

COMMONWEALTH OF THE BAHAMAS

2019/CLE/gen/FP/00110

IN THE SUPREME COURT

Common Law and Equity Division

B E T W E E N:

DALEON BROWN

PLAINTIFF

AND

THE ATTORNEY GENERAL OF THE
COMMONWEALTH OF THE BAHAMAS

DEFENDANT

Before: Mr. R. Dawson Malone
Assistant Registrar (Acting)

Appearances: Mr. Simeon Brown of Counsel for the Plaintiff

Mrs. Eurika Wilkinson-Coccia, Mrs. Anishka Missick,
and Mr. John Trevor Kemp of Counsel for the
Defendant

Hearing Date(s): 10th December, 2020 and 15th January, 2021

Assessment of Damages – Detention in prison after the grant of bail and provision of conditions – No Defence filed -Order 18 Rule 13 RSC – Judgment on Liability by Consent - Damages for breach of Article 19 of the Constitutional – A party is bound by their pleadings - Exemplary and Vindictory Damages

JUDGMENT

Assessment of Damages¹

Malone, Assistant Registrar (Acting):-

Background

1. The Plaintiff commenced this action by way of specially indorsed writ of summons filed on 27th May, 2019 against the Defendant for his detention at Her Majesty's Prison (Bahamas Department of Corrections HMP) ("prison"), between the 11th March, 2019 to 20th March, 2019 on the basis that having obtained bail and the surety requirements having been satisfied the continued detention was unlawful, arbitrary and in contravention to his right to liberty as contained in Article 19 of the Constitution.
2. As to the loss and damage claimed, the Plaintiff pleaded that he suffered mental stress and disorder and loss of earnings.
3. The Plaintiff further pleaded that:-

“ . . . [T]he conduct of the Defendant, his servants or agents in unlawfully detaining the Plaintiff, was arbitrary, oppressive and unconstitutional and the Plaintiff claims exemplary damages.

PARTICULARS

Beginning the 12th day of March, 2019, the Sureties alerted and complained to the Administrative Officers of the Supreme Court, servants and/or agents of the Defendant of the unlawful detention of the Plaintiff and were ignored or considered with

¹ *This matter was heard together with Anthony Dames v Attorney General of The Bahamas, 2019/CLE/gen/FP00111 albeit not consolidated, the matter involved the same Counsel and same issues of law.*

indifference, resulting in the prolonged and continued unlawful detention of the Plaintiff.

4. The Plaintiff concluded his statement of claim seeking the following relief:-

“i. General and Compensatory Damages;

ii. Exemplary and Vindictory Damages;

iii. Interest thereon in such amount and at such rate as the Court deems just;

iv. Costs;”

5. The Defendant entered an appearance on 31st May, 2019 and notwithstanding the same, the Defendant failed to file a Defence.

6. Thereafter on 15th August, 2019 the Plaintiff filed an application seeking leave to enter judgment in default of defence and on the same day the Defendant filed an application for an extension of time to file a Defence.

7. Both applications (i.e. the Plaintiff's application to enter default judgment and the Defendant's extension of time application), were listed before me on 16th October, 2020 and the parties obtained an adjournment to 22nd October, 2020.

8. On the adjourned date, Counsel presented a Consent Order on the following material terms:

“UPON THE PARTIES CONSENTING to the issues herein IT IS HEREBY ORDERED by consent as follows:-

i. **THAT the Defendant is liable herein as claimed in the Statement of Claim of the Plaintiff and that this action be**

referred to a hearing for the Assessment of Damages herein and the Plaintiff be at liberty to enter judgment herein accordingly;

- ii. THAT the parties file and serve Affidavits of Evidence for the hearing of the Assessment of Damages on or before the 20th day of November, A.D., 2020;"

9. The aforesaid Judgment was filed on 28th October, 2020 and the Plaintiff filed his affidavit on 19th November, 2020.
10. A directions hearing was held for the assessment of damages on 23rd November, 2020 by which it was ordered *inter alia* that the Plaintiff's affidavit shall stand as evidence in chief; the Defendant was granted time to file an affidavit in response and the Plaintiff in reply. Moreover, if cross examination is desired, deadlines were given for the filing and service of notices and if no such notice was filed then the witness would not need to appear however if such notice was served, and the witness did not appear it was ordered that the affidavit would be disregarded and or struck out. It was further ordered that if there was no cross examination the closing arguments should be filed and the closing arguments would be heard on 10th December, 2020.
11. The Defendant did not file any affidavits however, on 27th November, 2020 the Defendant filed a Notice to cross examine the Plaintiff in respect of his affidavit which was subsequently withdrawn at the hearing on 10th December, 2020.
12. The assessment of damages took place via Zoom on 10th January, 2021.

The Evidence

13. The Plaintiff by affidavit filed on 19th November, 2020 gave evidence as follows:

1. That I am the Plaintiff in the above-entitled matter and I am represented [SIC] by the Law Firm of Brown Law Chambers Co. Ltd., herein;
2. That on the 7th March, 2019, I appeared in custody before Justice Petra Hanna-Adderley in the Supreme Court at Freeport, on an application for Bail for the charge of "Possession of Firearm with Intent to Endanger Life" and was granted Bail in the sum of \$9,000 with one or two sureties. I was further ordered by the [SIC] Honorable Justice to report to the Bimini Police Station on Friday of each week before the hour of 6:00 pm. As evidence thereof, a copy of a letter from the Office of the Registrar to the Bimini Police Station and copied to the Defendant is attached as an exhibit hereto and marked Exhibit "D.B.1";
3. That thereafter, I was sent by the Court to Her Majesty's Prison at Fox Hill in Nassau and detained until my release on Bail.
4. That on the 11th March, 2019, my Bail as aforementioned was signed in the Supreme Court by the required Sureties so as to enable my release from custody. A copy of the Bail Bond is attached hereto and marked Exhibit "D.B.2".
5. That despite the same, I was continuously detained and imprisoned at the said Prison until the 20th March, 2019, when I was finally released on Bail.
6. That after several days of my not being sent by the Prison to be released on Bail, I alerted Brown Law Chambers, my Attorneys herein and on the 19th March, 2019, my Attorneys informed the Deputy Registrar by letter of my

false imprisonment [SIC] and demanded my release. A copy of this letter is attached hereto and marked Exhibit "D.B.3".

7. That I verily believe that my imprisonment and detention at the said Prison during the period between the signing of my Bail and my release on Bail as aforesaid (9 days) was unlawful and a violation of my constitutional rights as granted by Article 19 of the Constitution of the Bahamas.
8. That further, during my imprisonment at the said Prison, I was detained in filthy, degrading and inhumane conditions in a crowded general area in the southern section of the "Big Jail" and forced to sleep on pieces of cardboard boxes on a concrete floor, with no toilet facilities. I was forced to share an open bucket to excrete, which was often partially filled with faeces and urine from other prisoners.
9. That I verily believe that these conditions at the Prison in which I was detained constitute degrading and inhumane treatment and were in contravention of Article 17 of the Constitution of the Bahamas.
10. That this degrading and inhumane treatment that I have suffered have caused me mental distress and nightmares which continue to affect me, especially in distrusting persons in authority and in viewing them as tyrants.
11. That I swear this Affidavit as evidence of the contents hereof and I seek both tortious and constitutional damages and compensation for the unlawful acts and omissions of the Defendant as described herein;
12. That the statements herein contained are to the best of my knowledge, information and belief, true and correct.

SWORN etc

14. The Defendant having duly withdrawn its notice to cross examine, the facts were deemed admitted by the Defendant and the Defendant elected not to call any witnesses or lead any evidence therefore the matter proceeded to closing arguments.

Submissions of Counsel

15. Counsel for the Plaintiff provided the Court with Skeleton Arguments filed on 7th December, 2020 whereby he submitted as follows:

INTRODUCTION

Herbert Hoover said: “Freedom is the open window through which pours the sunlight of the human spirit and human dignity”.

It is in recognition of this fact that the Constitution of the Bahamas establishes this country as a “Free and Democratic Sovereign Nation” which recognizes the fundamental rights and freedoms of the individual.

FACTS:-

In this case, the Plaintiff alleges false imprisonment and a breach of his constitutional rights as provided by Article 19 of the Constitution of the Bahamas. The Plaintiff was granted bail on the 7th March, 2019 which was met and signed by the required sureties on the 11th March, 2019. Thereafter, the Plaintiff was entitled under the Bail Act to be released from custody. In contravention thereof, the Plaintiff was unlawfully and continuously detained and imprisoned until the 20th March, 2019 without just cause in the harsh conditions of Fox Hill Prison. This nine (9) day period of unlawful imprisonment gives rise to this civil action and we seek both common law, exemplary, vindictory and/or constitutional damages for the same.

In this regard, we rely on The Privy Council's statements and opinions as were expressed in the Trinidadian case of Ramanoop vs. The A.G. of Trinidad which was followed in Takitota vs. The Attorney General of The Bahamas. These are relevant especially on the issue of Constitutional Damages.

In addition, we rely on a series of local cases. Most recently, in the case of Robert Kane vs. The Attorney General, the Supreme Court awarded the sum of \$30,000.00 for the torts of unlawful arrest, false imprisonment/unlawful detention for just shy of three days in custody.

In Gilford Lloyd the Supreme Court awarded the sum of \$30,000.00 to the Plaintiff therein for false imprisonment for a period of less than an hour in custody.

In Merson vs. Cartwright, the Supreme Court awarded the sum of \$90,000.00 for the torts of assault, battery and false imprisonment. In Merson, the Plaintiff was in custody for a total of 57 hours (nearly 2 days and a half).

There are several other local cases like Tynes v. Barr and Farquharson v. The Attorney General, but these either do not involve imprisonment at Fox Hill Prison or detention for less than a day in custody. There is also cases like Takitota and the case of Douglas Ngumi, which involve foreign nationals and imprisonment for lengthy periods of time.

In the circumstances, we submit that the cases appear to establish a range for quantum of damages at common law for false imprisonment of \$10,000 to \$20,000 per day. The aforesaid case of Robert Kane is an example.

The Plaintiff herein was unlawfully detained at Fox Hill Prison for 9 days. How much then are 9 days (216 hours) in Fox Hill Prison? We submit that a sum of \$90,000 to \$180,000 is justifiable at common law for this period of false imprisonment.

We further submit that both Exemplary and Constitutional Damages are due and payable herein. In Rookes vs. Barnard (No.1), Lord Devlin in the House of Lords stated that exemplary damages should be awarded in cases involving oppressive, arbitrary or unconstitutional actions by the servants of the government. The actions of the Police and Prison Authorities as servants of the Bahamas Government were such. They demonstrated at the least, a careless disregard for the constitutional and legal rights of the

Plaintiff. We thus seek exemplary damages in the sum of \$100,000.00.

As regards, constitutional damages we note the guidance of the Privy Council as referred to in Takitota with respect to compensatory and vindictory damages. In Merson, the sum of \$100,000.00 was awarded as constitutional damages. This was affirmed in the Privy Council. In this case, following the Merson precedent, we seek the sum of \$150,000.00 as constitutional damages, inclusive of vindictory damages. We further seek Interest thereon in a reasonable sum and our legal costs herein.

16. In addition to relying on the skeleton arguments, Counsel for the Plaintiff presented oral arguments which are summarized below:-
 - a. Although liability was conceded, this is not a proper case for nominal damages;
 - b. Being presumed innocent and only accused, upon obtaining bail the Plaintiff ought to be released from custody within a reasonable time;
 - c. For general damages a sum of \$90,000 plus damages for vindictory and or exemplary damages in the range of at least \$50,000 resulting in a low end figure of \$150,000 and a high end figure being over \$200,000.
17. In response, Counsel for the Defendant provided the Court with Skeleton Submissions dated 9th December, 2020 whereby she submits:
 1. These are the Defendants' Skeleton Submissions in respect of the assessment of damages. The Defendants reserve the right to withdraw and/or amend and/or supplement these written skeleton submissions.

BRIEF FACTS:

2. This action arose out of the Plaintiff being detained at Bahamas Department of Corrections and his delayed release after the signing of his bail. The period of detention for consideration is nine (9) days of unlawful detention since the actual signing of his bail to his actual release. The Plaintiff filed a specially endorsed Writ of Summons on the 27th May, 2019, in which he claimed at paragraph 3 that on the 7th March, 2019 he was granted bail. At paragraph 4 he claimed his sureties signed his bail. At paragraph 5 he claimed he was detained until the 20th March, 2019.

At paragraph 6 that his detention was unlawful, arbitrary, oppressive and unconstitutional. In his Claim he prayed for the following reliefs:

- i. General and compensatory damages;
- ii. Exemplary and Vindictory Damages;
- iii. Interest in such amount and at such rate the Court deem just;
- iv. Costs

It is noted that the Plaintiff did not seek any specific sums in his Writ and therefore left the sums to be assessed within the Court's discretion.

AVOIDANCE OF FURTHER DELAYS

3. First and foremost, we humbly submit that the Crown accepts that there was no defence to this action. No good reason or rationale could be had for the Plaintiff being kept in custody for the period of nine (9) days after the signing of his bail. The Crown fully appreciates that there are flaws in the system in having the accused persons properly positioned in a

timely fashion for the signing of bail and it does not negate the importance of one's liberty and or constitutional freedoms.

4. It is my humble submission that the Crown does not condone suppression of an individual's fundamental rights and freedoms, and in this matter, as should be the case in all matters, seeks to assist in any way possible in the means to achieve justice. So, in an effort to act promptly to avoid further delays, because justice delayed is justice denied, the Crown accepted responsibility. Consequently, in order to avoid full trial and not waste judicial time and incur unnecessary Costs, the Consent Order was agreed between the parties and filed on the 22nd October, 2020.

5. A judgment for the Plaintiff was filed on the 28th October, 2020. An assessment of damages hearing was scheduled before Assistant Registrar Roderick Dawson Malone for 9th December and rescheduled to the 10th December, 2020.

LEGAL FRAMEWORK:

6. These Assessment proceedings are governed by Order 37 of the Rules of The Supreme Court, Chapter 53 of the Statute Laws of The Bahamas. (See Tab 1).

MEASURE OF DAMAGES

7. It is submitted that there is an overriding objective of doing justice and fairness and ensuring that the Plaintiff is not only adequately compensated, but also not over compensated.

8. Generally, damages fall into Special or General Damages. General Damages may be further broken down into different categories and may even sometimes overlap. These general damages may include:

- i. Compensatory

Simply is to grant reimburse, recompense or pay as a relief in favour of the individual, or to compensate for losses suffered. (Here we consider loss of liberty).

ii. Vindictory

These type of damages are awarded where a constitutional breach has occurred and there is a means to vindicate the wronged individual in justification of their assertions.

iii. Aggravated

This head of damage takes into any aggravating factors or features in the case and wrongdoing that may be considered egregious or appalling behaviour on the part of the wrongdoer.

iv. Exemplary

"Punitive damages" or "exemplary damages is an award of damages that grants relief as a means of punishment or retribution for a wrong to an individual that seeks to not only deter further breaches but teach the wrongdoer a lesson.

9. To deal firstly with vindictory damages, Chapter 3 of the Constitution of The Bahamas lays out the fundamental rights and freedoms of an individual, in particular protection from inhumane and degrading treatment; under Article 17, and protection from arbitrary arrest or detention under Article 19: which Articles respectively provides, inter alia:

'17. (1) No person shall be subjected to torture or to inhuman or degrading

treatment or punishment. ...

and

19 (1) No person shall be deprived of his personal liberty save

as may be authorized by law in any of the following cases- ...

19 (4) Any person who is unlawfully arrested or detained by

any other persons shall be entitled to compensation therefor from

that other person. ...'

(See Tab 2)

10. I humbly submit that we all be reminded that The Constitution of The Bahamas is deliberate in precluding the exercise by the court of its power to grant constitutional redress if satisfied that adequate means of legal redress are otherwise available.

11. It is submitted the above constitutional provisions, as the cases will demonstrate, is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

12. It is further submitted that when exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. Notwithstanding, a wronged individual may have suffered damage and may be awarded compensation, and although in most cases more will be required than words, a declaration by the court can suffice to articulate the fact of the violation.

13. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under the constitutional provisions above.

14. Yes, the fact that the right violated was a constitutional right adds an extra dimension to the wrong and even though in principle an award of compensation may well not suffice, it will go some distance towards vindicating the infringed constitutional right.

15. It is submitted that the question for this court is 'How far will the compensation award go?' That will depend on the circumstances. A sufficient award in compensation and vindicatory it is submitted will do.

16. 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. Such an award is to be made if the court considers it is required having regard to all the circumstances. Moreover, 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, and arguably punishment in the instant case should not be an award on the facts of this matter neither.

17. The Plaintiff relies on the cases *Ramanoop vs. The Attorney General of Trinidad and Tobago* [2005] UKPC (23 March 2005); *Atain Takitota vs. AG et al* [2009] UKPC 11; *Merson vs. Cartwright & Anor (Bahamas)* [2005] UKPC 38; *Jamal Cleare vs. AG et al* [2011] Bah CA, SCCiv.App 110 of 2011; *Gilford Lloyd vs. Chief Superintendent Cunningham et al* [2017] 2 BHS J. No.76; *Tynes vs. Barr et al*; *Farquharson vs. AG*; *Douglas Ngumi*; *Robert Kane vs. AG*; *Rookes vs. Barnard (No.1)* in support of his claim. It is our submission that these cases relied on by the Plaintiff are only a guide for

the Court in its calculated guesswork to determine the measure of damages. We will seek to examine these authorities and or restate the relevant and or applicable legal principles that may assist this Court in its deliberation since are distinguishable on the facts. We might even cite additional authority(ies).

18. In *Harrikissoon vs. AG of Trinidad [SIC] and Tobago* [1980] AC 265, (Tab 3) the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant. Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action. The facts of the instant case is involves purely administrative functions and what may be termed loopholes in the administrative functions for want of a better phrase and not merely abuse of powers. This is by no means any excuse to redress, we humbly submit.

19. Further, that permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have. Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is made "solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right": [1981] AC 265, 268.

20. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power. We

submit the court must consider is there any real arbitrary use of power in the circumstances of the Plaintiff's case.

21. The English courts appreciate that while there exist a need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, but their claims must not be frivolous, vexatious or contrived be repelled, unless it is a bona fide resort which is not to be discouraged. So must our courts appreciate this need.

22. Over the years we have been admonished against the misuse of constitutional proceedings and this has [SIC] been repeated in cases such as *Chokolingo vs. AG of Trinidad and Tobago*, [1981] 1 WLR 111-112, and the *AG of Trinidad and Tobago vs. McLeod* [1984] 1 WLR 522, 530. These warnings were reiterated more recently by Lord Bingham of Cornhill in *Hinds vs. AG of Barbados* [2002] 1 854, 870, para 24. (Tab 4 – 6)

23. Turning now to exemplary damages, *Rookes v Barnard* [1964] 1 All ER 367, the leading authority dealing with the award of damages in connection with unlawful arrest, detention and deprivation of rights is to be considered. Exemplary damages are awarded when, inter alia, the Defendant as a servant of the government has taken oppressive, arbitrary or unconstitutional action: In *Rookes v Barnard* at page 410. Additionally, at page 411, the court stated inter alia, that:

24. In *Ramanoop* (Supra), the Court questioned whether exemplary damages could be awarded by way of redress for contravention of the human rights provisions enshrined in the Constitution of Trinidad and Tobago. The proceedings related to some quite appalling misbehaviour by a police officer. *Ramanoop* a 35 year old man was leaving a bar around 10 pm one night bar when he had an altercation with another 'Indian man'. He left and went home and later on the same evening while at home he heard a car and someone calling his name.

Clothed only in his underwear he opened the door and was confronted by two men, one a uniformed policeman and the other man whom he had the earlier altercation with. Before he could say anything the policeman, PC Rahim, slapped him across the face and neck for about five to ten minutes, turned him around, handcuffed him, and started beating him. While doing so PC Rahim kept shouting "Yuh want tuh fucking interfere with police? Take dat. I will manners yuh. Doh ever interfere with police". Ramanoop was helpless because he was handcuffed. He was pushed back into his house where PC Rahim continued to beat him for a further two to three minutes. PC Rahim told him to take a shirt and pants because "he was going to lock me up". PC Rahim refused to let him get dressed properly. He took him outside and shoved him into the back seat of a car and sat beside him. The car was driven by the Indian man. Ramanoop was constantly cuffed and slap by police while being driven to station. He asked PC Rahim which police he had interfered with, but PC Rahim kept saying he would teach him a "lesson for interfering with police". At the police station PC Rahim rammed Ramanoop's head against the wall, causing a wound from which blood gushed at once. He was then handcuffed to an iron bar. PC Rahim taunted him ("Who buss your head?"), and poured rum over his head, causing the wound to burn and blood and rum to run into his eyes. He was taken to a bathroom and soaked in the shower while PC Rahim spun him around by the shoulders until he was dizzy. He was later allowed to get dressed then interviewed by PC Rahim who asked him to initial a written document. He refused. PC Rahim started slapping his head, and told him "If you doh sign dis yuh cyah fucking leave dis station here tonite". Ramanoop was losing blood and feeling weak and dizzy. He signed the document as instructed because he was frightened at what PC Rahim might do to him if he did not. PC Rahim then apologised for "bussing" Mr Ramanoop's head but his wife was pregnant and he was "under some pressure". The Indian man then took Ramanoop back home around 2 am.

25. Ramanoop instituted these proceedings claiming declarations and damages, including exemplary damages. The motion was supported by an affidavit of Ramanoop setting out the facts summarised above. The Crown did not dispute any of the facts. The trial judge made a number of declarations, principally that Mr Ramanoop's arrest and imprisonment were unconstitutional and in breach of his rights under section 4(a) of the Constitution. Also that PC Rahim's assault upon during this arrest and period of imprisonment was unconstitutional. The trial judge awarded \$18,000 for the deprivation of his liberty for two hours and \$35,000 for the assaults. He further held that he had no jurisdiction to award exemplary damages, and that PC Rahim's conduct was outrageous and in an ordinary action would attract an award of exemplary damages. The Appeal Court reversed the decision and remitted the matter for assessment of exemplary/vindicated damages.

26. When the matter reached the Privy Council they examined a number of cases. They considered AG vs. Reynolds [1980] AC 637 (Tab7), and accepted that exemplary damages did not fall within the ambit of compensation, but further held that exemplary damages could be awarded at common law. So they upheld an award of exemplary damages.

27. The facts of Ramanoop case was highlighted in order to demonstrate the egregious acts of abuse which by comparison are from present in the matter before this Court. The Court must consider the gravity of the facts involved in this case when considering an award of exemplary damages.

28. It is submitted therefore, that while Exemplary damages may be available as an award in these proceedings, it is available as a discretionary remedy and not as of right. This is not an appropriate matter, on the facts and the evidence before this Court, to exercise its discretion to make such an award.

29. It is further submitted that if the Court is so minded to make and award of exemplary damages that only a nominal award ought to be made, given the nature and gravity involved in the instant case, also bearing in mind that there are no egregious set of circumstances involved. Most if not all of the authorities are factually distinguishable in my humble submission.

30. In *Cartwright & anor v Merson* SCCiv App No 30 of 1994 and *Merson v Cartwright & anor* [2005] UKPC 28: awards for exemplary damages and aggravated damages ought to be separately identified. The Defence references herein paragraphs 13 to 15 of Lord Scott's Judgment. *Takitota v The Attorney General et al* SCCivApp No. 54 of 2004 and *Takitota v The Attorney General et al* [2009] UKPC 11: The Defence references herein paragraphs 11 to 14 of Lord Carswell's Judgment. In *Merson* and *Takitota* the court awarded the extra measure of damages.

31. We humbly submit that in considering the gravity of this instant case, there are no exceptional features of highhandedness and abuse of power as in the authorities cited above. Arguably, the only evidence the court may wish to consider as any support for an award of exemplary damages is that the ankle monitoring device was not fitted within a reasonable time to allow the Plaintiff's immediate release upon the signing of his bail. Perhaps his detention may even be deemed arbitrary or oppressive due to the prison conditions. But there is no harsh and abusive behavior towards the Plaintiff that has to be assessed with a view to punishing such behaviour.

32. Turning to aggravated damages, which is pretty straightforward. The principles have been clearly outlined in the mentioned authorities. It is submitted that it appears that there is no rigid or absolute rule to be applied in assessing damages. The Plaintiff's submissions seem to attempt to suggest a rigid guide. Helpful guidance as to the amount of

award of exemplary damages can also be found in the follow cases like Tynes v Barr (1994) 45 WIR7 at 20-23 which adopts the law as stated in Rookes v Barnard, it was held:

“compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their [jury’s] disapproval of such conduct and to deter him from repeating it, then they can award some larger sum”.

33. We further submit that on the facts of the instant case there are no real aggravating factors other than perhaps the prison conditions at which the Plaintiff was detained for the nine day period. The Ngumi case speaks specifically to the unlawful detention and is distinguishable for the fact that the Plaintiff in that case was detained for six years as opposed to nine days in the instant case. Takitota is also distinguishable where the period of detention was for some 9 years. The lengthy period was what made the circumstances of these cases even more aggravating and why they attracted such a sizeable award of damages. Such a sizeable award is not warranted or even justifiable in this instant case. We [SIC] even go as far as to submit that this case may not even warrant an award of exemplary damages and or aggravated damages. However, if the court is so minded it be nominal.

34. Where nominal damages is to be considered, the Court is referred to the Reynolds decision where aggravating factors were considered through the prison conditions and a small amount was awarded to include the exemplary damages. We would recommend that no more than \$22,000.00 be awarded as for aggravated damages. Otherwise, if the court is minded to award exemplary damages it be considered as an overlap of aggravated damages and increase it to \$27,000.00 for both heads.

35. As for mere compensatory damages we submit that in the event the court considers the exemplary; aggravated; or

additional vindictory awards, then no more than \$400.00 per day should be awarded in the circumstances, taking into account inflation since the cited authorities were decided. However, if the view is accepted that there is a need to make an overall award as compensatory without any aggravated and or exemplary damages or additional vindictory awards, we would recommend a total nominal award of \$42,000.00.

INTEREST

36. There is no interest as of right on the damages to be awarded in the instant case and interest, we respectfully submit should be awarded at a prescribed rate in accordance with section 2 (1) of the Civil Procedure (Award of Interest) Act, Ch.80 (Tab 8). This section provides that every judgment debt shall carry interest at such rate as shall be prescribed by the Rules of Court (i.e. the prime rate of the Central Bank plus 2% per annum). The court has a wide discretion as it relates to interest

COSTS:

37. This court's power to assess Costs is found under Order 59 (12) of the Rules of the Supreme Court, Chapter 53 (Tab 10) which provides as follows:

'The Registrar shall have the power to tax –

- (a) the costs of or arising out of any cause or matter in the Supreme Court;*
- (b) the costs directed by an award made on a reference to arbitration or pursuant to an arbitration agreement to be paid; and*
- (c) any other costs the taxation of which is directed by an order of the Court.'*

38. The amount of Costs that is sought in this matter, we humbly submit is exorbitant, especially given that the parties consented and did not have to go through a full trial of this Claim. We further submit that this Court grants a fix amount

of costs on the assessment hearing in order to avoid further taxation proceedings and unnecessary costs.

CONCLUSION:

39. Having had the opportunity to review the submissions of the Plaintiff along with the evidence and the history of this case, the Defendants despite having filed a Notice to cross-examine the Plaintiff will withdraw such request. There is nothing that can be added to the assessment hearing through cross-examination that can assist this Court further. This concludes the skeleton submissions of the Defendants, unless any further assistance is required by this Honourable Court.

18. In addition to the Defendant relying upon the skeleton submissions, Counsel for the Defendant made oral submissions which are summarized below:-
 - a. The length of time of the detention is not the only factor for the Court to take into account;
 - b. Un-pleaded facts cannot be taken into consideration such as evidence in relation to any of the circumstances and only bare minimal facts of the detention were given;
 - c. In considering what damages should be awarded the Court ought to take into account that the Defendant accepted responsibility;
 - d. In assessing unlawful detention the court must consider the loss of time primarily from a pecuniary viewpoint;

- e. Considering the admissible facts and the gravity, the nature, and the circumstances surrounding the matter, this is a case for nominal damages;
- f. In terms of damages, the total nominal damages that should be allowed in this case is \$42,000;
- g. There is a recent case of *Britney Neymour et al and Attorney General et al*, Supreme Court Action 2017/CLE/gen/00770 by Winder J which the court ought to also consider as it relates to unlawful detention and reduction to review overlap in damages.

Discussion and Analysis

19. On 7th March, 2019 the Plaintiff was duly granted bail by the Supreme Court sitting in Grand Bahama in connection with the charge of “*Possession of Firearm with Intent to Endanger Life: Contrary to Section 33 of the Firearms Act, Ch. 213*” in the sum of \$9000.00 with one or two sureties with reporting conditions. Thereafter the Plaintiff was detained and transferred to the prison in New Providence. Despite the sureties having executed the requisite bail bond on 11th March, 2019, the Plaintiff was not released until 21st March, 2019.
20. The evidence in this action is not challenged however, notwithstanding the same, the evidence goes beyond the scope of the pleaded case in that the Plaintiff only alleges that Article 17 of the Constitution was breached in relation to his detention and by way of his affidavit the Plaintiff says he claims tortious damages as well.

21. It is settled law that a party is bound by their pleadings (*McIntosh v Family Guardian Insurance Company Limited*, SCCivApp No. 64 of 2019 Judgment dated 10th June, 2020) as such the Court holds that the damages to be considered on this hearing does not include damages for Article 17 or tortious damages as the same was not pleaded and therefore they cannot have formed part of the basis of the Judgment and therefore in accessing damages the court will not make any awards for the same.
22. In the Plaintiff's Statement of Claim he seeks damages for being detained unlawfully, arbitrarily and in contravention to liberty "*as contained in Article 19 of the Constitution*" between the period of 11th March, 2019 and 20th March, 2019.
23. The Defendant did not file a defence and by Consent Order filed on 22nd October, 2020 the Defendant was held to be liable as claimed in the Statement of Claim and the action be referred to an assessment of damages hearing. In accordance with *Order 18 Rule 13 (1) and (4) of the Rules of the Supreme Court* ("RSC"), while the facts may be deemed admitted the Plaintiff is still required to prove the damages claimed.
24. The Plaintiff further pleaded that he suffered loss by way of mental stress and disorder and loss of earnings.
25. "*Loss of earnings*" are "*special damages*" which must be specifically pleaded and proved in the absence of agreement (*Robert Kane v Attorney General et al*, 2011/CLE/gen/FP/00170, dated 24 July, 2019, Judgment of Gray Evans J at [16]). The prayer for relief did not claim special damages, nor did the Plaintiff lead any evidence in this regard or make any submissions for award of the same therefore I make no award for special damages.

26. Further, the Plaintiff by his pleadings alleged that the unlawful detention was “*arbitrary, oppressive and unconstitutional*” and claims exemplary damages to which the particulars were listed (and quoted above at paragraph 3 hereof). These particulars include the fact that after providing the sureties and repeated notification to administration the requests were ignored resulting in the continued detention. These particulars were corroborated by the Plaintiff’s evidence.
27. The particulars as pleaded relate to particulars for “*exemplary damages*” whereas by way of prayer in the Statement of Claim the Plaintiff also seeks compensatory and vindictory damages as well without providing specific particulars for the same.
28. In the Court’s view the facts pleaded in the Statement of Claim if proven could support a claim for compensatory and vindictory damages.
29. To the extent that no objection was taken to the evidence of the Plaintiff and the parties made submissions in respect of the various damages, I shall consider the same despite the apparent variance in the pleadings as the Court is permitted to do (see *Philico Development (Bahamas) Limited v Wilchcombe*, 2001/CLE/gen/FP00325, Judgment of Longley SJ (as he then as) dated 31st October, 2013 at [25]).
30. Having set out the submissions above, I do not repeat the same. Counsel for the Plaintiff submits that an award of damages in the range of \$90,000 to \$180,000 should be given for compensatory damages, \$100,000 for exemplary damages and \$150,000 for vindictory damages which amounts to a sum in the range of \$340,000 to \$430,000.

31. In response, Counsel for the Defendant submits that a total of \$42,000 is an appropriate total award for compensatory, exemplary and vindicatory damages by which compensatory damages are suggested at \$400 per day and the remaining sum compromised of nominal damages for exemplary damages.

General and Compensatory Damages

32. In determining what general and compensatory damages should be assessed for the Plaintiff's unlawful detention in prison for 9 days, the Court starts by considering the case of *Merson v Attorney General* [2005] UKPC 38, in which their Lordships (at [17] and [19]) provided guidance when assessing such damages by reference to then recent case of *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15 which states as follows:

“ 17. As to the first issue, the function of constitutional damages has been reviewed recently by the Privy Council in *Attorney-General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15; [2005] 2 WLR 1324. The case involved claims for damages for "quite appalling misbehaviour by a police officer" (para 2 of the judgment). A police officer had, quite unjustifiably, roughed up, arrested, taken to the police station and locked up for some few hours the unfortunate Mr Ramanoop. Mr Ramanoop instituted proceedings against the Attorney-General for constitutional redress, including exemplary damages. He did not claim damages for the nominate torts that had certainly been committed. Counsel for the Attorney General submitted that constitutional redress, in so far as it took the form of an award of damages, should be confined to compensatory damages. The Privy Council dealt with this submission in paragraphs 17 to 20 inclusive of the judgment delivered by Lord Nicholls of Birkenhead.

"17. Their Lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection chapter I of

the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court.

18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law.

19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. 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.

20. For these reasons their Lordships are unable to accept the Attorney General's basic submission that a monetary

award under section 14 is confined to an award of compensatory damages in the traditional sense. Bereaux J stated his jurisdiction too narrowly. The matter should be remitted to him, or another judge, to consider whether an additional award of damages of the character described above is appropriate in this case. Their Lordships dismiss this appeal with costs."

18. These principles apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that "constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course" (para 25 in *Ramanoop*) – the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.

33. Although Counsel for the Plaintiff submitted that the Plaintiff having claimed damages under the common law for unlawful imprisonment, the same does not appear in the pleadings. However, as I understand *Ramanoop* quoted above, the comparable common law measure of damages will often be a useful guide in assessing the amount of compensation. To the extent that the Defendant consented to liability as claimed in the statement of claim, I do not address my mind to arguments/considerations which may have been relevant on the issue of whether the Plaintiff would be stopped

from obtaining damages by virtue of the availability of damage under the common law.

34. In terms of authorities referred to by both Counsel such as *Merson, Tynes, Cleare, Lloyd, Lockwood, and Farquharson* (all also cited in *Robert Kane v Attorney General et al*, 2011/CLE/gen/FP/00170, dated 24 July, 2019, Judgment of Grey Evans J) in which the Plaintiffs were unlawfully detained for short periods (i.e. hours to days) a global award fixed figure is used without reference to the day x rate formula which was used in *Takitota* and *Ngumi* wherein the respective Plaintiff's unlawful detention spanned for several years.
35. In considering an appropriate sum the Court must strike a balance with the range of compensation allowed in cases where the Plaintiffs were detained for mere hours at a local police station and awarded the sum of \$25,000 (excluding vindicatory damages) for the unlawful detention in *Farquharson v Attorney General* [2015] 1 BHS J No. 84 and on the other hand for 3 days of unlawful detention the Plaintiff in *Cleare v Attorney General* [2013] 1 BHS J No. 64 was awarded the sum of \$25,000 inclusive of vindicatory damages.
36. Having reviewed the authorities and the Defendant accepting liability as it relates to the Plaintiff's pleaded case that he was unlawfully detained in prison for 9 days and having regard to the conditions of his detention given in evidence by the Plaintiff and taking judicial notice of the harsh conditions and bearing in mind that there is no exact yard stick with damages being at large and paying heed to previous authorities, applying the considerations in *Cleare*, I am of the view that this is not a case of "prolonged detention" warranting a daily allowance rate and I find that an award for general and compensatory damages for detention in

prison in the circumstances of this case the sum of \$45,000 is appropriate.

37. In terms of vindictory damages, taking into account the sum already awarded with a view to vindicate the Plaintiff's right to not be unlawfully detained, I also award an additional \$40,000 in damages.

38. As it relates to the Plaintiff's claim for exemplary damages, Counsel for the Defendant submits that exemplary damages should not be allowed in this case because such damages are discretionary and not as of right or alternatively a nominal award ought to be made given that there are no egregious circumstances.

39. Exemplary damages as explained in *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15 emanating from the leading case of *Rookes v Barnard* [1964] 1 ALL ER 367 at 410 as advised by the House of Lords are damages that are awarded when the government has taken oppressive, arbitrary or unconstitutional action. At 411, their Lordships state that:-

“compensation (which may of course be a sum aggravated by way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their[jury's] disapproval of such conduct and to deter him from repeating it, then they can award some large sum.”

40. The Privy Council in *Takitota* at [12] helpfully provided the following guidance and analysis to be considered by the Court:

“The award of exemplary damages is a common law head of damages, the object of which is to punish the defendant for outrageous behaviour and deter him and others from repeating it. One of the residual categories of behaviour in respect of which

exemplary damages may properly be awarded is oppressive, arbitrary or unconstitutional action by the servants of the government, the ground relied upon by the Court of Appeal in the present case. It serves, as Lord Devlin said in *Rookes v Barnard* [1964] AC 1229 at 1223, to restrain such improper use of executive power. Both Lord Devlin in *Rookes v Barnard* and Lord Hailsham of St Marylebone LC in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1081 emphasised the need for moderation in assessing exemplary damages. That principle has been followed in The Bahamas (see *Tynes v Barr* (1994) 45 WIR at 26), but in *Merson v Cartwright and the Attorney General* [2005] UKPC 38 the Privy Council upheld an award of \$100,000 exemplary damages, which they regarded as high but within the permissible bracket.”

41. As the Court understands it, the sum of exemplary/punitive damages is calculated upon considering the gravity of the highhandedness and abuse of power with a view to punishing such behaviour.
42. I balance the fact that the Defendant accepted liability in full knowledge of the allegations of highhandedness and arbitrariness on the part of the Defendant in releasing the Plaintiff from detention, the release however, upon consideration of the evidence adduced save for the Defendant’s failure to immediately release the Plaintiff, I am constrained to hold that the facts disclose albeit limited, highhandedness conduct was visited upon the Plaintiff. Having made a substantial award for the unlawful detention by way of compensation and so as to not overlap, I make an award in the sum of \$5,000.

Interest

43. On the issue of interest, the Plaintiff having entered Judgment without including “*interest*” and the Defendants having

objected to interest, my view is that in this assessment the jurisdiction to consider interest could only have been a reference to pre-judgment interest.

44. Having omitted interest from the Judgment entered herein, I accept Counsel for the Defendants submission that the Court ought not to make any order.

45. In so far as various submissions were made on interest, for future reference, I refer Counsel to the case *R v Comptroller of HM Customs Ex Parte Kelly's Freeport Limited*, 2010/PUB/jrv/FP00006, Judgment of Gray Evans J (as she then was) dated 31st March, 2017 on the law regarding pre-judgment interest and, in relation to post-judgment interest, the same is pursuant to statute (see *Garland v Perez et al*, Supreme Court No. FP148 of 1995 (formerly 674/1993) Ruling of Deputy Registrar Gray Evans (as she then was) dated 27th February, 1998).

Conclusion

46. The damages herein stand assessed in the global sum of \$90,000.00 which is comprised as follows:-

a. Compensatory Damages	\$45,000.00
b. Vindictory Damages	\$40,000.00
c. Exemplary Damages	\$5,000.00
d. Pre-judgment interest	0

47. On 15th January, 2021 the parties appeared before the Court for the taxation of the Plaintiff's costs in respect of the order on liability and duly advised the Court that instead of proceeding with the taxation and providing submissions for fixed costs on the assessment, Counsel advised that the parties have agreed fixed

costs for the entire action in the sum of \$60,000.00 to be paid by the Defendant to the Plaintiff.

Delivered this 5th day of February, 2021

[Original Signed & Sealed]

R. Dawson Malone
Assistant Registrar (Acting) of the Supreme Court