THE EASTERN CARRIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

SKBHCV2021/0182

BETWEEN:

DEXTER SOMERSALL
SONIA SOMERSALL

Claimants

and

THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS

Defendant

Appearances:

Mr. Eustace Nisbett for the Claimants
Mrs. Simone Bullen Thompson, Solicitor General, with her Ms. Sasha Lloyd for the Defendant

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2024: June 6, 24;
September 24.

JUDGMENT ON ASSESSMENT OF DAMAGES

[1] **GILL, J.:** This is an assessment of damages for breach of sections of the Constitution of Saint Christopher and Nevis. The State has accepted liability for violation of the claimants' constitutional rights, and that the claimants are entitled to damages that may arise. However, the parties are at loggerheads on quantum.

Background facts

[2] The first claimant Dexter Somersall ("Mr. Somersall") is a swimming instructor and landscaper. At the time of the matters complained of, he was a retail store operator, fisherman, box-truck operator, disc jockey and musical promoter.

[3] The second claimant Sonia Somersall ("Ms. Somersall") is Mr. Somersall's sister. At the material time, she was a Senior Accounts Clerk at a business called KDP Enterprises. Having been laid off from that position, she is now employed in the Ministry of Human Settlement and Ecclesiastical Affairs in the Federal Government.

[4] On November 6, 2012, Mr. Somersall was convicted in the Magistrate's Court of possession of cocaine with intent to supply and possession of crack cocaine. On the said date, in the presence of Mr. Somersall, the police prosecutor indicated to the court that the State would be pursuing asset recovery proceedings in respect of Mr. Somersall's assets.

[5] The next day, November 7, 2012, Mr. Somersall transferred ownership of two of his vehicles – a white Dodge Caravan and a white Isuzu Lorry- registered in his name to Ms. Somersall. Although this was a fact taken into consideration to bring the asset recovery proceedings, Mr. Somersall asserted that he did not transfer the vehicles to avoid asset recovery proceedings, but agreed to transfer one vehicle, the white Dodge Caravan, so that Ms. Somersall could sell it to pay his court fines. That vehicle was in fact sold by Ms. Somersall.

[6] On November 22, 2012, the court granted an application for a production order requiring ten different institutions to produce documents and records in relation to the claimants and their mother, Maisie Somersall. The ten respondents were:

i. Bank of Nova Scotia
ii. St. Kitts-Nevis-Anguilla National Bank
iii. Royal Bank of Canada
iv. First Caribbean International Bank Barbados Limited
v. Nevis Co-operative Credit Union
vi. Bank of Nevis
vii. Grace Kennedy Money Services (MoneyGram)
viii. Delisle Walwyn & Company Ltd (MoneyGram)
ix. NAGICO Insurance Company
x. The Director of Social Security

[7] On March 25, 2013, the Director of Public Prosecutions (DPP) filed an *ex parte* application in the civil jurisdiction of the High Court[1] against both claimants for restraint

[1] SKBHCV2013/0080

and freezing orders pursuant to the Proceeds of Crime Act, Cap. 4.28 of the 2002 Revised Edition of the Laws of Saint Christopher and Nevis. The application was granted and the following vehicles, alleged to be the proceeds of Mr. Somersall's crimes, were listed as the subjects of the order:

- Silver Utility Land Rover Defender (2005) registered in the name of Dexter Somersall;
- Black Ueireg Motorcycle (2007) registered in the name of Dexter Somersall;
- White Dodge Caravan (2005) registered in the name of Sonia Somersall; and
- White Isuzu Lorry registered in the name of Sonia Somersall.

[8] On November 5, 2013, the DPP applied for a confiscation order against the claimants in respect of the alleged benefit derived by Mr. Somersall from the commission of the cocaine offences. The said four vehicles were listed in this application.

[9] Several extensions were granted in respect of the restraint and freezing orders as each had an expiry date of six months, the last of which was granted on July 11, 2014.

[10] Without an order of the court or any lawful authority, on January 21, 2014, members of the Royal Saint Christopher and Nevis Police Force seized and took the four vehicles into custody. The application for a confiscation order was not pursued. To date, the vehicles have not been returned to the claimants.

[11] On November 8, 2021, the claimants filed an originating motion against the Attorney General of Saint Chrisopher and Nevis seeking constitutional redress for breaches of section 8 and 10 of the Constitution, including special damages for the replacement cost of the vehicles, general damages for loss of use of the vehicles, exemplary damages, vindicatory damages, interest, costs and such further relief as the court deems just.

[12] The Attorney General accepts that the claimants are entitled to a declaration under section 8 of the Constitution for the unlawful removal of the motor vehicles. The Attorney General further accepts that the claimants are entitled to a declaration pursuant to section 10(8) of the Constitution that they were not afforded a hearing within a reasonable time.

[13] While the Attorney General accepts that the claimants are entitled to the said declarations and damages that may arise from these, the Attorney General does not accept the claims for loss of use, vindicatory and exemplary damages.

[14] The court granted the Attorney General's application to cross-examine the claimants and four of their witnesses because there are disputes of fact in relation to the claim for damages.

Issue

[15] Since the parties are not in agreement, the court is tasked to determine the quantum of damages to be awarded to the claimants.

Breach of section 8 of the Constitution

[16] Section 8(1) of the Constitution provides:

> *8.-(1)No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except for a public purpose and by or under the provisions of a law that prescribes the principles on which and the manner in which compensation therefor is to be determined and given.*

[17] The claim alleges a breach of this section, and the Attorney General concedes, the vehicles having been taken into custody without lawful authority and not returned to the claimants. The claimants aver that as a result, they are entitled to special damages for the replacement cost of the vehicles which have deteriorated in custody, damages for loss of use and loss of income. I note that the claimants did not plead loss of income but submit that they are entitled to same in relation to the white Isuzu Lorry.

Replacement cost

[18] The claimants claim, and the Attorney General has consented to pay the claimants, the replacement cost of the three vehicles that remain to be considered, based on valuations submitted by the claimants as follows:-

Land Rover Defender	$62,100.00
Ueireg Motorcycle	$5,000.00
Isuzu Lorry	$38,621.72

The total amounts to $105,721.72.

[19] As far as the Attorney General is concerned, the replacement cost of the vehicles is sufficient to compensate the claimants for breach of section 8 of the Constitution.

Loss of use

[20] The claimants seek damages for loss of use involving the Land Rover Defender and the Ueireg Motorcycle. They aver that such loss has accrued since January 21, 2014 when the police seized these vehicles and continuing. Rental values for both vehicles were provided by the unchallenged affidavit evidence of Ivan Hanley who gave his professional opinion that the Ueireg Motorcycle had a rental value of US$40.00 or EC$108.68 per day while the Land Rover Defender had a rental value of US$85.00 or EC$230.94 per day.

[21] The claimants therefore claim:

<u>Ueireg Motorcycle</u>

- Daily rental rate - $108.68
- Period of loss - 3,859 days

Total EC$419,396.12

<u>Land Rover Defender</u>

- Daily rental rate - $230.98
- Period of loss - 3,859 days

Total EC$891,351.82

The total damages for loss of use claimed is EC$1,310,747.94.

[22] The Attorney General submits that in the case of both vehicles, the claimants failed to provide evidence of actual rental expenses for replacement vehicles, which would have substantiated their claim for loss of use under the head of special damages. Instead, they presented speculative costs of potential rentals. Moreover, there was no demonstrated inconvenience suffered and no effort to insure these vehicles. There was no evidence of any intent to or any action taken to mitigate the losses claimed.

[23] The Attorney General points out that the Ueireg motorcycle's insurance expired in May 2009, and its licence expired in August 2008. The expiration of the insurance and licence predates the police taking the vehicle into custody in January 2014 by more than four years. Mr. Somersall admitted to using the motorcycle illegally after these dates. The Attorney General submits that the claimants should not benefit from the illegal use of this vehicle. Therefore, the Attorney General argues that the claimants are not entitled to loss of use for this vehicle, and that the replacement cost of the motorcycle is adequate compensation.

[24] Regarding the Land Rover Defender, the Attorney General points out that its insurance expired in May 2011, and its licence expired in February 2012. The claimants attributed their failure to use the vehicles to an inability to obtain insurance, which they claimed was due to the production order. The Attorney General's counter argument is that the evidence presented indicates that the production order was granted in November 2012, so that the expiration of the insurance and licence predated the production order. The order was only served on NAGICO Insurance Company, and no attempt was made to insure the vehicles with other companies. Further, the claimants have not provided any evidence that they were in fact denied insurance coverage by any insurance company.

[25] Given the foregoing, the Attorney General submits that the claimants are not entitled to recover any damages for loss of use in respect of the Ueireg Motorcycle or the Land Rover Defender.

Ruling on Loss of Use

[26] The licences and insurance of both vehicles having expired long in advance of the unlawful seizure of the vehicles, the use of those vehicles after such expiration would constitute the traffic offences of driving an unlicensed vehicle and driving an uninsured vehicle in each case. Section 3 of the Motor Vehicles Insurance (Third Party Risks) Act[2] makes it an offence to use a vehicle on a public road unless there is in existence a policy of insurance covering third party risk in relation to the vehicle. Section 12 of the Vehicles and Road Traffic Act[3] prohibits the use or to permit someone to use a vehicle on a road unless the vehicle is licensed. Although there is nothing before the court to indicate that Mr. Somersall was charged with any of these offences, he admitted to them in respect of the Ueireg Motorcycle. Further, in the absence of any cogent evidence, I reject the claimants' assertion that insurance was denied in light of the production order.

[27] Having considered the evidence and the submissions of the parties, I am in agreement with the position of the Attorney General that the claimants ought not to benefit from the illegal use of the vehicles, the licences and insurance having expired long in advance of the removal of the vehicles, and I conclude that the claimants are not entitled to damages for loss of use for the Ueireg Motorcycle and the Land Rover Defender.

Loss of income

[28] The claimants seek damages for loss of income in respect of the white Isuzu Lorry (hereinafter "the lorry"). They aver that the lorry was a profit earning chattel used to provide a transportation service for goods. They called the following witnesses to support their claim that the lorry was in fact an income earning chattel:

<u>Jude Andrew Ross</u>

[29] Mr. Ross, a painter for about a year, who did not have a stable job before, stated that from about 2011 to 2013, he contracted the services of Mr. Somersall to pick up cattle

[2] Cap. 15.02 of the Laws of Saint Christopher and Nevis
[3] Cap. 15.06 of the Laws of Saint Christopher and Nevis

and take them to the St. Kitts abattoir for slaughter. Thereafter, Mr. Somersall collected the carcasses and transported same via the Seabridge (a ferry service) to a supermarket in Nevis. Mr. Somersall's cost was $250 per trip to Nevis, twice monthly.

Elvira Williams

[30] A self-employed woman operating a catering business, Ms. Williams' evidence is that she contracted Mr. Somersall's transportation services from 2010/2011 until his box truck (the lorry) was seized in 2014. She catered for cricket matches, weddings and other events. The average cost of each trip was $150.00 "each way". She did not collect any receipts from Mr. Somersall "as his business was a small business".

Elvis Richardson

[31] Mr. Richardson is a landscaper and former disc jockey. He stated that in or about mid-January 2011 he entered into an arrangement with Mr. Somersall to transport his musical equipment to and from events. At first, Mr. Somersall performed the service at a rate of $250.00 per round trip, but with regular engagements, reduced the rate to $200.00.

Euklyn Daniel

[32] This witness was brought by the claimants to show how much income is generated by a similar business. Mr. Daniel operates a box trucking business. Taking fuel costs into consideration, his evidence is that he makes $1,850.00 net per week.

Stephen Hector

[33] This witness was not cross-examined. Like Euklyn Daniel, he operates a box truck and his evidence is that his gross weekly income from that business is $6,000.00 per week. With weekly operating costs of $3,200, he earns a profit of $3,400.00 per week.

[34] The claimants submit that the loss of income due and payable is $993,600.00.

[35] The Attorney General challenges the fact that the lorry was used as an income earning chattel. The Attorney General points out that Mr. Somersall failed to provide a business licence or any documentation supporting the existence of such a business, that is, transportation services for goods. Notably, the lorry's insurance expired in

February 2013, and its licence expired in September 2013. The lorry was taken into police custody in January 2014. Therefore, at the material time, Mr. Somersall could not be lawfully using the vehicle at all or for commercial activities as asserted. Mr. Somersall admitted to illegally driving the lorry after the insurance and licence for the vehicle expired.

[36] Although the claimants cited difficulties in obtaining insurance due to the production order, the Attorney General submits that it was established that this order was only served on NAGICO, and not on any other insurance company such as National Caribbean Insurance, which later insured the lorry. Ms. Somersall, the vehicle's legal owner, admitted ignorance of the expired licence and indicated that she ceased using the lorry upon realizing this fact. Further, she explained that she had no difficulty in obtaining licences for her vehicles.

[37] The witness Jude Andrew Ross attempted to corroborate Mr. Somersall's testimony that the lorry was an income earning chattel at the material time. However, the Attorney General alleges that his evidence revealed certain inconsistencies. Mr. Ross admitted that he did not operate a cow farm as initially suggested but instead bought cows from various persons which were slaughtered at the abattoir in St. Kitts and then transported to Nevis. Moreover, Mr. Ross claimed that the lorry was equipped with hooks for hanging meat, a feature Mr. Somersall denied existed.

[38] Further, the Attorney General submits that none of the witnesses put forward by the claimants to support the assertion that the lorry was an income earning chattel was in a position to provide receipts or other documentary evidence to substantiate any transactions or business activity involving the lorry. These witnesses were unable to specify dates when they contracted Mr. Somersall's services or the number of times they did so. Similarly, the claimants did not produce any receipts or other documentary evidence to support their claim and their evidence was lacking in specificity as it relates to transactions undertaken involving the lorry.

[39] The Attorney General submits that the evidence of the witness Euklyn Daniel of the fact that he offered transportation services utilising a similar vehicle and of the income

he made has no probative value in this matter, as there are many factors which determine the success of a business operation. Specifically, as it relates to this matter, the claimants' business success was not solely dependent on the ownership of the vehicle in issue, but the actual service provided. The service is impacted by matters such as the person providing the service, the location of the services and the quality of the service. The fact that Euklyn Daniel made a certain sum in the conduct of his business offering transportation services does not mean that the claimants would make a similar sum doing the same type of business.

[40] Given the circumstances, the Attorney General argues that the lorry was not used as an income-earning chattel and that the claimants should not benefit from its illegal use. In this regard, the Attorney General relies on the case of **Raquel Fray v Sergeant Jeffrey Amos, The Attorney General of Jamaica and the Transport Authority.**[4] In that case, the claimant's motor vehicle was being driven without a front bumper or front registration on the said motor vehicle. The vehicle was stopped and upon inspection, it was discovered that the motor vehicle was unlicensed. It was seized for being in breach of the Jamaica Road Traffic Act, that is, for being driven along a public road without the requisite licence. Commenting on the claim for damages, the court stated the following at paragraph 41 of the judgment:

> "Having found no liability on the part of the Defendants, it is unnecessary to consider the issue of damages. I would add that even if the Claimant were successful in her claim, this court would only be prepared to award the claimant the loss of the value of her vehicle, $1,800,000.00 and a refund of the wrecker and storage fees, $28,000.00. The court would be unable to award damages for loss of use as a commercial carrier from the 3rd of February 2010. The Claimant gave no credible evidence regarding the existence of valid commercial carrier's licence at the time of the seizure. The motor vehicle was not registered at the time of the seizure and had not been for one year prior. It is therefore doubtful as to how she would have been able to lawfully carry out her contractual obligations. Finally, there was nothing before the court to support the termination of a contract that she allegedly had with Coldfield MFG Ltd, as a result of the seizure."

[4] [2018] JMSC Civ. 74

[41] Similarly, as in **Raquel Fray,** the Attorney General submits that the claimants are not entitled to loss of income as claimed, and maintains that in all the circumstances of this case, the appropriate remedy is the replacement cost of the vehicle, which would adequately compensate the claimants.

Ruling on loss of income

[42] Notwithstanding the lack of documentary evidence to support Mr. Somersall's claim that he had a business licence for trucking services, and the inconsistencies revealed in cross-examination of Jude Andrew Ross, I accept the evidence of those witnesses who testified to engaging Mr. Somersall to transport items for their various enterprises, namely the said Jude Andrew Ross, Elvira Williams and Elvis Richardson. Mr. Somersall asserted that he provided trucking services under his business 'Vigilante' for which he exhibited expired business licences, revealing that 'Vigilante' was granted business licences as a sport and entertainment promoter. Although it is questionable whether Mr. Somersall operated a legitimate trucking business, that is, in the absence of cogent documentary proof, the evidence shows and I am satisfied that he used the lorry as an income earning chattel.

[43] The lorry's insurance and licence expired in February 2013 and September 2013 respectively, that is, before it was seized by the police in January 2014. Therefore, it was used to provide trucking services, admittedly by Mr. Somersall, in breach of the traffic and insurance laws of the Federation. In these circumstances, in my view, the claimants ought not to benefit from the illegal use of the lorry in the form of damages for loss of income. Therefore, being guided by the quoted statement of the court in **Raquel Fray,** I rule that the claimants are not entitled to any compensation for loss of income and that the replacement cost of the lorry is sufficient. Indeed, the same principle applies to the claim for loss of use of the Ueireg motorcycle and the Land Rover Defender.

Breach of section 10 of the Constitution (reasonable time)

[44] The claimants cite section 10(1) of the Constitution as the relevant provision and aver that breach of this section brought hardship upon them. The section provides:

> *10.-(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*

[45] The claimants seek damages under the peculiar circumstances of this case where they allege that the DPP knew that there was no case against them, but failed to take the necessary steps to mitigate the losses and hardship on their lives, the effects of which have been so harsh, being similar to a sentence of a term of imprisonment. They aver that Mr. Somersall lost all of his businesses and vehicles and resorted to seek employment as a landscaper, a profession well below his normal course of business; he has been forced to repeatedly appear in court and had all of his bank accounts closed. His potential for earning a proper income has been significantly curtailed as his age has increased by some near 13 years while he has not been able to advance his life.

[46] Similarly, the claimants lament that Ms. Somersall's enjoyment of her success as a Senior Accounts Clerk was short lived, perhaps never to be renewed. She has now settled for a meager role in government employment, far removed from what she was trained for and to which she was accustomed.

[47] There is no indication that anything has been done with the matter for at least the past near 13 years and all adjournments were requested by the DPP and were so granted. The claimants allege that they have not been communicated with within the past 13 years and the only information given to Mr. Somersall were through oral conversations with the DPP and various high-ranking members of the Police Force.

[48] There is no evidence that the DPP faced any procedural or other challenges nor is there any indication that the claimants acted unreasonably or in a manner that jeopardized the speedy determination of the matter. To the contrary, the claimants say that they attended each hearing and even approached the DPP no less than 30 times. Indeed they were eager to have the matter tried and to clear their names.

[49] The claimants cite the case of **Jermaine Browne v The Attorney General of Saint Christopher and Nevis and The Director of Public Prosecutions**,[5] a judgment out of this jurisdiction. With regard to the administration of justice, at paragraph 36 of the judgment, Ventose J (as he then was) opined: "The words of the constitution must have some meaning and are not mere surplusage. The courts as guardians of the constitution must give effect to the meaning of those words that promote respect for and obedience by the State of the commands of the Constitution." The claimants allege that this matter has remained and continues to remain on the court list for more than 4,000 days without any action being taken seriously to advance the "charges" against them.

[50] The Attorney General having accepted that the claimants' right to a hearing within a reasonable time pursuant to Section 10 of the Constitution was breached, the claimants submit that an award of damages would be warranted under the circumstances they have highlighted and invite the court to consider an award of $50,000.00 for each claimant for breach of section 10.

[51] The Attorney General cites section 10(8) of the Constitution as the relevant provision. Section 10(8) reads:

> *(8) Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.*

[52] The Attorney General submits that the claimants have not established how the delay caused them to suffer any loss, and therefore they are not entitled to compensation. In the case of **Duncan and Jokhan (Appellants) v Attorney General of Trinidad and Tobago**[6] where the appellants claimed that there was a breach of due process, the Board indicated that the appellants needed to show that they suffered actual loss.

[5] SKBHCV2016/0074, delivered November 19, 2018
[6] [2021] UKPC 17

[53] The Attorney General asserts that any humiliation or difficulties alleged by Mr. Somersall are as a result of his convictions as follows:

- October 12, 2006 - possession of cocaine – sentenced to eighteen (18) months hard labour
- March, 4, 2008 - possession of cannabis - fined $500 in one (1) month or six (6) months hard labour
- November, 6, 2012 - possession of cocaine with intent to supply and possession of crack cocaine – for each offence, fined $15,000.00 in one (1) week or ten (10) months hard labour, sentences to run consecutively; and
- September 27, 2016 – possession of cannabis – sentenced to one (1) month in prison, and possession of cannabis with intent to supply another – sentenced to two (2) months in prison, sentences to run concurrently.

[54] In relation to Ms. Somersall's assertion that as a result of the orders served on her, she encountered difficulties at work, the Attorney General directs the court's attention to the affidavits of her former employer Kenneth Pennyfeather, Managing Director of KDP Enterprises Inc. and Sheridane Warner, Chief Personnel Officer in the Ministry of Human Resource Management which stated otherwise. Ms. Warner exhibited Ms. Somersall's application for employment with the Government which indicated that she was laid off from her previous employment as a result of the COVID-19 pandemic. Mr. Pennyfeather confirmed this as the reason for Ms. Somersall being relieved of her duties at KDP. In fact, his evidence is that other employees at KDP were similarly laid off.

[55] In all the circumstances the Attorney General submits that declaratory relief is sufficient redress for the breach of section 10 of the Constitution.[7]

Ruling on Delay

[56] It appears that the claimants have confused the proceeds of crime proceedings with criminal proceedings. They refer to the applications filed pursuant to the then

[7] See *Rashid A. Pigott v the Queen* ANUHCRAP2000/0009

Proceeds of Crime Act as charges. Applications for restraint, freezing, production and confiscation orders were properly filed in the civil jurisdiction of the court in relation to the possible benefit derived from the criminal conduct of Mr. Somersall. Ms. Somersall was not convicted of any crime, and the applications against her were not criminal charges, but included her as a respondent because two of the vehicles in issue were registered in her name, having been transferred to her by Mr. Somersall after he was convicted of drug offences. It should be noted that a criminal conviction is not a prerequisite for the institution of asset recovery proceedings. Therefore, in considering a breach of section 10 of the Constitution in this case, the relevant provision is section 10(8) which deals with civil proceedings.

[57] Delay in respect of section 10(8) of the Constitution arises from the non-completion of the proceedings pursuant to the proceeds of crime legislation, and not from any criminal charges. Mr. Somersall was charged over the years with drug offences for which he was convicted and sentenced. The Attorney General has conceded a breach as it relates to the reasonable time guarantee under section 10(8), that is, that the claimants were not afforded a fair hearing of the proceeds of crime applications, in particular, the application for a confiscation order, within a reasonable time.

[58] The DPP made the application for a confiscation order on November 5, 2013 and both claimants were served with the application on November 7, 2013. After several adjournments, on September 22, 2015, an oral application was made for the matter against Ms. Somersall to be withdrawn. The application was granted by Carter J who then gave case management directions for submissions in respect of the application against Mr. Somersall. According to the evidence on behalf of the Attorney General, "It would appear that the matter stymied thereafter."

[59] Remarkably, there is no evidence that the proceeds of crime proceedings against Mr. Somersall were similarly withdrawn before the court. The evidence shows that Mr. Somersall contacted the then DPP on no less than 15 to 20 occasions and was informed by the DPP of the decision not to proceed against him. There is no evidence before this court of a formal hearing or court document indicating that the application

for a confiscation order against Mr. Somersall was withdrawn or discontinued. This state of affairs remains to date, almost 11 years after the filing of the application for a confiscation order, and 13 years since the filing of the application for the initial restraint and freezing orders, and even as the parties agree, in these proceedings, that the confiscation application will no longer be pursued. In these circumstances, the prolonged period, with the proceeds of crime proceedings hanging over Mr. Somersall's head without evidence of a determination, constitutes inordinate delay.

[60] In addition, notwithstanding the situation of Ms. Somersall where the proceedings against her were withdrawn before the court, she has not obtained any documentation to that effect. In her case, the proceedings were withdrawn some two and a half years after the initial filing.

[61] As regards actual loss suffered by the claimants, on the evidence, I do not accept that Ms. Somersall lost her job as a Senior Accounts Clerk because of the orders being served on her. Instead, she was laid off as a result of the COVID-19 pandemic, as stated in her application for employment with the Government, the contents of which, she told the court, were true and correct. However, even in the absence of the evidence of others, given the fact of the police serving the documents on her on several occasions at her workplace over the years, it is not unreasonable to conclude that this must have had some impact on her reputation. In support of illustrating his business losses, Mr. Somersall exhibited a letter dated November 13, 2017 in which the Development Bank of St. Kitts and Nevis declined his application for a loan to purchase a vessel and equipment for fishing. In addition, by letter dated September 3, 2020, the Bank of Nevis Ltd. (the 6th respondent in the production order) discontinued its relationship with Mr. Somersall because his "risk profile does not align with the bank's risk tolerance".

[62] I take the Attorney General's point that Mr. Somersall's convictions for drug offences may well be the reason for his inability to conduct normal business. Indeed, the withdrawal or discontinuation of the asset recovery proceedings will not negative the convictions, including prison sentences and remand. It simply means that there has

not been a determination that the vehicles and other property listed in the confiscation application were the proceeds of Mr. Somersall's crimes. Mr. Somersall's convictions stand and form part of the records of the police. However, the production order dated November 22, 2022 to ten respondents has not been neutralized by a document Mr. Somersall can present to a financial institution or anyone with whom he wishes to conduct business.

[63] Notwithstanding Mr. Somersall's drug convictions, in my view, it is not unreasonable to conclude that an official court document, indicating that the asset recovery proceedings against him were withdrawn or discontinued, could have some positive bearing on his ability to conduct normal business with financial and other institutions. Therefore, although Mr. Somersall's drug convictions reduces the force of his argument, the essence of which is that the incomplete proceedings caused his financial decline, I accept that there would have been some loss to Mr. Somersall as a result of the non-completion of the proceedings and the absence of any documentation to that effect.

[64] In making a determination on quantum for breach of section 10(8) of the Constitution, I also take into consideration the inaction of the claimants in asserting their rights. There is nothing in Ms. Somersall's evidence to indicate that she took any steps to obtain from the Registrar of the Supreme Court the court's record of the proceedings being withdrawn against her on September 22, 2015. The court having granted the application to withdraw the proceedings against Ms. Somersall, she was entitled to the record of the outcome of the proceedings. As regards, Mr. Somersall, given the failure of the State to advance the matter, notwithstanding his numerous queries to the DPP, being aggrieved, it was open to him to bring proceedings to have the matter brought to an end. As a respondent in the proceedings, he was entitled to move the Registrar to have the matter listed to be determined. Instead, the claimants sat on their rights until November 2021 to file a constitutional claim. I do not accept as a good explanation for this delay Mr. Somersall's reason that he was waiting for the matter to be concluded before deciding whether to bring a claim.

[65] In all the circumstances of this case, I am of the view that an award of $10,000 to each claimant is reasonable for breach of section 10 of the Constitution.

Vindicatory damages

[66] The claimants seek an additional award of vindicatory damages. The claim for exemplary damages in the originating motion appears to have been abandoned in the claimants' submissions.

[67] The purpose of an award of vindicatory damages was explained in the Privy Council case of **Inniss v Attorney General of Saint Christopher and Nevis**[8] where Lord Hope of Craighead stated:

> "Allowance must of course be made for the importance of the right and the gravity of the breach in the assessment of any award. The fundamental points are of general application, however. The purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right. It is not to punish the Executive. But vindication involves an assertion that the right is a valuable one, as to whose enforcement the Complainant herself has an interest. Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard."

[68] In **Attorney General of Trinidad and Tobago v Ramanoop,**[9] Lord Nicholls of Birkenhead opined:

> "An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award."

[69] The claimants seek damages under this head asserting that they have suffered damage to their reputation as a result of the actions of the State.

[8] [2008] UKPC 42 at para. 27
[9] (2005) WIR 334; [2006] UKPC 15 at para. 19

[70] Mr. Somersall's evidence is that he was served by two police officers, in the public, with the numerous orders. He says he was dragged before the court on at least seven occasions and on each and every occasion, the prosecution requested and was granted adjournments. Mr. Somersall recalls visiting or speaking to the former DPP on at least 15 to 20 occasions and was informed that the office of the Attorney General was already written to and advised that the "charges" against the claimants were withdrawn.

[71] Mr. Somersall states that to date, he has not been able to conduct business to the extent that he cannot get a loan, he cannot open a bank account or conduct any financial business as he has been red flagged, neither has he been able to secure a police record. Notwithstanding his complaints to the former DPP who indicated that "all charges were withdrawn", yet no action was taken by the State to restore the rights of either claimant. Further still, he says that his businesses have all been forced to close and he has been unable to live a normal life.

[72] This issue has been brought to the attention of the court on at least two to three occasions but to date remains an issue. Mr. Somersall avers that he has been scorned and viewed as a drug lord. His vehicles were "confiscated" and dragged away from within a community where many persons resided.

[73] The claimants submit that Ms. Somersall is an upstanding citizen who is involved in her church. She complains that each time she attempts to travel, she cannot do so without incident and has been subject to temporary detention, questioning and searches at the airport and in the presence of other travellers. She has lost her job as a Senior Accounts Clerk after many intrusions at her workplace by law enforcement to the extent that the employers complained that she was having a bad effect or outlook on the company. She states that the police visited her workplace on numerous occasions and her staff informed her that the police came to lock her up.

[74] Ms. Somersall stated in her affidavit that she resided within a community of approximately 20 homes and that the intrusion of the police humiliated her and

affected her reputation as members of her community referred to her as a drug lord and members of her church avoided and talked about the "charges" against her.

[75] Both claimants complain of being red-flagged and wish to have such classification remedied so that they can conduct business and social affairs. They state that the infringement has been perpetrated for nearly 13 years, delimiting their ability to function as normal citizens would.

[76] The claimants cite the case of **Everette Davis v The Attorney General of St. Christopher and Nevis**[10] where Ramdhani J (Ag.) awarded $30,000.00 in vindicatory damages in the circumstances of that case. In breach of his right to liberty under section 5(5) of the Constitution, the claimant was arrested and detained for eight months and five days (230 days) on a charge of murder. In **Dustin Lapsey v The Attorney General of Saint Christopher and Nevis,**[11] Moise J awarded the sum of $50,000.00 where the claimant was detained on a murder charge for two years and seven months in contravention of sections 5 and 10 of the Constitution.

[77] Citing the case of **Ramanoop**, the Attorney General observes that vindicatory damages should only be granted if the amount of compensation awarded is presumed to be insufficient to vindicate the right of the claimant, and argues that based on the submissions put forward, the claimants are not entitled to an award for vindicatory damages.

Ruling on vindicatory damages

[78] In my view, the breaches by the State in this matter are serious. In breach of section 8 of the Constitution, the law enforcement arm of the State took possession of the claimants' four vehicles without lawful authority. The vehicles were not returned even after Carter J, in open court, on learning of the seizure of the vehicles, questioned the Crown as to their authority for so doing, as the court had made no such order. Notwithstanding the concession of the Attorney General to pay the replacement cost

[10] SKBHCV2013/0220, delivered June 30, 2014
[11] NEVHCV2019/0086, delivered March 29, 2021

of the vehicles, this compromise occurred only after the Constitutional motion was brought.

[79] In relation to section 10(8) of the Constitution, the breach is startling. The asset recovery proceedings began with the first restraint and freezing orders in March/April 2012, followed by several extensions, a production order and the confiscation application. To date, there is no order or notice of discontinuance to indicate the conclusion of these proceedings in favour of the claimants. Although the confiscation application against Ms. Somersall was withdrawn before the court in September 2015, the proceedings remain in abeyance with respect to Mr. Somersall. The situation continues notwithstanding Mr. Somersall's efforts and the State's indication that the matter will be remedied. No doubt, he has suffered distress and inconvenience as a result.

[80] Ms. Somersall gave evidence of the humiliation and embarrassment she has endured since the service on her of the various orders, which in the end have come to naught. I accept that the entire process, including the delay, caused her great hurt and distress.

[81] In my respectful view, the awards in **Everette Davis** and **Dustin Lapsey** are not appropriate in the claimants' circumstances. Mr. Davis and Mr. Lapsey were unconstitutionally deprived of their liberty and imprisoned for relatively lengthy periods, easily distinguishable from the situation of the claimants. A fairer comparison can be made with the case of **Fraser v The Judicial and Legal Services Commission and The Attorney General,**[12] where the Privy Council restored the decision of the first instance judge to award $10,000 for distress and inconvenience as an additional award for the unconstitutional dismissal of a Magistrate in St. Lucia.

[82] In the circumstances of this case, I am of the view that an award for each claimant is warranted, not to punish the State but to vindicate the claimants' Constitutional rights. The flagrant breach of section 8 of the Constitution in taking the claimants' property

[12] [2008] UKPC 25; see also *Laren Kay Simon v The Attorney General and Judicial and Legal Services Commission* GDAHCV2023/0411, delivered July 30, 2024

without lawful authority and the inordinate delay in affording the claimants a fair hearing within a reasonable time in breach of section 10(8) attract an award of vindicatory damages in this case to highlight the importance of the claimants' rights, the gravity of the breaches and to deter further similar breaches. An appropriate award for vindicatory damages in this case for each claimant is $10,000.

Order

[83] Based on the foregoing, it is hereby ordered that the defendant shall pay the claimants as follows:

1) Replacement cost of the vehicles in the sum of $105,721.72.

2) Damages for breach of section 10(8) of the Constitution in the sum of $10,000.00 each.

3) Vindicatory damages to each claimant in the sum of $10,000.00.

4) Interest at the rate of 5% per annum from the date of the judgment to the date of payment in full.

5) Upon payment of the sums ordered for the replacement cost of the vehicles, the vehicles shall be forfeited to the State and sold at a public auction or by private treaty by the Attorney General and the proceeds of sale shall be deposited into the Consolidated Fund for the benefit of the State.

6) The Attorney General shall pay the claimants' costs of this claim to be assessed in accordance with CPR 65.12 in default of agreement within 30 days from the date of this judgment.

Tamara Gill
High Court Judge

By the Court

Registrar