

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
CLAIM NO. 2006/HCV02524**

<b>BETWEEN</b>	<b>KEITH BROWN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>CONSTABLE NEVILLE HEAVEN</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>CONSTABLE DAVE MORRISON</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND</b>	<b>MARVA HEAVEN</b>	<b>4<sup>TH</sup> DEFENDANT</b>

Ms. Kayann Balli for the Claimant

Mrs. Trudy Ann Dixon Frith and Ms. Gail Mitchell instructed by the Director of State Proceedings for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Ms. Denieve Barnett for the 1<sup>st</sup> and 4<sup>th</sup> Defendants

Heard: February 7 -10, 15 and June 2, 2011

*Malicious Prosecution –False Imprisonment*

**Straw J**

1. The claimant, Mr. Keith Brown, a financial consultant, has brought a claim against the defendants for malicious prosecution and false imprisonment. Mr. Neville and Mrs. Marva Heavens, the 1<sup>st</sup> and 4<sup>th</sup> defendants respectively, contracted Mr. Brown in May 2005 to prepare the financial accounts for the years 2003 and 2004 for their business, The Food Hygiene Bureau (FHB). Both Heavens are directors of the company. Mr. Heaven was also a corporal of police who was stationed at the Ferry Police Station. The 2<sup>nd</sup> defendant, Mr. Dave Morrison, was at the relevant time a detective constable assigned to the Constant Spring CIB.

2. On the 9<sup>th</sup> August 2005, Mrs. Heaven made a report to Constable Morrison concerning Mr. Brown.

As a result of the said report, Constable Morrison obtained a warrant on the 11<sup>th</sup> August signed by one Mr. Uter, a Justice of the Peace for the arrest of Mr. Brown on a charge of fraudulent conversion.

The 3<sup>rd</sup> defendant, the Attorney General, is being sued in his capacity as the Director of State Proceedings in respect of the actions of the 1<sup>st</sup> and 2<sup>nd</sup> defendants acting in the course of their duties as the servants and or agents of the State.

3. The claimant was actually arrested on the 19<sup>th</sup> December 2005 by Constable Morrison when he was taken from the Constant Spring Revenue Department where he had gone to conduct business. He was seen there by Mr. Heaven who was on vacation leave and conducting his own personal business.

He was bailed on the same day and attended the Half Way Tree Resident Magistrate Court on the 22<sup>nd</sup> December 2005 to answer the charge of fraudulent conversion. The matter was adjourned to the 29<sup>th</sup> December 2005 and then further adjourned to the 11<sup>th</sup> January 2006, when the court directed that No Order be made as the matter should be dealt with in the Civil Court.

The claimant is contending that the Heavens and Constable Morrison acted maliciously and without reasonable and probable cause in commencing a criminal prosecution against him and caused him to be falsely imprisoned for several hours both at the Revenue Department and at the Constant Spring Police Station.

## **The Contractual Relationship between Mr. Brown and the Heavens**

4. In order to properly determine the issues, the actions of the above parties subsequent to the contractual relationship must be examined and carefully considered. It is agreed that the financial reports were needed urgently and were to be completed within three weeks. The sum of \$150,000.00 was the agreed contract price. However, the claimant contends that this figure was merely an estimate [pro forma Invoice] depending on the actual work that he would have to do. The Heavens state that this figure was the final agreed figure for which they received an invoice. This invoice was tendered and admitted into evidence as Exhibit 4.

5. Mr. Brown received a cheque of \$30,000.00 on the 9<sup>th</sup> May 2005 as a deposit and a subsequent deposit of \$30,000.00 on the 10<sup>th</sup> June 2005.

Both parties agree that Mr. Brown requested additional documentation between May and June so the original completion date had to be extended. Mr. Brown gave evidence that he received the last set of documents from Mr. Heavens at his home/office in early July. This has not been disputed. However, Mrs. Heaven states that the last relevant documents were delivered in June.

6. On the 4<sup>th</sup> August, the Heavens turned up at his home unexpectedly demanding to see the work he had done up to this point. According to Mr. Brown, he had a summary report available but the Heavens insisted on seeing the detailed transaction summary which was on the computer in his bedroom and he refused them access to his bedroom. The Heavens have denied that he showed them any summary at all. However, both parties agree that the relationship broke down and the contract was terminated. The Heavens maintain that it was Mr. Brown who terminated the contract insisting that he

could not work with people who did not trust him. On the other hand, Mr Brown insists that it was the Heavens who terminated the contract.

7. At the end of the day, Mr. Brown was asked to produce the work that he did or return the sum of \$60,000.00. The intention was that the Heavens would give the interim report to another accountant to complete the work. Mr. Brown said that he agreed to return Mrs. Heaven's original records with his bill and the interim report showing the progress of the work that he had done.

8. On the 8<sup>th</sup> August 2005, Mr Brown returned the records to the company's office on Mannings Hill Road. Mr Heaven assisted him in taking the boxes with the records from the vehicle into the office. Mr. Brown then promptly left the location. According to him, he had placed his bill (Exhibit 2) and the interim report (Exhibit 3) in one of the boxes.

9. The Heavens have denied that there was any such bill or interim report located or seen amongst the records.

Mrs. Heaven has stated that she called him the same day and asked him for the report and that he promised to send it by email. She stated that she has never received any email from the claimant containing any draft, interim or other report.

10. Mr. Brown confirmed that Mrs Heaven called him on the 8<sup>th</sup> August but that she requested a soft copy of the report and that it was sent to her by email.

### **The Report to Constable Morrison**

11. Constable Morrison reports that Mrs. Heaven visited the Constant Spring Police Station on the 9<sup>th</sup> August 2005 and made a report to him. He did not know her before,

neither did he know of her connection to Mr. Heaven. He collected a statement from her. (Exhibit 9) The statement was taken at 8:30 p.m.

A perusal of the statement reveals that the agreed contract price for Mr Brown's services was \$150,000.00 and that the accounts were to be completed in three weeks. He was given two deposits of \$30,000.00 respectively on the 9<sup>th</sup> May and 10<sup>th</sup> June 2005. He failed to supply the draft financial statement. Mrs Heaven questioned him about the failure and the claimant stated that he needed a further \$20,000.00. She refused to give it to him. Mr Brown then terminated the contract and indicated that he could not work under such conditions. He stated that he would return the company documents and a report and copy of the work he had done so far by the 5<sup>th</sup> August. He failed to do. On the 6<sup>th</sup> August, she contacted him by telephone. Mr Brown stated that he would finish the job but that he needed \$20,000.00 first. She refused and asked him for her company documents.

12. On the 8<sup>th</sup> August at 6:30 p.m., he brought the said documents. When she checked through the documents, there was no financial draft and no print out showing any work done. She called Mr. Brown and asked him what of the work he did for \$60,000.00. She said that he made excuses and promised to send the draft by email the following morning. Up to 8:30 p.m., on the 9<sup>th</sup> August, he had failed to do so and that he also ceased communication with her. She further stated as follows:

“I do believe that Mr Brown is trying to swindle my husband and I of our --- money.”

13. Mrs. Heaven gave Constable Morrison two sets of telephone numbers and Mr. Brown's address. He also received copies of the cheque receipts paid to Mr. Brown.

### **Constable Morrison's State of Mind**

14. Constable Morrison stated that he had no reason to doubt the truthfulness of the report. He attended Mr. Brown's residence on several occasions between the 9<sup>th</sup> and 11<sup>th</sup> of August. He also tried to contact him using the telephone numbers. However, he was unsuccessful on all occasions. He stated that he visited the house at night as he believed Mr. Brown would be there at that time. He visited the house on the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup>. He also visited the house after the 11<sup>th</sup> August.

15. Constable Morrison further stated that based on all the above factors, he reasonably believed that Mr. Brown had committed the offence of fraudulent conversion. On the 11<sup>th</sup> August, he laid an information against Mr. Brown on the charge of fraudulent conversion and secured the arrest warrant.

### **Other Factors to be Considered**

16. Mr. Brown left the island for Canada on the 19<sup>th</sup> August 2005 and did not return until the 13<sup>th</sup> December 2005. There is no evidence that Constable Morrison knew where he was or that he had business interests in Canada. In fact, there is no evidence that the claimant told the Heavens that he would be leaving the island in August. The Heavens have said that they were not told and the court accepts that this is true.

17. Constable Morrison's first contact with Mr Brown was on the 19<sup>th</sup> of December when he was called to the Constant Spring Revenue Department by Mr. Heaven. Although Mr. Heaven has denied that he was the one who called Constable Morrison. I accept the evidence of Constable Morrison as being more reliable and credible on the point. It was Mr. Heaven who had seen Mr. Brown at the said location. His evidence is that he alerted a district constable at the location that the police at Constant Spring

wanted to question Mr. Brown. He does not state that he saw or heard the district constable or anyone else make contact with the police station. However, he states that the district constable had a portable radio.

18. As far as Constable Morrison was concerned, the claimant had produced no work to Mr. and Mrs. Heaven nor had he accounted for the \$60,000.00 up 11th August and the situation remained unchanged on the date of the 19<sup>th</sup> December when he took him from the tax office to the police station.

19. In relation to the draft or interim report, the claimant produced the spreadsheet, (Exhibit 3), on his third court appearance in the Resident Magistrate Criminal Court. He stated that he told the court on the 29<sup>th</sup> December that he had done work and that the judge told him to produce the work done on the 11<sup>th</sup> January. On that date he explained to the judge his side of the story and produced the bill (Exhibit 2) and the spreadsheet. He agreed that this took place in the absence of all the defendants. It was on this date that the court directed that 'No Order' should be endorsed on the information brought against him.

20. Mr. and Mrs. Heaven subsequently sued Mr. Brown in the civil court to recover the sum of \$60,000.00. Mr. Brown brought a counter claim for \$66,000.00 being the balance due on the invoice of \$126,000.00 (Exhibit 2). The Heavens were granted judgement on the claim and counterclaim.

### **The Detention at the Tax Office and the Arrest and Charge at the Constant Spring Police Station**

21. The claimant and defendants differ as to what transpired at the above locations. Mr. Brown stated that he saw Mr. Heaven at the tax office and that he demanded the repayment of the \$60,000.00. Mr. Brown said he refused as he had done work and that

Mr. Heaven instructed the security officer not to allow him to leave. He then saw Mr. Heaven making a call on his cell phone and speaking to someone he referred to as 'Dave' (presumably Constable Morrison) and informing him that he had Mr. Brown at the said location. He was detained by the security officer for half an hour then Constable Morrison came to the tax office.

22. According to Mr Brown, he asked Constable Morrison who he was, as he did not know he was a police officer. There is some ambiguity in relation to Mr Brown's evidence on this point as he had indicated that Constable Morrison showed him his identification badge and said that he was a police officer. He said Constable Morrison did this as he, the claimant did not know him and was asking who he was. However, he had also given evidence that he had been introduced to Constable Morrison by Mr. Heaven on a previous occasion and had also seen him at the Heavens' business location on the 8<sup>th</sup> August when he was returning the source documents. There is nothing in his witness statement that suggests that he knew Constable Morrison before the 19<sup>th</sup> December or that he had seen him at the above location. He said that Constable Morrison failed to tell him that he was wanted by the police in connection with the said contract.

Constable Morrison also did not tell him there was a warrant for his arrest but that both he and Mr. Heaven demanded that he repay the money. Mr. Brown described the behaviour of both these defendants as threatening but that he held his ground because he had done work in exchange for the money.

23. Mr. Brown further stated that he was taken by Constable Morrison to the Constant Spring Station at about 3:00 p.m. and that Morrison continued demanding the money. He was still not told of any charges against him. Mr. Heaven was also present and making

the same demands. He stated that he offered to take Constable Morrison to his home to see the work he had done but that Constable Morrison refused his request.

24. He further stated that he called an attorney, one Mr. Samuel Smith, who attended the station and told Constable Morrison that it was not a police matter and that Constable Morrison said he would take his chance in court. One Errol Rose, a friend, also came to the station and asked Constable Morrison to visit the claimant's house with him to investigate whether any work was done but this request was also refused.

He was kept at the station for three hours and then charged for fraudulent conversion. He was then detained for a further five hours before being offered bail. He stated that Constable Morrison did not offer him bail as he said that he wanted to teach him a lesson. He obtained bail at 10:30 p.m.

Mr. Brown, however, concedes that paragraph 15 of the particulars of claim avers that he was held at the station from 4:05 p.m. to 5:00 p.m. before being charged.

### **Malicious Prosecution**

25. In order to establish a case in relation to the above tort, the claimant must prove on a balance of probabilities the following:

1. The defendants instituted criminal proceedings against him.
2. That the criminal proceedings were terminated in his favour.
3. That the prosecutor set the law in motion without reasonable and probable cause.
4. That, in so setting the law in motion, the prosecutor was activated by malice [**Wills v Voisin**] 1963 6 W I R 50, per Wooding CJ, page 57.

26. There is a distinction, however, between private citizens and police officers. Section 33 of the Constabulary Force Act states, that in an action brought against a

constable for any act done by him in the execution of his office, it must be alleged that the act was done either maliciously or without reasonable and probable cause.

The claimant would therefore only have to prove that the police officers acted either maliciously or without reasonable and probable cause (per Forte JA in **Flemming v Det. Cpl. Myers and the Attorney General**, [1989] 26 JLR, 525 at page 535).

### **Termination of Proceedings**

27. It is accepted that the claimant has no difficulty in relation to proof of point two as listed above as 'NO ORDER' is endorsed on the information charging him with the offence of fraudulent conversion (Exhibit 10). The prosecution was resolved in his favour although it was not an acquittal.

### **Institution of Criminal Proceedings**

28. The claimant has to prove that the defendants jointly or severally instituted the prosecution against him or that they were 'actively instrumental in setting the law in motion' against him (**Danby v Beardsley**, [1880] 43 LT 603, per Lopes J).

29. It is not sufficient for a defendant to be liable if he merely supplied information, albeit incriminating to the police on which they eventually decide to prosecute as the critical decision was not his. However, a defendant may be regarded as a prosecutor if his information virtually compels the police to prosecute and this is even more so where he deliberately deceives the police by supplying false information without which they would not have proceeded (**Commercial Union Assurance v Lamont**), 1989 3 NZLR 187 [C A]; **Tewani v Singh** [1908] 24 TLR 884; **J Haman v Anroop** [1951] LRBG 172.

30. In the case of **Martin v Watson**, 1996, **The Law Reports**, 74, the defendant made a deliberately false report to the police that the plaintiff had indecently exposed

himself to her, and the police brought a prosecution against the plaintiff which was subsequently dismissed. The House of Lords held that if a person falsely and maliciously gives a police officer information indicating that the plaintiff is guilty of a criminal offence and states that he is willing to give evidence in court in the matter in question, the inference may be drawn that there is an intention that the plaintiff be prosecuted. It was held further that where the facts under the above circumstances relating to the alleged offence are exclusively within the knowledge of the complainant, it would be impossible for the police to exercise any independent judgement, therefore the complainant would be liable for the institution of the prosecution if a prosecution was brought by the police.

31. A defendant may also be liable not only for initiating, but also for adopting or continuing proceedings (**Fitz John v Mackinder** 1861 142 E R 199). In that case it was held that a prosecution commenced under a bona fide belief in the guilt of the accused may become actionable, if at a later stage the prosecutor acquires positive knowledge of his innocence, yet perseveres bent on procuring a conviction.

### **The Evidence Relating to the Institution of Proceedings**

#### **The Case against the First Defendant**

32. The claimant has failed to establish any evidence against the first defendant in relation to the above issue. The first defendant made no report to the 2<sup>nd</sup> defendant implicating the claimant in any criminal offence. Although he had knowledge of the nature of the dispute between his wife and the claimant and was involved to a certain extent with the dealings between both parties, it cannot be said that he instituted any prosecution, or gave false information to the 2<sup>nd</sup> defendant which led the 2<sup>nd</sup> defendant to initiate prosecution. There is also absolutely no evidence that he colluded with his wife to

fabricate any false report or indeed, to make any report against the claimant. There is also no evidence to support the claimant's contention that Mr. Heaven instigated the report made by his wife, or that he arranged that she should meet with Constable Morrison in order to actively pursue the prosecution of Mr. Brown.

I am not of the view that such an inference can be drawn because he was a police officer and ought to have advised his wife that the matter belonged in the civil court. I also find that he was not acting in the execution of his duties on the 19<sup>th</sup> December while he was present at the tax office.

### **The Case against the Second Defendant**

33. The 2<sup>nd</sup> defendant, having received a report from the 4<sup>th</sup> defendant concerning the claimant, laid information against him for fraudulent conversion and secured an arrest warrant for him. He arrested and charged the claimant for the said offence and placed him before the criminal courts.

The claimant has therefore established that the 2<sup>nd</sup> defendant set the law in motion against him unless there is evidence that the 4<sup>th</sup> defendant gave false information to the 2<sup>nd</sup> defendant which prevented him from exercising any independent judgement in the matter (**Martin v Watson**, supra).

I will also have to consider whether there was collusion between the defendants with a view to having Mr. Brown prosecuted.

### **The Case against the Fourth Defendant**

34. Based on the law as set out above, the 4<sup>th</sup> defendant can only be said to have instituted the prosecution if she supplied false information to the 2<sup>nd</sup> defendant which made it impossible for him to have exercised independent judgement concerning the

matter. In considering this issue, the court has to examine the report of the 4<sup>th</sup> defendant as is contained in her statement.

A perusal of the statement reveals that certain factual situations were omitted.

35. Firstly, she failed to mention that the claimant had requested more documentation which had been supplied as late as mid July and as a result the original time line for the delivery of the report would have been extended.

36. Secondly, her report spoke to a demand by Mr. Brown for a further \$20,000.00 at the meeting in August and that upon her refusal, the claimant terminated the contract and agreed to return the documents with a report and a copy of the work he had done. This is in contrast to her testimony and that of the 1<sup>st</sup> defendant that the claimant terminated the contract on the basis of their loss of confidence in him.

37. Thirdly, she reported that when she contacted the claimant on the 8<sup>th</sup> August in relation to his failure to do as he had promised, he said that he would complete the contract if he received the further sum of \$20,000.00.

In her evidence before this court, she never spoke to the issue of the demand for the money as playing a role in the claimant's decision.

In relation to the above issues, she explained to the court that the claimant had given the 1<sup>st</sup> defendant a message in relation to a further sum of \$80,000.00. This was confirmed by the first defendant's testimony. However, she further explained that in a subsequent meeting, he requested \$20,000.00 which she refused to give him as they had agreed on a deposit of fifty percent. She also stated that the issue of the \$80,000.00 came up again at the meeting in August.

38. The issue for this court is whether these ambiguities could be said to have ‘virtually compelled’ the 2<sup>nd</sup> defendant to prosecute. In his evidence he stated that he considered the following facts when he laid the charge against the claimant:

- Mr. Brown had failed to deliver any accounting services to Mrs Heaven and that no work was produced by Mr Brown despite the fact that several weeks had passed since he was to provide same and the sum of \$60,000 had already been paid to him by Mrs Heaven.
- Mr Brown was demanding further payment of \$20,000 for the provision of the draft financial statements and was stating that he needed the further money to complete the work.

39. It would appear therefore that both these issues, the timeline and the demand for money did affect the 2<sup>nd</sup> defendant’s state of mind.

The 2<sup>nd</sup> defendant stated that he also considered that the claimant had promised to return the money and the work he had completed but up to the time of the report he had not done so. However, there is no evidence that the claimant had promised to return the money along with the work he had completed.

40. The issue is further complicated by the evidence of the claimant that there were some difficulties with the Heavens in relation to some of the records and how they wished the records to be presented. He explained that there were ethical concerns on his part and as a result there was a breakdown of the contractual arrangements and that the deterioration continued until July/August.

He also stated that, based on the additional work, he informed the Heavens that the new contract price would be \$210,000.00 and requested a further payment on account. According to the claimant, this refusal was one of the contributions to the difficulty in completing the contract’ and that he did ask the Heavens for \$20,000.00

more towards the work in July. He also confirmed that after the contract was terminated, he did offer to complete the project but his offer was refused by Mrs. Heaven.

The claimant, therefore, gives credence to the 4<sup>th</sup> defendant's report to the 2<sup>nd</sup> defendant in relation to the issue of the \$20,000.00.

41. In relation to the ethical concerns, the 1<sup>st</sup> and 4<sup>th</sup> defendants have denied that there were any such issues. However, I am not of the view that ethical concerns were the motivating factor in the breakdown of the contractual relationship. The claimant is unreliable on the point as to the termination of the contract. There is an inconsistency in the Particulars of Claim and the claimant's witness statement as to who terminated the contract.

**Paragraph 7 of the Particulars of Claim reads as follows:**

*“The claimant terminated the contract on or about 4th August 2005 due to the 1<sup>st</sup> and 4<sup>th</sup> defendants’ failure to provide additional information as requested and their refusal to accept the claimant’s recommendations on the proper method of preparing the accounts. The claimant returned the business’ records to the 1<sup>st</sup> and 4<sup>th</sup> defendants on or about 8<sup>th</sup> August 2005.”*

42. The witness statement, however, stated that the Heavens accused him of working for the tax man instead of working on their behalf and terminated the contract.

He explained further that at the meeting at his home in August, the Heavens demanded to see the work he had done and insisted on seeing a detailed transaction. He, however, had a summary prepared and refused to show the detailed report to them as it was on the computer in his bedroom and he would not allow them access to his bedroom. He also admitted that he told them that trust was important and he could not work for clients who had no confidence in him. The Heavens have stated that this is the basis on

which the claimant terminated the contract; all the parties agree that he was then asked either to produce the work or return the money.

43. It would appear and I accept that the breakdown in the contractual relationship was as a result of this refusal on his part to show proof of the work he had done and not as a result of any ethical concerns. His evidence is that he was still prepared to complete the assignment as it had almost been completed.

44. I do not therefore find that the demand for the \$20,000.00 was false or fabricated by Mrs. Heaven although it appears it was not put into proper context with the other issues in the report.

45. In relation to the issue of the timeline, the evidence of the 4<sup>th</sup> defendant is to the effect that sufficient time had passed since the claimant had received the last set of documents in July. The claimant has also confirmed that prior to the 4<sup>th</sup> August, Mrs. Heaven had been speaking to him concerning the returns and that she needed to get them filed. He also agreed that at the meeting in August she demanded to see proof of the work he had done.

46. Finally, in relation to the report of the 4<sup>th</sup> defendant, the court has to consider whether she falsely stated that the claimant had produced no report, interim or otherwise on the 8<sup>th</sup> or 9<sup>th</sup> of August.

47. The claimant has stated that he returned the source documents, a bill for \$126,000.00 (Exhibit 2) and the spreadsheet (Exhibit 3) on the 8<sup>th</sup> August and that when Mrs. Heaven called him on the 9<sup>th</sup>, it was to request a soft copy of the said spreadsheet. He further stated that he instructed someone to send it to her by email and it was done in his presence. Mrs. Heaven has stated that the spreadsheet is neither a draft nor interim

report, however, it does show that he did work on the contract. She stated that he would not have required the source documents to compile the said spreadsheet as he had previously received a print of all the data from her secretary.

48. Both the 1<sup>st</sup> and 4<sup>th</sup> defendants have stated that they searched through the boxes with the returned source documents and that no such documents were seen. The 4<sup>th</sup> defendant further stated that the first time she saw either Exhibits 2 or 3 was during the trial in the Civil Court. Mrs. Heaven has also stated that she called the claimant many times on the 8<sup>th</sup> after he had promised to send the report by email. She further explained that she waited all day on the 9<sup>th</sup> as she was expecting the document and Mr. Brown had told her that he was coming from the country that morning.

49. The court does not find the claimant to be credible on this point for the following reasons:

1. The claimant has admitted that after the boxes were delivered at FHB's office, he left without any discussion.
2. He did not discuss the payment of the \$66,000.00 that he said would be due to him.
3. Mrs. Heaven was the one who called him the next morning and again he did not speak of this bill.
4. He left for Canada that same month without discussing the same.
5. He knew she needed the report urgently, yet he made no effort to compile and print the information that was on the computer and send it to her before the 8<sup>th</sup> as he alleges.
6. If, in fact, all he had to do was to print this report, it is strange that he did not produce it on his second court appearance on the 29<sup>th</sup> December.
7. The spread sheet (Exhibit 3) was first produced to the court on the 11<sup>th</sup> January, 2006.

8. Mrs. Heaven did not attend on the police station until 8:30 p.m. I accept her explanation as to why this was so.

50. I find her evidence on the point compelling and I accept that she did not receive either the bill or the spreadsheet. Having taken all this into consideration, I find that there is no basis for the claim of malicious prosecution against the 4<sup>th</sup> defendant. The claimant has not discharged his burden of proving that the decision to prosecute was hers and ‘the stone set rolling by her is a stone of suspicion only’ [**Danby v Beardsley** [1880] 43 LT 603, per Lindley J.].

**Was there Collusion between the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants?**

51. The 2<sup>nd</sup> defendant has stated that the 4<sup>th</sup> defendant did not tell him to charge, arrest or prosecute the claimant. He has said that she merely made a report to him and that he used his knowledge and experience to decide what to do based on her report. He has stated further that the 1<sup>st</sup> defendant did not direct him to take a statement from the 4<sup>th</sup> defendant or to lay any information or take out a warrant for the arrest of the claimant.

52. Both the 1<sup>st</sup> and 4<sup>th</sup> defendants have stated that they knew each other, having worked together in the same police division for a number of years. They have both denied that they are friends as alleged by the claimant. In particular, they have denied that the 1<sup>st</sup> defendant introduced the 2<sup>nd</sup> defendant to the claimant as his friend and that both dropped off documents to the claimant’s house. They have also denied that the 2<sup>nd</sup> defendant was at the office of FHB on the 8th August.

53. I am of the view that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were not as forthright in the evidence as to their communication with each other. I also reject the evidence of the 1<sup>st</sup> defendant that he did not call the 2<sup>nd</sup> defendant to the tax office. However, the fact that the 2<sup>nd</sup> defendant was called by the 1<sup>st</sup> defendant is not suggestive of collusion. The first

defendant stated that he had been told that there was a warrant out for the claimant and he should make a report if he ever saw him. This is reasonable and justifiable.

However, each defendant was impressive as they spoke of the extent of their relationship and, apart from the assertions of the claimant, there was no evidence of any collusion between them. While the claimant stated that he had seen the 2<sup>nd</sup> defendant on the 8<sup>th</sup> August at the company offices, this was never written in his witness statement and it is a material omission which affects his general credibility. Similarly, although he states that the 2<sup>nd</sup> defendant had been to his house with the 1<sup>st</sup> defendant, it was suggested to the 2<sup>nd</sup> defendant by Counsel for the claimant that he had never been to the claimant's house.

54. I find the claimant to be a witness of convenience who is willing to change his testimony to strengthen his case. There is no reliable evidence presented by him to prove that the 1<sup>st</sup> defendant abused his status as a police officer and colluded with his wife and the 2<sup>nd</sup> defendant to have him prosecuted for a criminal offence.

#### **Want of Reasonable and Probable Cause**

55. The claimant, having proved the institution of the prosecution by the 2<sup>nd</sup> defendant, must also prove the absence of reasonable and probable cause or malice.

The best known definition of 'reasonable and probable cause' is that of Hawkins J in **Hicks v Faulkner**, 1878 8 QBD, 167 at 171:

*"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 an 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."*

56. The definition contains both an objective and subjective element. There must be actual and reasonable belief (**Haddrick v Heslop**, 1848 12 QB, 267). The objective test is therefore whether a reasonable man, having knowledge of facts which the defendant knew at the time he instituted the prosecution, would have believed that the plaintiff was probable guilty of the crime imputed. The subjective test is whether the defendant did himself honestly believe that the plaintiff was guilty. In relation to the subjective test, Lord Denning in **Tempest v Snowden**, ([1951] 2 **The Times Law Report**, page 1201), stated that the issue of the honest belief in the accused's guilt should not be regarded as a universal proposition applicable to all cases:

*“There are many justifiable prosecutions where the prosecutor has not himself formed any concluded belief as to the guilt of the accused. If he is a fair-minded man, he may well say to himself ‘the case is so black against the man that I feel I must prosecute but I am not going to believe him guilty unless the court finds him to be so.’ Such a man would, I should have thought, have reasonable and probable cause for instigating a prosecution even though he did not affirmatively believe the other to be guilty.”*

57. The court must therefore first determine what were the facts known to the prosecutor after determining any dispute on the matter and ask whether these facts amounted to reasonable and probable cause (per Lord Denning in **Tempest**, *supra*, at page 1205).

**Do the Facts as accepted by the Court as known to the 2<sup>nd</sup> Defendant Reveal an absence of Reasonable and Probable Cause?**

58. It is the duty of the claimant to prove that there was an absence of reasonable and probable cause. The claimant must therefore adduce sufficient evidence from which an inference may be drawn as to what the defendant actually believed. This burden of proof

could be discharged by the claimant proving that the defendant had before him facts that pointed to the innocence of the claimant. However, it would not be sufficient to show that the defendant had information, some of which pointed to guilt and some to innocence (John G Fleming, **The Law of Torts**, [8<sup>th</sup> edition] page 618).

59. Counsel for the claimant has submitted that the 2<sup>nd</sup> defendant ought to have been alerted to the fact that the complaint was contractual in nature and that the appropriate recourse was civil. She has submitted further that he cannot escape liability by hiding behind a warrant which he produced in full knowledge of the fact that the dispute was contractual.

60. I accept that the facts known to the 2<sup>nd</sup> defendant is as contained in the 4<sup>th</sup> defendant's report. There is no other reliable evidence to suggest otherwise. I also accept that the 2<sup>nd</sup> defendant made several attempts to contact the claimant between the 9<sup>th</sup> and 11<sup>th</sup> August before securing the warrant for his arrest. Although the claimant has stated that he would have been aware if there were any such attempts, the evidence of the 2<sup>nd</sup> defendant is compelling on the point. In fact, the evidence reveals that he waited on the 4<sup>th</sup> defendant to produce copies of the cheques before proceeding further in his investigations. It is inconceivable that he would not have attempted to make contact with the claimant. It was after he failed to make contact that the information was laid and the warrant secured.

61. The second defendant has stated that in order to determine if there is a broken agreement, one has to 'view the entire circumstances to make a determination between civil and criminal court.' He also spoke to the factors as indicated above that he relied on in coming to a decision to prosecute.

In light of all the existing circumstances, this court is of the view that the 2<sup>nd</sup> defendant had reasonable and probable cause to initiate the prosecution.

**Should the Prosecution have been terminated after the 19<sup>th</sup> December?**

62. The claimant has alleged that the 2<sup>nd</sup> defendant refused his request to produce the work that he had done and along with the 1<sup>st</sup> defendant, demanded the return of the money. He has also said that the claimant was advised by a lawyer that the matter was for the civil courts. Counsel for the claimant has submitted that the 2<sup>nd</sup> defendant should be liable for continuing the prosecution while failing to fully investigate the matter.

63. The court does not accept the claimant's evidence that these defendants behaved in a threatening fashion and demanded the return of the money. They have both denied this and while it would not be out of place for the 1<sup>st</sup> defendant to ask for the return of the funds, the court is hard pressed to accept that the 1<sup>st</sup> defendant would behave in such a manner as described. He impressed the court as phlegmatic in nature, while his wife, the 4<sup>th</sup> defendant appeared to be the assertive partner.

64. The 2<sup>nd</sup> defendant has admitted that the claimant stated he had done work for the Heavens at the time of his arrest. He has also said that his statements were contrary as he indicated at one point that he was in the process of paying back the money. The 2<sup>nd</sup> defendant also testified that the claimant said he could get someone to send the transcript by email to the Heavens but that he did not allow him to do that. The claimant has denied this. The 2<sup>nd</sup> defendant agreed that it would be relevant if the claimant said that he had documents to show he had done work. However, he explained that it would not have been reasonable to make checks at that stage as he believed the offence had already been committed. His evidence reads as follows:

“I could not just go by what Mr Brown said to me under caution at the time. I was prepared solely at that time to go solely by what Mrs. Heaven said.”

65. Bearing in mind my assessment of the Claimant as an unreliable witness, the court accepts the evidence of the 2<sup>nd</sup> defendant as to the contrary statements of the claimant. This court also considers that between August and the 19<sup>th</sup> December there had been no resolution of the issues. The claimant had left the island and he has not stated that he explained this fact to the 2<sup>nd</sup> defendant.

66. The 2<sup>nd</sup> defendant has also denied that the claimant suggested that he should go to his house to make checks on the work he had done. I accept that he did not. This is a witness who has told this court that he had the work on the computer but refused to appease his clients although he knew that the matter was urgent and that Mrs. Heaven was anxious for a resolution of the matter. The court also accepts that he left the island for four months without sending the report to the Heavens. The claimant has agreed that one of the options given to him was to return the money with the source documents. He did not do so although he failed to produce the report.

67. The court therefore rejects the submission by the claimant’s attorney that the 2<sup>nd</sup> defendant blinded his eyes from facts which would show that the prosecution was groundless (**John Lewis and Co. Ltd v Tims**, 1952, HOUSE OF LORDS, page 676).

In **Glinks v McIver**, 1961, HL page 850, 851, Lord Denning stated that the prosecutor need not be convinced of the guilt of the accused but he need only be satisfied that there is a proper case to go before the court.

68. In **Herniman v Smith**, 1938, A.C. 305, Lord Atkin stated as follows:

*“It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution.”*

On the whole of the facts as accepted by the court, I am of the opinion that the claimant has failed to prove that Constable Morrison lacked reasonable and probable cause when he continued the prosecution after the 19<sup>th</sup> December.

### **The Issue of Malice**

69. Having failed to prove want of reasonable and probable cause against Constable Morrison, the defendant must show that he acted maliciously if he is to succeed in his claim for malicious prosecution.

70. In “**The Law of Torts**”, 8<sup>th</sup> edition, by John G. Fleming, the author states as follows [at page 620] in relation to the issue of malice:

*“At the root of it is the notion that the only purpose for the institution of criminal proceedings is to bring an offender to justice----. ‘Malice’ has, therefore, a wider meaning than spite, ill will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage.”*

Anger or indignation aroused by an imaginary crime is not sufficient since these are emotions upon which the law sometimes relies in order to secure the prosecution of offenders (**Brown v Hawkes** 2 QB 718 at 722).

71. The claimant has the burden of proving malice and may discharge this by showing what the motive was and that it was improper, or that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor (**Brown v Hawkes**, supra).

72. Although malice and lack of reasonable and probable cause are two separate elements, the proof that the defendant had no genuine belief in the claimant's guilt will constitute evidence both of lack of reasonable cause and malice (**Brown v Hawkes**, supra). However, evidence that the defendant has too hastily formed a belief in the guilt of the claimant on unreasonably insufficient grounds, does not ordinarily suffice to warrant an inference of malice (**Flemming**, supra, pg 621).

### **Evidence of an Improper Motive**

73. The claimant is asking the court to find that the 2<sup>nd</sup> defendant's motive for the prosecution was solely to assist the Heavens in recovering the amount of \$60,000.00. This is to be inferred by the relationship between the parties, the lack of investigation, the hasty application for the warrant, the demand for the return of the money and the refusal to verify whether work had actually been done.

74. I have already found that none of these points raised have merit.

The claimant's evidence of the circumstances as they occurred lack credibility. Mrs. Heaven has indicated she was upset and disappointed. She voiced her fear that Mr. Brown appeared to be swindling her. Even if Constable Morrison was influenced by the emotions of a colleague's wife, anger by itself does not constitute an improper motive. The only evidence that may be suggestive of spite is the failure of Constable Morrison to offer the accused bail but this does not affect either the issue of reasonable and probable cause or the genuineness of the intent to bring an offender to justice.

75. The court is satisfied that Constable Morrison instituted proceedings based on the information received and that there is no evidence of an intent to use the court process for a purpose other than for which it was intended.

## **False Imprisonment**

76. The claimant is also seeking redress for the tort of false imprisonment.

Paragraph 15 of the Particulars of Claim avers that he was held at the police station from 4:05 p.m. to 5:00 p.m. before being charged. He further avers that the 2<sup>nd</sup> defendant thereafter maliciously and without reasonable and probable cause denied him bail thereby falsely imprisoning him for an additional five hours.

His witness statement, however, speaks to his suffering and loss of liberty for six hours. He states that he was granted station bail and released at 10:30 p.m.

77. In **Flemming v Detective Corporal Myers and the Attorney General** 26 JLR, 525, Carey JA noted that false imprisonment arises where a person is detained against his will without legal justification (page 527c):

*“The legal justification may be pursuant to a valid warrant of arrest or where by statutory powers, a police officer is given a power of arrest in circumstances where he had honestly and on reasonable grounds believes a crime has been committed.”*

False imprisonment cannot therefore lie once there is such a lawful arrest.

78. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants has submitted that the claimant was arrested pursuant to a valid warrant of arrest, therefore the tort of false imprisonment does not arise (**Henderson v Preston** (1998) LR 21 QBD, 362; **McGrath v Chief Constable of the Royal Ulster Constabulary and Another** (2001), 2 AC 731).

On the other hand, counsel for the claimant has submitted that the defendants cannot hide behind the procurement of a warrant issued under such circumstances as these.

79. In **Brian Gibbs and others v John Mitchell Rea**, 1998 AC 786, the Privy Council held that the malicious procurement without reasonable cause, of the issue and execution of a search warrant resulting in damage was an actionable wrong.

80. Gault J, in delivering the verdict of the court stated as follows (page 798 C-D):

*“That the judge is to be taken as having conscientiously discharged his duty in dealing with the application means no more than that on the information presented to him, he must be regarded as having been reasonably satisfied of the conditions for issue of warrants. But that does not establish the accuracy of the matters presented to the judge or the state of mind of the police officer.”*

This is not a matter of a warrant irregularly obtained as in **McGrath**, (supra). The Justice of the Peace would have issued the warrant based on the information laid by the 2<sup>nd</sup> defendant.

81. However, I have already indicated that I am of the view that the facts known to the 2<sup>nd</sup> defendant provided him with reasonable and probable cause in instituting the proceedings. The claimant has therefore not proved that there was no legal justification for his arrest.

82. The second defendant may, however, still be liable for the tort of false imprisonment if the claimant was held in custody for an unreasonable period after arrest and without either being taken before a Justice of the Peace or a Resident Magistrate (per Carey JA in **Flemming** (supra) at page 530 d).

The claimant has stated that the 2<sup>nd</sup> defendant failed to offer him bail but he eventually obtained bail after five hours and was released about 10:30 p.m.

83. It is necessary to examine both the Constabulary Force Act and the Bail Act in order to consider this issue. Section 23 of the Constabulary Force Act states as follows:

*“Where any person is apprehended by a member of the Force -*

- (a) that person shall be taken to a police station or lock-up;*
- (b) Subject to paragraph (c), an Officer or Sub Officer in charge of the police station shall grant bail to that person in accordance with the Bail Act;”*

84. Section 3 of the Bail Act grants an entitlement of bail subject to the provision of the said Act. Section 3 (2) states that a person charged with an offence is not to be held in custody for longer than 24 hours without the question of bail being considered.

The claimant received bail within the designated period. There is therefore no evidence to substantiate the tort of false imprisonment against the 2<sup>nd</sup> defendant.

#### **False Imprisonment in relation to First Defendant**

85. Is there any evidence that the first defendant detained the claimant against his will without legal justification?

The claimant’s attorney has submitted that he is liable for the detention of the claimant in his private capacity and can find no safe harbour under the guise of the warrant. It was further submitted that since he was a police officer, he should be taken to know the bounds of the criminal law and had full knowledge that the appropriate remedy was to be found in the civil court.

86. I have already found that the 1<sup>st</sup> defendant knew of the existence of the warrant. I also consider that this warrant would have been unexecuted between August and December 2005.

87. The 1<sup>st</sup> defendant stated that he informed the district constable that the claimant was wanted for questioning. He also stated that he did not lay hands on the claimant and the claimant has confirmed that this was so.

88. Under the circumstance, I am of the view that the 1<sup>st</sup> defendant did no more than what any prudent citizen would do. The claim against the 1<sup>st</sup> defendant for false imprisonment must therefore fail.

The court grants judgment to the defendants.