



[2020] JMSC Civ 166

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV03304

BETWEEN	ALTON WEDDERBURN	CLAIMANT
AND	RED STRIPE BREWING COMPANY (TRADING AS RED STRIPE)	1 <sup>ST</sup> DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2 <sup>ND</sup> DEFENDANT

IN OPEN COURT

Mr Leonard Green and Mr Makene Brown instructed by Chen Green & Company for the Claimant

Mrs T Rowe Coke instructed by the Director of State Proceedings for the 2<sup>nd</sup> Defendant

**Tort – Malicious Prosecution – Whether prosecutor had reasonable or probable cause or was actuated by malice – Damages – Assessment**

HEARD: FEBRUARY 24, 2020, MARCH 9 AND 11, AND JULY 30, 2020

LINDO, J.

### Introduction

[1] On or around April 26, 2006, the Claimant, Alton Wedderburn, (Mr Wedderburn) Computer Technician and Distribution Centre Manager employed to Red Stripe Brewing Company, Smithfield Centre, (Red Stripe), the 1<sup>st</sup> Defendant, was arrested and charged by Detective Sergeant Ethon Miller (Det. Miller) of the Savanna-la-mar Police Station for forty- one (41) counts of obtaining money by

false pretence. This followed a report by Andrew Wynter, Loss Prevention Manager of Red Stripe.

- [2] Mr Wedderburn was placed before the Resident Magistrates' Court for the parish of Westmoreland, and was tried, convicted and sentenced to 18 months imprisonment on each count, on July 23, 2008. He appealed his conviction on August 14, 2008 and on July 30, 2009, the Court of Appeal quashed his conviction.

### **The Claim**

- [3] On July 1, 2015, Mr Wedderburn filed a claim against Red Stripe and The Attorney General, as representative for the Government, for damages for false imprisonment, malicious prosecution, negligence and defamation. He claims that Red Stripe unlawfully, maliciously and/or negligently made directly and through its agents and/or employees, false reports to the Savanna-la-mar police and caused him to be falsely charged, arrested, falsely imprisoned and convicted between 2006 and 2008 and that the complaint to the police amounted to false publications and utterings that he had stolen and/or misappropriated monies belonging to the 1<sup>st</sup> Defendant and were untrue and defamatory.
- [4] In his particulars of claim, Mr Wedderburn states, *inter alia*, that he was "unlawfully and maliciously and without reasonable and probable cause" charged, and that he was confined and in custody from April 28, 2006 to December 14, 2006.
- [5] As special damages, Mr Wedderburn claims loss of earnings from 2010 to 2015 in the sum of \$30,000,000.00, and attorneys-at-law costs of \$2,500,000.00

### **The Defence**

- [6] On December 23, 2016, with the permission of the court, the 2<sup>nd</sup> Defendant filed a defence in which it was admitted that Mr Andrew Wynter made a report to Det. Miller who conducted "full and diligent" investigations and charged Mr Wedderburn and that the information received led Det. Miller to a genuine belief that Mr

Wedderburn had committed the offences and that at all material times Det. Miller acted without malice and with reasonable and probable cause.

### **Pre Trial**

[7] At the Pre Trial Review held on November 5, 2019, the claims against the 2<sup>nd</sup> Defendant in relation to the causes of action for false imprisonment and negligence were struck out.

[8] There was no indication that the matter was proceeding against Red Stripe and neither was there any indication that Red Stripe was served with the claim.

### **The Issue**

[9] The issue to be determined is whether Mr Wedderburn was maliciously prosecuted by the servant or agent of the 2<sup>nd</sup> Defendant and, if so, the quantum of damages to which he would be entitled.

### **The Trial**

[10] At the trial on February 24, 2020, the following were deleted from Mr Wedderburn's witness statement: paragraph 9 (a) to (c); the last sentence in paragraph 19, the words 'false imprisonment' in paragraph 25, and paragraph 29. This was in keeping with the fact that the matter was proceeding in respect of the claim for malicious prosecution.

### **The Claimant's Case**

[11] The witness statement of Mr Wedderburn filed on September 27, 2019, as amended, stood as his evidence in chief after he was sworn.

[12] He states, among other things, that he was in jail amongst alleged murderers and others and that he obtained bail pending his appeal. He says he was arrested while at the Police Station in the process of applying to renew his firearm licence and that Det. Miller took him to the interrogation room, was very aggressive towards

him, handcuffed him, took him to the holding area and called a number of persons to the holding area and most of them proceeded to laugh at him. He says he was then placed in a cell and later transferred to Bethel Town and “deliberately subjected ... to the harshest of treatments” and that during his detention he fell ill as a result of the conditions of the holding cell at Bethel Town.

- [13] He says the salesmen owe him money and that at no time was he engaged in any form of criminal wrongdoing and the records of his banking transaction indicated that he could not have been so involved.
- [14] Mr Wedderburn adds that for Det. Miller to have charged him caused severe harm to his reputation which he has never been able to restore. He also says Det. Miller has disliked him for some time and had come to his office and tried to arrest him in relation to a break-in at a private school in Savanna-la-mar from which computers were stolen.
- [15] He says further that he had to go overseas to take up employment that was not equivalent to his qualification and whenever he attempted to obtain work maintaining computer servers, he was rejected and the allegations continue to affect him. He also states that while engaged as a manager at Desnoes & Geddes, he was able to earn \$3m per annum, as a basic salary, and he has been unable to earn for a period of five years as a result of which he lost in excess of \$15,000,000.00 “and continuing”.
- [16] When cross examined, he said he was in custody from April 2006 to December and agreed that he was detained for about eight months. He said he knew Det. Miller, personally, because he grew up in the community, he recalls seeing him while attending high school and they both had knowledge of each other, and everyone knew of the police who live in the community. He said it was his personal knowledge that Det. Miller had a bar, he did not know its location or the name, and that Det. Miller did not necessarily go to Red Stripe on a regular basis.

- [17] He indicated that it was 1996 to 1997 that he was teaching computer studies at a private school and during the time he worked at Red Stripe, there was a break-in at the school, Det. Miller took him off his job to arrest him for larceny, but he was not charged for any offence. He said he could not remember the year of the break-in but that he almost lost his job at Red Stripe. He said he did not resign from Red Stripe and did not know if he was terminated and that between April 2006 and December his computer businesses closed as “it start to affect my clientele”
- [18] He said he made multiple efforts to get jobs, during the court case and after he was released, and he applied for accounting, supervisory management and computer related jobs.
- [19] In re-examination, he said, initially, he was seeking jobs in Jamaica and afterwards in the United States of America and never got a response in Jamaica and that at the time he had an Association of Chartered Certified Accountants, qualification.

### **The Defendant's Case**

- [20] Detective Ethon Miller's witness statement filed February 13, 2020 was admitted as his evidence in chief. His evidence is that he received a report from Andrew Wynter, he started an investigation and made several visits to the home of Alton Wedderburn, but was unsuccessful in making contact with him.
- [21] He says he took statements from several drivers/subcontractors of Red Stripe, and visited the Savanna-la-mar branch of National Commercial Bank, spoke with the manager, Stuart Barnes, and obtained a court order for permission to examine the bank records in respect of the account. He adds that the 41 dishonoured cheques totalling \$5,960,770.80 had passed through Mr Wedderburn's account.
- [22] Det. Miller states further that on April 28, 2006, Mr Wedderburn was held when he came to the police station to renew his firearm licence and that he cautioned him and he said “*officer a try me try fe help the salesmen dem when dem come in short*”. He says Mr Wedderburn was then placed in custody and on May 2, 2006

he was again cautioned and was charged. He says he honestly believed that Mr Wedderburn had committed the offence of obtaining monies by false pretence.

- [23]** In amplifying his evidence in chief, he admitted to knowing most of the sales persons but denied but denied going to the Savanna-la-mar, Red Stripe location to visit them or for consignment. He said that he never owned a bar and had no idea what informal consignment was. He also denied ever trying to arrest Mr Wedderburn in relation to the break-in at the school but said he knew of him when he worked at Red Stripe, as the manager, but did not know him personally.
- [24]** He identified the copy statements of Oral McIntosh, Tricia Jackson, Andrew Nathan and Stuart Barnes, taken by him, in his handwriting, and with his signature affixed. They were admitted in evidence as Exhibits 1 – 5.
- [25]** When cross examined, Det. Miller said he believes he conducted the investigations thoroughly and was not negligent, and that he could not tell anyone that Mr Wedderburn did not have an overdraft at the bank and could not recall saying that at the trial. He then said he could not have said that, and if he did, that it is not what he meant. He indicated that he would have said he exceeded his overdraft limit and agreed that he was concentrating on 41 cheques and never sought to find out if the account was an active one.
- [26]** Det Miller said he could not recall if at the trial Mr Wedderburn put in evidence a number of cheques which passed through that account between July and August, to Andrew Nathan. He agreed that when arrested, Mr Wedderburn said he was helping out the salesmen and that he asked how, and was told that when they came up short, he would write his personal cheque to balance off their day's sales.
- [27]** He stated that he did not find out that products were not allowed to leave the compound unless they were paid for and said of the 41 cheques, there was one without a payee for \$157,700.27.

[28] He said he was not involved in any bar business and then said he had a bar between 2018 and 2019. He also said he could not recall if Mr Wedderburn was taken in custody on a previous occasion and that based on his investigations, he had every reason to believe he had committed the offence of obtaining money by false pretences.

## **The Law and Discussion**

### **Malicious Prosecution**

[29] It is well settled that in order for an action for malicious prosecution to succeed, the Claimant must prove, on a balance of probabilities, that the law was set in motion against him on a charge for a criminal offence; he was acquitted of the charge or it was otherwise determined in his favour; when the law was set in motion the prosecutor was actuated by malice or acted without reasonable or probable cause; and that he suffered damage as a result. (See **Sec. 33 of the Constabulary Force Act**. See also **Wills v Voisin** (1963) 6 WIR 50.).

[30] Mr Wedderburn has established on a balance of probabilities, that the law was set in motion against him and he was subsequently acquitted of the charges. In that regard, he has given evidence that on May 2, 2006 he was charged with the offences, he attended court on twenty occasions and after trial, he was convicted and he was later acquitted on appeal.

[31] It is well established in this jurisdiction that although a police officer is not required to believe that the person is guilty, he must have an honest belief, founded on reasonable grounds, that the person may be guilty of the offence with which he is charged or is about to be charged (See **Peter Flemming v Det. Cpl. Myers and the Attorney General** (1989) 26 JLR 525).

[32] I therefore accept that Det. Miller was not required to decide on whether or not Mr Wedderburn was guilty of the offences, but that he should have a 'genuine belief, based on reasonable grounds. Det. Miller was therefore entitled to rely on

information he obtained in the course of his investigations to determine whether there were reasonable grounds on which to charge him.

- [33]** It is clear that the investigations were not thoroughly done. The state of the investigations and the information gathered by Det. Miller at the time he made the arrest and charged Mr Wedderburn, would have revealed to him that there was no basis to make an arrest. In determining the weight to be accorded to the statements, taken by Det Miller, which were admitted in evidence, a central consideration was the fact that the persons who gave these statements were not witnesses for the defence.
- [34]** I bear in mind that at the time of arrest, Mr Wedderburn told Det. Miller that he was helping the salesmen when they came up short, yet, in carrying out his investigations he limited his examination of Mr Wedderburn's bank records to a specific period and did not collect a statement from the bank manager until after he made the arrest.
- [35]** I do not find favour with the submission of Counsel for the Defendants that the record of Mr Wedderburn's banking transactions, was "not a fact that Det. Miller could have ascertained, neither was it his duty to do so" as evidence presented is that Det. Miller took a statement from the bank manager, after arresting Mr Wedderburn, and, he, Det Miller, had said he obtained a court order to examine the bank records. The court order to examine the bank records was not presented to this court and neither was there any evidence presented as to the grounds on which it was obtained. However, there is evidence to show that it was also after Mr Wedderburn was arrested that the court order referred to was presented to the bank for an examination of the bank records. This court is therefore left to infer that the court order was limited to the period requested in the application therefor, an application which would have been made by the investigating officer, Det Miller and goes to show the quality of the investigations prior to the arrest. The fact that some of the cheques were written by persons other than Mr Wedderburn, although



drawn on his personal bank account, also lends some credence to his statement that he was trying to assist some of the salesmen.

- [36] Det. Miller clearly carried out the prosecution without any evidence to substantiate the case and this in my view points to a finding that he had no reasonable and probable cause. There could therefore be no genuine belief based on reasonable grounds, by Det. Miller in the prosecution instituted by him against Mr Wedderburn.
- [37] I accept that Det Miller was not required to “test every possible relevant fact before he took action” (See **Herniman v Smith** [1938] AC 305, 319) However, I find that he did not, at the time of carrying out the prosecution, have sufficient facts which would have been relevant to give him any genuine belief that Mr Wedderburn had committed the offence.
- [38] Both parties agree that Mr Wedderburn was at the police station to renew his firearm licence when he was arrested. I therefore do not believe Det Miller’s evidence that he was of the view Mr Wedderburn was hiding from the police.
- [39] I must point out at this juncture that I was not impressed with Det. Miller and did not find him to be a credible witness. I find that it was a matter of convenience for him to say that he could not recall a prior incident in which Mr Wedderburn was questioned about a break-in and larceny of computers at the school he once worked, as, during extensive amplification of his evidence in chief, he made an outright denial of ever trying to arrest him in relation to the incident referred to, saying “no such thing”. I also do not believe him when he states he knew nothing about consignment especially in view of the fact that he reluctantly admitted to owning a bar in 2018 to 2019.
- [40] I find that it is more likely than not that Det Miller knew Mr Wedderburn before that day and find it to be of some significance in view of the fact that Det Miller sought to give the court the impression that he only “knew of” Mr Wedderburn, but did not know him personally.

- [41] Having regard to the lack of complete and thorough investigations on the part of Det. Miller as to the status of the account held at the bank by Mr Wedderburn, and as to his involvement with the persons whose names appear on the some of the cheques, this court finds it difficult to accept that Det Miller could even have had an honest belief that Mr Wedderburn had obtained money by false pretences. In any event, even if he had an “honest belief” that would not have been sufficient to ground the charges and prosecution. Any belief he may have had, would have had to be founded on reasonable grounds and as I have found, he acted without having any such grounds when he arrested and charged Mr Wedderburn.
- [42] I do not agree with Counsel for the Defendant that the credibility of Mr Wedderburn was destroyed on account of his statement in his pleadings that he was released on bail in December 2006 but in his witness statement he said he was incarcerated throughout his criminal prosecution. This apparent inconsistency was explained by Mr Wedderburn as he repeated that he was incarcerated from April to December 2006. In any event I do not find that it is so material as to affect his credibility in relation to his burden of proof in respect of this claim for malicious prosecution.
- [43] This court having accepted, on a balance of probabilities Mr Wedderburn’s account over that of Det. Miller, it follows that the court finds that he has successfully shown that the charges were laid against him without reasonable and probable cause.
- [44] Counsel for Mr Wedderburn, quoting from the case of **Marcia Ellington v The Attorney General** [2012] JMSC Civ 82 in which the court cited **Salmon on the Law of Torts**, 17<sup>th</sup> Edition, page 414, had submitted that where there is an absence of reasonable and probable cause there is a presumption of malice. He further stated that the absence of reasonable and probable cause when paired with the fact that the Claimant was known to Det Miller, give rise to malice on the part of Det Miller.
- [45] I find that Det Miller knew Mr Wedderburn, personally, prior to the date he arrested him as I find as a fact that while Mr Wedderburn was working at Red Stripe, Det

Miller tried to arrest him in relation to a break in at the school he had worked and this is evidence of at least an involvement between them prior to the arrest in 2006.

[46] I do not however find that Mr Wedderburn has presented sufficient evidence from which the court can find that when Det Miller arrested him he was also actuated by malice.

[47] Mr Wedderburn has given evidence as to how he was affected by the prosecution and the action of Det Miller of handcuffing him, taking him to the “holding area and calling persons, some of whom proceeded to laugh at him. This was not challenged in cross examination and has not been controverted by any evidence presented by the 2<sup>nd</sup> Defendant. Mr Wedderburn has therefore shown, on a balance of probabilities that he has suffered loss and is therefore entitled to compensation.

[48] There will therefore be judgment for the Claimant with damages assessed.

[49] I will now assess the quantum of damages that he should be awarded.

## **Damages – Assessment**

### **Special Damages**

[50] Mr Wedderburn has claimed special damages for loss of earnings and attorneys-at-law costs. His claim in relation to his loss of earnings has been stated as being for the period 2010 to 2015 at \$3,000,000.00 per annum. He gave evidence of having lost his employment and that he was unable to get another job in Jamaica, despite his qualifications and that he had to go overseas to take up employment which was not equivalent to his qualifications. He also stated that when he was engaged as a manager at Desnoes & Geddes Savanna-la-mar branch, “[he] was able to earn an amount of Three million dollars...per annum as a basic salary...”

[51] There is no evidence in relation to when Mr Wedderburn ceased working at Red Stripe. What is clear however is that in or around December 2005 a report was

made to the police and it was when Mr Wedderburn went to the police station in April 2006 he was arrested by Det Miller.

[52] Although Mr Wedderburn has pleaded and particularised a total sum of \$32,500,000.00 which he is claiming as special damages, he has failed to strictly prove that he has lost income as a result of the prosecution and he has also failed to show that he incurred attorneys-at-law costs. He is entitled to the sums he would have lost as earnings as well as the costs incurred in his defence of the charges made against him. However, he has not provided any documentary evidence to substantiate this claim.

[53] This is not a case of a 'push-cart vendor' for example, who would not be able to provide documentary proof of his earnings. (See **Desmond Walters v Carline Mitchell** (1999) 29 JLR 173) The circumstances of this case are such that Mr Wedderburn should be able to produce copy of payslips to show how much he earned when he was employed, and he should also be able to provide a receipt, or receipts, to show any payments he made to his attorneys. A claim for loss of earnings and costs incurred in the defence of the charges laid against the claimant in these circumstances ought to be supported by documentary evidence. (See **Bonham-Carter v Hyde Park Hotel** (3) (1948) 64 TLR 177) I therefore find this to be a classic case of throwing up figures at the head of the court, and as such the court is in no position to make a determination as to what award can be made.

[54] There will therefore be no award for special damages.

### **General Damages**

[55] Having established that he was maliciously prosecuted, and that as a result he suffered damage, Mr Wedderburn is entitled to damages.

[56] In the case of **Roderick Cunningham v The Attorney General** [2014] JMSC Civ 30, (unreported), delivered February 28, 2014, the learned judge underscored the factors relevant in determining an award for malicious prosecution. These have

been stated as the seriousness of the offence, length of time the prosecution lasted, number of times the claimant attended court, any damage to reputation or credit, mental distress anxiety, humiliation, disgrace or any inconvenience and discomfort caused by the charge.

- [57] Mr Wedderburn was arrested and charged for a very serious offence. He attended court twenty times and has shown on his evidence that he endured the humiliation of a criminal prosecution for a period of three years and three months. His evidence also is that he suffered mental anguish and was inconvenienced. I have taken into account the seriousness of the offence, the length of time the prosecution lasted and the humiliation and mental distress which resulted from the fact of the charges laid against him
- [58] His Counsel has submitted that the sum of \$2,800,000.00 ought to be awarded, while Counsel for the Defendant has submitted that a reasonable sum would be \$1,300,000.00. Mr Green cited the cases of **Maxwell Russell v The Attorney General and Corporal McDonald**, Claim No.2006HCV04024, (unreported) delivered January 18, 2008, and **Earl Hobbins v The Attorney General and Mark Watson**, Suit No. CL 1998/H196, (unreported), delivered January 29, 2007.
- [59] In the case of **Russell**, an award of \$250,000.00 was made (CPI 119.4) where the claimant was prosecuted for a period of approximately ten months, while **Hobbins** was awarded \$600,000 in January 2007 (CPI 100.96) for a prosecution which lasted six months.
- [60] Counsel for the Defendant cited the case of **John Crossfield v The Attorney General of Jamaica and Cpl Ethel Halliman** [2016] JMCA Civ 40, (unreported) delivered July 2016, in which the Claimant was prosecuted for a total of three years and ten months, inclusive of the time the matter was on appeal. **Crossfield** was awarded \$1,500,000.00 (CPI 232.1) Counsel pointed out that the time frame in relation to this Claimant is less than that of Crossfield by seven months, and submitted that a reasonable sum should be a discounted sum of \$1,300,000.00.

[61] In assessing the damages to be awarded to Mr Wedderburn I have examined the cases provided for comparison by Counsel for the respective parties. In the court's view, the case of **Crossfield** is the most helpful, although in that case the claimant was prosecuted for a longer period and attended court over thirty times. The award made to Crossfield updates to \$1,740,413.61 (CPI 269.3, March 2020). The court will therefore make an award of \$1,450,000.00, discounting for the fact that Mr Wedderburn had a shorter period of prosecution and attended court less times than Crossfield.

### **Aggravated and Exemplary Damages**

[62] In addition to general damages, a claimant may claim aggravated and or exemplary damages.

[63] Aggravated damages are awarded to compensate for the manner in which the defendant committed the tort. Lord Devlin in **Rookes v Barnard** [1964] AC 1129 at 1229, refers to "the insolence or arrogance by which it is accompanied". In relation to exemplary damages this is said to be awarded where the conduct of the defendant is found to be "oppressive, arbitrary or unconstitutional".

[64] In his closing submissions, Counsel for the Claimant submitted that the circumstances of the case warrant an award of both aggravated and exemplary damages. Mr Green suggested an award of \$1.5m "on the basis of the award made for these heads of damages in the **Leeman Anderson** case"

[65] In the case of **Leeman Anderson v The Attorney General & Christopher Burton**, Suit No. CLA 017 of 2002, unreported, delivered July 16, 2004, Sykes J, (as he then was) at page 11 of the judgment said, inter alia;

*"It would seem that under the new rules a failure to state in the claim form the facts being relied on to ground the claim for exemplary damages may not necessarily be fatal provided that the claimant makes it clear in the claim form that he is claiming exemplary damages. Because of the restricted categories in which exemplary damages can be awarded and certainly in the case of servants of the Crown the witness statement should make the basis of the claim for exemplary damages obvious to all who read*

*it. The purpose of particularizing is not an end in itself but a means to an end, namely, advanced notification of (a) the claim for exemplary damages and (b) the facts being relied on to ground the claim.....This same principle can be applied to aggravated damages.*

**[66]** Sykes J concluded that the witness statement of Mr Anderson made it very clear what he was complaining about.

**[67]** In the case at bar, Mr Wedderburn has not made a specific claim under either head of damages, but has presented evidence that he was exposed to the scrutiny of the staff of Red Stripe whilst in the custody of the police and that Det Miller 'verbally abused' him and said, among other things, "*I am going to make sure you go to prison...I don't play, because you tek man fe fool*". I note that these assertions have not been denied by Det Miller.

**[68]** I am not satisfied that there has been a clear indication by Mr Wedderburn that his claim is for aggravated and neither has he presented any evidence to show any conduct on the part of Det. Miller which this court is of the view would warrant an award for exemplary damages.

**[69]** I will therefore make no award under those heads of damages.

### **Disposition**

**[70]** General damages are awarded in the sum of \$1,450,000.00 with interest at 3% per annum from the date of service of the claim form (July 7, 2015) to the date of judgment.

Costs to the Claimant to be agreed or taxed.