enforcement Team of Jamaica Customs, the first claimant seized a number of vehicles from the Kingston Logistics Centre (KLC) on the basis that they were brought into Jamaica in breach of the Customs Act. These vehicles were later forfeited by the Commissioner of Customs, and as such became the property of the Crown. It is further alleged that between June 2010 and April 2011 The first claimant, with knowledge that the Minister of Finance is the only competent authority to order the disposal of goods forfeited to the Crown under the Customs Act, coordinated a scheme to unlawfully and fraudulently dispose of the 14 motor vehicles itemized in the informations laid before the Court, without the authority of the Minister of Finance.*
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> *20. This scheme allegedly involved coordinating the unlawful removal of these motor vehicles from the customs area at Kingston Wharves, the fraudulent preparation of correspondence to give the appearance that the motor vehicles were sold by KLC, the soliciting of persons to "purchase" these motor vehicles from KLC, the use of the first claimant's position of authority at Customs to prepare correspondence purporting to authorize the entry of the motor vehicles by Customs and to process the payment of "duties" at the Queen's Warehouse in Montego Bay, in the parish of Saint James by the "purchasers" of these motor vehicles in order to make it appear that the motor vehicles were lawfully processed by Jamaica Customs.*

[4] Agreed Bundle, page 402 at page 407-408, filed on March 10, 2014

21. Ms. Brown, who was a Deputy Commissioner of Customs is alleged to have conspired with Guyah to defraud the Government of Jamaica of one of the motor vehicles. The evidence on which the Crown intends to rely to establish the conspiracy is the alleged use by Ms. Brown of her credit card to 'pay' the 'duties' in respect of one of the motor vehicles and the alleged receipt by Ms. Brown from Ms. Carter of a sum of money representing the refund of the sums paid in respect of the disposal of the motor vehicle as well as an additional sum of money. Ms. Carter, who is the only accused not employed to Jamaica Customs, is alleged to have been associated with the disposal of 4 of the 14 vehicles."

[24] The evidence of Major (Ret'd), Commissioner of the RPD, was that the charges against both claimants arose from the actions of the first claimant in relation to KLC. KLC had been granted free zone status by the Ministry of Industry and Commerce in 2006. Ministerial approval had been given for KLC to operate a Customs private bonded Warehouse. KLC was allowed to provide services to international customers without having to pay duties as the Free Zone is considered international space.

[25] The prosecution's case was based on correspondence and other documents prepared in relation to the processing of fourteen (14) motor vehicles by Customs which had been used by the first claimant to create the impression that the motor vehicles had been dealt with in accordance with customs laws. The first claimant had procured these documents by dishonest means and, with whom the second claimant had conspired.

[26] Attached to the affidavit of the first claimant as "OG-11C" is a memorandum purportedly from Mr Danville Walker, Commissioner of Customs (as he then was) to the Deputy Commissioner – Operations, Collectors – Kingston and Montego Bay dated November 11, 2010. This memorandum is regarding:

"Procedure for the disposal of Goods under requests made by the wharfinger under Section 91 of the Customs Act".[5]

[27] This memorandum bore the signature of the Commissioner and was later exhibited to his police statement to the RPD dated May 12, 2010 as "JL2". In respect of this Memorandum, Mr Walker said: "*I knew I didn't draft it. I'm pretty sure it was the first claimant…I would not intentionally give such instructions as adequate procedures are in place."*

[28] I will set out the contents of the memorandum signed by Mr Walker regarding section 91 of the Customs Act[6] below as much turns on its contents.

"To: Deputy Commissioner – Operations, Collectors – Kingston & Montego Bay

From: Danville Walker, O.J., J.P., Commissioner of Customs

Date: 2010-November-11

Re: Procedure for the disposal of Goods under requests made by the wharfinger under Section 91 of the Customs Act

This procedure shall guide how the entry of goods should be treated by Customs where the wharfinger makes an application under section 91 of the Customs Act and this request has been duly approved by the Commissioner.

Where the goods in question do not require any licences or permits then an import entry is to be prepared and processed for the consignment referencing the wharfinger as the importer. The wharfinger would then present the entry at the port for clearance of the goods as is customary.

Where the goods require permits, licences or other documentation which the wharfinger would not be in possession of, then the goods would be

[5] OG-11C
[6] OG-11C

treated as Queens Warehouse auctioned goods and all duty payments and releases done from there providing all other conditions are met.

In the case of perishable goods, after clearance is received from the relevant state agencies, and the duties and taxes have been assessed and duty collected by Queens then the goods should be released to the wharfinger.

In the case of motor vehicles, the wharfinger is to obtain the services of a customs broker to prepare a Bill of Sight and submit it to the valuation branch for processing. After receiving the assessed CIF value, the Bill of Sight and all other supporting documents, if any, are to be taken to the Queens Warehouse where the duties will be assessed. Queens is then to collect the duties and make the relevant entry into the Queens Auction System (QAS) in order to generate the relevant paperwork to effect registration of the vehicle to the wharfinger. The Certificate generated from QAS and the release documentation is to be prepared by Queens and given to the wharfinger, wherein the vehicle would be released to them.

The processing of these goods may be done at any Queens Warehouse regardless of the location of the consignment.

At all times, Collectors must ensure that the entries for goods processed under this Section, have been adequately vetted to ensure proper duty collection and to prevent any revenue loss. These clearances must be strictly monitored with adequate approvals for the processing of these goods obtained from the Commissioner prior to these provisions being applied."

[29] That memorandum was drafted by the first claimant and he has admitted this to be a fact.

[30] There is also a letter dated January 11, 2011 signed by Ms. Trudy Binns, Operations Manager at KLC. This document marked "OG-11A" purportedly

requests permission to enter the fourteen (14) motor vehicles pursuant to section 91 of the Customs Act in accordance with the Commissioner's memorandum.

[31] In her statement dated February 24, 2012[7] she said that sometime in 2011, the first claimant came to her office and requested assistance in processing paperwork relating to the notice of seizure and forfeiture orders which had been served in respect of vehicles that had been removed from the Free Zone area. She said that the first claimant prepared letters on her computer on KLC letterheads, printed them and requested that she sign them, which she did.

[32] These letters sought permission from the Commissioner of Customs for clearance of fourteen (14) abandoned motor vehicles. She said she became suspicious at the time because the first claimant told her he was back-dating the letters. She signed them, as the first claimant had assured her that it was okay and reminded her that she had the forfeiture orders and seizure notices in relation to the vehicles and that the government was only interested in ensuring that the duties were paid.

[33] These letters to which I will refer hereafter as KLC's section 91 application, requested permission under section 91 of the Customs Act "*to enter these goods being abandoned motor vehicles which have reported and remain unclaimed in excess of One Hundred and Eighty (180) days*:" The list of vehicles was set out therein and included the following vehicle:

8. ZCSU8415282	11/15/2009	Zim Shanghai	2007 Suzuki Swift	ZC71S404213	J$465,800

[7] JL6

[34] These letters were signed by Miss Trudy Binns of KLC and date stamped as received by Customs on January 12, 2011 and addressed to the Commissioner, in accordance with his memorandum.

[35] This Suzuki was among fourteen (14) vehicles which KLC in its section 91 application to the Commissioner of Customs,[8] dated January 11, 2011, had described as *"goods being abandoned*".

[36] On March 7, 2011, the Commissioner responded to Miss Binns in respect of all fourteen (14) motor vehicles in a letter[9] also admittedly drafted by the first claimant, as follows:

> *"**…**With regard to the fact that the importers have been given notice of these goods being stored at your warehouse and have taken no steps to clear same, in accordance with the said Section 91, approval is hereby granted for Kingston Logistics Centre to enter these vehicles and take custody of them when all Customs requirements as to duties and taxes have been adhered to.*
>
> *Given the difficulty with the lack of proper documentation to adequately prepare import entry C87, the clearance process would have to be treated as an auctioned vehicle.*
>
> *The Customs Broker is to prepare a Bill of Sight and submit it to the Customs Valuation Branch and then take the completed document to any Queens Warehouse to compete the clearance process.*
>
> *Please be guided accordingly,*
>
> *Kind regards,*
>
> *Customs*

[8] OG-11A
[9] "OG-11B"

Danville Walker, O.J., J.P.

Commissioner of Customs

[37] In respect of the criminal investigation, Danville Walker had given a written statement to officers from the RPD on May 10, 2012. In that statement, Mr Walker described KLC's section 91 application as having been brought to his attention by the first claimant, upon whom he relied on heavily in matters of this nature.

[38] Mr Walker went on to say that he did not expect that the motor vehicles referred to by KLC were goods for which forfeiture orders could have been issued as where a forfeiture order had been issued, he would not have had any authority to determine the disposal of the goods without the written authority of the Minister of Finance.

[39] According to the evidence of Trudy Binns, of KLC, it was the first claimant who drafted KLC's section 91 application, in her office, back dated it and she signed it. According to Danville Walker, it was also the first claimant who prepared both his memorandum and his letter in response to KLC's section 91 application. That letter in response to KLC, dated March 7, 2007 signed by Danville Walker,[10] gave KLC permission for the fourteen (14) motor vehicles, described as abandoned goods to be entered. One of the fourteen vehicles entered was the 2007 Suzuki Swift ("Suzuki") mentioned earlier. It was paid for by the first claimant using his credit card, and he took possession of it.

[40] On February 15, 2012, Ms. Kerri-Ann Guyah who was an Occupational Health and Safety Officer employed to Customs was taken into custody by members of the CET. She was transported to the Norman Manley Law School where the Suzuki was located. It was seized and a Notice of Detention[11] issued. The first claimant eventually filed a claim in the Supreme Court ("the 2013 claim"), in respect of the Suzuki, seized from his sister, Ms. Kerri-Ann Guyah. (see "OG-13", which exhibits

[10] OG-11B
[11] OG-13

the order made by L. Pusey, J in respect of the 2007 Suzuki Swift motor car with chassis number ZC71S40213).[12]

[41] On March 9, 2012, the first claimant was arrested by investigators from the RPD at his family home in Fordyce Drive, St. Catherine. That residence was searched and seizures made. The team of investigators took the first claimant to his home in St. James and then to the lock-up at the Freeport Police Station. The first claimant was charged with breaches of the Customs Act, inter alia and appeared in the then Half Way Tree Criminal Court. The matter was heard in the case management court and was subsequently dismissed in that court, by Her Honour Mrs. Wolfe-Reece (as she then was). The claimants were never arraigned in respect of any of these charges*.*

[42] There is no dispute that the second claimant was similarly arrested, charged and her case also dismissed. It is also not in dispute that both claimants had been placed on interdiction by the then Financial Secretary ("FS"), Dr. Wesley Hughes.

[43] Dr. Hughes was succeeded by Mr Devon Rowe, who, following the dismissal of the criminal charges against both claimants, elected to continue their interdiction. The claimants now challenge this decision. They mount this challenge on the footing that under the PSR sections 32, 34 and 43 they have been acquitted of the criminal charges.

[44] The court notes that there was an affidavit in response filed on December 22, 2015 by the first claimant to which there was no challenge.

The evidence of the first claimant

[45] The first claimant, in his affidavit filed on October 1, 2015, said he was the Director, CET of Customs. On March 9, 2012, while at the home of his parents at 7 Fordyce Drive, Spanish Town, St. Catherine, Sergeant Gregory Farquharson of the RPD presented a search warrant issued under section 203 of the Customs Act. There

[12] February 27, 2015

is no dispute that the home of the first claimant's parents was searched and items uplifted. There is no dispute that the first claimant was taken to his residence in Rhyne Park Village, Rosehall, St. James. Items were uplifted therefrom as well and the first claimant was taken to the Freeport police station where he was placed in custody. The next day he was transferred to the Horizon Remand Centre.

[46] In cross-examination, the first claimant admitted that he had made recommendations to Mr Walker, who relied on him and other senior officers. He admitted to drafting all documents with regards to seized goods.

[47] The first claimant maintained throughout his testimony in court that the fourteen (14) motor vehicles needed no ministerial directive as there was nothing that breached customs laws. He pontificated that the goods had not been seized because no seizing officer had said that they had been, and furthermore, that "he" had not been asked this question by the RPD.

[48] The first claimant agreed that seized goods are not suitable for a section 91 Application. He denied preparing KLC's section 91 application signed by Miss Binns. He stated that he did not prepare or type any letters for her to sign. He denied that the fourteen (14) motor vehicles were abandoned goods and said that they had not been seized in the presence of KLC, therefore they had been only initially seized.

[49] The first claimant maintained that the motor vehicles had been only initially seized and that the seizures had never been effected. When shown the statement of Mr Walker,[13] the first claimant accepted that with regards to seized goods, that it was his function and the former Commissioner relied fully on him.

[50] The first claimant dogmatically maintained that there were no breaches of the Customs Act in relation to the fourteen vehicles. In his evidence, he stated that

[13] Exhibit 1

the documents labeled "OG-11A. B, C and D" demonstrated that the prosecution's case against him had no merit.

[51] When confronted with the notice of seizure, he agreed that the date thereon was June 30, 2010 and that the forfeiture order bore the same date. He insisted that the seizure notices had never been served and therefore time would not have begun to run to trigger forfeiture and condemnation proceedings on the Suzuki.

[52] The first claimant admitted recommending to Mr Walker that approval be granted for KLC's section 91 application, and admitted to drafting the memorandum[14] The first claimant also agreed that Mr Walker had said that it was the first claimant who had drafted the memorandum. He also acknowledged that he was aware that KLC's application had been granted but that he had not been involved in the processing of the motor vehicles. He knew that duties and taxes had been paid on the fourteen motor vehicles but not by whom. He only knew about the Suzuki which he had paid for with his credit card. He could not recall receiving the statement of Miss Carter or the question and answer from her criminal case, though it had been put to him that it had formed part of the material he placed before L. Pusey, J at his trial on the 2013 claim.

The evidence of Ms. Cordelia Brown

[53] The second claimant, Ms. Cordelia Brown in her affidavit filed on October 1, 2015 said she was the Deputy Commissioner of Customs in charge of Operations with oversight of daily operations island wide. She had also acted in the post of Commissioner of Customs on numerous occasions. In her position, she had delegated authority from the Commissioner of Customs for mitigation of breaches and penalties and sat on the Breach Tribunal which heard matters of breaches of the Customs Act.

[14] OG-11C

[54] On the 16th of February 2012, she attended a meeting chaired by Devon Rowe in which Mr. Jack Drummond of CET was present among others. Mr. Drummond showed her a copy of the memorandum signed by Mr. Walker and informed her that he was conducting an investigation into unusual transactions surrounding motor vehicles from the Queen's Warehouse in Montego Bay. She asserted that at the meeting, Mr. Drummond said he would not stop until he saw the first claimant behind prison bars. She said that these comments concerned her greatly as Mr. Drummond was supervised by the first claimant. She also noted that Mr. Rowe, who was in the meeting, did not respond to that utterance by Mr Drummond.

[55] She said, the first claimant was arrested on March 9, 2012 for the motor vehicles which had been released at the Queen's Warehouse. On the 21st of May 2012, she was summoned by Mr. Winston Lawrence, Revenue Officer at the RPD. She attended and answered questions concerning the sale and release of the motor vehicles. On May 24, 2012, she was again asked by Mr. Lawrence to attend the RPD, she refused to do so without an attorney and attended in the afternoon accompanied by an attorney. Mr. Lawrence again questioned her regarding investigations surrounding the release of the motor vehicles from the Queen's Warehouse. He read a caution and conducted a question and answer session.

[56] Ms. Brown changed attorneys and again attended the office of the RPD on June 21, 2012 where she was accompanied by Mrs. Carolyn Reid-Cameron, Attorney-at-Law. Mr. Lawrence informed them both that he was charging Ms. Brown for the offence of releasing a motor vehicle from the Queen's Warehouse without following proper procedure in breach of section 210 of the Customs Act. She was taken to the police station with her attorney. There she was processed and issued a summons to appear at the Corporate Area criminal court on July 24, 2012. She was never shown any document or statement from anyone to allege her involvement in this alleged motor vehicle racket.

[57] Ms. Brown was interdicted on June 11, 2012 by Dr. Wesley Hughes. She was interdicted before being charged by the RPD.

THE ISSUES

Whether the dismissal of charges in a criminal court constitutes an acquittal

[58] The claimants submitted that regulation 34 of the PSR provides:

> *"34. An officer acquitted in any court of a criminal charge shall not be dismissed or otherwise punished in respect of any charge of which he has been acquitted, but nothing in this regulation shall prevent his being dismissed or otherwise punished in respect of any other charge arising out of his conduct in the matter, unless such other charge is substantially the same as that in respect of which he has been acquitted."*

[59] The defendants submitted that in the case of **The Attorney General of Jamaica v Keith Lewis**[15], the Court of Appeal pronounced on the meaning of acquittal. The respondent Keith Lewis, a district constable, had been charged with conspiracy to defraud. No trial took place and the charges were eventually dismissed for want of prosecution. The clerk of courts issued a Certificate of Acquittal. The Attorney General appealed. It was argued on appeal that the respondent had been wrongly dismissed from the Rural Police Force and that he had sought to use the Certificate of Acquittal to prove that the charges against him had been dismissed. The applicant argued that there was no dismissal on the merits. In order to make use of the Certificate of Acquittal the respondent would have had to have been pleaded and the matter adjudicated upon.

[60] The Court of Appeal reviewed regulation 44 of the Police Services Regulations which states that:

> *"a member acquitted of a criminal charge shall be restored to his rank and pay and be paid the full amount of his salary for the period of his interdiction or suspension."*

[15] SCCA No 73/005; delivered October 5, 2007

[61] The Court of Appeal held that when a charge is dismissed for want of prosecution and no trial has taken place, charges may be re-listed once witnesses are available to attend the trial.

[62] K. Harrison, JA writing for the court said:

> *"In my judgment, there would have had to be the pronouncement of a verdict of "not guilty" for there to be an acquittal of the charges. It is for this reason that section 280(3) of the Judicature (Resident Magistrates) Act mandates that at the conclusion of a trial:*
>
> > *'the Magistrate shall declare the accused person guilty or not guilty, and shall thereupon on demand, give such person a certificate of conviction or acquittal, as the case may be.'*
>
> *The certificate of acquittal will be certified under the hand of the Clerk of the Courts and section 27 of the Evidence Act provides as follows:*
>
> > *'27. Whenever, in any proceeding whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified under the hand of the Clerk of the Court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the Deputy of such Clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.'*
>
> *In my view, the above provision makes it abundantly clear that a trial has taken place and has resulted in either a conviction or an acquittal of the charges. It is in these circumstances that the Clerk of the Courts will be*

authorized to issue the certificate of acquittal. It is therefore my view, that the document headed "Certificate of Acquittal was wrongly issued by the Deputy Clerk of Courts and no reliance ought to have been placed on it by the learned trial judge."

[63] There is nothing further that we can add to this clear statement of the law. The dismissal for want of prosecution in the course of proceedings in the Resident Magistrate's Court (as it was then known), is not an acquittal within the law of Jamaica.

[64] The instant case concerns the dismissal for want of prosecution ordered by a Resident Magistrate (as formerly so known) and for which a certificate of acquittal was similarly issued by the Clerk of Courts. This court accepts that there was no arraignment, and no trial in the court below and that therefore, the claimants have not been acquitted of the criminal charges. This means that regulation 34 of the PSR is applicable to the claimants, neither of whom have been acquitted of the criminal charges brought against them in the criminal court and both of whom remain public officers.

Search warrant

[65] The Court of Appeal held in **Reynolds v Commissioner of Police for the Metropolis**[16] that to procure the issue of a search warrant maliciously and without reasonable or probable cause is an actionable wrong. The existence of such an action was confirmed by the Privy Council in **Gibbs v Rea**.[17] Though seldom successfully prosecuted, the authorities have long recognized that it is an actionable wrong to procure the issue of a search warrant without reasonable and probable cause and with malice.

[66] A claim for maliciously procuring such a warrant requires, as with any action for malicious prosecution, that the claimant prove absence of reasonable and probable cause and

[16] [1985] Q.B. 881
[17] [1998] A.C. 786 at 797

malice. The tort is committed on proof of intent to use the process of obtaining a warrant for purposes other than a lawful search.

[67] The law clearly establishes that the claimant must demonstrate that the defendant acted in such a manner as to be directly responsible for the initiation of the proceedings.

[68] The RPD officers who conducted the searches had obtained a special warrant to do so issued by a lawful authority in the person of a Justice of the Peace. This will be discussed below.

Search executed pursuant to section 203 of the Customs Act

[69] Section 6 of the Revenue Administration Act (RAA) states inter alia**:**

> *"6.- (1) There is hereby established a department of Government to be called the Revenue Protection Department.*
>
> *(2) It shall be the duty' of the Revenue Protection Department to-*
>
> *(a) carry out investigations into cases involving fraud against the revenue;*
>
> *(b) institute programmes for the detection of fraud against the laws relating to revenue and ensure that such programmes are implemented;*
>
> *(c) provide assistance to the Revenue Departments in the planning and conduct of investigations in relation to, offences against the laws relating to revenue."*

[70] Section 8 of the RAA provides for the functions of the Commissioner of Revenue Protection:

"8.-(1) The Commissioner of Revenue Protection shall be responsible for the general administration, of the Revenue Protection Department and shall have such functions relating to revenue protection as may be assigned to him by or under this Act or any other enactment

(2) The Commissioner of Revenue Protection shall be under the operational superintendence of and report directly to the Financial Secretary in all matters relating to the functions of the Commissioner under this Act."

12. There is hereby established a department of Government to be called the Customs Department.

13. For the due administration of the Customs Department, the Governor-General may appoint –

(a) a Commissioner of Customs;

(b) Deputy Commissioners of Customs;

(c) Assistant Commissioners of Customs;

(d) such and so many officers as may be necessary for the efficient operation of the Customs Department*."*

[71] In the Customs Act, the following definitions are set out in section 2*:*

"offence against the customs laws" includes any act of any person contrary to the customs laws or any failure of any person to perform an act required by the customs laws to be performed by him;"

"officer" includes any person employed in the Department of Customs and Excise, the Revenue Protection Division of the Ministry of Finance and all officers of the Constabulary Force, as well as any

person acting in the aid of any officer or any such person; and any person acting in the aid of an officer acting in the execution of his office or duty shall be deemed to be an officer acting in the execution of his office or duty;"

"uncustomed goods" includes goods liable to duty on which the full duties due have not been paid, and any goods, whether liable to duty or not, which are imported or exported or in any way dealt with contrary to the customs laws;

[72] Against the background of the powers of the RPD, and the law as set out above, the first claimant challenges the validity of the special warrant by which the officers seized items from the residence occupied by his parents. The first claimant asserts without evidence that the special warrant was based on lies.

[73] The issuance of the warrant authorizes the entry, search, and removal of *"any uncustomed or prohibited goods; any books or documents relating to uncustomed or prohibited goods or any computer equipment reasonably believed to have been used in connection with and to contain evidence relating to the importation or attempted importation, landing, removal, conveyance, exportation or attempted exportation of any uncustomed, prohibited or restricted goods."*

[74] The special warrant was grounded by an affidavit pursuant to section 203 of the Customs Act and sworn to by Mr Gregory Farquharson of the RPD on the 9th of March, 2012 before a Justice of the Peace. The affidavit states that the first claimant maintained a residence at 7 Fordyce Drive, Spanish Town, St. Catherine.[18] This residential address was used by the first claimant in his application to the World Customs Organization[19] for the post of Technical Officer as his postal address on that application form. There will be more on this later on.

[18]

[19] OG-3E

[75] The removal of items is not disputed by the defendants. The uncustomed Suzuki is a fact in existence and its status has not changed. Its seizure from the first claimant's sister is also undisputed and his payment for it by his own credit card has been settled and is unchallengeable. The RPD had every right to send its officers to search for the uncustomed Suzuki at a place it was likely to be found as well as all else connected with that vehicle and the thirteen which were all under the same cloud of suspicion.

[76] Further, this matter before us was not a criminal trial. The search warrant formed part of a bundle of agreed documents which have been admitted into evidence. It contains assertions which are tied to other evidence against the first claimant, some of the assertions are: that the vehicles in the possession of Customs were unlawfully disposed of[20]; that on April 4, 2011, credit cards held by Omar Guyah were used as payment in the sum of $560,036.39 for customs duties in respect of the Suzuki;[21] that of the fourteen vehicles, some are now registered to private individuals[22]; that the first claimant maintained a residence at 7 Fordyce Drive, Spanish Town in the Parish of St. Catherine;[23]the first claimant was found there on the night of the search.

[77] Additionally, a number of documents belonging to Customs such as files, customs declarations and Proceeds Of Crime Act files were seized from that address.[24] The first claimant submits that this is his parents' home. This may be a fact and the defendants have not challenged his submission in this regard, however, if this is so, there has been no explanation for the presence of property which belonged to Customs being present at that address on the 9th of March, 2012.

[20] Affidavit of Gregory Farquharson to ground special warrant, paragraph 4
[21] Para 5
[22] Para 7

[23] Para 9
[24] OG-6

[78] The first claimant also challenged, but cannot lay claim to possession of the government office to which he was formerly assigned. He made this submission forgetting that he had been placed on interdiction on the same day of the search and no longer had an office at Customs to call his own.

[79] In an attempt to relitigate the issue, the first claimant having argued the lawfulness of the search under section 203 of the Customs Act before the Privy Council. The interpretation of section 203 is settled, the Board held that the word "*place*" in section 203 cannot be construed literally and must be intended to apply primarily to buildings other than dwelling-houses. In respect of the uncustomed goods:

> *"the Board did not accept the first claimant's submission in this regard and stated that section 203 of the Customs Act is concerned with powers to enter and search "any house or other place" and to seize and carry away any uncustomed, restricted or prohibited goods found there. Section 203 had to be construed in the context of other provisions conferring powers to enter and search without warrant, for example, section 204 which confers the power to examine vehicles and section 204 which confers the power to enter any part of the island other than a dwelling house or other building.*
>
> *It noted that in the context of those provisions, the word "place" in section 203 cannot be construed literally and must be intended to apply primarily to buildings other than dwelling-houses.*

[80] The Privy Council noted that on the fact, the motor vehicle was detained and driven to the premises of Customs. There was no detention which involved officers entering or searching any house or building. Accordingly, it was held that section 203 had no application to the case.

[81] The first claimant has failed to appreciate the legal position as regards the evidence obtained pursuant to section 203 of the Customs Act, the lawfulness of which is unassailable. The definition of section 203 having been set out by the

Privy Council, this is submission is essentially a challenge to the special warrant through the back door which fails.

The claim for constitutional redress

[82] This aspect of the claim is contained in the claim form with particulars of sixty-nine pages in length. The details of that claim will not be reproduced. It will be referred to hereafter as the 2019 claim. In it, the claimants plead constitutional redress under part 14,15 and 16 and allege contraventions of the Charter of Fundamental Rights and Freedoms, Constitution Amendment Act, 2011, ("the Charter".)

[83] The claimants assert that their constitutional rights have been breached in that:

i) their right to a fair hearing within a reasonable time has been infringed and that they were interdicted without a hearing, pursuant to section 16.

ii) The first claimant's right to property in that his personal firearm was unlawfully seized by the third defendant, pursuant to section 14.

iii) The first claimant claims that the failure by Customs to pay the travelling allowance for the months of June 2012 to May 2013 to the first claimant is a breach of his rights under Part 15 of the Charter.

I will begin with the right to due process as set out in section 16 of the Charter:

> *"16-(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by*
>
> *(2) In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his*

interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."

[84] E. Brown, J (as he then was) said this about the guaranteed rights under section 16(2) in **Ernest Smith & Co. (A Firm) et al consolidated with Hugh Thompson v The Attorney General of Jamaica**:

> *Section 16 (2) of the Charter is a near cousin of the previous section 20 (1) of the old Bill of Rights section. That is to say, as was said of section 20(1) in Bell v The Director of Public Prosecutions [1985] 1 AC 937 (Bell v DPP), section 16 (2) is a composite of three discrete rights: entitlement to a fair hearing; fair hearing within a reasonable time; and by an independent and impartial court or authority established by law. I quote section 16 (2):*
>
> *'In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law'.*
>
> *So, I agree with the submission of learned counsel for the claimant Mr. Thompson, that section 16 (2) is a compendious statement of the fundamental right to due process. Indeed, the Charter declares this to be so in section 13 (3) (r). The subsection specifically references the right to due process as provided in section 16."*[25]

[85] In the case of **Julian Robinson v The Attorney General of Jamaica**[26] at paragraph 203, the learned Chief Justice discussed the proper approach to interpretation of challenges to legislation under the Charter.

[86] It is for the Claimants to demonstrate by evidence to discharge the burden of proof, that a right or freedom has been, is being, or is likely to be violated; then the

[25] [2020] JMFC Full 7, at paragraphs 2 and 3, per
[26] [2019] JMFC Full 04

burden, legal and evidential, shifts to the violator. It is for the Claimants to show the true nature of the right allegedly contravened. The case of **Julian Robinson** concerned the constitutionality of a statute. The instant case concerns the alleged breach of a guaranteed right by a failure to grant a hearing before a decision adverse to the claimants was made.

[87] Section 19 (1) of the Charter provides that any person can apply to the Supreme Court for constitutional relief if he or she is of the view that any of its provisions has been, is being or is likely to be contravened in relation to him/her. This means that the claimants, like any other citizen/s regardless of 'race, place of origin, social class' or political opinion who allege that his or her 'constitutional rights have been, are being or are likely to be infringed' may bring a claim before the Supreme Court.

[88] In order to succeed, the claimants must show that: (1) they have sufficient standing to bring the claim, that is, they must show that a Charter right has been, is being or is likely to be infringed in relation to them; (2) the act/s they wish to do or have done is/are protected by the Charter, that is, the impugned conduct must be within one or more of the provisions of the Charter; (3) the defendants are bound by the right(s) claimed; (4) the defendants' conduct infringed their Charter rights; and (5) there are no other adequate means of redress.

[89] The claimants have established their standing to have brought the claim; in that they have satisfied the requirements of section 19(1) and (2) of the Charter. There is no dispute that they are Jamaican citizens who have been directly affected by the actions of the defendants.

[90] In the case of **Maurice Tomlinson v Television Jamaica Limited and others**[27], the Full Court set out the starting point in relation to fundamental rights cases. The

[27] [2013] JMFC Full 5 54

29 Stu Woolman and Henk Botha, 'Limitations' in Stuart Woolman, Michael Bishop, Jason Brickhill (eds), Constitutional Law of South Africa, (2nd edn, Juta Law 2008) Part 2, Ch 34, p 2. 30

Full Court stated that it is for the claimants who seek redress to allege infringement 'in relation to himself,' [themselves].

[91] The circumstances of the case also matter:

> *"Fair hearing does not mean a hearing according to what would be required in a court of law. Basically, it means an opportunity to put one's side of a case before a decision is reached. Accordingly, the legal requirement on the adjudicator is nothing more than a basic duty of fairness. Of course, in deciding what is fair, the courts have to balance several interests, such as those of the State, principles of good administration, speed and efficiency in decision making and the level of injustice suffered by the individual in having been denied the opportunity to present their case. There are no fixed rules, nor is there a requirement that any rules of evidence should be followed or applied.*[28] *There is no insistence either that there must always be an oral hearing.*[29] ***It all depends on the circumstances of the case."***[30] (Emphasis mine).

[92] It is settled that there are three components to the right in section 16(2) of the Charter. First, is the right to make representations. In a disciplinary proceeding this means that the party to be charged will be given disclosure of the offences with which he is charged. It also means the right to make representations before a decision adverse to the claimant is made.

[93] Under this head, the claimants also argue that they were not provided with disclosure before a decision to continue interdiction was made. It is settled that the section 16(2) rights are the right to the right to a fair trial, the right to a trial within a reasonable time and the right to be tried by an independent and impartial

[28] Mahon v Air New Zealand Ltd [1948] AC 808
[29] Lloyd McMahon [1987] 1 All ER 1118; Commissioner of Police v Mitchell, Court of Appeal No 1 of 1992, decided 23 October, 1996, CA Trinidad and Tobago
[30] Fiadjoe, Albert, Commonwealth Caribbean Public Law, (3rd.), pages 239-40

tribunal. The rights are free standing in civil cases with the reasonable time guarantee being independent of the right to a fair trial.[31]

[94] In the instant case, there is an injunction in place which bars the commencement of disciplinary proceedings, and therefore no charges have been issued. There is no dispute that draft charges are in evidence before us, as agreed by both sides.

Whether the claimants should have been interdicted

[95] The instant 2015 claim prays the grant of administrative orders; the judicial review powers of the court have not been engaged. The claimants seek a declaratory judgment and damages in their fixed date claim form as amended.

[96] In the determination of whether or not the decision to interdict and to continue interdiction meets that requirement, the court may consider the following factors:

1. Whether there is a sufficient connection between the decision and the kind of employment the officer holds;

2. Whether there are reasonable grounds for believing that maintaining the existing employment relationship, even temporarily, would be prejudicial to the operations or to the entity's reputation or image;

3. Whether there were immediate and significant adverse effects that could not practically be counteracted by other measures (such as assigning the officer to another position);

4. The need to protect the public; and

[31] Wolfe-Reece, J in Ernest Smith & Co. (A Firm) et al consolidated with Hugh Thompson v The Attorney General of Jamaica [2020] JMFC Full 7 at para. 169

5. The decision maker's motives and conduct in making the decision; whether the decision maker acted in good faith, and the absence of intent to harass or discriminate against the officer to name a few.

[97] In my view, the guaranteed right to a fair hearing under section 16(2) is not simply a disclosure issue or an issue of the exercise of a discretion, it is both a procedural and substantive law issue. The court will therefore have to examine the applicable statutory provisions as well as the Constitution in order to determine whether there has been a contravention of this guaranteed right. I will begin with the Public Service Regulations.

The Public Service Regulations, 1961

[98] The Public Service Regulations, 1961 ("PSR") were made under section 81 of the Jamaica (Constitution) Order in Council, and are preserved by section 2 of the Order in Council, 1962 which created the Constitution of Jamaica. Section 124 of the Constitution created the Public Service Commission ("PSC"). The PSR were amended in 1963, to conform with the Constitution. The PSR provides for the procedure on interdiction in Regulations 32 to 40. Regulations 33, 34, 37 and 38 are also mandatory in nature. They operate as a shield against an officer being exposed to unfair procedural practices as well as double jeopardy. The PSC as a body is constituted and imbued with its authority by the Constitution.[32]

[99] The PSR requires the PSC to make a recommendation on interdiction directly to the Financial Secretary who is the decision maker. The PSC receives reports from department heads and Permanent Secretaries pursuant to Regulation 28. Regulation 28(2) of the PSR states that the defendant or the delegated officer must be of the opinion that disciplinary proceedings ought to be instituted against an officer and that this opinion must be reasonably held. The factors outlined above

[32] Sections 124 -127

would constitute some of the factors a court may look at to see whether an opinion can be said to be reasonably held.

The legality and validity of the decision to interdict

[100] The claimants challenge the initial decision of the then Financial Secretary, Dr. Wesley Hughes to place them on interdiction, a decision he made on March 9, 2012 in respect of the first claimant and on June 11, 2012 in respect of the second claimant. The office holder in the claim before the court is not Dr. Wesley Hughes as he is not a party to the action. However, pursuant to the Delegation of Functions (Public Service) (Specified Ministry Order), 2003, the office of Financial Secretary is specifically named as the authority delegated pursuant to section 127(4) of the Constitution to exercise the powers conferred on the Governor General by section 125.

The constitutional provisions

[101] The Constitution has to be read as a whole and it is settled that a broad, generous and purposive interpretation is to be given to its provisions (see **Julian Robinson v The Attorney General**.[33]) With respect to this principle, sections 32(2), 125 and 127(4), have to be read together as they are the relevant constitutional provisions governing this issue. They are set out below:

"32.— (1) …

(2) Where the Governor-General is directed to exercise any function on the recommendation of any person or authority, he shall exercise that function in accordance with such recommendation:

Provided that—

[33] [2019] JMFC Full 04

(a) before he acts in accordance therewith, he may, in his discretion, once refer that recommendation back for reconsideration by the person or authority concerned; and

(b) if that person or authority, having reconsidered the original recommendation under the preceding paragraph, substitutes therefor a different recommendation, the provisions of this subsection shall apply to that different recommendation as they apply to the original recommendation."

Section 125 provides*:*

"125.- (1) Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices is hereby vested in the Governor-General acting on the advice of the Public Service Commission.

(2) …

(3) Before the Governor-General acts in accordance with the advice of the Public Service Commission that any public officer should be removed or that ***any penalty should be imposed on him by way of disciplinary control****, he shall inform the officer of that advice and if the officer then applies for the case to be referred to the Privy Council, the Governor-General shall not act in accordance with the advice but shall refer the case to the Privy Council accordingly:*

Provided that the Governor-General, acting on the advice of the Commission, may nevertheless suspend that officer from the exercise of his office pending the determination of the reference to the Privy Council.

(4) Where a reference is made to the Privy Council under the provisions of subsection (3) of this section, the Privy Council shall consider the case and

shall advise the Governor-General what action should be taken in respect of the officer, and the Governor-General shall then act in accordance with such advice." (Emphasis added)

Section 127(4):

"Where, by virtue of an instrument made under this section, the power to remove or to exercise disciplinary control over any officer has been exercised by a person or authority other than the Governor-General acting on the advice of the Public Service Commission, the officer in respect of whom it was exercised may apply for the case to be referred to the Privy Council, and thereupon the action of the aforesaid person or authority shall cease to have effect and the case shall be referred to the Privy Council accordingly and the Governor-General shall then take such action in respect of that officer as the Privy Council may advise:

Provided that –

(a) where the action of the aforesaid person or authority included the removal of that officer of his suspension from the exercise of his office, that person or authority may nevertheless suspend him from the exercise of his office pending the determination of the reference to the Privy Council.

(b) before advising the Governor-General under this subsection, the Privy Council shall consult with the Public Service Commission.

[102] Section 125 of the Constitution prescribes that once a recommendation is received from the Commission, and before the imposition of a penalty, the Governor-General is required to inform the affected member of the advice by the Commission.

[103] In the case at bar, section 127(4) prescribes that *a person or authority other than the Governor-General acting on the advice of the Public Service Commission,* shall exercise the function of the Governor General in section 125. Mr. Devon Rowe is that person. There is without question that interdiction constitutes disciplinary control.

[104] There is no evidence before us that the claimants were informed of the recommendation of the PSC. This measure is in place to afford the affected public officer the opportunity to request that his/her case be referred to the Privy Council for its consideration. The Financial Secretary standing in the shoes of the Governor General must follow the constitutional procedure as it is laid down and conduct the matter according to the provisions of the Constitution in the exercise of the delegated authority.

[105] As a general principle, this court is prepared to state that before a public officer is interdicted, where section 125 and section 127 of the Constitution apply, the court would expect to see correspondence from the office of the person or authority to whom the Governor General has delegated the power pursuant to section 125, written to the public officer which states the following:

1. The grant of authority as gazetted.

2. The advice of the Commission and the relevant sections of the regulations which the Commission took into account.

3. The express indication that before the delegated authority acts on the advice of the Commission, that an application may be made for the public officer to refer the case to the Privy Council for its consideration and recommendation.

4. The time within which that application, if the officer is minded to make one, should be filed with the Office of the Services Commission and that the

public officer should set out the grounds upon which the application would be made.

5. There should be a clear directive that, failure to apply for a referral would lead to the acceptance of the advice of the Commission without the matter being reverted to the public officer.

[106] The claimants were not informed of any of the legal requirements and therefore they were denied an opportunity for the matter to be referred to the Privy Council for its consideration.

[107] The first claimant as I have indicated had filed an application for an injunction in the Supreme Court to halt the impending disciplinary proceedings. That interim injunction was granted. No further steps have been taken by the Financial Secretary as a result.

[108] In the Public Service Regulations at regulation 32 it says:

32.-(1) Where-

(a) disciplinary proceedings: or

(b) criminal proceedings, have been or are about to be instituted against an officer. and where the Commission is of the opinion that the public interest requires that that officer should cease to perform the functions of his office, the ***Commission may recommend his interdiction*** *from the performance of these functions. (Emphasis mine)*

[109] Regulation 28 prescribes to whom the Commission is making their recommendation.

28.-(1) The Commission shall deal with disciplinary proceedings against officers in the light of reports from Permanent Secretaries and Heads of Departments, or otherwise.

(2) Subject to paragraph (3), where the Commission is of opinion that disciplinary proceedings ought to be instituted against an officer. the Commission may ***recommend to the Governor-General*** *that such proceedings be instituted. (Emphasis mine).*

[110] The FS, in exercising the power of the Governor General pursuant to section 125 of the Constitution was obliged to accept the recommendation of the Commission, if the claimants had failed to apply for the matter to be referred to the Privy Council.

[111] Sections 125(3) and (4) of the Constitution provide that a person or authority acting on the advice of the Commission was not permitted by the Constitution to act on the Commission's recommendation without reference to the claimant. This is so because the claimants have a constitutional right, to request that the matter be referred to the Privy Council for its consideration. The FS was no longer entitled by law to act on the Commission's recommendation, once a referral to the Privy Council had been made made as once a referral is made, the recommendation of the Commission "*shall cease to have effect."*

[112] The claimants having been made the subject of a decision adverse to their interests, based on the recommendation of the PSC to interdict them, are be entitled to a hearing of their case by the Privy Council.

[113] The Financial Secretary ran afoul of the law and the claimants were therefore not given the right of audience at the stage of the Privy Council, before the decision to interdict them was made. The documents before the court advising them that they were being interdicted, both initially and continuing do not indicate that they were granted a right to have their respective cases referred to the Privy Council for a hearing as is their constitutional right.

[114] In light of these factual circumstances, in my view, both claimants were in fact and law, not afforded the opportunity to make representations before a decision was made by the FS which was adverse to them and they are entitled to such a hearing.

As a consequence of this, the due process rights of both claimants has been breached.

[115] This court, having enquired into the procedure adopted by the FS before interdicting the claimants, holds that there was a contravention of their right to a fair hearing to which they were entitled under sections 16(2) and by the proper exercise of the power delegated under 125 of the Constitution.

[116] The decision to continue interdiction is similarly flawed. The decision to continue the interdiction of the claimants was made by Mr Devon Rowe, then the Financial Secretary. He is the first defendant in the 2015 claim and he has been sued in his personal capacity.

[117] The redress claimed by both claimants is from the Crown for the contravention of their constitutional rights by a member of the Executive. The exercise of the power of the Crown was one against which the claimants are entitled to protection. The Crown is not vicariously liable but is liable in public law. The following sections of the Charter are binding on both the Office of Financial Secretary and Devon Rowe in person. This is so because section 13(4) of the Constitution says that chapter 13 applies to all law and binds the legislature, executive and all public authorities. Section 13(5) prescribes that:

> *"A provision of this Chapter binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right."*

Whether disciplinary proceedings can still be instituted against the claimants

[118] The finding that there was a breach of the right to a fair hearing means that the claimants have to be afforded the opportunity to be heard before disciplinary proceedings can progress. It does not extinguish the decision which had been made by Devon Rowe, to commence disciplinary proceedings.

[119] The claimants contend that Devon Rowe was not entitled to commence disciplinary proceedings at the end of the criminal proceedings against them. They contended that he relied on reports made to him to continue their interdiction which were not disclosed to them and additionally, that his actions were biased, actuated by malice and unreasonable.

a. The failure to disclosure reports

[120] The evidence in respect of the absence of reports considered by the FS, is to be found in the affidavit evidence of Devon Rowe[34] which I will refer to as his first and second affidavit respectively. In his first affidavit, Mr Rowe states that he acted as Commissioner of Customs upon the resignation of Danville Walker in November, 2011 until May 2012 when Major (Ret'd) Richard Reece was appointed to the post.

[121] As Acting Commissioner, Mr. Rowe said he was aware of the first claimant having been placed on interdiction by the then Financial Secretary, on March 9, 2012 pending the outcome of criminal proceedings against him relative to the fourteen motor vehicles that had formed the basis of the RPD's investigations.

[122] He had also become aware of the disposition of the criminal matter, dismissed for want of prosecution on the basis on non-disclosure by the prosecution. Further, that based on legal advice he had received, the dismissal did not prevent disciplinary proceedings from being commenced under the PSR.

[123] After careful consideration of various reports made to him, he determined *"that it was appropriate in all the circumstances"* to continue the interdiction of the claimants and to institute disciplinary proceedings against them in accordance with the provisions of the PSR, *"as it is my belief that the allegations are serious enough to warrant such action."*

[124] At paragraph 13, Mr. Rowe says this:

[34] as contained in his affidavits filed on November 20, 2015 and February 21, 2020,

"The Public Service Regulations obliges me to appoint an independent committee of enquiry to enquire into the charges that I intended to lay against the Claimants. The Public Service Regulations guarantees the Claimants a fair hearing whereby they are entitled to retain counsel and to respond and defend themselves against all disciplinary charges laid against them."

[125] Mr. Rowe noted that the claimants obtained an interim injunction to prevent the laying of disciplinary charges against them. He said that the charges had already been drafted by that date and that it was his intention that they be laid. These draft charges are to be found in a bundle of documents not agreed which were subsequently agreed by counsel during the trial.[35]

[126] In respect of the second affidavit the only difference is the addition of paragraph six which adds that Mr. Rowe knew of the ongoing investigation into the allegations *"that the 1st Claimant had breached the Customs Act and had allegedly influenced the former Commissioner of Customs to procure certain documentation in relating to 14 motor vehicles for which there had been forfeiture orders and which had been released from Kingston Logistics Centre (KLC). As acting Commissioner, I asked Jack Drummond one of the then Managers in the Contraband Enforcement Team at Customs to further enquire into the circumstances under which the motor vehicles had been released from KLC. I therefore considered it prudent to limit my communication with the 1st claimant and to await the outcome of the investigation."*

[127] In cross-examination by Mr. Cameron for both claimants, Mr. Rowe said that as Commissioner he had no issues with the first claimant's performance of administrative functions. That there were meetings and consultations in respect of instituting disciplinary proceedings against the claimants. He stated that he had not received a written report, he based his decision on conversations and legal advice on the decision made by the Corporate Area criminal court. He was aware

[35] Response to request for specific disclosure, filed June 22, 2020, page 19 – Bundle of Documents Not Agreed

that the claimants had not been found not guilty but that there was *"an avenue"* through the PSR. The witness described looking at and weighing very carefully, thinking about it in a careful way that would be fair to all the customs officer and all the officers across different agencies to ensure his actions were the best actions. He looked at all the circumstances and believed the matters were serious and needed to be addressed. He had the opportunity to think about the course of action, the circumstances of the case at the time seemed odd to him. He did not recall the details or the notes he wrote at the time. The witness indicated that it was not an easy decision but it was based on the information and advice he had received. He indicated his decision by letter. That decision was to go ahead with the disciplinary proceedings.

[128] In a later affidavit in answer,[36] Mr. Rowe said in paragraph 10 that he was aware of the investigations carried out by the RPD. He had knowledge of the allegations against the claimants and several discussions about the matter with Major (Ret'd) Johanna Lewin, as also the Commissioner of Customs who reported to him in discussions on the RPD's investigation and the outcome of the criminal prosecution.

[129] The witness was not asked any questions in cross-examination about this affidavit in answer which ends with the statement: *"My decision to continue to interdict the claimants was based on my knowledge of the allegations, the RPD investigation and the reports made to me by Major Lewin in my discussions with her."*

[130] The reports described in the evidence of Mr. Rowe would not meet the requirements of the PSR as indicated in the procedure established by the law. Reports from heads of department or Permanent Secretaries must include material in a form, which can be provided to the public officer in order for him/her to answer the allegations against him/her. This is particularly so before a decision adverse to the officer is to be made. Conversations and personal notes do not suffice. While

[36] Filed June 22, 2020

the court understands the statutory reporting relationship set out in the Revenue Administration Act, the failure to disclose the reports used to make a decision adverse to the claimants is a fundamental breach of the right to a fair hearing and I so find.

b. Delay

[131] The evidence led by the claimants has to address the following factors under this head, the period of time which has elapsed which is the threshold test. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. Secondly, it is necessary for there to be an explanation to justify any lapse of time which appears to be excessive.

[132] The time requirement in this case, is clearly far beyond what could be considered reasonable. The facts of the case are that Mr Rowe consulted and reviewed his position on the matter. He simply took far too long to make the decision. There is no evidence as to the reason for the delay in making the decision. This is a concession which the defendants have rightly had to make.

[133] In so doing, the defendants have conceded that the claimants are entitled to receive half of their salaries withheld and any emoluments to which they would have been entitled had they been returned to their posts, over the period between the dismissal of the criminal charges on February 6, 2015 and the decision to continue their interdiction on September 18, 2015. Thus, the claimants are entitled to these sums with interest.

c. Bias

[134] This court has been asked to make a determination as to the legality and validity of the decision to institute disciplinary proceedings made by Devon Rowe in light

of bias. In my view, any reference to bad faith or bias, has not been established by the claimants in the instant case for these reasons. The assertions in the first claimant's affidavit that the actions taken by Mr. Rowe were based on spite, ill-will or malice were never put to him.

[135] The first claimant said he reported directly to Devon Rowe when the latter was Commissioner of Customs. Mr. Rowe did not facilitate meetings with him and was evasive in his responses to any enquiries.

[136] The duties of the Financial Secretary as set out in the PSR are mandatory. He is required to adhere to the method prescribed in the PSR in the execution of his duty. It is axiomatic that, Devon Rowe made more than one inquiry into the matter, and consulted with the head of RPD, the AG, considered the recommendation of the PSC as well as the allegations which had been before the criminal court. He had to satisfy himself that his decision was sound before he took the serious step of continuing the interdiction of the claimants. He was aware of the procedure for dismissal under the PSR and gave evidence that an enquiry would first have had to be held. In the discharge of this statutory duty, the FS failed to comply with the procedure set out in the statute as has been found. However, there was no challenge to whether the FS had not in fact considered the above factors, or that his mind was so prejudiced that he gave no genuine consideration to them and instead based his decision on malice, spite or ill-will, which is the case argued by the claimants.

[137] In **de Smith's Judicial Review**,[37] the learned authors state:

"In some situations those who have to make decisions can hardly insulate themselves from the general ethos of their organisation or institution; they are likely to have firm views about the proper regulation of its affairs, and they will often be

[37] 6th edn para 10-070

familiar with the issues and the conduct of the parties before they assume their role as adjudicators."

[138] My view is that the decision to commence disciplinary proceedings cannot be separated from its context, its factual circumstances nor could it be viewed in isolation from the duties of the Financial Secretary. The circumstances of each case depends on the facts, the nature and context of the case. The FS gave evidence that he considered these factors which I accept.

[139] The claimants also complain that Devon Rowe was not sufficiently independent, in that he made up his mind when he was Commissioner of Customs and in effect merely executed the decision he had made when he had previous intimate knowledge of the case. It is for the claimants to show the evidence which gave rise to the bias or prejudice which they assert was present in the decision maker and which was applied against them.

[140] In my view, one can hold a less than favourable view of a matter or person but not apply that view or opinion to a decision one has to make. In other words, even a pre-conceived opinion does not constitute bias until the unfavorable thoughts and opinions steeped in pernicious reasoning, ferment into conduct exercised in a way calculated to yield an adverse result to a person or matter.

[141] To find otherwise would be to accept that decisions are made without regard to the evidence and are based solely upon opinions, prejudices and emotions. Juries are directed everyday around the world, not to do this very thing in their deliberations. The claimants have presented no evidence to show that any knowledge Devon Rowe had acquired as Commissioner of Customs affected his decision making as FS, nor that his decision was purely to adversely affect the claimants without due regard to the evidence.

[142] I have previously indicated that none of this was put to Devon Rowe by the first claimant's counsel. The position is no different in respect of the second claimant,

[143] This court notes that the law in relation to bias has developed over time and there is no requirement for proof of actual malice or subjective bias, it is the appearance of bias which is the complaint. The current test is found in the well-known statement of the Lord Hope of Craighead in **Porter and v Magill**[38] where he stated that the question should now be "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

[144] The claimants bear the burden of establishing the appearance of bias in the FS. The first claimant has set out in his affidavit that it was Devon Rowe who was then Commissioner of Customs who recommended the initial interdiction to the then FS, Wesley Hughes. There is no evidence before us which contains any support for this assertion. When Devon Rowe assumed command of Customs from Mr. Walker, he said did not rely on the first claimant, this does not establish bias.

[145] Having failed to establish any personal hostility or malice on the part of Devon Rowe, his varying posts within the public service do not singularly disqualify him from making a decision to continue the interdiction of the first claimant.

[146] The first claimant has failed to appreciate that Devon Rowe was entitled to construe that the alleged impugned conduct of the first claimant, while not proven to the requisite standard in a criminal court could simultaneously constitute an infraction or misconduct given the importance of his role within the hierarchy at Jamaica Customs. Implicit in the first claimant's role, function and level of seniority would have been a significant degree of trust and confidence on the part of the FS and the Commissioner of Customs. This is so as it was the FS who appointed the first claimant to the post of Director.

[147] Additionally, as was apparent from the deposition of Danville Walker, heavy reliance was placed on the first claimant and such confidence reposed in him, that

[38] 2002] 1 All ER 465

Mr. Walker simply signed documents drafted by the first claimant such as the very document granting KLC approval under section 91 of the Customs Act.

[148] While the first claimant has sought and failed to establish bias on the part of Devon Rowe, it was Mr. Walker who first received the report of Jack Drummond and who had the first claimant removed to Customs House. This was done when Mr. Walker learned of the imbroglio between the members of the CET while under the command of the first claimant.

[149] Counsel for the first claimant put to Danville Walker, that Major (Ret'd) Lewin met with him in his office with a letter seeking powers of mitigation to the RPD. The witness responded that they had a discussion about that and he was not in agreement, that was the end of it. Mr. Walker described the request as novel, as it amounted to the RPD asking for the powers of Customs but he qualified his answer by saying the construct of the RPD was not far from that. Counsel for the first claimant did not ask Mr. Walker any questions relating to that discussion between the Commissioners as the involvement of the RPD in relation to the fourteen motor vehicles

[150] The fact that the first claimant's counsel, saw it fit to raise the RPD's involvement with the fourteen vehicles with Danville Walker is telling. It means that the first claimant did not know what was happening behind the scenes, in terms of an irregularities involving him. One inference to be drawn from the evidence of Danville Walker is that the first claimant was under scrutiny, and that both Commissioners knew about it. Danville Walker gave a statement to the RPD for use in the criminal case. That statement is now Exhibit 1 in his deposition. Counsel for the first claimant did not establish a timeline for his questions to the witness, but they all referred to a time before the tenure of Devon Rowe, when Danville Walker was Commissioner.

[151] The claimants fail on this issue as they have not established that Devon Rowe prejudged any genuine consideration or that he had not genuinely considered the claimants' matter based on bias, malice, spite or ill-will.

[152] The claimants argue further, that the decision maker which is undoubtedly Mr Rowe, failed to take into account, the fact of the dismissal by the then Resident Magistrate which by their own definition amounts to an acquittal of the criminal charges. Having failed to do so, he has failed to take into account a matter which he ought to have and fallen into classic reviewable jurisdictional error.

[153] Mr. Rowe gave evidence that he had taken advice on the matter before making his decision. The conduct which was alleged to have been exhibited on the part of the claimants was troubling to Mr. Rowe, he was aware of the reason the case was dismissed and that there had been no trial on the merits. This submission is does not find favour with the court in light of the settled law in regarding the dismissal of the criminal charges.

In light of the foregoing, the most appropriate course of action would be for the disciplinary proceedings to commence as prescribed by the PSR and the Constitution.

Seizure of the firearm

[154] In the case of ***The Attorney General Of Jamaica And Superintendent Of Police Anthony Mclaughlin v Xtrinet Limited,***[39] Brooks, P stated that:

> *"In this instance, section 15 of the Constitution of Jamaica is relevant. The section is a part of the Charter of Fundamental Rights and Freedoms. Section 15(1) prevents the compulsory taking of possession of property belonging to persons in Jamaica "except by or under the provisions of a law" that prescribes for the taking and for compensation, and secures the rights of the persons affected, to protect their interest in that property. Section*

[39][2020] JMCA App 14

15(2) allows for legislation providing for the: "taking of possession or acquisition of property – … (k) for so long as may be necessary for the purposes of any examination, investigation, trial or inquiry…" It is to be noted that the taking of possession must be pursuant to legislation.

[29] The applicants made no attempt to place any evidence before the learned judge to demonstrate that some law or legal principle authorised the retention by the police or prevented the return of the equipment to its owners. The submission that it is for Xtrinet to show that it was operating legally, is to improperly reverse the burden of proof, in the context of the litigation."

In B & D Trawling v Crpl Lewis, the police had wrongfully seized and detained a boat. The relevant portion of Sykes J's judgment in the case, was a discussion of the issue of detinue. During his characteristically comprehensive analysis, Sykes J, said, in part at paragraph 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)…" (Emphasis supplied)

[39] In Francis v Marston, cited by Sykes J, a police officer seized a firearm from Mr Francis after it proved that he had not renewed the licence for the weapon. No charges were laid against Mr Francis. He demanded the return of the firearm, but the officer refused. Mr Francis sued. On appeal Lewis JA discussed the position at common law as the Firearms Act, at that time, did not authorise the retention of the weapon. Lewis JA pointed out that detention of property by the police may be justified if at the time of the taking, or shortly thereafter, someone is arrested for an offence in connection with the property. He said, in part, at page 313: "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. See Elias v Pasmore ([1934] 2 KB 164, [1934] 2 All ER Rep 380, 103 LJKB 223, 150 LT 438, 98 JP 92, 50 TLR 196, 78 Sol Jo 104, 32 LGR 23, 46 Digest (Repl) 405, 469) and the cases referred to therein. The basis of these powers is the necessity of ensuring that material evidence is avaliable [sic] on the prosecution of the person charged and that his trial is not rendered abortive by the inability to produce such evidence as [may be] in his possession. 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. In this connection see, however, R v Waterfield ([1963] 3 All ER 659, CCA, 3rd Digest Sup)." *(Emphasis supplied)*

[40] The learned judge of appeal also said, at page 314, that the owner of the property, detained by the police, is entitled to sue in detinue even if it would be unlawful for the owner to have possession of the property, such as the absence of a licence."

[155] There is an exhibited receipt issued by the Firearm Licensing Authority ("FLA") for the collection of firearms, ammunition and firearm licenses as part of the agreed

bundle before the court. Neither side took issue with this document. Mr Farquharson's name, is on the receipt as the bearer of the firearm, he was not asked any questions by counsel about it. The receipt revealed that on March 2, 2015, a firearm, two (2) magazines and thirty (30) cartridges was returned to the first claimant by the FLA. The receipt also says that these items had been submitted to the FLA for safekeeping by Mr Farquharson. This receipt issued by the FLA was given to the first claimant, it was the one he presented to the FLA along with his identification to collect the firearm on March 2, 2015.

[156] The witness statement of the first claimant says that his government issued firearm and his personal firearm were both seized as well as three (3) magazines, fifty (50) rounds, one (1) gun lock, one (1) speed loader, one (1) cloth holster, one (1) plastic holster and one (1) hard plastic gun case. All the accessories for his government issued firearm were also seized to include two (2) magazines, thirty (30) rounds and a soft holster. He was given no receipt for the weapons or accessories seized at the time of seizure.

[157] In cross-examination, the first claimant said the firearm and its accessories were taken to FLA two (2) weeks after the seizure and in cross-examination he said:

> *"Q: All the ammo was returned to you?*
>
> *A: Only 30 of 50 returned to me, 20 still unaccounted for."*

[158] Mr Farquharson in his witness statement[40] said that he did not seize the first claimant's firearms and accessories instead, they were retained for safe keeping to facilitate the search exercise and for the safety of the RPD team. His intention was to hand them back to the first claimant at the end of the search. However, at the end of the search, the first claimant was required to attend Customs for the search of his office there. He said he could not hand the weapons back to him neither could they have been left in the custody of the family members. On his

[40] Filed January 17, 2020, paragraph 9

return to his office, Mr Farquharson said that he locked the firearm and accessories in the vault for safe keeping. Mr Farquharson was not challenged about this aspect of his witness statement.

[159] Based on the authorities I agree with the submissions of counsel for the first claimant. The first claimant is entitled to a declaration that the seizure of his personal firearm was done without lawful authority. He is also entitled to an award of nominal damages for the loss of the ammunition he alleges which has not been challenged as the claimant has adduced no evidence as to quantum under this head.

Travelling allowance

[160] In general, all allowances should still be paid in full to a public officer on interdiction, provided that the officer qualifies for them in accordance with the requirements outlined in the Staff Orders for the Public Service or otherwise set out by the Ministry with responsibility for the Public Service. The allowances that can be paid are those not linked to actual performance of duty. For example, motor vehicle upkeep should be paid but no claim for actual mileage should be made.

[161] On this issue of arrears from June 2012 to May 2013 and continuing, it is not disputed that the former Commissioner approved travelling allowance for the first claimant's government assigned motor vehicle.[41] It is also not in dispute that Mr. Walker had referred that approval to the internal audit section for their opinion. In further cross-examination, Mr. Walker was asked by Ms. Jarrett what ought to happen if there was an issue with his approval by internal audit. Mr. Walker responded saying "*pay it back*."

[162] The first claimant asserted that the 6th defendant withheld one (1) year's travelling allowance totaling J$530,250.00 without just cause and in breach of the provisions

[41] OG-19D

of the Financial Administration and Audit Act or directives from the Financial Secretary of the Ministry of Finance.

[163] 'OG-19A'[42] is a letter from the Commissioner of Customs outlining an audit recently conducted of travel allowances paid to staff over the last three years. With specific reference to the first claimant, the letter stated that he had claimed and received travelling allowances for the period March 2011 to January 2012 on a 1997 Mitsubishi Pajero with registration number 1144DW which the first claimant had transferred on March 2, 2011. Additional claims were made for December 2011 on a Toyota Rav4, registered 9692GB purchased on January 11, 2012. This resulted in an overpayment of $499,182.19. This letter requested terms of repayment within four days of its receipt.

[164] The first claimant explained in reply that he was involved in many high profile cases which kept his life and that of his family under threat. These cases involved large cash seizures and he was the sole prosecutor before the criminal court. Naturally, those who had lost their cash were seeking to make him a target and as a result he obtained police protection. The first claimant exhibited a memorandum to the Commissioner to this effect as also the approval of the Commissioner to use several different motor vehicles especially on the days he would be attending court. The first claimant said in response that he had to dispose of any vehicle registered in his name as he was a target for criminals. This arrangement was clandestine in nature and there was no documentation to substantiate it for fear of disclosure.

[165] The use of a personal vehicle/s had been approved by the Commissioner in response to the memorandum sent to him by the first claimant. The Commissioner referred the matter to the internal auditor for an opinion, there was no response.

[166] It was by way of an audit by the Auditor General during the tenure of the new Commissioner that the discrepancy as to overpayment was discovered. The first

[42] Dated June 20, 2012, signed by Ms. Jessica Belle, Director, Human Resource Development, for the Commissioner of Customs

claimant responded, however, this response was not channeled through the process described in the circular from the Ministry of Finance and the Public Service dated December 2, 2011 which governed disputed sums.[43] The claimant has an alternate remedy and has not raised any special features of his case which would lend the court to treat this matter as one for constitutional redress.

[167] This court will therefore, decline to exercise its powers pursuant to section 19(4) of the Charter of Rights and Freedoms to treat the matter as a breach of a constitutional right and instead direct that the parties make submissions on this issue. There is a process to be engaged in respect of disputed sums which would involve the Chief Internal Auditor of the Ministry of Finance who should examine the matter and follow the process outlined by the Ministry for dealing with matters such as this which involves public officers on interdiction.

Whether Salary is property

[168] Salary being money is regarded as property (see **A-G of St Christopher and Nevis v Lawrence**[44]; **Inland Revenue Commissioner v Lilleyman**[45] and **Barnwell v A-G**[46]).

[169] Regulations 32 (1) – (4) of the PSR state –

> *"(1)…*
>
> *(2) An officer so interdicted shall, subject to the provisions of regulation 36 and paragraph (3) hereof, be permitted to receive such proportion of the salary of his office* ***as the Commission shall recommend to the Governor-General*****.**

[43] OG-19C
[44] (1983) 31 WIR 176
[45] (1964) 7 WIR 496
[46] (1993) 49 WIR 88

(3) The proportion of salary referred to in paragraph (2) shall be related to the nature and circumstances of the charge against the officer, so, however, that –

(a) subject to sub-paragraphs (b) and (c), the proportion shall not be less than one-half;

(b) subject to sub-paragraph (c), where the charge involves an allegation of defalcation, fraud or misappropriation of public funds or public property, the proportion shall not be less than one-quarter; and

(c) where special circumstances exist which in the opinion of the Public Service Commission justify such action, the Commission may recommend to the Governor-General that salary be paid at a proportion less than one-quarter or entirely withheld.

(4) …

[170] The reasoning of the court on the issue of the breach of the claimants' due process rights apply in respect of being heard on this issue of salary also. This court having found that the claimants' constitutional right to a fair hearing has been breached finds that the issue of salary is a corollary to the issue of interdiction. The right to be heard by the Privy Council would naturally encompass the loss of salary which may flow from a decision to interdict a public officer.

Lost opportunity and future income

[171] The first claimant, in his first affidavit,[47] stated:

"8. That I assumed the office of Director of Customs, Contraband Enforcement Team in December 2008 [officially on January 5, 2009]…."

[47] Filed on October 1, 2015

20. That the Commissioner of Customs at the time, Mr. Devon Rowe, approved my nomination to the World Customs Organization and a recommendation was signed by Ms. Jessica Belle, Director of Human Resource Management and Development and I submitted my application to the World Customs Organization in Belgium in November 2011 prior to the deadline.

21. That sometime in the first quarter of 2012, the World Customs Organization contacted me for further documentation in support of my application, specifically the following: -

i. Copies of all procedural papers, regulations and procedural directives I had written and implemented.

ii Copies of all legislative amendment submissions and regulatory amendment documentation I had drafted

iii Notarized of all copies of all degrees, certifications, commendations and accreditations I have received along with the course outlines and transcripts.

26. That with effect from June 1, 2010 I was confirmed in the post of Director of Customs (RMG/TA7) vide a letter of appointment dated June 18, 2010 a copy of which is attached hereto and marked, ***'OG-4'****….*

[172] A look at 'OG-4' reveals a letter signed by Miss Jessica Belle, Director, Human Resource Management and Development for the Commissioner who signed for the Financial Secretary dated September 22, 2010 to the first claimant. It promotes the first claimant, whose substantive post was Manager (RMG/TA 6) and was then the Acting Director (RMG/TA7), Internal Audit Branch, Customs to the vacant post of Director (RMG/TA7) Post #57390 in Customs with effect from June 1, 2010.

[173] Referencing "OG-4" to the application for the post of Technical Officer, World Customs Organization[48] numbered 'OG-3E' and paragraphs 20 and 21 of the first claimant's first affidavit, I had a look at 'OG-3E.'

[174] I will set out the response of the first claimant in bold. On his application there is a box on the form which is headed *"Compulsory military or non-military national service: Dates and latest rank":* **June 2003 – Present Director of Customs i/c Border Protection** was the first claimant's response.

[175] I recall here that the date of the first claimant's appointment from the post of Acting Director to Director was effective June 1, 2010 and not June 2003. I also recall here that the first claimant acted in the post of Director, Internal Audit and not Border Protection.

[176] Under the heading '**PROFESSIONAL EXPERIENCE:**

'Present post Since': - **December 2008**; was the response

'Exact Title of your post': **Director of Customs (RMG/TA 7) Contraband Enforcement Team Border Protection Unit**, was the first claimant's response.

[177] This does not accord with OG-4, the letter of appointment. There is no mention of the first claimant acting in the post of Director, Internal Audit anywhere on the application form, nor did he indicate the fact that his substantive post as Manager (RMG/TA 6) would have continued until June 1, 2010.

[178] In fact, returning to the application form, regarding:

"*PROFESSIONAL EXPERIENCE"*, the first position held by the first claimant is said to be "**Branch Manager (RMG/TA6), Air Cargo and Control, and Queens Warehouse, Sangster International Airport."** The first claimant indicated the dates in that post as "**March 2005 to November 2008**."

[48] OG-3E

[179] The date of the application form is November 11, 2011. There is a signature affixed to the line for candidate's signature under a statement which said:

> *"I certify that the statements made by me above are accurate and complete and I undertake to supply, on request, any documentary evidence required in support of them.*
>
> *I am aware that any misrepresentation or material omission, even unintentional, may result in the rejection of my application or the annulment of any subsequent appointment.*
>
> *I agree to undergo the medical examination required before any appointment."*

[180] The first claimant has clearly certified these misrepresented qualifications on the application form which he exhibited to his sworn affidavit. These were facts peculiarly within his own knowledge. There is evidence in the deposition of Mr Danville Walker that the first claimant told him that he had been offered a position as a Technical Officer at the World Customs Organisation. There was no challenge to or denial of this statement by Mr. Walker.

[181] The first claimant also failed to demonstrate in this application that he was no longer in charge of CET as he had been transferred to Customs House in March, 2011 by Mr. Walker. In addition to these false statements, the first claimant failed to adduce before us any documentary evidence to show that he had been offered the job. There is no job offer from the World Customs Organisation before this court.

[182] 'OG-4' is important as it shows that up to September 22, 2010, Devon Rowe, as FS, had promoted the first claimant to the post of Director. Therefore, the inference that can be drawn is that any allegations which tended to cast the first claimant in a less than favourable light must have arisen after September 22, 2010.

[183] The first claimant seemed not to grasp the breach of trust which the allegations of his impugned conduct would have wrought in terms of the decision to promote him. The Financial Secretary would have been the one whose confidence had been undermined. The false statement that he had received a job offer cannot constitute evidence of such an offer. Consequently, there is no evidence of a job offer from any entity before this court, therefore there can be no loss of opportunity or loss of future income.

Legitimate Expectation

[184] In regards to whether the first claimant had a legitimate expectation to be free from the initiation of disciplinary proceedings against him, the criminal case against him having been dismissed, the affidavit evidence is as follows:

> *"That this is specifically in relation to motor vehicles which I was arrested and charged for and for which I was vindicated in the criminal courts and which the Supreme Court has declared are not criminal and not infringing on the Customs Laws.*[49]
>
> *"Q: No, that's not the question. The question I have recorded is that Kingston Logistics Centre did not purchase vehicles from Customs; what's your answer?*
>
> *A: Customs does not have vehicles for sale. There [sic] are Government entities [sic] that collect duties and taxes at the port.*
>
> *Q: I know that. So that I am not misstating your evidence, you said earlier that – you accepted earlier that you were the only person providing evidence in the civil suit before Justice Pusey?*
>
> *A: Yes, ma'am.*

[49] Para. 220

Q: Only evidence before the Court of Appeal?

A: As I understood it, yes, ma'am.

Q: And only evidence before the Privy Council?

A: Yes, ma'am"

[185] The witness was then referred to the judgment of the Privy Council[50] and specifically to paragraphs 10 and 11 which state:

> *"10. On 4 April 2011, the duties and taxes payable on the importation of the Suzuki were paid to the Customs, using The first claimant's credit card. A receipt for the payment was issued to Kingston Logistics.*
>
> *11. On 26 April 2011, the supervisor of the Customs Queen's Warehouse issued a certificate for the Suzuki, certifying that the vehicle had been sold to Kingston Logistics at public auction. No such auction had in fact taken place."*

[186] When asked whether the evidence before the Board would have been provided by him, the witness answered "*yes. Ma'am*."

[187] Queens's counsel also established that not only did the first claimant pay for the Suzuki with his credit card but he did so knowing that there had been no auction for the sale of the Suzuki to KLC.

> *"Q: On 4 April 2011—well, before I go there, the 2007 Suzuki Swift motor vehicle, The first claimant, that was the subject of your civil suit, you say that the methodology used to process those vehicles – that vehicle, I'm sorry – was the same one used for the 14 vehicles, the subject of the criminal prosecution.*

[50] [2018] UKPC 10, judgment delivered on 14 May 2018

A: yes, ma'am.[51]*"*

[188] Interestingly, in the deposition of Danville Walker, counsel for the first claimant asked these questions as set out below:

> *"Q: When Kingston Logistics cleared these vehicles, were they entitled to dispose of them after you cleared them, all right, hold up, let's back up a second. Let us for the sake of the now discussion say that you, Commissioner, were wrong. That you couldn't properly dispose of the vehicles in the way you did, by allowing Kingston Logistics to pay the duty and take them and sell them, let's say you were wrong, but even if you were wrong, what did you expect them to do after they cleared it?*
>
> *A: To sell them.*
>
> *Q: To sell them?*
>
> *A: Yes*
>
> *Q: To?*
>
> *A: To whoever the buyers are.*
>
> *Q: Anybody, money?*
>
> *A: My concern really is that the duties would have been paid.*
>
> *Q: Were the duties paid on these 14 vehicles?*
>
> *A: To my knowledge they were paid.*
>
> *…*
>
> *Q: Now, these vehicles weren't auctioned?*

[51] Transcript of evidence, dated July 13, 2021

A: No, they weren't.

Q: But you generated a document that made them look, to make them look like they were auctioned. I mean you had to do that in order for them to be licensed?

A: Well, these were vehicles for the police, so I don't know that they need…"

[189] It is apparent from this evidence before us that the position taken by the first claimant was that the motor vehicles were not properly seized, in that seizure notices had not been served on KLC as the seizure was not done in their presence. Yet, knowing this to be so, the first claimant paid for the Suzuki with his credit card. It means that he would have known that the motor vehicle had been sold to KLC but not by means of a CET auction, as one had not taken place. He would also have known that the Suzuki had not been properly seized and was intended for the police, yet went ahead and acquired it anyway. In the same breath, it is his affidavit evidence that the vehicles were seized and forfeited by the Commissioner of Customs. It is against this background that the first claimant advances that there is no reason for him to face disciplinary proceedings or to have been arrested and charged. The first claimant simply has not adduced any evidence to demonstrate the legitimate expectation he claims.

The second claimant

[190] In respect of the second claimant the only evidence adduced by the prosecution were two (2) cheques drawn on JMMB. Item 104 on the prosecution's list of documents says *"JMMB Client Sales Record dated April 26 2011 in respect of cheque numbers 764888 and 764890."* This is different than the allegations set out by the prosecution in the criminal proceedings. There it was said that the second claimant used a credit card and there was nothing said of two cheques.

[191] The second claimant received a letter from Dr Wesley Hughes, dated June 11, 2012[52] which said:

> *"Pursuant to the Delegation of Functions (Public Service) (Specified Departments) Order 2002, and Regulation 32 of the Public Service Regulations (1961), I hereby advise that with effect from June 11, 2012 you are being interdicted from duty pending the determination of investigations into allegations of your involvement in the unlawful disposal of certain vehicles that were in the custody of the Customs."*

[192] The evidence before this court does not establish that the second claimant did anything except to challenge her assertion that she made a loan to the first claimant for the payment to Customs for duties and taxes. There is no nexus to the first claimant and his unlawful disposal of the motor vehicles from Customs nor any evidence of conspiracy.

[193] The second claimant in my view is entitled to the relief prayed in her further amended statement of claim. The Further Amended Fixed Date Claim known as the 2015 claim is dismissed.

Injunction

The defendants have conceded that the claimants are entitled to receive their half salaries that were withheld and emoluments to which they would have been entitled had they returned to their posts, during the period of approximately eight (8) months, between the dismissal of the charges in February 2015 and their interdiction in September 2015, pending disciplinary proceedings. Based on the conclusion of the court. There is therefore no need for the interim injunction to be made permanent as the court has indicated above that the disciplinary proceedings ought to proceed.

[52] CB-5

Psychological trauma

[194] The evidence of Dr. John Campbell, expert witness for the first claimant was that after observation and examination he concluded that the first claimant was obese, hypertensive and had high cholesterol prior to his arrest, and suffered from panic attacks thereafter. After 2012, the first claimant was on medication from other physicians including a psychiatrist. He recommended that the first claimant lose weight in order to alleviate his pain. He said that when he first saw the first claimant, he was significantly overweight. He attributes the first claimant's vomiting to the stress of the his incarceration which was not happening prior to 2012. The evidence concerned observations which took place over eighteen (18) months.

[195] The evidence of Dr. Colleen Gooden, consultant psychiatrist was that the first claimant had not been referred to her formally. She had received a call from a colleague about seeing the first claimant and when she did, it was he who provided his medical history to her. The first visit was on March 8, 2013. He told her that there had been threats made on his life related to the 2012 court case. Dr. Gooden said, she made an association between these death threats and the first claimant's incarceration. There were also other stressors such as a recently ended intimate relationship which was a significant contributory stressor. The diagnosis made was Post Traumatic Stress Disorder ("PTSD".) PTSD was diagnosed based on the incarceration and death threats. The first claimant was still exhibiting symptoms of PTSD though it had been a year since the was incarceration. Anxiety disorders and panic disorders were common with PTSD. She had made a clinical diagnosis by way of an interview with the first claimant, monitored him at three (3) month intervals and provided psychotherapy.

[196] The first claimant relapsed when his ex-girlfriend died overseas and he assumed responsibility for her estate. Her father accused the first claimant of misappropriating funds from her estate and the first claimant was again held by the police. This constituted a psychosocial stressor. Both of these stressors would impact PTSD. The first claimant reported fluctuations in mood, developing

symptoms of major depression as of 9 in DSM, DTR, low energy, decreased interest in activities and thoughts of death without suicidal ideation.

[197] On June 26, 2015, the first claimant reported to her that he had to take higher doses of the drug Alprazolam because he continued to experience anxiety related to court appearances. Dr. Gooden understood that the court appearances being referred to were concerning the civil suit he was involved in as he had to make appearances at court and it was a long process. He said that he had filed the lawsuit. The witness said the first claimant seemed preoccupied with his symptoms, in that he exhibited anxious preoccupation, talking a lot and very concerned with the symptoms he was experiencing. She noted that when she first saw the first claimant, he was already taking Alprazolam, which is prescribed to treat anxiety.

[198] The first claimant told her that all these incidents were all related. The death threats were all related to the court case. There was an association between the death threats and the presentation along with his incarceration. Death threats were a contributing stressor.

[199] The first claimant has not provided any evidence to us in his affidavit or his witness statement to suggest that he was the subject of death threats during or associated with the 2012 criminal court matter or his incarceration as a result of that matter. In fact, his witness Miss Karen Harrison would certainly have told the court if this were so and there is not one scintilla of evidence in her witness statement to this effect. There will be more on Miss Karen Harrison later on.

[200] While there may be suffering in the person of the first claimant, the fact that he was in custody and held for bail was not a breach of his rights under section 14 of the Charter. He is not entitled to damages for having been lawfully arrested and charged. In addition, the self-reported medical history coupled with the false statements given to Dr. Gooden have weakened and diluted the first's claimant's

position so significantly that there is no foundation remaining. There is no award to be made under this head.

[201] The second claimant filed no expert evidence, there will be no award under this head on her claim.

The 2019 Claim

[202] In what can only be described as extensive and prolix pleadings, which were considerably reduced on the first day of trial, the 2019 claim sought 36 orders none of which are going to be set out here.

Prolix and unnecessary pleadings

[203] The claimants, in filing their 2019 claim, have failed to give due regard to rule 8.9(2) of the Civil Procedure Rules, 2002 ("CPR") which requires a statement of case to be as concise as practicable.

[204] Rule 8.9 states:

> (*1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.*
>
> *(2)* ***Such statement must be as short as practicable.***
>
> *(3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.*
>
> *(4) …*
>
> *(5) …*

[Emphasis added]

[205] The Claim was accompanied by an even longer amended particulars of claim containing 264 paragraphs.

[206] Pursuant to Rule 26.3 (1) (d) of the CPR, the court may strike out pleadings which fail to comply with rule 8.9(2). The court may employ other measures as striking out is best used as a last resort. Costs is one such measure which comes to mind.

Reinstatement and payment of retroactive salaries

[207] Paragraphs 3 and 4 of the Further Amended Claim Form will be dealt with together. The first claimant's attorneys wrote letters dated February 23, 2015, March 4, 2015 requesting reinstatement. The first claimant also appealed the decision to fill his position. The PSC responded to the first claimant's attorneys on December 30, 2015, indicating that the appeal was dismissed and that the post of Director, Contraband Enforcement Team had been filled on the establishment of Customs, now an Executive Agency. The PSC deferred consideration of the first claimant's case until after the conclusion of the criminal case. The Financial Secretary responded on March 23, 2015 indicating that he was reviewing all the matters related to the first claimant and would advise upon completion.

[208] The first claimant's attorneys continued writing letters of March 25, March 27 and June 4, 2015 to the PSC requesting permission to initiate proceedings against the Crown pursuant to section 4.9 of the Staff Orders for the Public Service. Another letter was written to the PSC on September 15, 2015, there being no response. The PSC responded on September 17, 2015 stating that he should await the decision of the Financial Secretary who had advised them that he was in the process of communicating his decision. On September 18, 2015, the Financial Secretary responded indicating that he was commencing disciplinary proceedings with a view to dismissal.[53] This was over seven months after the dismissal of the criminal proceedings.

[53] OG-15K

[209] In April 2014, Customs began the transition to an Executive Agency. The post of Director of the CET was advertised. The first claimant filed an application for an injunction to keep the post from being filled which was refused by L. Campbell, J. An appeal to the Public Service Commission ("PSC") was deferred pending the outcome of the criminal case.

[210] The claimants submitted that they are entitled to their salary, vacation leave and all emoluments associated with their posts in the new Customs Agency. To bolster their submission they cited the case of **Beatrice McKenzie et al v the Attorney General of Jamaica**[54] which dealt with customs officers who had been charged with breaches of the Customs Act. The prosecution withdrew the charges. The officers had been interdicted from duty and during the period of interdiction they received one-quarter pay. The officers were reinstated and given their full pay for the period they were on interdiction. However, they claimed their accrued vacation leave. The Solicitor General sought the guidance of the court as based on her understanding, it had never been the policy or practice for public officers to be allowed to accrue vacation leave or be paid in lieu thereof while on interdiction. The learned trial judge agreed with the Solicitor General. On appeal it was held that on being reinstated, public officers are entitled to accrued vacation leave by virtue of their contractual right as it was a benefit which Parliament would not have intended to deny them during the period of interdiction, or thereafter having been absolved from the charges.

[211] In the case at bar, having found that the Financial Secretary was not entitled to continue the interdiction proceedings, the case of **Beatrice McKenzie** does not assist the claimants as the claimants have not been reinstated. When disciplinary proceedings have taken place and the charges against the officers have been resolved, it is then that the issues regarding reinstatement shall be resolved if it becomes necessary.

[54] SCCA 86/2003; delivered March 22, 2006

The doctrine of res judicata and issue estoppel

[212] The doctrine of res judicata stipulates that a decision or ruling made by a court of competent jurisdiction cannot be re-litigated by the parties who are bound by the said decision or ruling, except on appeal. The purpose of the doctrine is to protect courts from having to adjudicate more than once on issues arising from the same cause of action and to protect the public interest that there should be finality in litigation and that justice be done between the parties.[55]

[213] Issue estoppel may arise where a plea of res judicata cannot be established because the causes of action are different. It has been established by some authorities that this form of estoppel arises where a particular issue, forming a necessary ingredient in a cause of action, has been litigated and decided and one of the parties seeks to reopen it in subsequent proceedings between the same parties, involving a different cause of action to which the same issue is relevant.[56]

[214] A party is therefore precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has solemnly and with certainty been determined against him. Even if the objects of the first and second actions are different, the findings on a matter which came directly (not collaterally or incidentally) in issue in the first action and which is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. The principle applies whether the point involved in the earlier decision is one of fact or law or a mixed question of fact and law.

[215] What can be gleaned from the authorities is that the principle requires, among other things, that the issue in question must have been decided between the same parties or their privies before the estoppel can arise. The authorities on this subject have revealed two schools of thought as to the extent of the application of this form of estoppel. One school of thought is that the true test of an issue is whether for all practical purposes the

[55] **Gordon Stewart and Independent Radio Company Limited v Wilmot Perkins** [2012] JMCA Civ 2

[56] **Fletcher & Company Limited v Billy Craig Investments Limited** [2012] JMSC Civ 128, per McDonald-Bishop J (as she then was), at paragraph [43]

party seeking to put forward the issue has already had that issue determined against him by a court of competent jurisdiction, even if the parties are different.

[216] The conflicting approach is to confine the issue estoppel to those species of estoppel per rem judicatum, that may arise in civil actions between the same parties or their privies. It follows then that issue estoppel may or may not operate in cases involving a new party to the proceedings depending on the approach that is adopted.

[217] In **Fletcher & Company Limited v Billy Craig Investments Limited**[57], McDonald-Bishop J (as she then was) accepted as the better view the broader approach that issue estoppel should apply in circumstances where the parties are different, provided that the person against whom the estoppel is being sought to be invoked in the subsequent proceedings, was a party to the earlier proceedings in which the point in issue was determined against him.

[218] Issue estoppel does not avail the first claimant in respect of Devon Rowe. The subject matter of these proceedings is and has been:

1) the release of the fourteen (14) motor vehicles to include the Suzuki;

2) the result of actions taken by the first claimant in relation to it; the nature and quality of his conduct in relation to it;

3) his evidence about it;

4) his evidence about the actions of others regarding it; and

5) the judgments of the reviewing courts in respect to it.

[219] This court is now being asked to ignore or disregard what has been determined about this Suzuki by the Court of Appeal and Privy Council which has decided it

[57] [2012] JMSC Civ 128, at paragraph [50]

constitutes uncustomed goods. This is an invitation which this court must most respectfully decline.

[220] The fact that there was a failed criminal prosecution is of no moment. It does not mean that the charges could not have been laid. The unchallenged evidence is that the genesis of the investigations into the Suzuki began at Tax Administration Jamaica ("TAJ"). It was that entity which first detected the offence. No questions were put to Mr Walker about this, by counsel for the first claimant and no questions about this were put to Major (Ret'd) Lewin. It was the then Commissioner, Mr. Walker who had received the first report from Mr Drummond about the enquiries made of him by TAJ. The need for an investigation was clear. The law relating to acquittal of criminal charges and autrefois acquit has already been set out and does not bear repeating under this head. In any event, the conclusions of the court do not necessitate such a finding under this head.

Res Judicata

[221] Mr Walker in his deposition[58] dealt with the question of seizure in this way:

> *"Q: Would it be fair to say that if there is no specific answer in your statement about this process of seizure, that you didn't answer it, you didn't give any answer?*
>
> *A: What I remember making very clear to the investigators, was that the process that we used was essentially the first claimant who had advised us how we will have to do this and so however we did it was essentially at his direction, on his direction and advice that his is how we need to effect it and so as to that section, I go under our Forfeiture Order, I am not sure we had a Forfeiture Order form before this matter and so that I can remember, I keep repeating a few times to the investigators to make it clear that that is why I did whatever I did, that*

[58] Before Palmer, J taken on July 29, 2020 at page 26

was what I remember most about that interaction with Mr. Lawrence. As to whether it was a detailed how a seizure is done, no, I don't think I would even have been able to do it in that way, in the way you just took me through."

[222] The first claimant said in cross-examination that the motor vehicles were not properly seized as the notices of seizure had not been served on the wharfinger. However, in his first affidavit, he said that the motor vehicles were initially seized and forfeited by the Commissioner who then restored the seizures under section 219 of the Customs Act and vested them to the wharfinger who was their owner.[59]

[223] The Customs Act provides in section 219 as follows:

> *"219. Subject to the approval of the Minister (which approval may be signified by general directions to the Commissioner) and notwithstanding anything contained in section 217, the Commissioner may mitigate or remit any penalty or restore anything seized under the customs laws at any time prior to the commencement of proceedings in any court against any person for an offence against the customs laws or for the condemnation of any seizure."* (emphasis mine)

[224] It is difficult to understand the assertion made by the first claimant given the clear words of the section coupled with his own admission that the Commissioner had seized and forfeited the vehicles.

[225] The first claimant went on in paragraph 94 to indicate that based on the provisions of sections 219 and 259 of the Customs Act, there would have been no need for any ministerial directives from the Minister of Finance. This is weighed in the same scale as his evidence in cross-examination which is best described as evasive and prevaricating. The first claimant was asked whether there was a forfeiture order in relation to a Toyota Harrier, listed at item 4 in 'OG-11E', the letter from Miss Trudy

[59] Para 92

Binns to the first claimant. He responded yes. Queen's Counsel asked the following question:

"Q: The year of the vehicle is prohibited from entering the country at the – three states one of the –only vehicles up to three years for cars and four years for light commercial vehicles will enter, at the time of the deposition, by reason of the vehicle being restricted, and the vehicle entering contrary to such description in contravention of section 210 of the Customs Act recommend the vehicle being forfeited. Do you see that?

A: I see that, yes.

Q: So this 2004 Toyota Harrier was not as referenced by Miss Davis wrote to the Commissioner in January 2011, these vehicles that she details here, the forfeiture vehicles,

A: As I understood it, when Miss Binns wrote to the Commissioner in January 2011, these vehicles that she details here, the forfeiture vehicles was the subject of the forfeiture vehicles, and those motor vehicles were forfeited at the same time.

…

Q: These goods were, in fact, not at the time that was seized by you

A: They have an initial seizure

Q: Just say yes or no

A: it is not a yes or no

Q: it is not?

A: If you look at the seizure you will see the date on it is June 30, 2010, which is the same dates as the Forfeiture Order. That, in and of itself, would have been a breach of Section 215 of the Customs Act, as the Notice of Seizure, the time required for it to be served, which is 37 days, would not have grounds to have triggered condemnation and forfeiture proceedings. It is for that reason that when the Commissioner received the report on January 11, realizing that the notice was never served, he would be – the response of that KLC has no reason for the forfeiture because they were never effected; the time had not expired."

[226] This entire line of argument was advanced before the Privy Council, who decided the issue. The doctrine of res judicata would therefore apply.

Abuse of process

[227] An application to strike out a statement of claim ought not to be made after the trial of the action has begun as it would be discordant with the overriding objective.

[228] Aspects of the claims before this court seek the improper purpose of relitigating issues decided by the Court of Appeal and Privy Council. This court can draw that conclusion based on the following factors:

(a) the long delay between the original date of interdiction and the filing of the claim in 2015 – 6 years;

(b) the lack of any valid explanation for that delay;

(c) the association in time between the hearing of the matter before the Privy council on January 23, 2018, their decision handed on May 18, 2018 and the filing of the 2019 claim on March 9, 2018;

(d) the collateral attack on the decision of the Privy Council which the cross-examination of the first claimant made plain;

(e) the fact that the issues now raised in respect of the evidence of Mr Walker were not raised before L. Pusey, J; and

(f) The failure to secure Mr Walker's deposition until 2020 with the submission that this evidence was critical to the case of the first claimant and that the evidence was not put before the Privy Council.

The doctrine of collateral attack

[229] A collateral attack is a species of abuse of process.[60] A collateral attack has been described as an attack on a previous final decision of a court of competent jurisdiction.

[230] In the seminal authority of **Hunter v Chief Constable of West Midlands and another**[61], Lord Diplock examined the doctrine of collateral attack and highlighted that a collateral attack on the final decision of a court of competent jurisdiction may take a variation of forms. At page 733, he provided a detailed definition of the doctrine of collateral attack. He states as follows: -

> *"The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."*

[231] The circumstances of the **Hunter case** are instructive. There, the claimant, Hunter, alleged that at his trial for murder, his confession had been obtained as a result of him having been assaulted by police officers. The confession (which was the main evidence against the claimant) had been found admissible by the court upon a voir dire.

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[60] **Arthur J S Hall & Co (a firm) v Simons; Barratt v Woolf Seddon (a firm); Harris v Scholfield Roberts & Hill (a firm)** [2002] 1 AC 615 at page 743, paragraph B

[61] (supra)

[232] The police officers were later charged with the offence of assaulting the claimant but were acquitted. The claimant appealed against his conviction (in which no challenge was made to the admissibility of the confession) and his appeal was dismissed. Subsequently, the claimant initiated a claim against the defendants for damages for assault on the basis that there was fresh evidence to support his allegation of assault. The court of appeal struck out his statement of case on the basis that he was precluded by the doctrine of issue estoppel from raising the issue of assault in the civil proceedings as it had already been decided against him in the criminal trial. The claimant appealed that decision to the House of Lords. The House of Lords concluded that the civil claim was an abuse of the process of the court, as it was, in essence, a collateral attack on the decision of the court at first instance in the criminal case that concluded that the confession was admissible.

[233] In the authority of **The Minister of Housing v New Falmouth Resorts Ltd**[62]. F Williams JA (ag) (as he then was), cited with approval, the dicta of Lord Diplock as set out above and determined that the claimant's claim was res judicata or, in the alternative, a collateral attack on the decision and orders of the trial judge in previous proceedings. He found that the claim was an attempt by the claimant to circumvent the trial judge's decision and relitigate an already decided issue. As a consequence, he struck out the claimant's claim on the basis that it was an abuse of process.

[234] It is of great importance to note that the authorities have indicated that a collateral attack on a previous decision of a court of competent jurisdiction does not automatically constitute an abuse of process. In the decision of **Secretary of State for Trade and Industry v Bairstow Re Queen's Moat House plc**[63], Sir Andrew Morritt V-C. highlighted the circumstances in which mounting collateral attack on a previous decision of the court would give rise to an abuse of process. At paragraph 38j-b he opined as follows:-

> *"(a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court… (c) If the earlier decision is that of a court exercising a civil*

[62] 2016] JMCA Civ 20
[63] [2004] 4 All ER 325

jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings. (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

[235] Furthermore, in **Arthur J S Hall & Co (a firm) v Simons; Barratt v Woolf Seddon (a firm); Harris v Scholfield Roberts & Hill (a firm)**[64], Lord Bingham of Cornhill succinctly outlined the factors that a court must consider when determining whether a collateral attack on a previous decision constitutes an abuse of process. These factors include the nature and effect of the earlier decision, the nature and basis of the claim made in the later proceedings, and any grounds relied on by the party to justify the collateral attack (if it is determined by the court to be a collateral attack).

[236] In this regard, the court has a duty to balance a claimant's right to bring a genuine and legitimate claim against a defendant's right to be protected from being harassed by multiple proceedings where one should have sufficed.[65] Consequently, a court will only strike out a claim as an abuse of process after careful consideration. In the case at bar, the court will not find that the claims constitute an abuse of process as there are other remedies which are less draconian and which I am prepared to employ.

[237] The first claimant in essence submits that this court cannot consider the decisions of the reviewing courts by which it is bound, as their decisions had not yet been delivered when Mr Rowe made the decision to further interdict him. In that, at that time, there was only one decision of the Supreme Court and it was that of Pusey, J.

[64] (supra), at page 643, paragraph 38G
[65] **Johnson v Gore Wood & Co (a firm)** [2002] 2 AC 1, at page 29, paragraph a

[238] The initial interdiction of the first claimant came well before the case tried by Pusey, J. This was not a fact discussed by any level of court. It was not argued before Pusey, J that there were breaches of the first claimant's constitutional rights under section 16(2) of the Charter, that he was interdicted without a hearing; or that the evidence of Danville Walker was available. "A party must raise all relevant issues at the first opportunity and not be dilatory in doing so, in order not to occasion an abuse of the court's process."[66]

[239] This court finds that the 2019 claim represents an attempt on the part of the first claimant to re-litigate the civil proceedings which commenced in 2013 and to mount a collateral attack on the judgment of the Privy Council which affirmed the judgment of the Court of Appeal.

The judgment of the Privy Council – collateral attack

[240] The final appellate court handed down its decision in the matter of **Guyah v Commissioner of Customs and another** [67] on the 14th day of May, 2018.

[241] In the case at bar, under this head, the first claimant argued that, the central issue which concerns the fourteen (14) motor vehicles that were seized, forfeited and deemed condemned was never an issue that came directly for the determination before the Privy Council;

[242] Further, that the Privy Council did not have the benefit of the evidence of the then Commissioner, Mr Walker who approved the entirety of the transactions concerning the fourteen (14) motor vehicles. The court in the instant matter now has the benefit of his evidence.

[66] **The Minister of Housing v New Falmouth Resorts Ltd** (supra) per F. Williams, JA (Ag) (as he then was), at paragraph [89]
[67] (supra)

[243] The defendants argue that the 2019 claim which was filed on March 9, 2018 is nothing but a collateral attack on the judgments of the Court of Appeal and the Privy Council. In addition, they submit that the 2019 claim offends the principle of res judicata and is an abuse of process.

[244] The defendants relied on the cases of the **Minister of Housing v New Falmouth Resorts Ltd.**[68] and **Abraham Dabdoub v Raymond Clough and the Disciplinary Committee of the General Legal Council (ex parte Dirk Harrison, Contractor General of Jamaica)**[69].

[245] In **Abraham Dabdoub**, like in **Felix Augustus Durity v The Attorney General of Trinidad and Tobago**[70] the court considered the question of whether the claimant had an alternative remedy and whether the claim was an abuse of process.

[246] In **Dabdoub**, the Contractor General made a complaint against the applicants in their capacities as attorneys-at-law to the Disciplinary Committee of the General Legal Council. Upon examining the complaint, the Committee found that there was a prima facie case to answer and set a trial date, and the application was adjourned. The applicants filed a Fixed Date Claim Form in the Supreme Court where they sought various declarations and an injunction. Included were declarations that there was no or no sufficient evidence to ground a prima facie case against the applicants and that there was breach of their constitutional right to a fair hearing. They also sought an injunction.

[247] The Committee filed an application to strike out the claim on the basis that the claim was an abuse of process on the ground that the Legal Profession Act ("LPA") prescribes the process if the applicants were dissatisfied with the decision of the Committee. Brown Beckford J made an order striking out the claim on the basis that it was an abuse of process, and the appropriate course was for the applicants

[68] [2016] JMCA Civ. 20
[69] [2018] JMCA App. 33
[70] [2008] UKPC 59

to have filed an appeal, a right which was given under the LPA. She also refused leave to appeal.

[248] The applicants sought permission to appeal to the court of appeal. One ground of appeal was whether the learned judge erred when she ruled that the proper course for the applicants to have taken was an appeal against the decision of the Committee which was that a prima facie case had been made. The applicants could also have sought an application for a judicial review of that decision. A further ground of appeal was whether the learned judge erred in refusing to accept the applicants' submission that they could properly pursue declaratory relief under part 8 of the CPR. The third ground of appeal was whether the learned judge was correct when, in respect of the alleged constitutional breaches, she ruled that the jurisdiction of the court was being prematurely provoked.

[249] Phillips JA determined at paragraph 28 that the applicants had an avenue of redress by way of appeal based on section 16 of the LPA and that based on the wording of section 19(4) of the Constitution, it would be difficult for the applicants to demonstrate that the learned judge had erred in declining to exercise her powers to otherwise remit the matter to the appropriate authority, having been satisfied that there was adequate means for redress for the alleged contravention. She continued at paragraph 30 and 38:

> *[30] "The ruling by the court that any effort to proceed by way of declaratory relief under Part 8 of the CPR was merely a means of attempting to have the court re adjudicate what had already been decided by the Committee and also to effect a collateral attack on its previous decision, appeared quite sound.*
>
> *[38] ...The issues arising from the decision of the Committee are matters which ought to be the subject of an appeal pursuant to section 16(1) of the LPA, and the fixed date claim seeking similar reliefs by way of declarations,*

can only be described as an abuse of the process, and was therefore correctly struck out by the learned trial judge."

[250] The written submissions of the first claimant on this point states that the evidence that is before this court was not before the Privy Council as the actions of Mr Walker would have brought the motor vehicles "*within customed goods*." The submissions in this regard further states that "*We cannot be bound by that decision (Privy Council) as it was based on an entirely different set of facts."*

[251] The "**we**" used by counsel in the previous paragraph does not and could not include this court. It is unclear, that submission having being made, why the first claimant elected not to put the police statement of Danville Walker given on May 10, 2012 before the trial court presided over by Pusey, J. The evidence was clearly available. It is even more unclear why a deposition was not taken from Mr. Walker then or why he did not give evidence from the witness box witness himself at the trial of the 2013 claim. There has been absolutely no explanation placed before this court for the evidence these failings, moreso now that the evidence of Danville Walker is being described as critical. The evidence was available, there is no reason why it is only now being adduced by the first claimant. In his deposition, Mr. Walker said he had no knowledge of the civil case. It was the first claimant's counsel who asked the astonishing question which elicited that response. The first claimant felt no duty to put the evidence of Danville Walker before Pusey, J at his trial.

[252] The 2015 claim was filed after Mr. Walker demitted office in 2011. He was not made a party to the action. If the first claimant had found it necessary to have the evidence of Mr. Walker, now described as critical, then he should have seen fit to secure it. This court views that failing as an attempt to get a second bite at the cherry. This submission is unimpressive and viewed as without merit. The attempt at a collateral attack on the judgment of the Privy Council is so made out.

[253] The Privy Council had to determine whether the Court of Appeal erred in finding that it may have been reasonable for the learned judge to have made the comments he did concerning the conduct, character and integrity of the first claimant. The Board answered in the affirmative. It stated that the view formed by the trial judge was reasonably open to him. On the evidence before the trial judge, he could reasonably consider that the first claimant had used his official position for his personal advantage.

[254] It is this specific finding which leaves it open to the authorized officer to pursue disciplinary proceedings. In addition, section 34 of the PSR provides that:

> *"An officer acquitted in any court of a criminal charge shall not be dismissed or otherwise punished in respect of any charge of which he has been acquitted, but nothing in this regulation shall prevent his being dismissed or otherwise punished in respect of any other charge arising out of his conduct in the matter, unless such other charge is substantially the same as that in respect of which he has been acquitted."*

[255] The collateral attack on the judgment of the Privy Council is evident. The court has an inherent power to safeguard against abuse of its processes. This power has been described as *"an inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people*."[71]

[256] This power is reflected in the provisions of rule 26.3 (1) (b) of the Civil Procedure Rules, 2002 ("the CPR") which permits the court to strike out a statement of case or part of a statement of case if it appears that the statement of case or the part to be struck out is an

[71] **Hunter v Chief Constable of West Midlands and another** [1981] 3 All ER 727, at page 729, paragraphs e-f

abuse of the process of the court or is likely to obstruct the just disposal of the proceedings.

Malicious prosecution

[257] In relation to malicious prosecution the interests of the claimant must be weighed against the defendant's right to institute proceedings if he does so with the honest intention of protecting his own or the public interest or if the circumstances are such that whatever the defendant's own motives there are good grounds for instituting a prosecution. It is, however, an abuse of that right to proceed maliciously and without reasonable and probable cause for anticipating success and by so doing to cause damage to another.

[258] The tort of malicious prosecution is determined by the balance of two countervailing interests of high social importance: safeguarding the individual from being harassed by unjustifiable litigation and encouraging citizens to aid in law enforcement.[72]

The burden and standard of proof

[259] In an action for malicious prosecution, the burden of proof lies, on the claimant to prove, on a balance of probabilities, that the prosecution was determined in his favour and that the defendant acted maliciously and without reasonable and probable cause.[73]

[260] In this regard, in the first instance, the onus of proving all the relevant ingredients for an action of malicious prosecution rests squarely on the claimant. Evidence of malice of

[72] See – Fleming, *The Law of Torts* (8th ed., 1992), p. 609 quoted in **Martin v Watson** [1994] Q.B. 425 at 436 and 449, CA

[73]See – Halsbury's Laws of England/Tort (Volume 97A (2021))/9 at paragraph 321; **Richard Robinson v The Attorney General and Constable Mark Grant** [2016] JMCA Civ 3, at paragraphs 32 -33

whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the tort.[74]

Nature of damage caused

[261] An abuse of the right to institute proceedings may of necessity be injurious, involving damage to his fame (that is his character) or, it may in any particular case, bring about damage to a claimant or his property, any one of which is sufficient to support an action for malicious prosecution.

[262] In **Wiffen v Bailey and Romford Urban District Council**,[75] Buckley L.J. highlighted the requirements to establish damage under each head. At page 606 he states as follows: -

> *"An action for malicious prosecution will lie under the circumstances stated by Lord Holt C.J. in Savile v. Roberts*. *(1) There are three sorts of damage, any one of which is sufficient to support this action. First, damage to a man's fame, as if the matter whereof he is accused be scandalous. Secondly, damage to his person, as where a man is put in danger to lose his life, limb, or liberty. Thirdly, damage to his property, as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused. The action is maintainable if and only if it falls within one or other of those three heads."*

[263] To establish damage to his fame, a claimant must prove that the charge brought against him was 'necessarily and naturally' defamatory.[76]

Elements of the tort of malicious prosecution

[264] In an action for malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal

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[74] See – **Martin v Watson** (supra)
[75] [1915] KB 600
[76] See – **Jerome Freckleton v The Attorney General of Jamaica and Det. Sgt. Maurice Puddie** [2018] JMSC Civ 127 Paragraph 33

charge;[77] secondly, that the prosecution was determined in his favour;[78] thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious.

[265] The onus of proving every one of these elements is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the tort.[79]

Institution of prosecution

[266] In establishing the first element of the tort of malicious prosecution two key issues must be addressed. Firstly, what constitutes a prosecution; and who is a prosecutor?

[267] To prosecute is to set the law in motion and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question. In order to be liable for the tort of malicious prosecution a person must be actively instrumental in so setting the law in motion.

[268] Halsbury's Laws of England, (Volume 97A (2021))/9, at paragraph 304, succinctly outlines what constitutes a prosecution and who is considered to be a prosecutor in an action for malicious prosecution. It states as follows: -

> *"A prosecution exists where a criminal charge is made before a judicial officer or tribunal, and any person who makes or is actively instrumental in the making or prosecuting of the charge is deemed to prosecute it, and is called the prosecutor. A person who lays before a magistrate an information stating that he suspects and has good reason to suspect another, or who prefers a bill of indictment, is engaged in a prosecution; and he may be responsible for the prosecution even though the charge made before the*

[77] The test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution but whether they have reached a stage at which damage to the claimant results: **Mohammed Amin v Bannerjee** [1947] A.C. 322 at 331; **Casey v Automobiles Renault Canada Ltd** (1966) 54 D.L.R. (2d) 600 (laying information before magistrate who investigates and takes cognizance of it and later withdrawal at request of prosecutor held sufficient) followed in **Reid v Webster** (1966) 59 D.L.R. (2d) 189

[78] See – **Bynoe v Bank of England** [1902] 1 K.B. 467

[79] See – **Martin v Watson** (supra)

magistrate is an oral one, and even though, after making the charge before the magistrate, or even without making one, he is bound over to prosecute and does so."

The absence of reasonable and probable cause

[269] This involves the proof of a negative. The burden of proving the absence of reasonable and probable cause rests on the claimant. The claimant must, in the first place, give some evidence tending to establish an absence of reasonable and probable cause operating on the mind of the defendant. To do so, a claimant must show the existing facts or the circumstances under which the prosecution was instituted.

[270] The term "reasonable and probable cause" was defined by Hawkins J in **Hicks v Faulkner**.[80] At page 5, Hawkins J stated as follows: -

"This brings me to the consideration of what is reasonable and probable cause. I should define reasonable and probable cause to be 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 ordinarily 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. There must be first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly mentioned belief must be based upon reasonable grounds – by this I mean such grounds as would load any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused."

[80] [1881-85] All ER Rep 187

[271] To determine whether there was an absence of reasonable and probable cause, the court must consider whether reasonable care was taken by the defendant to inform himself of the true state of the facts. Consequently, if the court finds that the defendant failed to inform himself of the true state of the case then there must be an absence of reasonable and probable cause.[81]

[272] It is the act of prosecuting and not of imprisoning or detaining which must have been done without reasonable and probable cause.[82]

Malice

[273] Malice, in this context, has the special meaning common to other torts and covers not only spite or ill-will but also improper motive. The proper motive for a prosecution is, of course, a desire to secure the ends of justice. If a claimant satisfies a jury, either negatively that this was not the true or predominant motive of the defendant or affirmatively that something else was, he proves his case on the point. Mere absence of proper motive is generally evidenced by the absence of reasonable and probable cause.

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[81] See – **Abrath v The North Eastern Railway Company** (1883) 11 Q.B.D. 440, per Brett, M.R. at pages 450-451: -

> "*It has been decided that the question whether reasonable care has been taken by those who instituted the proceedings, to inform themselves of the true state of the case, must be determined one way or the other, in order to enable the judge to give his opinion. Therefore, it becomes a necessary part of the question whether there was an absence of reasonable cause, to determine whether reasonable care was taken by the defendants to inform themselves of the true state of the facts. The question, whether reasonable care has or has not been taken by a prosecutor to inform himself of the real state of the case, is not merely a piece of evidence to prove some fact, but it is a question which is itself to be decided by evidence, and upon which evidence to prove and disprove it may be given. It is a necessary part of the question whether there was reasonable and probable cause, because if there has been a want of reasonable care on the part of the prosecutor to inform himself of the true state of the case, then there must be a want of reasonable and probable cause."*

[82] See – **Peter Flemming v Det. Cpl. Myers and the Attorney-General** (1989) 26 J.L.R. 525 at page 535, paragraph H

[274] Malice was defined with clarity by Cave J in **Brown v Hawkes**,[83]. At page 722 he stated as follows: -

> *"Now malice, in its widest and vaguest sense, has been said to mean any wrong or indirect motive; and malice can be proved, either by shewing what the motive was and that it was wrong, or by shewing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor. In this case I do not think that any particular wrong or indirect motive was proved."*

[275] The absence of belief in the defendant's mind as the merits of the case will no doubt afford strong evidence of malice; so also any lack of good faith in his proceedings, any indication of a desire to concoct evidence or procure a conviction at any cost. A claimant may sometimes be able to show what the exact motive was, as by proving expressions of spite or ill-will on the defendant's part or by showing that he had some collateral object to secure.

[276] In an action for malicious prosecution, those facts which constitute the absence of reasonable and probable cause may also supply evidence of malice.[84]

[277] Whilst it is a requirement that to ground a successful action for malicious prosecution, a claimant must establish, inter alia, an absence of reasonable and probable cause and malice, malice may be and is often inferred from an absence of reasonable and probable cause. However, the authorities have indicated that the absence of reasonable and probable cause ought not to be inferred from even the most express malice.[85]

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[83] [1891] 2 Q.B. 718, at page 722

[84] See – Halsbury's Laws of England/Tort (Volume 97A (2021))/9, at paragraph 323

[85] See – **Glinski v McIver** [1962] A.C. 726, at pages 743-744; see also *Commonwealth Caribbean Tort Law* (5th edn.,2015) at page 60: -

"Although malice and lack of reasonable and probable cause are two separate elements and both must be proved, there is an overlap between the two, in the sense that proof that the defendant had no genuine belief in the plaintiff's guilt will constitute evidence both of lack of reasonable and probable cause and malice. However, it is well settled that proof of malice does not necessarily supply evidence of lack of reasonable; for however malicious the

[278] The evidence of Jack Drummond

[279] There was the evidence of Jack Drummond, as part of the agreed bundle. I recall here that even though the first report had been made to Mr. Walker, it was Mr Rowe who directed Mr. Drummond to make certain enquiries. In the affidavit of Jack Drummond,[86] he said that in 2011, shortly before Mr Walker ceased being Commissioner of Customs, he received a call from a female who identified herself as from the St. Ann's Bay Tax Office. They conversed about a CET auction. (This conversation would have taken place before the enquiries he was directed to make by Mr Rowe who was not yet the Commissioner of Customs.) Being a member of the Contraband enforcement team ("CET"), it was conveyed to Mr Drummond by Miss Naomi Goulbourne, the manager of Queen's 230 Warehouse that there had been a CET auction. Mr Drummond said that he had been in the CET for a very long time and had never heard of a CET auction. Mr. Drummond says he reported these calls to Mr Walker and not to the first claimant, even though he was the Director of CET as he had been transferred to the Head Office. Mr. Drummond went on to say that he had been previously instructed by Mr Walker to report directly to him in relation to CET matters. Sometime in late 2011 or early 2012, he received a phone call from a female identifying herself as calling from the Montego Bay Tax Office about the same CET auction of motor vehicles. The calls were in respect of three (3) motor vehicles.

[280] At paragraph 17 he averred:

> *"Following the phone call from Montego Bay, I made some enquiries and learned that the vehicles were among a set of vehicles that had been detained by CET for use in the Customs fleet. The vehicles had been imported into the Kingston Logistics Centre (KLC) Free Zone. I also learned that the 3 vehicles had been collected by the police. I found it unsettling that vehicles that had been detained for use by the Customs Department*

defendant may have been, he will not be liable for malicious prosecution if he had reasonable and probable cause to believe the claimant to be guilty of the crime charged"

[86] Filed on November 20, 2015

had been released to the police. At the time, the Customs Department was attempting to strengthen its fleet of vehicles and these vehicles had been identified as suitable for the purpose. I also found it unusual that the tax offices were enquiring about vehicles that had been released to the police in the context of private persons attempting to register those same vehicles. I did not make further enquiries into the matter however I passed on the information to the new Commissioner of Customs, Mr. Devon Rowe."

[281] Mr Rowe was then briefed by Mr Drummond. In paragraph 18 the affiant says:

"I briefed Devon Rowe about the enquiries that I had received from the tax offices, the information I had obtained and I also gave Mr. Rowe a copy of the documents I had regarding the vehicles being queried by the tax offices. I did not do an investigation merely made enquiries to answer the questions raised by the tax offices. At that time, I was not convinced that there had been any illegality because I did not have that kind of information but I did find the trail of events to be suspicious or unusual."

[282] What is evident at this point is that both former and new Commissioner had knowledge of irregularities within the CET and the first claimant did not know that they knew. To this end, Mr Rowe instructed Mr Drummond to take another officer from Customs to assist the RPD in an investigation into the release of motor vehicles from KLC.

[283] Mr Drummond said he had not been previously aware of an investigation by the RPD. Meetings with the RPD led to Mr Drummond becoming aware that it was fourteen (14) motor vehicles that were under investigation. I also infer from the information received by Mr Drummond that there was co-operation between both Commissioners, for that was the purpose of sending Mr. Drummond to assist the RPD.

[284] The first claimant in his witness statement said that Mr. Drummond was a Supervisor in CET, when he, the first claimant took over the position of Director of

CET. The first claimant mentored and encouraged Mr. Drummond and promoted him to Branch Manager. Mr. Drummond was all the while, plotting to undermine and usurp the office of Director. He would abuse the chain of command by "seeking direct authorizations from the Commissioner under the cloak of doing so with my approval."

[285] The first claimant said, then came an altercation between the two after the first claimant had been transferred by the Commissioner. At a staff meeting held at the request of Mr. Drummond, the latter made "numerous boisterous outbursts and threats" against the first claimant. The first claimant did not state why he would have been attending a staff meeting at CET when he was no longer in charge there and it was now Mr. Drummond. Given their negative history as averred by the first claimant nevertheless went to the meeting with no explanation as to why he had been asked to go.

[286] The first claimant wrote about it in a memorandum dated March 15, 2011[87] which was addressed to the Commissioner. I will quote just one paragraph:

> *"Mr. Drummond went into other matters now and I quote, "A whole heap a things yuh a keep up in yah you know Omar, yuh tell one heap a lie and do one whole heap a tings inside yah and mi just keep it down yuh know fi keep the peace, but you need fi stop, yuh need fi stop it, everything yuh a she the Commissioner she, the Commissioner she and a nuff lie yuh tell…"*

[287] This memorandum formed part of an agreed bundle and is unchallenged. Mr Walker was asked the following in his deposition by counsel for the first claimant:

> *"Q: Jack Drummond and Velma Ricketts- Walker were at some stage Assistant commissioner of Border Protection?*
>
> *A: Yes*

[87] OG-20

Q: In a straight organizational line The first claimant would report to her?

A: Yes

Q: But every manager reported to you?

A: Yes

Q: She was Assistant Commissioner of Border Protection and I then asked him, I suggested to him that in a straight organizational line, The first claimant would report to her and he agreed. But a caveat, Mr. Walker, every man is reporting to the Commissioner, that's you?

A: Yes"

[288] The reporting relationship was established by counsel for the first claimant in the above exchange. These questions and answers demonstrate that there was nothing untoward about Mr Drummond reporting directly to the Commissioner as a Manager of CET.

[289] The former Commissioner explained that the memorandum addressed to him at 'OG-20' was one he could not recall seeing. However, as a result of the deterioration in the relationship with members of the first claimant's staff, to include Mr. Drummond, he transferred the first claimant to Customs House to "work more closely there rather than running CET."

[290] Ms. Jarrett in cross-examination elicited the following exchange:

Q: What accounted, Mr. Walker, for the deterioration in the relationship with The first claimant and as you put it, his CET people, such that he had to be, your words, removed from Customs, from the office to Customs, sorry, what caused that deterioration.?

A: I'd say they felt that he would fabricate events

Q: *You mean he would not tell the truth?*

A: *Yes, they didn't trust him.*

Q: *And Mr. Walker I am taking you to the witness statement of Omar Guyah and that is to be found, particularly want to take you to page 10 of that bundle and I believe you have an individual witness statement of The first claimant. It was given to you earlier today.*

A: *Yes, I have it*

Q: *The first claimant says in paragraph 36, that he was removed to Customs House and the suggestion he gives for the removal is that his safety and security, it was a safety and security issue. That is not true, based on what you just said?*

A: *Well, that was part of it. I mean, because it had reached a point you mean the safety of the issue outside of customs, or?*

Q: *Well, the suggestion in this paragraph. Read it Mr. Walker and then…*

A: *That was I'd say that would have had to be part of it.*

Q: *Part of it, but not all of it?*

A: *But not all of it.*

Q: *Would you be suggesting that the deterioration in the relationship with his staff, the fact that you felt that he fabricated things and events, led to some security issues as well?*

A: *I don't know if I would say that it led to security issues. Maybe, you know things can get really heated and at this time CET officers also carried firearms, so I thought it prudent that The first claimant come*

and work from Customs House and the team reported to the then Assistant Commissioner and he worked more closely on the legal issues.

Q: Things were getting heated among the CET staff?

A: Yes"

[291] I weigh this exchange with the evidence of the first claimant on this point, which was given within the context of external threats based on high profile cases of which he had carriage:

> *"the integrity of officers within my own unit, the Contraband Enforcement Team, came under scrutiny. That my safety and security was of such a great concern, that in March 2011, the then Commissioner of Customs, removed me from my office located at the Contraband Enforcement Team's headquarters on the Kingston Freezone property and transferred me to the Customs Head Office. All of my duties as Director of Enforcement were then reassigned to Miss Velma Ricketts, the Acting Assistant Commissioner of Border Protection (as she then was) and I was reassigned to perform my prosecutorial and investigative functions."*[88]

[292] There were no questions put to Mr Walker by the first claimant's counsel to challenge this very important paragraph in the first claimant's witness statement and I bear in mind that the witness statement of the first claimant had been filed several months before July 29, 2020, the date of the deposition. I also bear in mind that it is Mr Walker's deposition which is said to be the critical evidence which was not before the Privy Council and is essential to the case of the claimants.

[88] Witness statement of Omar Guyah, filed on January 21, 2020

[293] Therefore, I will continue on with the said deposition, continuing with the cross-examination by Ms. Jarrett.

> "*Q: And you would agree with me wouldn't you Mr. Walker, that the deteriorating relationship he had with his CET people as you put it, would have been an issue that anybody responsible for interviewing staff and selecting staff to the new agency would be concerned with?*
>
> *A: Yes, and that' why he said that maybe elsewhere he would work*
>
> *Q: Mr. Walker, so despite meeting the targets, revenue targets as someone who was Commissioner of Customs, you think twice before promoting to a higher office, to Deputy CEO, someone who fabricates things?*
>
> *A: Yes"*

[294] Mr. Walker was asked by the first claimant's counsel whether the first claimant would have been doing the same job and Mr. Walker said *"yes, but with less operational capabilities with CET, Jack Drummond would report to Velma Ricketts-Walker and Mr. Drummond would have taken over more oversight of CET. The first claimant "wasn't running CET anymore and he came to Customs."*

[295] This exchange settles the issue raised by the first claimant as to malice on the part of Jack Drummond and a conspiracy within CET based on spite and ill-will. From the evidence, the decisions taken were the Commissioner's and these decisions are therefore accepted by the first claimant who has failed to challenge them or to establish that they were made otherwise than in good faith and intra vires. The first claimant has also failed to establish that which

he asserts he was not moved for safety reasons from outside factors. The Commissioner moved him because his staff no longer trusted him.

[296] The first claimant also imputed malice to Johanna Lewin on the basis of personal hostility. She was extensively cross-examined but not shaken in her testimony. Again, most curiously, there was no admission by the first claimant that the investigation began under the stewardship of Danville Walker.

[297] The first claimant has failed to discharge the evidentiary burden to establish the orders sought, at paragraphs three (3) and four (4) of the Further Amended Statement of Claim. Therefore, the said orders sought at paragraphs three (3) and four (4) are refused.

Misfeasance in public office

[298] The tort of misfeasance in public office is an intentional tort that is committed by a public authority (either directly or vicariously through its officers or members) or a public officer. It involves the unlawful exercise of power by a public officer where either the officer's conduct or omission is intended to injure the claimant or where a public officer acts, knowing that he has no power to do the act complained of and that the act will probably injure the claimant.

[299] The purpose of the tort of misfeasance in public office is to provide compensation to those who have suffered loss as a result of improper abuse of process.[89] The underlying rationale of the tort is that in a legal system based on the rule of law, public power is conferred to be exercised only for public good and not for ulterior and improper purposes.

Elements of the tort of misfeasance in public office

[89] *Winfield and Jolowicz on Tort* (15th ed., 1998), p 266

[300] In an action for misfeasance in public office, a claimant must satisfy the following elements or ingredients of the tort:-

(1) the defendant must be a public officer;

(2) the defendant must have exercised power as a public officer;

(3) the defendant's state of mind is such as to constitute either targeted malice (that is, conduct specifically intended to injure a person or persons), or untargeted malice (knowledge that he has no power to do the act complained of and that the act will probably injure the claimant);

(4) the claimant has a sufficient interest to found a legal standing to sue;

(5) there is damage caused by the defendant's wrongful conduct (causation); and

(6) the claimant suffers loss that the defendant actually foresaw as a probable consequence of his act or omission[90]

The defendant must be a public officer

[301] The tort of misfeasance in public office can only be committed by public officers. The requirement that the subject of misfeasance in public office must be a public officer originates from the very nature of the tort. "It is the office in a relatively wide sense on which everything depends"[91]

[302] Who is a public officer? Section 1(1) of the Constitution gives the following definitions:

> *"public officer" means the holder of any public office and includes any person appointed to act in any such office;*

[90] Halsbury's Laws of England/Tort (Volume 97A (2021))/11, at para 394, See also - **Three Rivers District Council v Governor and Company of the Bank of England (No. 3)** [2000] 3 All ER 1, at pgs 8-13 and **Stockwell and others v Society of Lloyd's** [2007] EWCA Civ 930, at pgs 5-6, para 22

[91] **Three Rivers District Council v Governor and Company of the Bank of England** (supra), at pg 8, para b

"public office" means any office of emolument in the public service;

"the public service" means subject to the provisions of subsections (5) and (6) of this section, the service of the Crown in a civil capacity in respect of the Government of Jamaica (including service as a member of the Judicial Service Commission, the Public Service Commission or the Police Service Commission), and includes public service in respect of the former Colony of Jamaica."

[303] In the very old case of **R v Dr. Burnell**[92], the criterion for determining a public officer was firmly established as follows:

"every man is a publick officer who hath any duty concerning the publick, and he is not less a publick officer where his authority is confined to narrow limits, because 'tis the duty of his office, and the nature of that duty, which makes him a publick officer and not the extent of his authority."

[304] The case of **I. R. Commissioners v Hambrook**[93] is also instructive. Lord Goddard CJ, in considering the nature of employment in the service of the Crown, explains the position with reference to the established civil servant thus at p 653:

"... an established Civil Servant, whatever his grade, is more properly described as an officer in the civil employment of Her Majesty ... "

At page 654 Lord Goddard further stated:

"*an established civil servant is appointed to an office and is a public officer, remunerated by moneys provided by Parliament, so that his employment depends not on a contract with the Crown but on appointment by the Crown."*

[92] *(1698), Carth 478*
[93] *[1956] 2 QB 641*

[305] A public officer may be defined as a person who is vested with governmental authority and exercises executive powers.[94] This includes natural and non-natural persons and public bodies.[95] It is important to note that, a public body may also be vicariously liable for the misfeasance of its employees. [96]

The exercise of power as a public officer

[306] A deliberate act or omission made by a public officer in purported performance of the functions of his office is sufficient to establish this element of the tort. If the public officer has a legal duty to act and the decision not to act constitutes an unlawful breach of that legal duty, the omission can amount to misfeasance for the purpose of the tort. A public officer will not be liable for damage caused by his mere failure, oversight, accident or negligence.[97]

[307] It follows that to constitute the tort of misfeasance in public office, the purported exercise of power by the public officer must have been invalid. This principle was enunciated by Brennan J in the authority of **Northern Territory of Australia and Others v Arthur John Mengel and Others**[98]. At paragraphs 8 and 9 he opined as follows:-

> *"There can be no tortious liability for an act or omission which is done or made in valid exercise of a power. A valid exercise of power by a public officer may inflict on another an unintended but foreseeable loss - or even an intended loss - but, if the exercise of the power is valid, the other's loss is authorized by the law creating the power. In that case, the conduct of the public officer does not infringe an interest which the common law protects. However, a purported exercise of power is not necessarily wrongful because it is ultra vires. The history of the tort shows that a public officer whose action has caused loss and who has acted without power is not liable*

[94] **Stockwell and others v Society of Lloyd's** [2007] EWCA Civ 930, at para 23-24
[95] **David Wong Ken and Ors v National Investment Bank Jamaica Limited and Ors** [2012] JMSC Civ 32, at para 26
[96] **Racz v Home Office** [1994] 1 All ER 97
[97] **Three Rivers District Council v Governor and Company of the Bank of England** (supra) at pg 44, para b-f
[98] (1995) 185 CLR 307

for the loss merely by reason of an error in appreciating the power available. Something further is required to render wrongful an act done in purported exercise of power when the act is ultra vires. The further requirement relates to the state of mind of the public officer when the relevant act is done or the omission is made."

The defendant's state of mind

[308] This element of the tort is concerned with the public officer's state of mind when the relevant act or omission was made.

[309] There are two forms of liability for misfeasance in public office. The first form of liability is targeted malice by a public officer, that is, conduct specifically intended to injure a person or persons. This form involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is untargeted malice by a public officer. This is where a public officer acts, knowing that he has no power to do the act complained of and that the act will probably injure the claimant. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful. These two forms are alternative ways in which the tort can be committed.[99]

[310] In **David Wong Ken and Ors v National Investment Bank Jamaica Limited and Ors**[100], Sykes, J (as he then was) comprehensively examined the two forms of liability for the tort of misfeasance in public office. At paragraphs **[27]** and **[28]** he stated as follows:-

"There are two forms of the tort. There is targeted malice, the first form, and untargeted malice, the second form. Targeted malice occurs where a public officer uses his power with the specific intent of injuring a specific claimant or a class of persons to which the claimant belongs. In this form of the tort, there is oftentimes outwardly lawful actions that are not ultra vires, but which are in fact unlawful because the public official has the specific intent of

[99] **Three Rivers District Council v Governor and Company of the Bank of England (No. 3)** (supra), at page 8, para d - j

[100] (supra)

harming the claimant or a class of persons to which the claimant belongs. It is this intent which transforms the ostensibly lawful conduct into an unlawful one for the purpose of this tort where one is dealing with the targeted malice version of the tort.

*The second form of the tort is committed where (a) the public official does not have the power to do what he did (ultra vires); (b) he knows that he has no power to do the act in question or is reckless as to whether he has the power and (c) he knows that his action will probably injure the claimant or is reckless as to whether his action will injure the claimant or a class of persons to which the claimant belongs. It is untargeted in the sense that the defendant did not target a specific claimant or a specific class of persons to which the claimant belongs but is aware that his action will probably cause loss to the claimant or an identifiable class to which the claimant belongs (**Three Rivers** p 230 (Lord Hobhouse)). Both forms are alternate ways of committing the tort (**Three Rivers** p 191 (Lord Steyn)).*

The claimant has sufficient standing to sue

[311] The claimant must have a sufficient interest to found a legal standing to sue. In this regard, the appropriate question is who can sue in respect of an abuse of power by a public officer. The tort is not actionable by any member of the public. A claimant must have suffered special damage that is, loss or damage which is specific to him and which is not being suffered in common with the public in general to maintain an action for misfeasance in public office. The claimant must be complaining of some loss or damage to him which completes the special connection between him and the public officer's conduct. [101]

Causation

[101] **Three Rivers District Council v Governor and Company of the Bank of England (No. 3) (supra), at** pg 45 para c-e

[312] Causation is an essential element of the tort of misfeasance in public office. It is a question of fact.[102]

[313] A claimant has the burden of proving, on a balance of probabilities that the defendant's tortious conduct caused or materially contributed to his injury or damage.

[314] This principle was highlighted by Lord Hobhouse of Woodborough in **Three Rivers District Council v Governor and Company of the Bank of England (No. 3)**. At pages 43-44, paragraphs j-a, he states as follows:-

> *"My Lords, features of the tort have to be found both in the origin and in the consequence. The official must have dishonestly exceeded his powers and he must thereby have caused loss to the plaintiff which has the requisite connection with his dishonest state of mind."*

The claimant suffered loss that the defendant actually foresaw as a probable consequence

[315] To satisfy the final element of the tort, a claimant must prove that he suffered loss that the defendant foresaw as a probable consequence of his conduct.

[316] The tort of misfeasance in public office is not actionable per se. As previously stated, a claimant must first prove that he has suffered damage which is specific to him and which is not being suffered in common with the public in general.

[317] As a consequence, a claimant must establish material damage. Material damage includes financial loss, physical or mental injury and psychiatric illness but does not include distress, injured feelings, indignation or annoyance.[103]

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[102] **Three Rivers District Council v Governor and Company of the Bank of England (No. 3)** (supra), at pg 10, para j
[103] **Watkins v Secretary of State for the Home Department and others** [2006] 2 All ER 353

[318] A claimant must also establish that the defendant acted in the knowledge that the act was beyond his powers and that his act would probably injure the claimant or a person of a class of which the he (the claimant) was a member.[104]

[319] In both forms of liability for the tort of misfeasance in public office, the intent required must be directed at the harm complained of, or at least to harm of the type suffered by the claimant. [105]

[320] The authorities have indicated that subjective recklessness on the part of a public officer in acting in excess of his powers is sufficient to establish this element of the tort. A public officer's recklessness about the consequences of his act, in the sense of not caring whether the consequences happen or not, is enough.

[321] In the Canadian authority of **Odhavji Estate v Woodhouse**[106], the Supreme Court of Canada examined the ingredients of the tort of misfeasance in public office and concluded that, in addition to satisfying the other ingredients of the tort, a claimant must also establish that the defendant foresaw that his unlawful conduct would harm the claimant. At paragraph 29, Iacobucci, J opined as follows: -

> *"The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public wrong, but absent some awareness of harm there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, as an individual. And absent the breach of an*

[104] **Three Rivers District Council v Governor and Company of the Bank of England (No. 3)** (Supra), at pg 12, para e-h
[105] (Supra)
[106] [2003] 3 SCR 263, at pg 285

obligation that the defendant owes to the plaintiff, there can be no liability in tort."

[322] In all the circumstances of the case, on the allegations which were before the criminal court, Mr Rowe had material before him on which to consider whether there had been any improprieties in the disposal of the fourteen (14) motor vehicles. It is an inference to be drawn from all the circumstances that he kept the first claimant at arm's length and did not wish to rely on him as Mr Walker had. This is evident from his posture towards the first claimant which the first claimant described as evasive. This is demonstrated by Mr Rowe instructing Mr Drummond, a member of the first claimant's CET to enquire into the improprieties which had been brought to his attention.

[323] The fact that Mr Rowe had been the Commissioner of Customs at one point would have meant that he ought to have acquired some knowledge of the procedures employed by Customs. He would have been expected to have had technical advisors and Mr Drummond was the one he chose to take advice from. Mr Walker had chosen the first claimant. The real complaint of the first claimant seems to be that he was not the chosen. He had been excluded from the new Commissioner's inner circle, however this does not ascribe misfeasance to Mr Rowe. There must be evidence adduced by the first claimant on every aspect of this tort.

[324] In respect of Johanna Lewin, the first claimant asserts targeted malice by Major (Ret'd) Johanna Lewin, Mr Drummond and Mr Lawrence. The difficulty with the assertions the first claimant has made is that they have not been established in the evidence adduced by him. They are allegations, without proof.

[325] The memorandum regarding section 91 applications speaks for itself. The memorandum was a part of the record of the criminal case and it was disclosed to the defence by the prosecution. The letter of May 7, 2011 from Mr Walker to KLC was similarly disclosed by the prosecution.

[326] The prosecution's case against the first claimant was that he had deliberately concealed the full facts from Mr Walker and obtained the response to KLC in the letter of March 7, 2007 by fraud. This assertion was bolstered by Mr. Walker's deposition in which he said that he relied on and had full confidence in the first claimant. In the deposition at page 47, there is the following exchange between counsel for the first claimant and Mr. Walker:

> *"Q: You say that that memorandum was drafted by The first claimant?*
>
> *A: Yes*
>
> *Q: And I believe you said that you didn't have, your words, the technical capabilities to prepare it?*
>
> *A: Yes, I said that*
>
> *Q: You understand that memo, Mr. Walker?*
>
> *A: Which one*
>
> *Q: That same one.*
>
> *A: Yes, I understand it.*
>
> *Q: When you were interviewed by Mr. Lawrence, you said that you didn't find, well, first of all look at your statement from Page 39, sorry, Page 40.*
>
> *A: Where on Page 40?*
>
> *Q: Yes, is your answer in relation to questions asked regarding that same memo? You say that you didn't see why that process is necessary, but in reliance on the first claimant you signed the memo?*
>
> *A: Yes, that's what it says in my statement."*

[327] In written submissions on behalf of the first claimant, it was argued that Major Lewin inserted herself into every aspect of matters concerning him. She instigated his interdiction, continued interdiction, criminal prosecution, false imprisonment, search and seizure operations and disciplinary proceedings against him with a view to have him dismissed from public service. She held the belief that the findings of the Resident Magistrate in the criminal proceedings were wrong and took it upon herself to find alternative means to prosecute him. Major Lewin was insistent in her pursuit to see that he was subjected to some punitive process at all costs, whatever the resulting damage.

[328] Mr Jack Drummond acted with gross malice. He put the criminal investigation by the RPD into motion. He also played an active role in the investigation. He was jealous of him [The first claimant] had long standing issues with him and sought to undermine him at every opportunity. Additionally, there were numerous inconsistencies in Mr Drummond's evidence which makes him an incredible witness.

[329] Mr Winston Lawrence was the main investigating officer and played a key role in the criminal investigations against him. He affected the unlawful search of his residence in Montego Bay and his subsequent arrest and custody at the Freeport Police Station and the Horizon Remand Centre. He also laid the charges against him. Mr Lawrence had some malicious intent and failed to adhere to the high standard required of him as a prosecutor and an agent of the state imbued with statutory authority.

[330] Sergeant Farquharson was the arresting officer who first placed him in custody. He also played a role in the criminal investigations on 9 and 10 March 2012. Sergeant Farquharson effected the unlawful search of his parents' residence in Spanish Town and the seizure of his property in breach of the search warrant. He also effected his [The first claimant's] subsequent arrest and custody at the Freeport Police Station and the Horizon Remand Centre. As a police officer, Sergeant Farquharson ought to have known the proper procedure when taking a person into custody to ensure that his constitutional rights were not infringed. He [Sergeant Farquharson] was not in possession of adequate information to ratify the prejudicial actions that he took against him.

[331] On the cross-examination of the first claimant in respect of assertions made in paragraphs 224 to 228 of his first affidavit against Major (Ret'd) Johanna Lewin, the first claimant said that he suffered for the last nine (9) years under her hand and all of her actions could not have been done without malice or spite. There is no specificity, there are no details, there is no evidence upon which the court could make a finding that the elements of the tort have been made out.

[332] It was not put to Major Lewin that she went to Mr Walker to obtain more power to further her investigation. There is no evidence that anyone from RPD conducted themselves in a manner calculated to cause injury to the first claimant. It was not put to Major Lewin that she sought to have the first claimant removed from a presentation he was to make at a conference and to substitute herself therefor. It was not put to her that she had a hand in removing the first claimant from a flight at the Norman Manley International Airport. It was not put to her that she caused the first claimant to end up on a "bail watch list". It was not put to her that she had written to the United States Embassy in order to ensure the first claimant is inspected whenever he visits that country. It was not put to her that she had taken steps to tarnish the reputation and character of the first claimant by disclosing prejudicial information about him to banks. There has simply been no nexus established on the evidence as to targeted malice on the part of Major Lewin or that of any RPD officer.

[333] Even if a finding could be made that Major Lewin or any other of the named defendants had willfully failed to discharge her public obligations towards the first claimant, (which I am not minded to do) their state of mind has not been established. There is no evidence that they knew their conduct was unlawful, or dishonest as is required in proof of the tort. Likewise, the valid exercise of power by a public officer may inflict on another an unintended but foreseeable loss - or even an intended loss - but, if the exercise of the power is valid, the other's loss is authorized by the law creating the power.

[334] The first claimant asserts targeted malice by Major (Ret'd) Lewin, Mr Drummond and Mr Lawrence. The difficulty with the assertions the first claimant has made is that they have not been established by the evidence adduced. He was detained by RPD officers who conducted a search made lawful by a special warrant issued by a lawful authority. This tort has not been established on the evidence.

[335] In respect of the second claimant, she has made the identical assertions as the first claimant. This issue is resolved in respect of the second claimant in the same way. Misfeasance in public office has not been established on the evidence.

False imprisonment

a. Statutory liability of police constables and customs officers

[336] Section 3 of the Customs Act endows a customs officer with the same powers, authorities and privileges that are given, by law, to a police constable.

Section 3 of the Customs Act provides as follows: -

> *"For the purpose of carrying out the provisions of the customs laws all officers shall have the same powers, authorities and privileges as are given by law to officers of the Constabulary Force."*

[337] Section 33 of the Constabulary Force Act indicates who has the burden of proof in tortious liability claims brought against police constables and, by virtue of section 3 of the Customs Act, customs officers. Section 33 provides as follows: -

> *"33. Every action to be brought against any Constable for any act done by him in the execution of his 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 or probable cause; and if at*

the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant."

[338] Section 33 of the Constabulary Force Act in effect reverses the burden of proof in actions for malicious prosecution and false imprisonment by requiring the claimant to establish lack of reasonable and probable cause or malice on the part of the constable, whereas at common law the onus is on the defendant to show that he had reasonable cause for the detention of the claimant.

[339] Section 13 of the Constabulary Force Act authorizes the police to apprehend any person who they reasonably suspect to have committed a crime. It outlines the duties and powers of the police force including the general power to apprehend any person who they reasonably suspect of having committed an offence. The section reads as follows: -

> *"13. The duties of the Police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence, to serve and to execute all summonses, warrants, subpoenas, notices, and criminal processes issued from any Court of Criminal Justice or by any Justice in a criminal matter and to do and perform all the duties appertaining to the office of a Constable, but it shall not be lawful to employ any member of the Force in the service of any civil process, or in the levying of rents, rates or taxes for or on behalf of any private person or incorporated company."*

[340] In **The Attorney General v Glenville Murphy**,[107] Harris JA examined the test of reasonableness of suspicion under section 13 of the Constabulary Force Act. At paragraph [13], she states as follows: -

[107] [2010] JMCA Civ 50

"The word 'reasonably', as used in section 13 of the statute imposes a subjective as well as an objective element. It does not introduce an exclusive objective element. The test for the purpose of section 13 is partly subjective and partly objective."

[341] Harris JA goes on to explain that the foundation of the subjective test is the honest belief on the part of the police constable of the claimant's guilt. If it is found that the police constable had honestly believed that the claimant had committed an offence, then no liability can be ascribed to him. However, if it is established that the police constable could not have had any genuine suspicion that the claimant had committed an offence then the objective test comes into play. Consideration would then have to be given as to whether there were reasonable grounds for the police to have reasonably suspected that he had committed the offence.

[342] The fact that the police are empowered to arrest and detain in custody any person on suspicion of his having committed an offence does not mean that they are at liberty to do so without lawful justification. This suspicion must be reasonable and the police must show that the arrest was justified. An action for false imprisonment offers a safeguard against police excess and abuse of their powers.[108]

[343] The burden is on the claimant to prove that the police had no lawful justification for his arrest. However, if it is shown that the arrest was unjustifiable and the period of detention unjustifiably lengthy, the onus shifts to the defendant to show whether, in all the circumstances, the period of detention was reasonable.[109]

[344] The first claimant has adduced no evidence beyond his detention, arrest, imprisonment and the dismissal of the criminal case that the defendants had no reasonable or probable cause for charging him as they did. This is insufficient to discharge the burden of proof placed upon him. In **Glinski v McIver**, Lord Denning stated the responsibility which falls to the plaintiff in an action for malicious prosecution:

[108] See – **The Attorney General v Glenville Murphy** (supra), at paragraph 8
[109] See – **Peter Flemming v Det. Cpl. Myers and the Attorney-General** (supra)

"…there are many cases where the facts and information known to the prosecutor are not in doubt. The plaintiff himself has to put them before the court because the burden is on him to show there was no reasonable or probable cause. ***The mere fact of an acquittal gets him nowhere."***

[345] In the case at bar, neither claimant was acquitted by the criminal court. The dismissal for want of prosecution similarly gets them nowhere in terms of proof of the tort.

[346] The first claimant was taken before a Resident Magistrate on the day after his arrest and detention who by judicial order remanded him into custody. That order is impervious to challenge and cannot be attributed to the RPD.

[347] It is settled law that there can be no false imprisonment where there was a lawful arrest. as the police have a duty pursuant to section 13 of the Constabulary Force Act.

[348] Further, as a general rule, no injury is suffered by a claimant where he is arrested but subsequently shown to be innocent before taken to court. It is the detention for an unreasonable period which constitutes the wrong, making the detention illegal ab initio.[110] False imprisonment is the "unlawful imposition of constraint on another's freedom of movement from a particular place. The essence of a claim of false imprisonment is the mere imprisonment.[111] As a consequence, false imprisonment is actionable per se, that is, without proof of damage.

[349] The tort of false imprisonment is established on proof of: -

(i) the fact of imprisonment; and

(ii) absence of lawful authority to justify that imprisonment.

[110] AG v Glenville Murphy [2010] JMCA Civ 50, per Harris, JA at paras 9 and 9

[111] See – Halsbury's Laws of England/Tort (Volume 97A (2021))/3, at paragraph 141

[350] False imprisonment arises where a person is detained against his will without legal justification. It is the complete restriction of a claimant's freedom of movement without lawful excuse or justification. The word "false" denotes "erroneous" or "wrong".

[351] Halsbury's Laws of England, Volume 97 (2015))/3, at paragraph 141, provides a detailed analysis of the tort of false imprisonment. It reads as follows: -

> *"A claim of false imprisonment lies at the suit of a person unlawfully imprisoned against the person who causes the imprisonment. Any total restraint of the liberty of the person, for however short a time, by the use or threat of force or by confinement, is an imprisonment. It is not necessary that the person detained is aware of the detention at the time. To compel a person to remain in a given place is an imprisonment, but merely to obstruct a person attempting to pass in a particular direction or to prevent him from moving in any direction but one is not."*

The burden of proof

[352] The burden of proof rests on the claimant to establish a prima facie case that he was unlawfully imprisoned by the defendant. The onus then shifts to the defendant to justify his actions

[353] Atkin's Court Forms, Volume 40(1)/Practice/B at paragraph 208, states as follows:

> *"The claimant bears the burden of proving the fact of imprisonment. If proved, it is then for the defendant to show that he had lawful authority for acting as he did. If there is no lawful authority then the person responsible for the imprisonment is liable even if he acted in accordance with the view of the law which, at the time, was accepted by the courts as being correct. This is because false imprisonment is a strict liability tort."*[112]

[112] See also - **R v Governor of Brockhill Prison, Ex p Evans** (No 2) [2001] 2 AC 19, at paragraph C

The right to liberty under the Constitution

[354] The Charter enshrines the rights and freedoms that are guaranteed to every Jamaican citizen regardless of race, place of origin, political opinions, colour and creed of sex. The right to liberty is codified in section 14 (1) of the Charter. Section 14(1), so far as it is relevant, reads as follows: -

> *"14. – (1) No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances–*
>
> *(a)…*
>
> *(b)…*
>
> *(c)…*
>
> *(d)…*
>
> *(e)…*
>
> *(f) the arrest or detention of a person-*
>
> > *(i) for the purpose of bringing him before the competent legal authority on reasonable suspicion of his having committed an offence; or*
> >
> > *(ii) where it is reasonably necessary to prevent his committing an offence;*
>
> *(g)…"*

[355] In **Jerome Freckleton v The Attorney General of Jamaica and Det. Sgt. Maurice Puddie**[113], Evan Brown, J, (as he then was), examined the interplay between the right to

[113] (supra)

liberty in the Charter and the tort of false imprisonment. At paragraphs 65- 66 he opined as follows: -

> *"Liberty is one of the rights and freedoms guaranteed to every Jamaican citizen, under the Charter of Fundamental Rights and Freedoms (the Charter) in the Jamaican Constitution. Liberty is part of that recognised bundle of: "fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and citizens of a free and democratic society*
>
> *The right to liberty which is enshrined in the Charter is, of course, a recognition of the values to which this country subscribes under the United Nations Universal Declaration of Human Rights. Under Article 3, "[e]veryone has the right to ... liberty", and under Article 9 "[n]o one shall be subjected to arbitrary arrest, detention". Arrest and detention must therefore be according to law."*

[356] Mr Winston Lawrence averred that the claimants were arrested upon his genuine belief that they had committed the offences for which they were charged. They were arrested based on the findings of his and the RPD's investigations.

[357] The evidence before this court disclosed that both Commissioners of Customs co-operated with the RPD and that the first claimant was moved from CET ostensibly to allow the investigation to continue uninterrupted. The outcome of these investigations in respect of the first Claimants dealings with the relevant motor vehicles which grounded this belief was referenced in his evidence.

[358] Section 210 of the Customs Act contains two sub-sections, section 210(2) commences with *"Where any person has been arrested or detained in respect of an offence against the provisions of subsection (1)…* The power of detention and arrest are clearly provided for in that section of the statute. The penalty for breach of the section is to be determined by a Justice who shall levy a fine and in default thereof order a period of imprisonment not exceeding one month.

[359] The officers named as defendants in their personal capacity in the 2019 claim were not prohibited from arresting the first claimant at the time when they did so based on the clear words of the statute. This tort has not been established on the evidence and also fails.

Breach of statutory duty

[360] The first claimant argued that his right to bail was infringed by the actions of the 2nd, 3rd, 4th and 7th defendants as he was taken into custody without bail being considered within twenty-four (24) hours as required by sections 3(3) and 22(1) of the Bail Act.

[361] The Bail Act provides that:

> *3.-(1) Subject to the provisions of this Act, every person who is charged with an offence shall be entitled to be granted bail by a Court, a Justice of the Peace or a police officer, as the I a. case may require.*
>
> *(2) A person who is charged with & offence shall not be held in custody for longer than twenty-four hours without the question of bail being considered.*
>
> *.. (3) Subject to section 4 (4), bail shall be granted to a defendant who, is charged with an offence which is not punishable with imprisonment.*
>
> *'22. Where a person who is arrested or detained is not charged within twenty-four hours after such arrest or detention, he shall be brought forthwith before a Resident Magistrate or a Justice of the Peace who shall order that the person be released or make such other order as the Resident Magistrate or the Justice of the Peace thinks fit, having regard to the circumstances:*
>
> *Provided that where an identification parade is required in relation to that person, the person shall not be brought before a Resident Magistrate or a Justice of the Peace but the matter shall be referred to a Resident Magistrate or a Justice of the Peace who shall make any such order in the absence of that person.*

[362] The difficulty with the argument made by the first claimant is that he had been remanded by a Resident Magistrate (as the office was then known) within the twenty-four (24) hour period. The order was made on a Warrant of Commitment to the Keeper of the Horizon Adult Remand Centre under the hand of the Resident Magistrate. It commanded the Keeper thereof to remand the first claimant on reasonable suspicion of breaches of the Customs Act. It commanded the Constables to convey the first claimant to Horizon and deliver him to the Keeper. There, the Keeper was to safely keep the first claimant and deliver him to the Half Way Tree Resident Magistrate's Court at 10:00am on the 19th day of March, 2012. This Warrant of Commitment was signed and issued on March 10, 2012, by the Clerk of Court on the day after the first claimant was arrested.

[363] The substance of this complaint is a review of the order made by a judicial officer. This court was not asked to commence judicial review proceedings, or bail review proceedings, this court is not a court of appeal, this court has no jurisdiction to entertain any such review.

[364] Regarding his detention, Section 14 of the Charter provides that:

> *14(1) "No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances –*
>
> > *(f) the arrest or detention of a person –*
> >
> > *(i) for the purpose of bringing him before the competent legal authority on reasonable suspicion of his having committed an offence; or …"*

[365] The detention at the Freeport Lockup was based on reasonable suspicion and so was the remand to the Horizon Adult Remand Centre ("Horizon") on the

order of a Resident Magistrate (as she then was) with a return date for a bail hearing in the Half Way Tree Criminal Court (as it was then known).

[366] The essence of the assertion that there has been a breach of the section 14 right to liberty was to attack the validity of this judicial remand. The fact is, it was a judicial act. This challenge also fails.

The right to counsel

[367] The right to counsel was exercised by the first claimant who consulted with Mr. Bert Samuels. The fact of this consultation with counsel is curiously absent from the witness statement of the first claimant. It is to be found in the witness statement of Karen Harrison who gave evidence on behalf of the first claimant. She stated that she was aware that Mr. Bert Samuels, Attorney-at-Law, attended the Horizon Remand Centre having been retained by the family of the first claimant. She was aware that counsel was able to make enquiries and to receive instructions on Sunday, March 11, 2012. (The date of remand to Horizon was Saturday, March 10, 2012). Ms. Harrison further stated that to her knowledge, a writ of habeas corpus was filed in the then Half Way Tree Criminal Court by Mr. Samuels and orders made pursuant to the hearing of that application on Monday, March 12, 2012.

[368] Ms. Harrison stated that up to Friday, March 16, 2012, the orders of the court had not been complied with. She intervened, obtaining a Writ from Her Honour Ms. Judith Pusey (as she then was), giving her the authority as a police officer and officer of the court to attend upon the Horizon Remand Centre and have the first claimant taken to court.[114] Bail was granted to the first claimant on this occasion. She again intervened to have the first claimant released from custody by having discussions with the Clerk of Court. She further caused the release of the first claimant into police custody for the purpose of the processing of the offer of bail as the first claimant had been returned to

[114] Paragraphs 16 and 17, witness statement of Karen Harrison, dated January 16, 2020

Horizon. Miss Harrison then caused the first claimant to be taken out of Horizon by police to the court's office for the offer of bail to be administratively processed. This evidence from Ms. Harrison was unchallenged.

[369] The breach of statutory duty alleged could not have been one laid at the feet of the RPD or the officers personally as the first claimant was remanded into custody until the 19th of March, 2012. It is also the evidence that his counsel made an application by way of a Writ of Habeas Corpus on the very next day, March 11, 2012. Any further remand would have been at the hand of the Resident Magistrate who heard the application brought by Mr. Bert Samuels as was indicated in the evidence of Ms. Harrison.

[370] There are no records of the proceedings in the lower court before us in this regard, however we are prepared to accept the evidence of Ms. Harrison. It is noteworthy that while she was not involved in the criminal case, she was a close friend of the first claimant who used her authority as a member of the Jamaica Constabulary Force to "*assist*" the first claimant in ways best described as iniquitous. The first claimant while alleging misfeasance, would have us gloss over the actions of Ms. Harrison since they were to aid him.

[371] It was not put to Major (Ret'd) Lewin that she orchestrated or caused the first claimant to remain in custody and not be brought to court until March 16, 2012 or that she caused the first claimant to be put back on a prisoner truck bound for Horizon after an offer of bail had been made to him. It was not Major (Ret'd) Lewin who intervened in the business of detention and courts, the wardens at Horizon Remand Centre or the office of the Clerk of Court.

[372] I am unable to find any evidence which suggests that the remaining elements of the tort have been made out.

Defamation

[373] In respect of the first claimant, the claim under this head must be examined against the background of a Privy Council decision affirming the decision of the Court of Appeal. In both of those judgments, which are public documents, the conduct of the first claimant has been reviewed by both courts on evidence provided solely by him.

[374] The first claimant relied on the judgment of L. Pusey, J in the instant claims. He maintains despite the principle of stare decisis, despite the evidence and despite all contradiction, the correctness of the findings in that judgment. I will reproduce here a passage from the decision of the Court of Appeal concerning the judgment of my learned brother at paragraph [30], the learned President said:

> "[*30] Paragraphs [31] and [33] speak to the learned judge's assessment of the actions of the customs officials. In those paragraphs, he stated his views for abstaining from making the declaration that those actions were an abuse of their powers. Those paragraphs state, respectively, as follows:*
>
> *[31]* ***The court will not declare the detention by Customs of the Vehicle an abuse of power. Firstly, these officers were investigating an impropriety that had occurred.*** *They received conflicting statements from the parties. It may have been reasonable for the vehicle to be detained while the explanations and stories [shifted and] were sifted. In light of that, it cannot be said that the original seizure or detention was an abuse of the powers. However, the length of time that the vehicle was held after the stories coalesced may have to be considered. This Court cannot opine on that because it has no indication of the criminal proceedings and the timeline there."*

[375] The first claimant has to take **all** the parts of the judgment of L. Pusey, J as he finds them. There are also these comments set out below in the judgment of the Court of Appeal:

> *"[27] …The issue of* ***the first claimant's inferred use of this knowledge to his financial advantage is not within my remit to***

determine. *I am further constrained in that there are criminal charges which may still be before another court and therefore this Court must be limited in its comments.' (Emphasis supplied)*

[34] ***It is clear that the first claimant acted in a manner which indicates that he is without truth.*** *Whether he acted contrary to law or the rules of his employer is for other tribunals. I will merely say that although* ***The first claimant is a very important Crown Servant, this court is of the view that he did not act in the best traditions of The Civil Service. Rather than being a servant of the people he attempted obtain financial gain from knowledge that came to him because of his position.****' (Emphasis supplied)*

[38] …When these factors are added to the clear inference derived from evidence that he put before the court that he attempted to profit from information that came to him by way of his job, this Court will not make an order for costs in his favour.' (Emphasis supplied)."

These comments were allowed to stand by the Court of Appeal and the Privy Council. Justice L. Pusey said that he had constrained his comments in light of impending criminal proceedings. The Court of Appeal said this:

Whereas it is within this court's authority to make observations concerning comments made by judges in the course of proceedings in the court below, or in their respective judgments,

… Authority aside, it is noted that the learned judge was stating his view of The first claimant's conduct. It is not difficult to ascertain the reason behind his view. No doubt the ***'tangled web'*** *concerning the ownership of the Suzuki, and the fact that Miss Carter's responses to the officials, to the effect that the first claimant was involved with her in transactions involving five vehicles, which were, apparently, bought in the same manner as the Suzuki, had a significant influence*

on the learned judge's view. It is noted that the learned judge was careful to point out in paragraph [34] of his judgment that, '[w]hether [The first claimant] acted contrary to law or the rules of his employer is for other tribunals'. ***There is no reason to criticise the learned judge's opinion of The first claimant's conduct in respect of these transactions.***[115]

On now to the Privy Council's view of the comments made in court's below as also constrained:

"We are mindful of the fact that Mr Guyah remains the subject of disciplinary proceedings. As far as possible, this court should avoid making any comments which might prejudice those proceedings. In these circumstances, we shall be circumspect in our discussion of this matter…[116]

"In the circumstances, it is sufficient to say that the judge was entitled to take the view that The first claimant's conduct, in relation to the events resulting in the proceedings before him, was relevant to the exercise of his discretion when deciding how responsibility for the costs of those proceedings should be allocated. ***Like the Court of Appeal, we are unable to say that the view which he formed of The first claimant's conduct was not one which was reasonably open to him. On the evidence before him, he could reasonably consider that The first claimant had used his official position for his personal advantage."***[117]

[376] It is against this background, that this court is being asked to find that there has been defamation of the character of the first claimant. When the statement of Mr Seric Smith which is also in the agreed bundle is considered, and which I accept; it is my view

[115] Paragragph 91
[116] Para 56
[117] Para 57

that it is a brave man who would dare to send an uncustomed vehicle to the police garage knowing that he had a hand in acquiring the property of Customs for the use and benefit of another. The vehicle was not located at the police garage but had been sent to the Office of the Commissioner of Police and was parked on that premises. The vehicle was driven away from the compound of the office of the Commissioner of Police by the purchaser and his driver. The first claimant is that brave man. His reputation as one who could procure vehicles for members of the public was the reputation he had acquired. This court can only describe the first claimant's fall from grace as one for which no award will be made.

Cordelia Brown

[377] In respect of the second defendant, it is still unclear to this court why she was charged, as there was no basis to do so. However, in terms of defamation there is no doubt that she has adduced evidence which this court finds reliable and cogent and will accept.

[378] In the case of **Jerome Freckleton v The Attorney-General of Jamaica And Detective Sgt. Maurice Puddie**, E. Brown, J opined:[118]

> *"The manifest opprobrium inherent in the character of most criminal offences is synonymous with being slanderous in the meaning intended by Holt CJ. In the opinion of Gilbert Kodilinye, learned author of Commonwealth Caribbean Tort Law, 3rd edition at page 60, a claimant satisfies the class of damage if he proves "that the charge brought against him was 'necessarily and naturally' defamatory". The court in Wiffen v Bailey and Romford Urban District Council [1915] 1 KB 600 (Wiffen v Bailey) had declared that to be the law. Therefore, a claimant would have proved that he suffered*

[118] [2018] JMSC Civ. 127 at para 26

damage if, for example, he established that the essence of the charge was an imputation that he is a dishonest person.

[379] The second claimant gave evidence that she was known at Customs as the little lady and there were articles in the press referring to the little lady in respect of the criminal charges. She described the humiliation and the debasement of her character in having to face the criminal charges. She had hitherto had an unblemished reputation and was the acting Commissioner of many occasions. She was admired for her integrity and viewed by her peers and scrupulous in her duties. She has claimed damages under this head relative to having to clear her name I find that the tort is made out on her evidence. There has been no challenge to her evidence on any score.

[380] I also find that based on the limited evidence of two cheques there may have been suspicion, however it cannot be said that this was reasonable suspicion on the part of the investigators. The court must then go on consider whether reasonable care was taken by the defendant investigators to inform themselves as to the true state of the facts. There is no evidence that the defendants did anything beyond taking statements and questioning the second claimant. There was no part of the investigation which led to culpability on her part. The court finds that the defendant investigators failed to inform themselves sufficiently and to investigate the case thoroughly, there is an absence of reasonable and probable cause. It can be inferred that these facts which constitute the absence of reasonable and probable cause also supply evidence of malice. The tort of malicious prosecution is made out on the part of the second claimant.

Costs

[381] This was a private law matter, which was not brought to further the public interest. On this point, see **Robinson v Attorney General of Jamaica.**[119] The general rule is that no order for costs may be made against an applicant for an administrative order unless

[119] [2019] JMFC Full 5

the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application. The unsuccessful party is subject to the general rule of costs following the event however in light of the breaches identified in these claims. The court reminds itself here that the prolix pleadings and the relititgation of issues decided by the Privy Council are factors to be taken into account under this head. However, in light of the general principles that the court has laid down for the commencement of interdiction proceedings by delegated authorities the court will hear counsel on their view of the matter.

NEMBHARD J

[382] I have read the draft Judgment of my sister, Wint-Blair J. I agree with the conclusions at which she has arrived and have nothing to add.

HUTCHINSON J

[383] I have read the judgment of my sister Wint-Blair J and I am in agreement with the decision and reasoning therein. The history of this matter revealed that a number of issues which were raised for consideration before this Court were contested by the Defendants as being an abuse of process or in the alternative a collateral attack on the decision of the Privy Council in an earlier and closely connected action. In addition to the discussion on this area which was outlined by my sister, I wish to comment briefly on same.

[384] On the 31st of January 2020, the Defendants filed an application which requested that Paragraphs 114 to 119 of the particulars of claim be struck out as being a collateral attack on the ***Privy Council decision in Guyah v Commissioner of Customs and another*** **[2018] UKPCIO** and an abuse of the process of the court. The grounds on which this application was filed were stated as follows;

a. The claimants allege in paragraphs 114 to 119 of the particulars of claim herein that the process that was engaged to process 14 motor vehicles was lawful and that those 14 motor vehicles were not uncustomed goods.

However, on May 14, 2018, the ***Privy Council in Guyah v Commissioner of Customs and another [2018] UKPCIO***, determined that one of the aforesaid 14 motor vehicles which was the subject of that appeal is in fact uncustomed goods and that the mechanism used by the Commissioner of Customs to have the goods entered was ultra vires the Customs Act.

b. The issues raised in paragraphs 114 to 119 of the claim herein are res judicata, as they have been definitively determined by the Privy Council in relation to the Commissioner of Customs and the RPD in Privy Council in ***Guyah v Commissioner of Customs and another [2018] UKPCIO***. The claimant's allegations are contrary to the findings of the Board and are an impermissible collateral attack on the Privy Council decision.

Defendant's Submissions

[385] In written submissions filed on the 5th of November 2021, the Defendants stated that on the 14th of May 2018, the ***Privy Council in Guyah v Commissioner of Customs and another [2018] UKPCIO***, determined that one of the aforesaid 14 motor vehicles (a Suzuki Swift) was uncustomed goods and that the procedure employed by the Commissioner to have the goods entered was ultra vires. They argued that in coming to their findings, the Privy Council interpreted sections 91, 215, 216, 218, 219 and 259 of the Customs Act and determined as follows: -

a) the procedural directives issued on November 11, 2010, by the Commissioner of Customs were ultra vires the Customs Act; and

b) the Commissioner could not have approved Kingston Logistics Centre Limited's section 91 application.

[386] The Defendants submitted further (that in spite of this ruling) in paragraphs 114 to 119 of the particulars of claim for the 2019 Claim and paragraphs 87 to 107 of the Affidavit of Omar Guyah filed October 1, 2015, the Claimants allege that the process engaged to process these 14 motor vehicles was lawful and they were not uncustomed goods. They also asserted that these same allegations have been

used by the Claimants to buttress their contention that the prosecution brought by the Revenue Protection Division was malicious.

[387] The Defendants cited and relied on two authorities, namely, ***The Minister of Housing v New Falmouth Resorts Ltd*** **[2016] JMCA Civ 20**, and ***Abraham Dabdoub v Raymond Clough and the Disciplinary Committee of the General Legal Council (ex parte Dirk Harrison , Contractor General of Jamaica)*** **[2018] JMCA App 33**, in which the Court of Appeal reviewed extensively the principles of res judicata as well as the Court's power to fetter a Claimant's right of access to the courts where his claim amounts to a collateral attack in seeking to relitigate a question that had been determined by a competent court.

[388] The remarks of F Williams JA at paragraphs 91- 94 of The Minister of Housing decision were quoted extensively and I have outlined the learned Judges utterances at paragraph 94 in full where he stated as follows: -

> *This is the other quotation of Lord Diplock (to be found at page 733 of the judgment):*
>
> *"My Lords, collateral attack on a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view, simply and clearly stated in those passages from the judgment of A L Smith in* ***Stephenson v Garnett [1898] 1 QB 677*** *and the speech of Lord Halsbury LC in* ***Reichel v Magrath (1889) 14 App Cas 665*** *which are cited by Goff LJ in his judgment in the instant case. I need only repeat an extract from the passage which he cited from the judgment of A L Smith LJ in* ***Stephenson v Garnett [1898] 1 QB 677 at 680-681****:*
>
> *'…the Court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court'."*

[389] The Defendants submitted that applying the principles outlined in this decision to the impugned paragraphs, the allegations made by the claimants are a blatant collateral attack on the decision of the Privy Council and as a consequence ought to be struck from the claims.

Claimant's Submissions

[390] In their submissions in response, the Claimants asserted that the Privy Council at no time determined that the mechanism used by the Commissioner of Customs was ultra vires or unlawful in any way. They argued that at its highest, the Court found that based on the evidence before them and the submissions of the Attorney General concerning the Commissioner of Customs, the vehicle having been deemed properly seized could only have been dealt with by the Minister and not the Commissioner of Customs, and in those circumstances Section 91 could not have applied. The Claimants also contended that the ruling went no further and the determination as to whether the motor vehicle was seized goods or not, was never squarely put before the Court for determination.

[391] The Claimants insisted that the Privy Council did not have the benefit of evidence from the Defendants, particularly the Commissioner of Customs, which this Court has. They argued that the issues outlined in these paragraphs are central to the Court determining the questions surrounding the decision of the RPD to prosecute the Claimants before the criminal court and not the status of the vehicles as customed or uncustomed goods.

[392] The Claimants submitted further that the decision in ***The Ministry of Housing v New Falmouth Resorts Ltd***. does not assist the Defendants as that Court had found that the claims in both cases were similar and sought to achieve the same objective. Reference was also made to paragraph 88 of the decision where the Court opined: -

> *"[88] Having examined the applications that were before McIntosh J, Harris J and Campbell J, I find myself to be in agreement with the finding of Campbell J that all the applications were in substance based on the*

> *compulsory acquisition of the subject lands by the Minister. Or, viewed from another perspective, their common aim was to prevent the orders of McIntosh J from taking effect...*

[393] The Claimants argued that any similarity between this matter and the claim before the Privy Council is in so far as the processing of the fourteen (14) motor vehicles by the Kingston Logistics Centre and the Jamaica Customs was concerned. They maintained that the earlier matter did not address the issue of whether the motor vehicles were seized or not and this has been addressed by the seizing officer, ie, the 1st Claimant and corroborated by the Commissioner of Customs in evidence to this Court.

[394] It was asserted by the Claimants that it is not in dispute between the parties, that the Commissioner of Customs; whose decision they maintain it was to deal with these 14 motor vehicles under Section 91 of the Customs Act, had determined that the fourteen motor vehicles were not seized goods and not forfeited to the crown. They also insisted that at no time was the Commissioner tricked or deceived by Mr. Guvah into granting the Section 91 request from the Kingston Logistics Centre and described the Defendants application as being grounded on a decision which was arrived at in entirely different circumstances.

[395] In concluding their submissions on this point the Claimants described the application to have these paragraphs struck out as an abuse of the processes of the Court and which should be rejected.

ANALYSIS AND DISCUSSION

The Impugned Paragraphs

[396] The paragraphs in the particulars of claim which form the basis for the Defendant's application to strike out read as follows;

> *114. That the Claimants will say that the RPD's case was centred around fourteen (14) vehicles which they allege were unlawfully disposed of in contravention of the Customs Laws by the Claimants herein.*

115. That the RPD's entire case surrounds the fact that these 14 vehicles were disposed of by the 6th Defendant and not by the authority of either of the Claimants herein. The Court of Appeal in a separate proceeding brought by the I st Claimant declared one of the vehicle to be uncustomed goods however nothing turns on this declaration with regard to the criminal proceedings, as the Claimants will say that neither of them did any wrong with regard to the offences for which they were charged. Further the Claimants will say that the declaration of uncustomed goods was made by the Court of Appeal as the evidence before the Court did not indicate if the Minister had given his approval to the disposal of the motor vehicle. ***The 1 Claimant will say that his affidavit which formed the basis of the evidence before the Court did not give any details as to the initial seizure of the motor nor of the Ministerial Approval as the 5 th and 6th Defendants****, not having filed a defence — the Claimants would not have known that this point would have been in issue. Further, the I st Claimant did not file any further affidavit evidence in the Supreme Court as these issues did not present in the case prior to the trial of the claim, where leave to amplify the evidence to address this issue was refused by the learned first instance judge.*

116. That the 1 st Claimant will say that the Court in seeking to explore the allegations in determining the claim herein, is to consider that the issues were never fully ventilated before the Court in the I st Claimant's related claim where the declaration was made and that the Claimants herein would rely on the actions and written approvals of the 6th Defendant. Further, the I st Claimant will say that the Minister of Finance to his certain knowledge did give general directions and certain approvals to the 6th Defendant with regard to the execution of his powers under the Customs Act and that the instant request would have been discussed with the Minister as the process being utilized by the 6th Defendant would not have been unknown to him. The Claimants will say that RPD in seeking to lay charges against the Claimants would have to prove that they individually took steps in breach of the Customs Laws and, as the evidence discloses, the errors of the 6th Defendant, if any, cannot be laid at the feet of the Claimants' herein. Further, the I Claimant will say that the vehicle which was purchased by his trustee was duly entered and full duties and taxes were paid in accordance with the Custom Laws and the proper procedure followed for its entry into the island as directed by the 6th Defendant. Further, it is the 1 Claimant's honest believe that if the 5th and 6th Defendants had complied with the rules of the Court and not been negligent in filing their Defence then these issues would not arise and the vehicle would have been declared not to be uncustomed goods.

117. That the Claimants will say that the 6th Defendant issued Procedural Directives concerning the entry of these fourteen vehicles vide Memorandum dated November I l, 2010 under his own hand. A letter Subject to the wharfinger also written under the hand of the 6th Defendant dated March 7, 201 1 authorized the entry of the fourteen vehicles.

118. That the fourteen motor vehicles for which the Claimants were charged for breaches of the Customs Law were duly entered by virtue of documentation in the possession of the RPD, which indicated that neither Claimant were liable for any breaches of the CustomsLaws and that the prosecution was entirely malicious. The vehicles were processed as outlined below:-

i. The application of the Kingston Logistics Centre [being the wharfinger/ importer of the vehicles] made a written application for the vehicles to be entered vide letter dated January 1 1, 2011 — a copy of which is attached hereto and marked,

'OG-IIA' for identification;

ii. The 6th Defendant having accepted the entry issued procedural directives for the prescribed form to be used in the prescribed manner vide letter dated March 7, 2011 — a copy of which is attached hereto and marked, 'OG-IIB' for identification;

iii. The importer/owner of the goods, then prepared the entry using Customs Bills of Sight [prescribed form];

iv. That agents of the 5th and 6th Defendants, for which the Claimants were at the instant time, then adhered to Procedural Directives concerning entries of that type issued vide Memorandum dated November 1 1, 2010 from the 6th Defendant, — a copy of which is attached hereto and marked, 'OG-IIC' for identification;

v. The full duties and taxes due thereon were duly paid to the proper officer and receipts indicating such duly generated;

vi. The vehicles were then sold by Kingston Logistics Centre to the public.

119. That the Claimants will say that at no time throughout the process was there any malfeasance on the part by the Claimants and they did not commit any breach of any provisions of the Customs laws. The charges being preferred in the Courts were frivolous and completely without merit and was a gross abuse of process by the RPI).

[397] In analysing the Defendant's application, it became apparent that in order to fully dissect the areas of complaint, close scrutiny of the contents of the impugned paragraphs as well as the judgment delivered by the Privy Council would be required. In paragraph 115, it was noted that the only reference made to a decision in the original claim is the Court of Appeal decision in which 1 of the vehicles was declared to be uncustomed goods. The Claimant's asserted that this declaration

by the Court was based on evidence which did not show that the Minister had given his approval for the vehicle to be disposed of.

[398] At paragraph 116, the Claimant insisted that the issues were never fully ventilated in the initial claim and indicated that they were relying on the Commissioner's actions and written approvals. Reliance was also placed on what was outlined as the 1st Claimant's certain knowledge that the Minister of Finance had given general directions and certain powers to the Commissioner under the Customs Act and the request (in respect of the motor vehicles) would have been discussed with the Minister.

[399] In examining these assertions, I noted that paragraph 46 of the Privy Council decision is instructive in addressing these issues where it was stated as follows;

> *46. The principal flaw in this argument, apart from the fact that it was not raised in the courts below, is that the only evidence in this case is comprised in the affidavits submitted on behalf of The first claimant, which were before the judge at the trial.* ***The first claimant's affidavit, sworn on oath, states that "the Commissioner had issued forfeiture notices under his own hand, as prescribed by the Customs Act****, for these 14 vehicles", and that "I had also seized these 14 vehicles for breaches under the Customs Act". There is no suggestion in the affidavit that either the seizure or the forfeiture was irregular or invalid.* ***On the contrary, according to the affidavit, the position at the time when the application was made under section 91 was that "these vehicles were the subject of forfeiture proceedings under the Customs Act for breaches under section 210". The natural reading of the affidavit is that "seized" means "lawfully seized", and "forfeiture" means "lawful forfeiture". Unsurprisingly, the courts below dealt with the case on that basis.*** *Given the contents of his affidavit, The first claimant cannot now be heard to argue that he had not in fact seized the vehicles but had merely purported to do so, or that the forfeiture notices signed by the Commissioner did not signify that the vehicles had actually been forfeited, but were merely worthless pieces of paper (emphasis added)*

[400] A detailed examination of this paragraph, particularly the areas highlighted, reveal that the Court made reference to an extract from the affidavit of the 1st Claimant wherein he stated that the Commissioner had issued the forfeiture order for the vehicle and he had seized them. The contents of this extract provides clear evidence that contrary to the contention of the Claimant that the evidence before

the Court did not provide details of the seizure or the Ministerial approval or only did so in a peripheral manner, these details were provided and at that point the 1st Claimant had asserted that the Commissioner had issued the orders under his own hand and not with Ministerial approval as he now asserts; after which he had acted to seize the vehicles. It is also noteworthy that it had been argued in the alternative before the Privy Council that the vehicles had not been seized by the 1st Claimant as he had only purported to do so and the forfeiture notices were of no effect.

[401] The evidence of the Court's consideration of this issue, does not stop at this point however as Lord Reed actually commented on the 1st Claimant's submissions in respect of the roles of the Commissioner and Minister where he stated;

> *47. The first claimant further argues that, even if the vehicles were seized, the Commissioner was nevertheless empowered to reverse any seizure under section 219, and then to permit their entry, by virtue of section 259.* ***There was no need for any Ministerial direction or approval, since the vehicles were never the subject of court proceedings and were never condemned.*** *It was proper for the vehicles to be restored to the wharfinger, who, it is argued, would have been their owner.*

[402] In light of his own evidence/submissions in that related matter that there was no need for any Ministerial direction or approval it is clear that the 1st Claimant having encountered an adverse result in respect of his earlier position, appears to be using this opportunity to re-litigate this issue by arguing in the alternative the assertions made at paragraph 116 which state;

> *'the 1st Claimant will say that the Minister of Finance to his certain knowledge did give general directions and certain approvals to the 6th Defendant with regard to the execution of his powers under the Customs Act and that the instant request would have been discussed with the Minister as the process being utilized by the 6th Defendant would not have been unknown to him'.*

[403] It was also noted that the manner in which the vehicles had been handled as outlined in these paragraphs, had already been fully considered and ruled on the by the Court. This is seen in Lord Reed's remarks at paragraphs 48 and 49 of the judgment where he stated;

> *48. We reject this argument for much the same reasons as the Court of Appeal.* ***By virtue of section 215(1), goods which have been seized are automatically condemned after one month, unless claimed by or on behalf of the master or owner within that time. In the present case, no such claim was made, and the vehicles were therefore condemned, without any need for court proceedings. The result was that they could only be disposed of as the Minister directed, in accordance with sections 215(1) and 216, subject to the exceptional power given to the Governor-General by section 218. The power conferred on the Commissioner by section 219****, even assuming it to be relevant following automatic condemnation (a question on which we have heard no argument), would in any event require Ministerial approval.*** *Furthermore, both the application by Page 17 Kingston Logistics, and the Commissioner's decision to grant it, were expressly based on section 91: a provision which cannot apply to goods which have been seized.*
>
> *49.* ***The first claimant further argues that it should be presumed that the Commissioner was acting in accordance with a Ministerial direction, or with Ministerial approval, when he authorised the disposal of the vehicles to Kingston Logistics. We again reject this argument for the same reasons as the Court of Appeal. The Commissioner based his action on section 91: he did not purport to act under any of the provisions authorising disposal in accordance with a Ministerial direction or with Ministerial approval, such as sections 215, 216 or 219. There were in addition sufficient indications of irregularity, as the Court of Appeal explained, to exclude the application of the presumption of regularity. Those included, most notably, the conferral of a gratuitous benefit at public expense, in respect of the value of the seized vehicles, by artificially deeming***

them to have been sold to Kingston Logistics at public auction, when no such sale had taken place.

[404] On a careful review of the affidavit evidence presented by the 1st Claimant as well as the submissions raised in the alternative, the Court's remarks reveal that they gave due consideration to both sets of arguments raised. This included the assertion that no ministerial approval was needed where the Court ruled that permission would in fact be required. In light of the foregoing, the approach that the 1st Claimant now wishes to adopt by arguing that there had in fact been Ministerial approval is, in my opinion, a continued attempt to circumvent the adverse ruling of the Privy Council.

[405] Support for this conclusion is found in the Court's reasoning at paragraph 49. Although the 1st Claimant asserted in the instant claim that he 'had certain knowledge that the Minister had given his approval', Lord Reed made reference to an extract from his previous affidavit in which he had stated that 'it could be presumed that the Commissioner was acting in accordance with a ministerial direction or with ministerial approval'. These comments made it clear that the argument in respect of Ministerial authority had been fully considered and rejected by the Court which found that the Commissioner did not purport to act with any such approval/direction.

[406] The 1st Claimant's assertion that 'a distinction between this claim and the earlier claim, is the fact that his account is corroborated by the evidence of the Commissioner' was also reviewed. In the course of this exercise, the transcript of Mr Walker's evidence was carefully considered. At page 5 of the transcript it was noted that Mr Walker stated that any instructions he received came from the Financial Secretary and not the Minister. He also testified that any communication with the Minister would have been in general terms in respect of his job description and the terms of his contract. At page 6 of the transcript he denied that the Minister had authorised him specifically/generally in relation to goods which customs was

clearing within the country. The extracts where these comments are found are set out below;

> *Q. (Shown par. 131 of Guyah witness statement) Read to yourself. In that paragraph there is a reference to directions from the minister of Finance to the Commissioner of Customs. Any comment on that in regards to yourself?*
>
> *A. Well, I don't know what they mean by general directions, to be honest with you, and if there was any direction given, then I would essentially get it from the Financial Secretary in terms of my duties, not the Minister of Finance. With regard to the execution of his powers specifically, I am not sure what this is really referring to. It seems like a very general statement about the relationship between the Minister of Finance and the Commissioner of Customs, which I think it is a bit more specific in terms of that, in terms of your job description and that comes from the Minister, that comes from the Financial Secretary or the Commissioner or the Tax Commissioner. That's the hierarchy of the Department, it's not that the Commissioner is reporting directly to the Minister, that's not how it works.*
>
> *Q. Did the Minister authorize you specifically or generally in relation to duties … did the Minister give specific or general authority in relation to the goods on which customs was clearing in the country?*
>
> *A. No, not… I don't know if you are referring to a specific discussion or conversation. The role of the Commissioner is defined in the Customs Act and that's where it comes from. It's not from the Minister but from the Customs Act as to what your authority is and what your expected behaviour is.*

[407] This extract is of particular significance given the 1st Claimant's position that this evidence contains new and different information which has only been placed before this Court, and specifically corroborates his account as to the procedure employed. The actual contents of the transcript however, completely undermine this argument.

[408] In respect of paragraph 117 of the particulars of claim, detailed examination of its contents revealed that the actions of the Commissioner had already been considered by the Privy Council. Paragraph 50 of the judgment shows the analysis of the submissions made on this point where it was stated;

50. The first claimant further argues that, even if the Commissioner acted unlawfully, nevertheless he is estopped from denying the lawfulness of his own action, having regard to authorities such as Robertson v Minister of Pensions [1949] 1 KB 227. This contention must also be rejected. The Commissioner made no representation to The first claimant as to the scope of his powers, and The first claimant was not misled by the Commissioner. On the contrary, the Commissioner acted on The first claimant's advice in his dealings with Kingston Logistics. Furthermore, although The first claimant asserts that he purchased the Suzuki in reliance on the Commissioner's decision, there is no finding to that effect. In these circumstances, there is no analogy with the case of Robertson, or with more recent authorities concerning legitimate expectations.

[409] The procedure employed in the disposal of the 14 motor vehicles outlined at paragraphs 118 and 119 was also reviewed by the Privy Council at paragraphs 6, 7, 8, 9, 10, 11 and 12 of their decision where references were made to this very information which the Court stated was extracted from the 1st Claimant's affidavit. At Paragraph 2 of that decision the Court made it clear that the 1st Claimant's affidavit, which was the only evidence before them was fully considered and this is seen in Lord Reed's remarks where he stated;

[2] As the respondents, the Commissioner of Customs ("the Commissioner") and the Attorney General of Jamaica, failed to submit any evidence timeously before the Supreme Court, and were refused permission to do so out of time, the only evidence before the court is that contained in a number of affidavits submitted on behalf of the appellant, The first claimant, of which his own affidavit dated 14 June 2013 is the most important. The following account of the facts is based primarily on that affidavit and on the agreed statement of facts and issues.

[410] In light of the foregoing, I am of the view that this is a situation in which the reasoning of F Williams JA in ***Minister of Housing v New Falmouth Resorts Ltd*** is most applicable to instant claim. As such, the complaints outlined between paragraphs 114 to 119 and the orders and/or declarations sought in relation

thereto are res judicata as they were fully considered and ruled on by the Privy Council. Accordingly, I am satisfied that the Defendant's submission that these paragraphs should be struck from the pleadings and not considered for the purpose of this judgment is well founded.

WINT-BLAIR J

DISPOSITION

[411] The following Orders are made in respect of the 2015 Claim: -

1. Judgment is entered in favour of the Defendants against the Claimants;

2. The issue of costs is reserved pending the submission of written submissions and authorities by each party no later than two (2) weeks of the date of Judgment;

[412] The following Orders are made in respect of the first Claimant, Omar Guyah, on the 2019 Claim: -

1. It is declared that the third defendant did unlawfully seize the first claimant's property without any lawful and/or reasonable and/or probable cause and without any judicial authority. The first claimant is entitled to the nominal damages hereunder.

2. The first Claimant is entitled to redress under Section 19 (1) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 in respect of the breach of his right to a fair hearing pursuant to section 16(2) of the Charter.

3. The decision to interdict the first claimant is declared to be unlawful and invalid.

4. The court directs that a date be fixed for the hearing of the Assessment of Damages by the Registrar of the Supreme Court in respect of the following:

    a.) The salary withheld and any allowances and emoluments to which the first Claimant would have been entitled had he been returned to his post between the dismissal of the charges on February 6, 2015 and the decision to continue interdiction on September 18, 2015, with interest.

5. The Oder for the grant of an injunction is refused;

6. Nominal Damages are awarded to the first Claimant for the unlawful seizure of the firearm in the sum of $50,000.00;

7. All other Orders and Declarations sought are refused;

8. Aggravated damages, vindicatory damages and exemplary damages are refused;

9. The Order sought for Damages for breach of statutory duty is refused;

10. The issue of costs is reserved pending the submission of written submissions and authorities by each party no later than two (2) weeks of the date of Judgment;

Second claimant:

The court makes the following Orders are made in respect to orders on the part of the second Claimant, Miss Cordelia Brown on the 2019 claim: -

1. Judgment for the second Claimant;

2. The Court directs that a hearing for the Assessment of Damages is to be fixed by the Registrar of the Supreme Court in respect of the following: -

3. The second claimant is entitled to redress under Section 19 (1) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 in respect of the breach of her right to a fair hearing pursuant to section 16(2) of the Charter.

4. The decision to interdict the second claimant is declared to be unlawful and invalid.

    a. Salary withheld and any allowances and emoluments to which the second claimant would have been entitled had she been returned to her post between the dismissal of the charges on February 6, 2015 and the decision to continue interdiction on September 18, 2015 and;

    b. Damages in respect of general damages, aggravated damages, reputational damage and special damages to include attorneys' costs.

5. The Order sought for the grant of an injunction is refused;

6. Costs are awarded to the second Claimant against the Defendants and are to be taxed if not agreed;

7. The parties may request that a Case Management Conference Hearing be fixed prior to the hearing for the Assessment of Damages;

S. Wint-Blair J

A. Nembhard J

T. Hutchinson J