

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(Civil)

SAINT LUCIA

SLUHCV2015/0669

BETWEEN:

HAMILTON EDWARD

Claimant

and

THE ATTORNEY GENERAL

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Horace Fraser for the Claimant

Ms. Kozel Creese, Crown Counsel for the Defendant

Claimants present

Corporal Hugh Darcheville, PC Vanglise Victorin and PC Ed Emmanuel present

2017: January 26;
March 1.

Damages for trespass-whether police had reasonable grounds to detain the claimant's bus-whether detention of claimant's bus lawful-whether detention of the vehicle necessary to prove offence of possession of controlled drugs-measure of damages recoverable where special damages not proven

JUDGMENT

- [1] **CENAC-PHULGENCE, J:** This case raises a very important question as to the right of the police to detain property of an accused person and the circumstances in which such detention can be held to be lawful or justified.

Background

- [2] On the evening of 20th May 2015, Mr. Hamilton Edward ("Mr. Edward") parked his minibus, registration number TX284 ("the bus") at the Rodney Bay Marina for the night. On that same night, police officers conducted a search of the bus and discovered a Jansport backpack containing nine rectangular bars each wrapped in black and clear wrapping believed to be drugs. The bus and the Jansport backpack and its contents and documents discovered in the bus were detained by the police.
- [3] On his return the following morning, Mr. Edward discovered that his bus was missing and after making enquiries discovered that the bus had been taken by the police. Mr. Edward reported to the Police Station on 29th May 2015 where he was charged in the presence of his lawyer with two counts of possession of controlled drugs and possession with intent to supply. He made a request through his lawyer for the release of his bus on the day when he was arrested and subsequently by letter to the Director of Public Prosecutions but the bus was not released to him until 4th August 2015 after he made an application to the criminal court. The charges against Mr. Edward were dismissed for want of prosecution at some point after August 2015. Mr. Edward claims damages for trespass caused by the unlawful detention of his bus by PC 295 Victorin, a servant of the Crown.

[4] The Attorney General says that the detention of the bus was lawful and did not amount to trespass as there was good reason for the police detaining the bus. The Attorney General denies that Mr. Edward is entitled to any of the relief claimed.

[5] The issues for the Court's determination are:

- (a) Whether the Police had reasonable grounds for detaining Mr. Edward's bus.
- (b) Whether the detention of the bus was initially lawful but became
- (c) unlawful by being detained after 29th May 2015. If the detention is unlawful, what if any damages is Mr. Edward entitled to?

I will address issues (a) and (b) together.

(a) Whether the Police had reasonable grounds for detaining Mr. Edward's bus.

(b) Whether the detention of the bus was initially lawful but became unlawful by being detained for an unreasonably longer time than was necessary.

[6] Mr. Edward does not dispute that between 20th May 2015 and 29th May 2015 when he was charged, that the police had a lawful right to detain the vehicle for the purposes of investigation. His contention is that once charged on 29th May 2015, the vehicle should have been released to the claimant as there was no reason for detaining it further. It is clear from his submissions that there could be no action in trespass for that period. So the question is whether from 29th May 2015 onwards, the detention of Mr. Edward's bus was unlawful.

[7] Learned counsel for Mr. Edward, Mr. Fraser argued that the court's duty is to see whether the police officers have justified the detention of the vehicle in law. He submitted that the evidence from Corporal Darcheville was that the police knew that the vehicle was not stolen before they charged him. Corporal Darcheville also testified that the bus was detained pending any report of it being stolen or missing.

This is buttressed by the fact that in his evidence, PC Victorin alluded to recovering documents from the minibus which included an insurance certificate which showed Mr. Edward as the insured. The evidence given by both officers indicates that they were satisfied on 29th May 2015 that the bus belonged to Mr. Edward.

[8] Mr. Fraser submitted that PC Victorin had not provided any acceptable reason for detaining the bus. Counsel referred to section 634 of the **Criminal Code**¹ in support of his contention that the first duty of the police officer was to get an order from the court to be able to detain the vehicle and he said the fact that this was not done made the detention of the vehicle unlawful.

[9] Section 634 headed “Report by police to Court as to property taken” states:
“If upon the arrest of any person charged with any offence, property is taken from him or her, the Police shall make a report to the Court of the fact that the property has been taken from that person and of the particulars of the property.”

[10] Learned Counsel, Ms. Creese, argued I think correctly that section 634 did not say that an order was required to take property but more importantly applying statutory interpretation; she argued that the sections that precede this section deal with search warrants and this case did not concern any search warrant having been issued. Ms. Creese argued that the case fell squarely under the **Drugs (Prevention of Misuse) Act**² (“Drugs Act”).

[11] Mr. Fraser argued that section 38 of the Drugs Act does not permit the police to detain property speculating that they will secure a conviction and then bring an action for forfeiture. He submitted that a conviction must be secured and then the procedure for forfeiture can be invoked.

¹ Cap. 3.01, Revised Laws of Saint Lucia 2008.

² Cap. 3.02, Revised Laws of Saint Lucia 2008.

- [12] Ms. Creese argued that section 33(2)(b) and (c) of the Drugs Act gives the police the right to seize and detain. She submitted that the bus is where the drugs were found making it material to the case and as such the police were well within their right to seize and detain it for the purposes of proceedings under the Act. Counsel further argued that section 38 of the Act deals with forfeiture of property if a conviction is obtained and so the police detained the vehicle for the purposes of section 38 as well.
- [13] There appear to be three legislative regimes by which the police are specifically empowered to seize and detain property. I have already looked at the procedure under section 634 of the **Criminal Code** and have determined that this section is not relevant to the facts of this case.
- [14] Section 33(2)(c) of the Drugs Act provides that if a police officer has reasonable grounds to suspect that a person is in possession of a controlled drug, the police officer may search any ship, vessel, boat, aircraft, vehicle or other means of conveyance of any description in which the police officer suspects that the drug may be found, or seize and detain for the purposes of proceedings under the Drugs Act, anything found in the course of the search which appears to the police officer to be evidence of an offence under the Drugs Act.
- [15] Section 38(1) of the Drugs Act provides that **where a person is convicted of an offence under this Act other than a drug trafficking offence** the court shall order forfeiture to the Government of Saint Lucia of any opium pipe or other article or the controlled drug in respect of which the offence was committed and all receptacles of any kind whatsoever found containing the controlled drug and **any ship, vessel, boat, aircraft, vehicle or other means of conveyance of any description, proved to have contained the opium pipe or other article or**

controlled drug or anything shown to the satisfaction of the court to relate to the offence.

- [16] Section 38(6) provides that before making an order for forfeiture the Court must give the owner or agent of the thing to be forfeited an opportunity to show cause why the thing should not be forfeited.
- [17] Section 4 of the **Proceeds of Crime Act**³ also makes provision for the Director of Public Prosecutions to apply to the Court where a person is convicted of a criminal conduct for a forfeiture or confiscation order.
- [18] Section 33 of the Drugs Act allows for the seizure and detention of anything found in the course of the search which appears to the police officer **to be evidence of an offence** under the Act. So the critical question to be answered is whether the bus which was detained in this case was evidence of the offence of possession of controlled drugs or of possession of controlled drugs with intent to supply. PC Victorin in his evidence clearly stated on more than one occasion that the bus was a part of the investigation and it was evidence.
- [19] Counsel, Ms. Creese also submitted that the vehicle was directly connected to the offences with which Mr. Edward had been charged as it was the conveyance on which the drugs were found at the time. She submitted that Mr. Edward was not in physical possession of the bus at the time the drugs were found. That fact is not disputed. However, it was very clear from the testimony of PC Victorin that documents were recovered from the bus on the night when the vehicle was detained and that documentary evidence showed Mr. Edward as the insured on a certificate of insurance. Also, on 29th May 2015 when Mr. Edward went to the Gros Islet Police Station, he would have identified the bus as his. The certificate obtained from the Ministry of Infrastructure which PC Victorin testified he received

³ Cap. 3.04, Revised Laws of Saint Lucia, 2008.

in October 2015 would have just been to confirm the position and to be able to present proof of ownership to the Court.

[20] Counsel, Mr. Fraser submitted that the detention of the vehicle had to be linked to the charge. He submitted that it is not an element of possession and so there had to be an ascertainable ground for its detention. He pointed to the fact that in his evidence PC Victorin did not point to any specific authority which gave the police the right to detain the vehicle beyond 29th May 2015 but instead spoke of protocol and standard procedure which is not law.

[21] In his testimony, PC Victorin alluded to the fact that the bus had to be detained until the investigation was completed and he said emphatically more than once in his testimony that the investigation had not been concluded. When asked what more was to be done, he responded that he had to obtain the Analyst's Certificate and statements from the Justice of the Peace, Corporal Darcheville and PC291 Emmanuel. PC Victorin in cross-examination said that he could not release the bus until he had gotten these statements. PC Victorin gave evidence that it was protocol that the bus had to be kept and when asked in cross-examination what informed him that a police officer had the right to detain property after he had charged Mr. Edward, he responded that it was standard procedure.

[22] When asked in cross-examination what element of possession was the bus required to prove, PC Victorin responded that the bus was one of the main sources of the evidence because the drugs were found on it and it was one of the key parts of his evidence. When asked further whether there was anything he was required to do after he applied for the analyst's certificate, PC Victorin said he could not recall but in relation to investigation of the offence, it was only the obtaining of the three statements spoken of above which he referred to.

- [23] In order to prove possession, it would have to be shown that the person charged had physical possession or control of the drugs, the substance found was indeed a controlled drug and the person charged had knowledge of possession of the item even if he did not know it was a controlled drug. Section 6(4) of the **Criminal Code** defines possession and states that it not only refers to having in one's own physical possession, but also knowingly having in the actual possession or custody of any other person or in any place (whether belonging to or occupied by oneself or not) for the use and benefit of oneself or of any other person. It is unclear how keeping the bus would assist in proving the charge beyond being able to show that it belonged to Mr. Edward. To my mind, the physical bus was not needed to prove that fact.
- [24] PC Victorin gave evidence and counsel, Ms. Creese submitted that the bus was kept because it was the intention to pursue the vehicle's detention under section 38 of the Drugs Act. This section however seems to be engaged after conviction. The section clearly contemplates a procedure where an application must be made to justify the forfeiture and also to afford the person who owns the property to be forfeited an opportunity to show cause why the property should not be forfeited. Also of interest is that section 38 refers to 'where a person is convicted of an offence other than a drug trafficking offence, the court shall order forfeiture ...' Drug trafficking offence is defined in section 2 of the Drugs Act as 'any of the following— (a) an offence under section 6(2), 6(3), 8(2) or 8(3)'. An offence under section 6(2) and (3) is a reference to production of a controlled drug and supply or offer to supply a controlled drug. An offence under section 8(2) and (3) is a reference to possession of a controlled drug and possession of a controlled drug with intent to supply. It would seem therefore that section 38 would not have been available to the police even if they had secured a conviction in this case.

- [25] Corporal Darcheville's evidence is very telling as he said in his testimony that he had discussions with PC Victorin not in relation to forfeiture but in relation to Proceeds of Crime investigation. It would appear that if part of the reason the vehicle was detained was to pursue proceedings under section 38 of the Drugs Act, then that would not be a good reason since (1) no conviction of Mr. Edward had been obtained and (2) the section would not have been available given the charges.
- [26] As stated previously, PC Victorin gave evidence that in order to complete his investigation he needed the analyst's certificate. Counsel, Ms. Creese submitted that the police had the right to retain material that has been involved in a serious criminal offence and the offence with which the claimant was charged was a serious offence. I cannot see why the detention of the bus was necessary whilst the analyst's certificate was being procured. The analyst would have been concerned with the quality of the substance presented to him/her and not the location or receptacle in which it was found.
- [27] Counsel, Mr. Fraser submitted that there was no need to detain the vehicle as PC Emmanuel gave evidence and supported the fact that photographs were taken of the backpack when it was found in the bus, the contents of the backpack, of the substance found in the rectangular bars and of the interior and exterior of the vehicle. He submitted that the photographs could have been used as evidence of the existence of the bus and the physical bus was not necessary. It is clear that at trial, the bus would not be brought physically to court to prove that it belonged to the claimant. It would be the certificate from Ministry of Infrastructure which would be tendered and this would be bolstered by the photographs of the vehicle showing the registration number and type of vehicle.

- [28] The question therefore is whether the police have shown that there was any reasonable grounds or right to detain the vehicle beyond 29th May 2015 when Mr. Edward was charged.
- [29] It is clear from the evidence of PC Victorin that there seems to be some uncertainty as to the actual procedure to be adopted. PC Victorin said in his evidence that he got instructions from his supervisor, Corporal Darcheville to detain the bus. Corporal Darcheville denied that these were his instructions to PC Victorin and instead said he had discussions with PC Victorin concerning Proceeds of Crime investigation and the period to which he referred to when he spoke of investigations and detention was when they were seeking to ascertain whether the vehicle had been stolen. His evidence was clear that he did not think that the bus should have been detained beyond the period after Mr. Edward was charged. PC Victorin's evidence was less than convincing as he did not appear to be certain when he gave his answers and appeared at times to be attempting to avoid the questions. He could not point to any law which authorised the police to simply deprive someone of possession of their vehicle without good cause.
- [30] The right to seize and detain must always be balanced with an individual's right to use and enjoyment of his property which must not be displaced except for good cause and as provided by the law. Protocol and procedure can indeed be unlawful if it does not find that balance. Both counsel referred to the case of **Malone v Metropolitan Police Commissioner**,⁴ where it was held that the police had no power to retain property lawfully seized from an accused person if it was not stolen or the subject matter of any charges, unless the detention was justified on ascertainable grounds. In that case which dealt with seizure of sums of money for which there was no charge laid against the plaintiff, the court made it clear that given the circumstances of that case, the detention was justified. However, the court held further that

⁴ [1978] 3 WLR 936.

“If the money could not have been retained as material evidence in the criminal trial, the (police) would not have been entitled to retain it for the purpose of making it available in the event of the plaintiff’s conviction to satisfy an order under section 28 (i) (c) of the Theft Act 1968 or under section 35 or 43 of the Powers of Criminal Courts Act 1973 because none of those sections conferred power on the police to retain money not the subject of any charge which had been found in the possession of an accused at the time of his arrest.”

[31] What this case suggests is that the police cannot simply detain property with the hope that having secured a conviction, it would be available for the purposes of forfeiture or proceeds of crime procedures. That could never be what is contemplated by the law as this would mean that a man could be deprived of his property for however long a matter took to come on for trial. What would happen if he is acquitted or the charges are dropped? His property would then be returned to him because there would be no question of any forfeiture or proceeds of crime procedures being pursued but he would have been deprived of the use of his property for all of that time.

[32] In **Malone**, Stephenson LJ said further

“The common law can develop in many ways, but I would accept it as clear law that, generally speaking, the right or power to deprive a defendant of his property even for a time, whether in criminal or in civil proceedings, for the purpose of punishing him by forfeiture or compensating the victim of his wrongdoing by any form of restitution can only be conferred by express and unambiguous statutory provisions.”⁵

[33] Stephenson LJ at page 953 said:

“It seems to me that the line of authorities ... show **that there is no general power in the police, when they have lawfully seized property which is thereafter not the subject of any charge and is clearly shown not to have been stolen, to retain that property as against the**

⁵ Ibid, at page 946

person entitled to possession of it against some uncertain future contingency. The police must be able to justify the retention of such property in such circumstances upon some clearly ascertainable ground. To my mind the only question in this case is whether it can be predicted with sufficient certainty that under no circumstances irrespective of the fact that that money was not exhibited in the committal proceedings, will it become necessary to adduce that money in evidence at the trial which starts next month, so that it can now, without risk to the administration of justice, be safely returned to the plaintiff. If it became necessary for the prosecution to adduce that money in evidence, it would obviously gravely hamper the administration of justice if that money had been handed back and spent, so that it was no longer available to be put in evidence whenever required.” (my emphasis)

- [34] Counsel, Ms. Creese referred to the case of **Ghani v Jones**⁶ and submitted that the principles laid down in that case were applicable to this case even if in **Ghani**, no one had been charged or arrested for the offence. In **Ghani**, the following principles were stated⁷:

“We have to consider, on the one hand, the freedom of the individual his privacy and his possessions are not to be invaded except for the most compelling reasons. On the other hand, we have to consider the interest of society at large in finding out wrongdoers and repressing crime. Honest citizens should help the police and not hinder them in their efforts to track down criminals. Balancing these interests, I should have thought that, in order to justify the taking of an article, when no man has been arrested or charged, these requisites must be satisfied:

First: The police officers must have reasonable grounds for believing that a serious offence has been committed - so serious that it is of the first importance that the offenders should be caught and brought to justice.

Second: The police officers must have reasonable grounds for believing that the article in question is either the fruit of the crime (as in the case of stolen goods) or is the instrument by which the crime was committed (as in the case of the axe used by the murderer) or is material evidence to prove the commission of the crime (as in the case of the car used by a bank raider or the saucer used by a train robber).

⁶ [1970] 1 QB 693.

⁷ Ibid, at page 708-709.

Third: The police officers must have reasonable grounds to believe that the person in possession of it has himself committed the crime, or is implicated in it, or is accessory to it, or at any rate his refusal must be quite unreasonable.

***Fourth:* The police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice, it should be made and the original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned.**

Finally: The lawfulness of the conduct of the police must be judged at the time, and not by what happens afterwards.” (my emphasis)

- [35] The critical point is that in **Ghani** investigations were still taking place and there had been no charges laid against anyone. In the case at bar, we have moved beyond that point as Mr. Edward was charged and so **Ghani** is distinguishable from this case. Counsel also referred to the case of **Eric Conliffe v Sergeant Jeffrey Laborde et al**⁸ in which Thom J referred to the Court of Appeal case of **Thakur Jaroo v The Attorney General of Trinidad and Tobago** but I am of the view that neither of these cases assist as the facts in both cases dealt with situations where there had been no charges laid against anyone and so the question was what would be a reasonable time within which the property could be held for the purposes of investigation prior to charges being laid. Clearly, at 29th May 2015 when PC Victorin charged Mr. Edward, he was of the belief that he had gathered sufficient evidence to charge him with the offences. The additional things such as the analyst’s certificate and the statement of ownership from Ministry of Infrastructure were necessary to be able to provide the court with evidence to support the charge.

⁸ SVGHCV2009/0331, delivered 24th August 2011.

- [36] Counsel, Mr. Fraser again reiterated his point that the Attorney General had failed to show that the police had any justifiable reason for detention of the bus or that it was evidence of the offence for which the claimant was charged. Counsel, Ms. Creese submitted that Mr. Edward had failed to show that the police officers kept the vehicle for longer than was necessary to complete their investigation. She said that a relevant consideration was the fact that the Drug Analyst's certificate was still outstanding.
- [37] Taking all the evidence into account, I find that it was not necessary to detain the bus to prove the charge of possession of a controlled drug or possession of a controlled drug with intent to supply nor that the vehicle was connected with the offence or evidence of the commission of an offence. The fact that the court in July 2015 made an order for the release of the vehicle even while the charges were still pending and clearly before PC Victorin obtained the analyst's certificate or the certificate of ownership from Ministry of Infrastructure shows that the vehicle was not considered as material evidence which was necessary to be kept until trial.
- [38] It was the evidence of PC 291 Emmanuel, Scenes of Crime Officer that he took digital images of the bus and surroundings. He said that when PC Victorin opened the vehicle and recovered the backpack he continued to take photos. His testimony was that he took images of the backpack and its contents and of the blocks removed from the backpack. He said that the vehicle was then taken to the Gros Islet Police Station where it was secured and evidence tape placed across the doors of the vehicle and signed by PC Victorin. PC Emmanuel testified that he took digital images of the vehicle and the seals. It is PC Emmanuel's evidence that the digital images taken were copied from the digital camera onto a non-rewritable disc, he made a master copy, additional working copies of the images and kept the master copy in his possession..

[39] Having already concluded that the physical bus was not required to be presented to prove the offence, the photographs of the minibus taken by PC Emmanuel would have been sufficient to identify the bus and show that it was the same as TX284 owned by Mr. Edward to satisfy the aspect of possession. This is supported further by the **Administration of Justice (Miscellaneous Provisions) Act**⁹ which sets out in detail the procedure which is to be adopted for admission of photographs as evidence in a criminal trial. Of interest to the case at bar is section 3(6) which states that unless the accused or his attorney objects to the photographs, *the goods or moveable property shall not be retained for use as evidence once photographs have been taken and the Commissioner of Police shall cause the goods and moveable property to be returned to the owner.*

[40] I therefore find that the Attorney General has failed to show in this case and on these facts that the police officers had any reasonable grounds for detaining Mr. Edward's bus beyond 29th May 2015 and consequently its detention was unlawful. The defendant is therefore liable in trespass for the period 29th May to 4th August 2015.

What if any, damages is Mr. Edward entitled to?

[41] Mr. Edward's claim is for special damages of \$31,450.00, general damages, punitive damages, costs and interest. Counsel, Mr. Fraser rightly stated that special damages must be specifically pleaded and proven. The claim for special damages included loss of income and lawyer's fees for filing of the application before the criminal court for the release of the vehicle. Mr. Fraser submitted that Mr. Edward had stated in his evidence the sum of money he made per day and that in dealing with an income earning chattel, nominal damages would apply if the claimant could not prove his loss. He referred to the cases of **Cyril Dornelly v**

⁹ Cap. 2:11, Revised Laws of Saint Lucia, 2008.

Samuel Fletcher¹⁰ and Attorney General of Antigua v Estate of Cyril Thomas Bufton¹¹ in support of this submission.

[42] Counsel, Ms. Creese argued in relation to the claim for special damages that the claimant was unable to put anything to the court regarding his income. Counsel also argued that the amount claimed as legal costs should not be allowed as these costs have no bearing on the current proceedings. Counsel did not however provide any support for this submission nor did she address the submission as it relates to the award of nominal damages suggested by counsel, Mr. Fraser.

[43] It is trite law that special damages must be specifically pleaded and proven. Mr. Edward has not provided any evidence in support of his testimony that he earns \$300.00 per day driving his minibus. In the case of **Grant v Motilal Moonan Ltd. and anr¹²** at paragraph 377a-c, Bernard CJ said:

“I quite agree that special damage, if sought, must be pleaded and particularized... and that it must be “strictly proved”. In regard to the latter requirement the question which necessarily arises, in my view, is what is the degree of this “strictness” that is required? The nearest answer to this seems to be that which Bowen LJ gave in the leading case, *Ratcliffe v Evans* where he said ([1982] 2 QB at pages 532, 533):

‘In all actions accordingly on the case where damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated *and proved*. As much certainty and particularity must be insisted on, both pleading and proof of damage, *as is reasonable, having regard to the circumstances* and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.” *[emphasis supplied]*

¹⁰ SLUHCVP2009/0033 and 0034, delivered 25th March 2010.

¹¹ ANUHCVP2004/0022, delivered 6th February 2006.

¹² (1988) 43 WIR 372 at 377d and 378.

Bernard CJ continued at paragraph 378j:

“...I must pose a question whether in this country it is unreasonable, in a case of this kind, for a person to be unable to produce bills for clothing, groceries, watches, ...and/or for that matter to remember their time of purchase. To my mind, the answer is clearly in the negative and to expect or to insist upon this is to resort to the “vainest pedantry”.

[44] Mr. Edward gave evidence that he is a taxi driver and this is not disputed. It is generally the case that minibus drivers and taxi drivers do not issue receipts and may not have documentation to show their earnings. In answer to counsel for the defendant, Mr. Edward testified that he issued receipts but when asked if he had anything to show that he made \$300.00 a day, he responded no. It is clear on the evidence that Mr. Edward has not been able to prove his loss of use.

[45] The law is that a claimant may recover nominal damages where he has suffered loss and is unable to prove the special damages claimed. This is supported by the case of **Cyril Dornelly**. In that case Edwards JA referred to the Privy Council decision of **Carlton Greer v Alstons Engineering Sales and Services Ltd.**¹³ in which the Court of Appeal awarded \$5000.00 as nominal damages where special damages had not been proven. On appeal to the Privy Council, it was held that though the loss was unquantified, it is the duty of the court to recognise it by an award that is not out of scale. In the **Buften** case out of Antigua, Barrow JA said at paragraph 24,

“I would, therefore set aside the award that the judge made and substitute an award that is justifiable on the scale of common experience. Because it was the duty of the claimant to produce evidence of value it seems on principle just that the doubts which must attend the effort at arriving at a nominal figure must be resolved against the Buftons, who failed in their

¹³ [2003] UKPC 46.

duty to prove, and in favour of the Government, which should not suffer any disadvantage by the other party's failure."

[46] I wish to adopt wholeheartedly the sentiments expressed by Barrow JA. Mr. Edward has failed to prove his loss and as acknowledged by his counsel, this will only entitle him to an award of nominal damages. Taking all the circumstances of this case into account and what would be considered reasonable in the absence of any evidence from the claimant, I would award \$7,000.00 as nominal damages to the claimant for his loss as a result of the trespass by the defendant taking a rough daily estimate of \$100.00 per day for 6 days a week. Mr. Edward testified that he worked 6 days and took one day a week off. Mr. Edward provided no evidence of general damages and so I make no award under that head.

[47] As regards the claim in relation to legal fees incurred by Mr. Edward, where the costs that the claimant now claims as damages from the defendant have been incurred in previous proceedings between the now claimant and a third party whether that third party be the Crown as prosecutor, the case of **Hammond v Bussey**¹⁴ has held that costs in such actions are recoverable subject to the rules of remoteness of damage.¹⁵

[48] The first question would be whether it was in the contemplation of the parties that the claimant would have had to bring this application for the release of the vehicle. The question is whether the defendant could have reasonably foreseen that the claimant might have been involved in legal proceedings with a third party. In **Morton-Norwich Products v Intercen (No. 2)**,¹⁶ an action for infringement of a patent, the plaintiffs successfully recovered as damages the costs incurred in bringing a discovery action against H.M. Customs since it was held to be reasonably foreseeable to the defendant infringers that the plaintiff would take all

¹⁴ (1888) 20 QBD 70 (CA).

¹⁵ See Mc Gregor on Damages, para 670 (15th edition).

¹⁶ [1981] FSR 337.

necessary steps to find out the extent of the defendant's activities and thereby incur expense in investigation and discovery of the full facts. I find that it was reasonably foreseeable that the claimant would have taken steps to secure the release of his vehicle given that he had made attempts before.

[49] The second question relates to the reasonableness of defending or bringing the previous proceedings. Where the now claimant has been successful in the previous proceedings, it can hardly be said that costs were incurred by him unreasonably and he will therefore recover in respect of them. Can the defendant argue that Mr. Edward's application was not justified? I would hardly say so since

Mr. Edward says that he had tried unsuccessfully to secure the release of his vehicle by having his attorney write to the relevant agency which letter went unanswered. The final question relates to causation. There can be no dispute here as Mr. Edward having to bring his application for the release of his vehicle in the criminal proceedings was a direct result of the police's action in detaining the vehicle unlawfully.

[50] It is therefore the conclusion that Mr. Edward can recover the legal fees incurred in making the application for the release of his vehicle. The costs recoverable will be the costs between solicitor and client which by the invoice produced by the claimant dated 2nd June 2015 amounts to \$3,450.00.

[51] The claimant also claimed punitive damages. However, no evidence was led to support the claim for punitive damages in keeping with the principles as laid down in **Rookes v Barnard**.¹⁷ The claimant has not shown that the defendant's conduct was such that it required such an award to punish the defendant for the wrong that had been committed against him.

¹⁷ [1964] 1 All ER 367.

Conclusion

[52] The defendant is liable in trespass for the period 29th May to 4th August 2015. The order is as follows:

1. Judgment is entered for Mr. Edward for damages in trespass to his bus for the period 29th May to 4th August 2015.
2. Damages are awarded to Mr. Edward in the sum of \$7,000.00 as nominal damages and \$3,450.00 as special damages making a total of \$10,450.00.
3. No award is made for general or punitive damages.
4. Costs to Mr. Edward pursuant to rule 65.5 **Civil Procedure Rules 2000** in the sum of \$1,567.50.

Justice Kimberly Cenac-Phulgence
High Court Judge