

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA
IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV 2020/0070
BETWEEN:

MARTIN MEYER

Claimant

-And-

THE OFFICE OF NATIONAL DRUG AND MONEY
LAUNDERING CONTROL POLICY

Defendant

Appearances:

Mr. Lawrence Daniels for the Claimant
Mr. Wesley L. George for the Defendant

2022: December 6th, 13th;
2023: August 14th

Malicious Prosecution – Claimant failing to prove ingredients of tort - honest belief that the offences charged had been committed – distinction between actual evidence to prove offences and honest belief in the existence of such evidence – absence of malice – charges being resolved in favour of claimant not automatically equivalent to proof of malice – finding of good faith belief that prosecution was in the interest of justice

JUDGMENT

[1] **RAMDHANI, J [AG.]:** On the 14th October 2011, Martin Myer, a resident of Jonas Road, St. Paul's, Antigua, was going along his daily life when the officers of the Office of the National Drug Control and Money Laundering Control Policy arrested him and shortly after, laid five criminal charges against him for drug trafficking and related offences. These charges saw him eventually being joined with four other men, who were also arrested and charged with drug trafficking and related offences when in a joint 'sting operation' officers of Antigua and Barbuda Defence Force, the Coast Guards and the Office of National Drug and Money Laundering Control Policy ('the defendant'), raided a vessel and a private

dwelling home on the south-eastern side of the island, and discovered more than 16 pounds of cannabis with a street value of US\$6.5 million.

- [2] On the 30th April 2015, flowing from the original complaints, the claimant and the four other men were indicted by the Director of Public Prosecutions of Antigua to stand trial in the High Court, for three offences, namely, Possession of the controlled drug, possession with intent to supply, and drug trafficking.
- [3] The charges against the claimant and some of the men were later discontinued and only one was convicted.
- [4] Throughout all of this, the claimant had asserted his innocence and after the discontinuance of the charges against him, he caused his attorney to write to the defendant, the statutory Authority, which had laid the charges against him in reliance of powers given by the provisions of the Money Laundering (Prevention) Act of 1996, demanding that they compensate him for his wrongful arrest and prosecution. They declined. The defendant, in the responses asserted that it had acted properly and directed the claimant to examine the disclosure material and to consider the statements made by the two of the co-accused.
- [5] He was not happy about this and on the 11th March 2020, he filed this claim pursuant to Part 8.1 of 'The Civil Procedure Rules 2000' seeking general damages, aggravated damages, exemplary damages and special damages in the sum of \$1,326,900.00 for the tort of malicious prosecution.
- [6] The claimant claims that the defendant had no reasonable or probable cause and the latter acted maliciously when it laid these five criminal charges against him.
- [7] He asserted that he was an innocent self-employed carpenter and a boat captain and that the arrest and charged caused him considerable distress, losses, damages. He pleaded and gave evidence that not only that he lost his employment and incurred some \$1,326,900.00 in special damages, but that he

had also lost his wife who divorced him because he was unable to provide financially for her. He seeks aggravated and exemplary damages for the tortious conduct of the defendant.

[8] This matter was defended on the basis that two of the other men who were arrested and charged, implicated the claimant in relation to the charges made, which provided adequate prima facie evidence to commit the claimant to the High Court for trial, which caused the Defendant to have reasonable belief that the claimant was involved in a criminal activity.

[9] The defendant further averred that the proceedings against the claimant were discontinued only as a result of the refusal of the witness who gave this witness statement refusal to give sworn evidence at the trial. The defendant therefore averred that at all material times it acted without malice and with reasonable and probable cause for proffering the charges and subsequent prosecution of the claimant in the bona fide belief that the defendant was discharging a public duty.

The Legal Issues

[10] The claimant claims that this is a case of malicious prosecution. The primary question therefore for the court is whether the elements of the tort of malicious prosecution have been proven.

[11] The critical questions which are raised if whether the defendant had reasonable and probable cause in laying charges against the claimant for the offences of unlawful possession, importation of cannabis, possession of cannabis, drug trafficking and being concerned in the supply of cannabis? The court must further consider whether the defendant's actions of laying such charges against the claimant and the prosecution of the claimant was actuated by malice?

[12] If these questions are answered in the affirmative, the issue then for the court to consider is whether the claimant is entitled to compensatory relief, general damages and special damages for his malicious prosecution by the defendant?

Further, whether the award that might be made will include an award of exemplary damages and aggravated damages?

Analysis and Findings

The law on the Tort of Malicious Prosecution

[13] The ingredients of the tort of malicious prosecution are well established. As our Court of Appeal has accepted,

*"In an action for malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say that the law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious. The onus of proving every one of these is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the tort."*¹

[14] The claimant must prove each and every ingredient of the tort, so that it would not be sufficient to prove the lack of 'reasonable and probable cause' but fail to prove malice. As Lord Eldon L.C. in the Scottish case **William Young & Co. v. Leven**², stated at page 210:

*"if a man's malice is as foul and black as it can be represented, but yet if he has probable cause for the complaint, he cannot be liable to any action for a malicious prosecution; and on the one hand, if it has been found that he has no probable cause of complaint, but if his mind is devoid of malice, neither can an action be maintained ..."*³

¹ This statement of the ingredients of malicious prosecution is to be found in Clerk and Lindsell on Torts 17th Ed at paragraph 15-05 and was endorsed by the OECS Court of Appeal as representing an accurate statement of the law. See for instance, the case of Sylvanus Leslie v Ryan Ollivierre Civil Appeal No. 27 of 2001.

² **William Young & Co. v. Leven (1822) 1 Sh. 179**

³ Quoted with approval in Brian Gibbs and Others v John Mitchell [1998] A.C. 786;

- [15] The burden of proof with regards to each ingredient of this tort is on the claimant. Earlier cases made it clear that:

“If on the trial of such an action the plaintiff were to offer no other evidence than that the defendant caused him to be indicted even from the most vindictive motives the defendant would be entitled to a verdict: Mitchell v Jenkins (1) 5 B & Ad at p 594, per PARKE, J”⁴

- [16] A claimant therefore must plead and prove that the defendant did not have grounds to reasonably believe that former was guilty of a criminal charge. Where the claimant pleads and presents even ‘slight’ evidence of the absence of a belief or the lack of reasonable and probable cause, which if not answered would prove the ingredients, a tactical burden shifts to the defendant to equally present evidence of his belief which is grounded on reasonable and probable cause.⁵

- [17] This point is well made in **Brian Gibbs and Others v John Mitchell** where the Privy Council stated:

“Proof that there was an absence of reasonable and probable cause involves proving a negative. So it is clear that slight evidence to show that there was no reasonable or probable cause will be enough to shift the burden of proving reasonable and probable cause on to the defendant. It is also well settled that proof of the absence of reasonable and probable cause may itself be evidence of malice.”

- [18] In **Brian Gibbs and Others v John Mitchell**, the defendants had sought and obtained a warrant to search the claimant’s home on the basis that there were reasonable grounds for suspecting that the claimant, who was a bank manager, had carried on or had benefited from drug trafficking and that material likely to be of substantial value to the investigation would be found. The search warrant

⁴ Hawkins J stated in *Hicks v Faulkner* [1881-85] All ER Rep 187 at page 190

⁵ *Brian Gibbs and Others v John Mitchell* [1998] A.C. 786; *Abrath v North Eastern Rly Co* (1883) 11 QBD 440 at 456, CA, per Bowen LJ cited with approval by Halsbury’s Laws of England Volume 97A (2001) para. 322.

was executed but nothing of value to the investigation was found. In the meantime, the claimant had been constructively dismissed by the bank. The claimant brought a claim in malicious prosecution contending that the defendants 'had wrongfully and maliciously procured the grant of the search warrants and had no reasonable or probable cause for suspecting that the plaintiff had carried on or had benefited from drug trafficking or that property of value to any investigation would be found.' The claimant gave evidence of his personal circumstances 'which did not suggest affluence disproportionate to his income, and his unsuccessful attempts to ascertain the basis for the warrant applications, and he gave unchallenged testimony that he had never done anything which could have caused anyone to suspect him of carrying on or benefiting from drug trafficking or to suspect that any material relating thereto would be in his home or office. The defendants merely denied the plaintiffs allegations and, apart from producing the information and warrants, called no evidence.' The High Court dismissed the claim as showing no cause of action, but both the Court of Appeal reversed and the Privy Council later affirmed the Court of Appeal's decision, holding that:

"...where defendants elected to give no evidence and to contend that the plaintiff's case was not proved, their silence in circumstances in which they would be expected to answer might convert evidence tending to establish the plaintiff's claim into proof; that there was a circumstantial case that there were no grounds on which the plaintiff could reasonably have been suspected of drug trafficking or benefiting therefrom; that, in the circumstances, the plaintiff's case called for an answer and the first defendant's silence supported the inferences that he did not have sufficient grounds on which to suspect that the plaintiff had carried on or had benefited from drug trafficking and had used the court process for an improper purpose; and that, accordingly, the Court of Appeal had been entitled to find that the first defendant had acted with malice and, since damage was not contested, that the plaintiff had proved all the elements of the tort."

[19] Much of this case will turn on whether there is reasonable and probable cause and or whether the prosecution was actuated by malice, as there is little doubt, and both sides have agreed, that the defendant has instituted criminal proceedings against the claimant and that these have been determined in favour of the claimant.

Reasonable and Probable Cause

[20] What amounts to 'reasonable and probable cause'? This element was defined in the case of **Hicks v Faulkner**⁶. And now represents the current state of the law as stated in Halsbury's Laws of England, Volume. 45(2) as follows:

"Reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

[21] As Hawkins J in **Hicks v Faulkner** stated:

"The question of reasonable and probable cause depends in all cases not upon the actual existence, but upon the reasonable bona fide belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of... No matter whether the belief arises out of the recollection and memory of the accuser, out of information furnished to him by another... The distinction between facts necessary to establish actual guilt and those required to establish a reasonable bona fide belief in guilt should never be lost sight of considering such case as I am now discussing."

⁶ **Hicks v Faulkner** [1881] AER 1987 at 19

Many facts admissible to prove the latter would be wholly inadmissible to prove the former.”

- [22] In a case like this where the prosecutor is the law enforcement – in this case, the defendant Authority, the question is whether this entity had that belief that there was reasonable and probable cause and that that belief was reasonably held.
- [23] In **Everette Davis**, I had occasion to visit this issue of what may amount to ‘reasonable and probable cause’, and then I held the view that having regards to the authorities that when law enforcement prefers a charge against a person for a criminal offence, reasonable grounds would require some admissible evidence to prove the charge and not be based on hearsay. I continue to hold the view that this represents the law. This case, however, brings that discussion to a different level. It is now necessary to set out those relevant facts which were found by this Court before I return and complete this discussions.
- [24] There is no doubt that on the 13th day of October of 2013, the officers of the defendant had carried on an investigation into reports of a large quantity of illicit drugs (cannabis) being imported into Antigua and Barbuda by boat which had resulted in a ‘drugs raid’ on the home of one David Horsford. A large quantity of cannabis was found at his home and Horsford and his son were arrested.
- [25] That same day, Horsford gave a statement to the defendant. He stated inter alia that on the 10th October 2011 he received a call from someone he knew as ‘third World’. In that statement he said that ‘Third World’ told him he was going to Barbuda and asked him to follow along with his boat in case ‘Third World’s’ boat ‘cut out’. He said that he followed Third World in his boat and they got to a boat in Barbuda where he saw a larger boat and he saw Martin Meyer of All Saint’s. He said Martin Meyer was ‘driving the boat’ and there were two other men on board. He said that the men started throwing bags onto his boat. There were many bags which he said, smelt of marijuana. He said that he brought the bags back to Antigua and they were placed in a van and he and the two men took them to his home. Third World asked him to keep the bags, and so he placed

them outside the fence near his gate. He said, the police later turned up and seized all the bags. These bags were all shown to contain marijuana with a street value of \$6.5 million.

[26] The defendant's officer thereafter executed a search on the home of the claimant, and he was arrested. He gave a statement to the police on the 17th October 2011. In that statement he denied being involved in any criminal activity.

[27] On the closing written submissions, learned counsel on behalf of the claimant contended that the Horsford's statement was not sufficient to ground any reasonable belief that the claimant was involved in criminal activities. Learned Counsel sought to make two points. First, learned counsel contended that as far as Horsford's statement is concerned, 'it is critical to note that no description of Mr. Meyer is given'. He pointed out that when the police arrested and charged the claimant on the 17th October 2011, there was no other evidence directly implicating the claimant as the other statement which was relied on to so implicate the claimant was taken in November 2011. Learned Counsel was therefore suggesting that there would therefore be no basis to have charged the claimant on the 17th October 2011.

[28] Second, learned counsel contended on the 17th October 2011, Horsford had been already charged for the same criminal activity and therefore he was a co-accused, and since the evidence of a co-accused is inadmissible against an accused, such inadmissible evidence could not ground a good faith belief that there was reasonable and probable grounds that the claimant was guilty of drug related crimes. Learned Counsel relied on my judgment in **Everette Davis** to make this point.

[29] I disagree with learned counsel on both of these contentions.

[30] As far as the first point is concerned, an examination of Horsford's statement reveals that Horsford did in fact speak to 'Martin Meyer of All Saints'. He also

spoke of a "Third World" whose surname was 'Simon' who is from 'English Harbour'. He also speaks about 'Martin Meyer' 'driving' a '30 to 40 feet boat'.

[31] The claimant is indeed from All Saints, and by his own admission, he knows one 'Simon' of English Harbour'. The Claimant also spoke of recently journeying to Jamaica and back by boat, some 'six weeks' previously and stayed there for a weekend for medical reasons. He said that since then he has not left Antigua.

[32] Now, this is considerable circumstantial evidence to lead the relevant officers of the defendant whose evidence I believe that they were of the view that this claimant was the 'Martin Meyer' who Horsford was speaking of. Was it not reasonable for the relevant officers to believe that it was this claimant, a man who was a boat captain, who knew 'Third World' of English Harbour, who had gone to Jamaica recently, was the very same man who Horsford was speaking about. I find that the combined effect of Horsford's statement and the claimant's own statement provided a reasonable basis for the view that it was the claimant that Horsford was speaking about – of course this not being a question as the truthfulness of the statement.

[33] If the description of the 'Martin Meyer' could have been in doubt, that was subsequently confirmed as, very shortly thereafter, Horsford himself was together in court with this claimant. Nothing was made of Horsford's identification as to which 'Martin Meyer' he was speaking about. Later, one Trevor Messiah, another co-accused, would also give a statement which spoke again to a 'Martin Meyers'

[34] As far as the second submission is concerned, I believe that Learned Counsel has misconstrued the effect of my judgment in **Everette Davis**. What I said was: 'No criminal charge can be laid against anyone unless the police ground their suspicion that the person has committed that offence on admissible evidence.'
[my emphasis]

[35] In that case, there was absolutely no evidence, hearsay or otherwise, presently in the hands of the police or about to be obtained, which supported the charging

of Davis for any offence. Additionally, the circumstances of that case did not require me to go any further but to say that charges must be laid on admissible evidence.

[36] The police or other law enforcement agency with powers of arrest and charge, are obliged to consider and act on evidence, which is capable of being admissible, when making a determination as to whether to charge a person for a criminal offence.

[37] As far as the question of the evidence of a co-accused is concerned, there are several points to be made here. It is too simplistic an analysis to contend that where all that is available to the law enforcement officer is deciding to lay a charge is a written statement from a person also accused of the same crime, that the matters contained in that statement is ipso facto inadmissible. That cannot be right.

[38] On the question of a decision to charge someone with a criminal offence, prosecutors in Antigua and Barbuda are to be guided by the 'Guide for Prosecutors'⁷ and the relevant principles of law which apply to the charging of offenders. That 'Guide' advises that a prosecutor should only lay a criminal charge against someone when there is 'sufficient evidence' to 'provide a realistic prospect of conviction' of the person to be charged. The prosecutor must consider the credibility of the evidence and whether the evidence may be rendered inadmissible for any reason. In my view a good faith belief by a prosecutor must require that he or she engage this process.

[39] In this case, it was not a question of some sort of anonymous evidence or evidence which could only be in the inadmissible category. There are several ways in which the matters contained in the statement of a person charged together with accused, may be presented to a court in a manner which makes it admissible. First, the prosecution who takes over the case, may seek separate

⁷ Published by the Director of Prosecution and effective from 1st January 2013. It is not expected to be an exhaustive document, nor does it attempt to lay down rules of law. It generally follows the UK Code of Conduct for Prosecutors.

trials. In such a case, the evidence is clearly admissible, and the co-accused would be summoned as a witness and would be compellable. Second, the co-accused may himself elect to give evidence during a joint trial in which event, all he says in the witness box will become admissible evidence against the accused. Third, the prosecution may engage the co-accused in a plea bargain exercise to secure his testimony against the accused. This is often one of the underlying rationale for plea bargaining.

[40] The question of 'admissibility' is always a relevant and important consideration when making a decision whether to lay a criminal charge. However, once the evidence is available, the law enforcement officer who is making a decision to lay the charge is not barred simply because the evidence comes from the lips of a co-accused. It surely does not prevent him from forming a good faith belief that the accused is likely guilty of the offence which the charge contemplates. The claimant must prove that the defendant did not believe that there was reasonable and probable cause to believe that he was probably guilty of the drug trafficking offence with which he was charged. I am of the view that the evidence of Horsford, if believed, would have led any reasonable person to believe that the claimant was probably guilty of those offence. It was Horsford who caused the claimant to be charged and prosecuted. Trevor Waites was also a reason why this prosecution was not abandoned. If there is really a case for malicious prosecution, it surely could be brought against one or both of these men. The defendant in this case simply did its job. What the defendant had was evidence which was capable of being admissible evidence.

[41] Even in all of this, this vexed question as to whether the defendant could have maintained this prosecution in all of the years seemingly yet to decide how to lead the evidence brings me very close to finding that the defendant in continuing this prosecution for years without clearly having admissible (or making sure that their evidence was admissible), that the claimant is right on this point. There is, however, nothing before me as the reasons for the delay. If the delay were as a result of the deliberate conduct of the Defendant, it might be a relevant factor in considering this issue. I am, however, unable to lay the blame for the delay at the feet of anyone. In any event, I do find that the

defendant did intend to persuade one of the co-accused to testify. If this were possible, I find that 'reasonable and probable cause' did not disappear from any delay in this case.

- [42] That would dispose of this matter, but in the circumstances of this case, I feel compelled to address the issue of 'malice'.

Malice

- [43] It is for the claimant to prove, that in setting the wheels of the prosecution in motion, the defendant was actuated by 'malice in fact', that is, with a motive, other with a legitimate desire to bring the claimant to justice. As Lord Devlin stated in **Glinski v McIver**⁸

"Malice, it is agreed, covers not only spite and ill-will but also any motive other than a desire to bring a criminal to justice."

- [44] Again, the learning in **Hicks v Faulkner**⁹ continues to be good law. As was stated:

"It is true as a general proposition that want of probable cause is evidence of malice, but this general proposition is apt to be misunderstood. ...The malice necessary to be established is not mere malice in law such as may be assumed from the intentional doing of a wrongful act: see **Bromage v Prosser**¹⁰, per Bayley, J; but malice in fact, malus animus, indicating that the party was actuated either by spite or ill-will towards an individual or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody. In order to arrive at a conclusion upon this question, the jury is to take into consideration all the circumstances of the case, and to form their own opinion upon them, uninfluenced by any opinion of the

⁸ Glinski vs McIver

⁹ **Hicks v Faulkner** [1881] 'ibid'

¹⁰ **Bromage v Prosser** (4) 4 B & C at p 255

judge, unless that opinion accords with their own view. If among these no reasonable ground for the prosecution, they may, though by no means bound to do so, well think that it must have been dictated by some sinister motive on the part of the person who instituted it. Absence of reasonable cause to be evidence of malice must be absence of such cause in the opinion of the jury themselves, and I do not think they could be properly told to consider the opinion of the judge upon that point, if it differed from their own as it possibly might, and in some cases probably would, as evidence for their consideration in determining whether there was malice or not. In no case, however, will their finding relieve the judge of the duty of determining for himself the question of reasonable cause. As an essential element of the case, want of reasonable cause is for the judge alone to determine upon the facts found for the jury. As evidence of malice, it is a question wholly for the jury, who, even if they should think there was want of probable cause, might nevertheless think that the defendant acted honestly and without ill-will, or any other motive or desire than to do what he bona fide believed to be right, and purely in the interest of justice, in which case they ought not, in my opinion, to find the existence of malice: see **Mitchell v Jenkins**,¹¹ **Turner v Ambler**¹²; **Lister v Perryman**.¹³

[45] Today, it is the judge who decides both the question of ‘reasonable and probable cause’ and ‘malice’, but the learning remains relevant. A court could find that there was an absence of reasonable and probable cause but yet go on to find that the defendant ‘*acted honestly and without ill will, or any other motive or desire than to do what he bona fide believed to be right, and purely in the interests of justice*’.

[46] The defendant had evidence in this case, capable of being admissible which justified the laying of charges. But even if I were to have found that there was no reasonable and probable cause, I find as a matter of fact that in this case,

¹¹ **Mitchell v Jenkins** (1);

¹² **Turner v Ambler** (3) 10 QB at p 254

¹³ **Lister v Perryman** (2) LR 4 HL at p 538, per Lord Westbury

Officers Calvin Browne and Trevor Walker acted in good faith and honestly held the belief that there was reasonable and probable cause to charge the claimant.

[47] Further, there was no evidence presented of any ulterior motive on either of these men's part or on the part of any of the other officers of the defendant's Authority. I therefore find that the defendant acted solely with the legitimate desire to bring a person to justice in relation to whom there was reasonable and probable cause to prosecute.

[48] In the circumstances, this claim is dismissed with prescribed costs to the defendant.

[49] The court is grateful to the parties for their patience.

Darshan Ramdhani

High Court Judge (AG.)

By The Court

Registrar