[2017] JMCA Civ 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 111/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

BETWEEN	**DION MOSS**	**APPELLANT**
AND	**SUPERINTENDENT REGINALD GRANT**	**1ST RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND RESPONDENT**

Mrs Nesta-Claire Hunter and Ms Marsha Smith instructed by Ernest A Smith & Co for the appellant

Miss Carla Thomas instructed by the Director of State Proceedings for the respondents

19, 20 January 2016 and 30 May 2017

MORRISON P

[1] The lamentable facts of this case have been fully stated in the admirable judgment prepared by my learned sister McDonald-Bishop JA, with which I find myself in general agreement. There is therefore no need for me to rehearse the facts for the purposes of this brief contribution. In summary, the appellant, who is a Bahamian national, brought his privately licensed airplane to Jamaica in June 1995 in order to explore a business opportunity. The airplane was seized and the appellant was taken

into custody by the narcotics police. However, he was later released and sent back to The Bahamas by the police on a commercial flight, without having been charged with anything.

[2] The 2nd respondent, in the defence filed in the Supreme Court on 29 November 1996, did not indicate what had happened to the airplane after it was seized by the narcotics police. However, in a statement of facts and issues, filed on 30 November 2007, the 2nd respondent indicated that the aircraft was, on 15 November 1995, seized by the United States Government and on 16 May 1996 it was forfeited by the United States authorities and sold at a public auction. Hardly surprisingly, the appellant sued the 1st respondent, who was at the material time the police officer in charge of the narcotics division, and the Government of Jamaica for damages for false imprisonment, detinue and/or conversion. For various reasons which it is not now relevant to recount, the case meandered through the court system for close on 20 years. But, in 2012, matters took a decisive turn in the appellant's favour when the respondents admitted liability in detinue in respect of the seizure and non-return of the airplane. For his part, the appellant dropped his claim for false imprisonment.

[3] In an assessment of damages conducted in 2013 upon the entry of judgment on admission against the respondents, F Williams J (as he then was) awarded the appellant damages for detinue as follows:

Replacement cost of the aircraft	US$47,722.14
Cost of obtaining an amended market	

analysis	US$910.00
Three months' loss of earnings from the airplane	US$36,288.00

The learned judge also awarded interest on these sums at the rates of 3% per annum from 26 June 1995 to 30 June 1999 and 6% per annum from 1 July 1999 to 26 June 2004 (a period of nine years).

[4] The appellant contends on appeal that the quantum of damages awarded to him was inadequate; while the respondents maintain (by and large) that the learned judge's award should not be disturbed. My sisters have both concluded that the appeal should be allowed and I agree with them. However, there is a disagreement between them as to the increased quantum of damages due to the appellant as a result. This is therefore my attempt at a tie-breaker, so to speak.

[5] Particularly in issue is the appellant's contention that the learned judge ought to have awarded him (i) the full replacement value of the aircraft; (ii) a greater amount for loss of income from use of the aircraft; (iii) his travelling expenses from The Bahamas to Jamaica; (iv) legal expenses incurred by him to secure the release of the aircraft; (v) exemplary/punitive damages; and (vi) interest for the full 18 years.

[6] McDonald-Bishop JA and Sinclair-Haynes JA are agreed that the learned judge erred in not giving the appellant the full amount claimed for the replacement of the airplane, a conclusion with which, for the reasons given by them, I entirely agree.

However, there is a difference between them on the question of interest on the replacement cost, in that McDonald-Bishop JA would give it, while Sinclair-Haynes JA would not. On this, I agree with McDonald-Bishop JA: first, it appears to be clear from the authorities referred to by her that interest is in principle payable on this amount; and, second, it not having been demonstrated that the tortuous path of the litigation through all its various stages was attributable to any fault of the appellant, I can see no basis for depriving him of interest on the replacement cost of his airplane.

[7] On the question of damages for loss of use of the airplane, my sisters are again in agreement that (i) the learned judge erred in imposing a duty to mitigate on the appellant in the circumstances of this case; and (ii) the appellant is entitled to compensation for the loss of his income-earning chattel from the date of the filing of the writ (which is used since there is no clear evidence as to the date of refusal of a formal demand for the aircraft's return) to the date of judgment. McDonald-Bishop JA would discount this amount by four years, to take into account imponderables and vicissitudes; while Sinclair-Haynes JA would apply a two-year discount, taking into consideration the time the aircraft would be out of commission for general maintenance, inspection and during vacation periods. However, as regards the actual amount to be awarded for loss of income, my sisters have arrived at different totals, principally as a result of a somewhat different approach to calculating the loss. The difference in the end result is not insignificant: McDonald-Bishop JA would award US$1,826,832.00 under this head, while Sinclair-Haynes JA would award US$2,101,279.36. It suffices to say that, on balance, I prefer McDonald-Bishop JA's

analysis and conclusion, essentially on the basis of the reasons she has given. I would therefore award the lower figure of US$1,826,832.00 under this head.

[8] The question of interest on this amount is, I think, more problematic. I was initially inclined to leave the learned judge's award of nine years' interest on the loss of use figure intact, primarily because there was no cross-appeal against it. However, having considered the matter further, I am concerned that, with the court now proposing to award damages for loss of use calculated on an annual basis for most of the period up to judgment, interest on the total amount going all the way back to the date of detention must inevitably involve a significant element of double-counting. At the time when the learned judge issued his judgment, this was hardly a significant issue, since his award was limited to three months' loss of use. But now that what the majority of the court has in mind is 14 years' loss of use, it appears to me to assume far more importance.

[9] Both of my sisters refer to the statement in Halsbury's Laws of England, Third Edition, Volume 38, paragraph 1325, that "[i]t is doubtful...whether interest could be awarded in addition to damages...for loss of use in an action of detinue without infringing the rule against giving interest upon interest". The learned editors refer specifically to proviso (a) to section 3(1) of the English Law Reform (Miscellaneous Provisions) Act, which is in identical terms to proviso (a) to section 3 of our Act of the same name. I would in the circumstances of this case take this to be sufficient authority militating against the making of an award of interest on the damages for loss of use.

[10] It seems to me that in these circumstances, even without a ground of appeal, the court ought not to sanction a result that is not only contrary to principle, but also produces a substantial windfall for the appellant. If authority is needed for disturbing the learned judge's award of interest without it having been appealed against, I would pray in aid rule 2.15(b) of the Court of Appeal Rules 2002, which empowers the court to "give any judgment or make any order which, in its opinion, ought to have been made by the court below". On this basis, I would therefore, in agreement with McDonald-Bishop JA, make no order as to interest on the damages for loss of use of the airplane.

[11] On the question of special damages for travel and legal expenses, I was also initially drawn to Sinclair-Haynes JA's view that sufficient proof of them had been put forward in the circumstances, particularly given the modest sums involved. But McDonald-Bishop JA's careful analysis has persuaded me that it would not be right to disturb the learned judge's findings on this, when it cannot be said that he acted on any wrong principle in declining to make awards under these heads.

[12] Finally, as regards exemplary damages, I agree with McDonald-Bishop JA's view that the evidence in support of such an award is simply not there, particularly given the abandonment of the claim for false imprisonment. In any event, I would regard this as a case in which the appellant will have been sufficiently compensated under the other heads of damages to obviate the need for additional compensation by way of exemplary damages. For, as White JA pointed out in **The Attorney-General and Another v Noel Gravesandy** (1982) 19 JLR 501, 504, "[t]he judge has to be careful

to understand that nothing should be awarded [for exemplary damages] unless he is satisfied that the punitive or exemplary element is not sufficiently met within the figure which has been arrived at for the plaintiff's solatium which is the subject of the compensatory damages".

[13] In the result, I agree that the appeal should be allowed to the extent set out in McDonald-Bishop JA's judgment. I would also order that there should also be an adjustment to the learned judge's order for interest on the damages for loss of use, in the manner indicated at paragraph [10] above.

MCDONALD-BISHOP JA

The background

[14] The matter on appeal concerns the quantum of damages awarded to the appellant by F Williams J (as he then was) on the appellant's claim for detinue against the respondents, following a hearing of assessment of damages between 5 July and 19 November 2013.

[15] This case has had a long and regrettable history with the issuance of the writ, marking its commencement in the Supreme Court, being as far back as 1995 — over two decades ago. At all material times, the appellant, a Bahamian national and a licensed commercial pilot, was the registered owner of a 1970 six seater Piper Aztec aircraft, which was registered in the USA. In June 1995, he came to Jamaica on a chartered flight from the Bahamas along with two pilots. On 26 June 1995, he was

taken into custody by the narcotics police, headed at the time by the 1st respondent, Superintendent Reginald Grant. On 28 June 1995, he was detained after the police advised him that substance resembling ganja was found inside a section of his aircraft, while it was in landing at the Boscobel aerodrome in Saint Mary. Despite being detained, the appellant was never charged for any offence related to the alleged discovery of the substance aboard his aircraft and his aircraft, which was detained, was never returned to him. The appellant received no information that the substance allegedly found on the aircraft was scientifically tested and found to be ganja.

[16] The uncontradicted evidence of the appellant is that upon being released from custody, he was put on an airplane on a flight outbound for The Bahamas by police from the Narcotics Division. He was told by the policemen who transported him to the airport that he must not return to Jamaica and that he would never see his aircraft again. There is no evidence that any court order was made for the confiscation of the aircraft and the appellant has not seen his aircraft since its detention by the narcotics police.

The proceedings in the Supreme Court

[17] The appellant bought his original claim against the respondents seeking damages for false imprisonment, trespass and/or conversion and/or detinue. The matter was defended and slowly meandered through the Supreme Court with several satellite proceedings, including a successful application by the respondents for security for costs.

[18] On 6 June 2012, being almost 17 years or so after the commencement of the proceedings, the respondents admitted liability in detinue which resulted in the entry of judgment on admission in favour of the appellant for damages to be assessed. The claim for false imprisonment was withdrawn by the appellant, for reasons not disclosed on the record. By way of information, it may be useful to indicate at this juncture that it is gleaned from a statement of facts and issues filed by the 2nd respondent in the Supreme Court in 2007 (which, it must be noted, did not constitute part of the respondents' pleadings in their defence to the claim) that the airplane was seized and eventually sold by the United States Government in 1996.

[19] Following the entry of judgment on admission and pursuant to an order of Thompson-James J, made on 5 December 2007, the appellant filed an amended statement of claim (on 2 July 2013), which was further amended during the course of the hearing of assessment of damages on 5 July 2013.

[20] In the amended statement of claim the appellant set out his particulars of damages as follows:

"**PARTICULARS OF DAMAGES:-**

i.	Loss of income from use of aircraft June 26, 1995 to June 30, 2013 @ US$1,000.00 per day, 6 days per week (312 days per year – 18 years) **(Damages for Detention)**	US$5,616,000.00
ii.	Replacement value of a typical 1970 Piper PA-23-250 Aztec Aircraft @ January 25, 2013	56,236.00

iii.	Costs of Market Analysis prepared by Mark Hutchens of Aircraft Appraisals Unlimited	910.00
iv.	Travelling from the Bahamas to Jamaica to secure release of aircraft 4 trips @ US$241.00 per trip	964.00
v.	Legal expenses incurred to secure release from custody and aircraft	2,000.00
vi.	Loss of income of aircraft from July 1, 2013 and continuing (to be determined)	_____
	Total	**US$5,676,110.00**"

[21] The appellant also claimed exemplary and/or punitive damages. These were his pleadings in support of that aspect of his claim:

> "The Claimant repeats and relies on paragraphs 1-29 of his Amended Statement of Claim in support of his claim for Exemplary and/or Punitive Damages. The Claimant will say that the actions of the First Defendant were actuated by malevolence or spite toward the Claimant and they thereby intended to and did intimidate the Claimant and subjected him to ridicule and contempt in public by reason whereof the injury to the Claimant has been greatly aggravated and the Claimant claims Damages under the footing of Exemplary Damages."

He then continued:

> "**AND THE CLAIMANT CLAIMS:-**
>
> a. Special Damages;
>
> b. Damages for unlawful detention and seizure of aircraft;

c. Punitive and/or Exemplary Damages;

d. Costs; and

e. Interest."

[22] At the end of the hearing, F Williams J made these awards:

"i. The sum of US$47,722.14, being the replacement cost of the aircraft.

ii. The sum of US$910.00, being the cost of the amended market analysis.

iii. The sum of US$36,288, being the sum awarded for loss of earnings from the aircraft.

iv. Interest on the said sums, at the rate of 3% per annum from June 26, 1995 to June 30, 1999; and at the rate 6% per annum from July 1, 1999 to June 26, 2004 (a period of nine (9) years);

v. Costs to the [appellant] to be agreed or taxed."

[23] As is obvious from the order of the learned judge, he refused to award the sums claimed by the appellant for:

(i) loss of income from use of the aircraft;

(ii) the replacement value of the aircraft;

(iii) the travelling expenses from The Bahamas to Jamaica;

(iv) legal expenses incurred to secure the release of the appellant and the aircraft from custody; and

(v) exemplary/punitive damages.

The learned judge also refused to award interest on damages beyond nine years of the filing of the writ.

The appeal

[24] The appellant being aggrieved by the award of the learned judge brought this appeal on 12 grounds of appeal which have been comprehensively set out. A synopsis of the grounds has managed to produce, essentially, six main planks on which the appeal stands. In outline, they are:

(1) The learned judge erred in not awarding the full sum claimed for the replacement value of the aircraft, having accepted that the amended market analysis is objective, fair and unbiased, and by failing to take into account that the appraiser had already made a discount in his market analysis (ground (a)).

(2) The learned judge erred in awarding damages for loss of use for only three months and not the entire period of detention and failed to recognize that the appellant was entitled to recover damages for loss of use of the aircraft at the normal rate at which the property could have been hired (grounds (b), (c), (d), (e), (f) and (i)).

(3) The learned judge erred in refusing to make an award for legal expenses (ground (g)).

(4) The learned judge erred in refusing to make an award for the appellant's travel to Jamaica to secure the release of his aircraft (ground (h)).

(5) The learned judge erred in making no award for exemplary damages (grounds (j) and (k)).

(6) The learned judge erred in awarding interest for only nine years (ground (l)).

The orders sought

[25] The appellant now seeks an award of damages in the following sums:

"I. The sum of US$56,236.00 being the replacement cost of the airplane;

II. The sum of US$5,316,000.00 being damages for detention of the airplane;

III. The sum of US$2,874.00, for special damages apportioned as follows:-

a) The cost of the amended market analysis – US$910.00.

b) The cost to travel to Jamaica to secure release of airplane – US$964.00.

c) The cost of legal expense to secure release of airplane – US$1,000.00.

IV. The sum of US$56,236.00 being the sum awarded for exemplary and/or punitive damages

V. Costs of the Appeal and in the Court below to be the Appellant [sic] to be taxed if not agreed.

VI. Such further and/or other relief as this Honourable Court deems just."

The approach of the court in treating with the appeal

[26] An apt starting point in considering the questions raised for consideration in this appeal is to note the approach that this court should take in determining whether the award of damages of the learned judge should be disturbed. In the first place, it is recognised that the learned judge, during the course of his assessment, had made several findings of fact on which his awards under the different heads of damages are based. Based on the well-known and settled authorities following on the lead of **Watt or Thomas v Thomas** [1947] AC 484, which include authorities from this court, this court can only properly disturb the learned judge's decision, if it is found that the learned judge was plainly wrong in coming to his decision or had made a mistake that is sufficiently material to undermine his conclusions. See **Industrial Chemical Co (Jamaica) Ltd v Ellis** (1986) 35 WIR 303, at page 310 and **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21 at paragraph [12].

[27] Similarly, issues that are raised on the grounds of appeal, which have given rise to the question of whether the learned judge had exercised his discretion correctly, have to be considered with the salutary directives of Lord Diplock, in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, 1046,

and as reiterated by Morrison JA in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, at paragraph [20], in mind. According to these authorities, this court can only properly set aside the decision of the learned judge, if it was based on a misunderstanding of the law or the evidence or on an inference as to the existence or non-existence of a particular fact, which can be shown to be demonstrably wrong or where it is so aberrant or is such that no judge, regardful of his duty to act judicially, could have reached it.

[28] It also should be borne in mind that there are also principles governing the approach an appellate court should take in reviewing an award of damages, which this appeal more specifically entails. In **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173, at page 178, it was stated thus:

> "An appellate court, notwithstanding that an appeal from a judge trying a case without a jury is a rehearing by the Court of Appeal with regard to all the questions involved in the action including the question what damages ought to be awarded, will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because the judges of appeal think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that the Court of Appeal should be convinced either that the trial judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled..."

Of course, the above dictum is a useful restatement of the principle laid down in the well-known case of **Flint v Lovell** [1935] 1 KB 354, at page 360.

[29] The fundamental principle is absolutely clear that it is not for this court to interfere with the decision of the learned judge simply on the basis that it would have arrived at a different decision.

[30] It is against this background of the applicable law as it concerns the duty of this court in reviewing the decision of the learned judge that I have examined and treated with the grounds of appeal. Having done so, I found that I am prepared to allow the appeal, only in part, for reasons which I will now outline.

Replacement value of the aircraft

Whether the learned judge erred in his award of US$47,722.14 for the replacement value of the aircraft (ground (a))

[31] The notes of evidence reveal that, at the commencement of the trial, there was an application that was granted for this claim to be incorporated under the head of general damages rather than special damages under which it was originally pleaded. So, for that reason, the principles governing the award of general damages are applied.

[32] The appellant has claimed US$56,236.00 for the replacement cost of the aircraft based on the evidence of Mr Mark Hutchens, an appraiser, as contained in his expert report that was admitted in evidence by consent. Mr Hutchens did not attend the hearing in person and so was not subject to cross-examination. The respondents, however, had placed questions to him, pursuant to rule 32.8 of the Civil Procedure Rules, 2002 (the CPR), and were, evidently, content to accept the responses to those questions without the need for cross-examination. The report and the responses to the questions, therefore, constituted the evidence of Mr Hutchens that was before the

learned judge. The evidence was not challenged. This notwithstanding, it was a matter for the learned judge to say what weight he would attach to it and what he made of the assessor's conclusion as to the value of a replacement aircraft. The assessment of the reliability and credibility of the evidence was solely that of the learned judge, and so his findings in this regard cannot lightly be interfered with.

[33] The learned judge did not find that the witness was not credible or that his report was not objectively fair and unbiased. He indicated, however, as a factor going to the reliability of the appraisal, the inability of the assessor to view the aircraft and his reliance on the words of the appellant as to the condition of the aircraft, among other things, in arriving at the replacement value. The appellant had described the condition of the aircraft as being "good" in some respects. The learned judge treated with the appellant's input in the assessed value of the aircraft in this way, at paragraphs [26]-[27] of the judgment:

> "[26] The information given by the client plaintiff has figured prominently in the appraiser's consideration of the matter and his ultimate assessment. For example, the items such as exterior paint condition; interior condition and cockpit condition are all listed as 'good' – based on information provided to the assessor by the plaintiff. Who is to say whether this was really so? Is it not possible that the plaintiff might have overstated the condition of these items in an effort to inflate the value that might ultimately be arrived at? There is no proof that he did. But, similarly, there is no proof that he did not. Is it likely that he would have understated the condition of his aircraft, the value of which he is trying to recover? This seems unlikely. To make allowances for such a consideration, it does appear to the court to be best to do some amount of discounting; and to

> discount the figure by 15% appears to the court to be reasonable.
>
> [27] The court will, therefore, accept the submissions of counsel for the defendants that the figure that should be awarded under this head is US$47,722.14."

[34] It was evidently on the basis of the unavailability of the aircraft for objective and independent viewing by the assessor that the learned judge proceeded to discount the assessor's statement by 15%, thereby arriving at the sum awarded under that head.

[35] I must indicate that had the facts been different, I would not have criticised the reasoning and ruling of the learned judge in awarding the replacement value that he did. However, based on the circumstances which led to the unavailability of the airplane for viewing and the inevitable need for the assessor to have relied on the words of the appellant, I conclude that the basis for the reduction, as revealed in the reasoning of the learned judge, cannot be said to be reasonable.

[36] The appellant was placed in a position to be left to describe his aircraft because of the action of the respondents in detaining it and rendering it unavailable for inspection. The learned judge would have failed to take into account a relevant consideration, which was the conduct of the respondents in depriving the appellant and the assessor of the opportunity to view the aircraft. The respondents, their servants or agents, were the last persons to have seen the aircraft and who would have handled it. They were, therefore, the persons most properly and strategically placed to say what was the condition of the aircraft they had seized at the time and to rebut the evidence

of the appellant that it was in good condition. They did not. In such circumstances, the appellant ought not to have been penalized by a reduction in the damages to which he is entitled for the unlawful, unreasonable and unjustifiable conduct of the respondents in detaining his chattel for roughly 18 years. The information he gave to the assessor ought not to have been utilised to his detriment and to the benefit of the respondents.

[37] It follows, therefore, that the learned judge, in discounting the sum proposed by the assessor for the reason he did, would have failed to weigh in his consideration a material fact that ought to have worked in favour of the appellant and to the detriment of the respondents. In other words, the learned judge would have failed to appreciate the weight and bearing of the indisputable circumstances of the case that the appellant was placed in that position because of the respondents' conduct in taking away and detaining his chattel for close to two decades. The failure to pay regard or sufficient regard to that critical fact means that the learned judge erred in his treatment of the evidence and so that error, in and of itself, would warrant the interference of this court.

[38] It is important to point out too, in considering an appropriate award under this head, that the assessor's appraisal was not based specifically on the appellant's aircraft that was taken. He was concerned with the value of a comparable replacement aircraft. He could only try to do the best he could by making the necessary adjustments, based on certain criteria, to arrive at a realistic and reasonable replacement value. The mere fact or possibility that the appellant may end up being better off with a replacement aircraft was not, without more, a material consideration to warrant a reduction by 15%

or at all. In Halsbury's Laws of England, Volume 29 (2014)/7, at paragraph 416, it is noted:

> "...if the claimant has good reason to replace the chattel, whether commercial or sentimental, and does so (or demonstrates an intent so to do), the proper measure is the cost of replacement with an equivalent or near-equivalent. Where this unavoidably provides the claimant with a better chattel than the one replaced, it seems no deduction falls to be made for betterment [**Bacon v Cooper (Metals) Ltd** [1982] 1 All ER 397], save possibly where the original item would have had to be replaced at a given time in the future and the provision of a new one has the effect of substantially postponing that replacement [**The Baltic Surveyor** [2002] EWCA Civ 89]."

[39] In my view, the learned judge erred in not awarding the full replacement value claimed by the appellant on the basis of the assessor's evidence, which would have taken into account the necessary discounts and additions in arriving at the sum suggested. In the absence of any good and compelling basis on which to discount the sum proposed by the assessor, whose competence, expertise and bases for arriving at his opinion were not challenged, I would set aside the award of US$47,722.14 as the replacement value of the aircraft and substitute, and award in its stead, the sum of US$56,236.00, as a fair and reasonable award.

[40] The award is set aside not simply because it is viewed as being inordinately low but because for the reasons outlined above; the learned judge's reasons for awarding that sum is plainly wrong. The appeal therefore succeeds on ground (a).

Damages for loss of income from use of aircraft: Grounds (b), (c), (d), (e), (f) and (i)

(a) Whether the learned judge erred in awarding damages for loss of use of the aircraft for only three months

[41] The appellant claimed damages for loss of income from the use of the aircraft for the period 26 June 1995 to 1 July 2013 "and continuing", which would have been a little in excess of 18 years. The learned judge, however, awarded the sum of US$36,288.00 under this head as representing three months loss of income.

[42] The contentions of the appellant in challenging this award, as set out in grounds (b), (c), (d), (e) and (f) of the grounds of appeal, are summarised as follows:

(i) The learned judge failed to appreciate that the detention of the aircraft continues to be wrongful by reason of the respondents' failure to return it and that the wrong continues until its delivery and/or judgment, whichever is first in time.

(ii) In arriving at the sum payable for loss of use of the aircraft, the learned judge failed to properly apply the principle in **Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd** [1952] 2 QB 246, which was adopted by this court in the case of **Workers Savings & Loan Bank and others v Horace Shields** (unreported) Court of Appeal,

Jamaica Supreme Court Criminal Appeal No 113/1998, judgment delivered 20 December 1999, which is that "the owner of the profit-earning chattel which is detained is entitled to a reasonable hire charge for the period of such detention".

(iii) The learned judge, having accepted that the aircraft was an income earning property, failed to recognise that the appellant was entitled to recover loss of use at the normal market rate at which the aircraft could have been hired.

(iv) The learned judge erred in finding that the appellant ought to have mitigated his loss, and that a period of three months was sufficient time to do so.

(v) The learned judge failed to apply the appropriate principle of *restitutio in integrum* in assessing the measure of damages, in that, he failed to appreciate that detinue is a continuing wrong and that the respondents, having waited in excess of 16½ years to admit liability for the unlawful seizure and detention of the appellant's airplane, cannot complain that the

appellant's claim for detention and/or loss of use is extravagant.

[43] Mrs Hunter, in advancing the argument on behalf of the appellant that the learned judge should have awarded damages for loss of income up to the date of judgment, also relied on **Rosenthal v Alderton and Sons Limited** [1946] 1 KB 374 and **The Attorney General and The Transport Authority v Aston Burey** [2011] JMCA Civ 6 to make the point that detinue is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continue until the goods are delivered up or judgment is obtained. It is for that reason that damages are to be awarded up to the date of verdict or judgment.

[44] Miss Thomas, for the respondents, rightly conceded that the learned judge erred in awarding damages for loss of income for only three months. It is evident from the reasoning of the learned judge that he based his assessment on what the appellant could have personally earned as his income as a pilot whilst operating the aircraft rather than the income that he could have earned from the hireage of the aircraft itself over the period it was detained. So what the learned judge should properly have been concerned with, was the loss of user profits from the inability of the appellant to operate his aircraft as an income earning chattel during the period of its unlawful detention.

[45] It is, indeed, correct in the light of the law, as extracted from the various authorities relied on by the appellant, that the learned judge would have failed to apply

the relevant principles applicable to the determination of damages under this head, when he awarded damages for only three months on the bases he did. The law is clear that the award should be made for the entire period of detention unless there are circumstances justifying a reduction.

[46] It follows, without more, that his award in the sum of US$36,288.00 would not only have been inordinately low but would have been arrived at on a wrong premise of fact and law. For these reasons, the interference of this court in allowing the appeal on this basis and setting aside the award would be justified. I would rule accordingly. The matter of the appropriate sum to be awarded as damages now becomes the crucial question for this court.

(b) Determining the appropriate award

(i) The relevant period in law for award of damages for loss of use

[47] In looking at the damages that should be awarded under this head, there is no question in the light of the relevant law that the appellant is entitled to be awarded damages for loss of use of the aircraft from the date of the wrongful detention (being accepted to be the date of refusal of the formal demand for the chattel's return) until the date of judgment. In this case, there is no evidence of the time at which a formal demand was made for the aircraft's return and a refusal of the demand, prior to the filing of the writ in 1995. However, there is no issue raised that there was no such demand and refusal for the return of the aircraft, which are important elements in proof of the tort of detinue. Therefore, since no issue was joined on these matters and liability in detinue was admitted, I would, for the purposes of this assessment, use the

date of the filing of the writ as the most appropriate date by which the cause of action would have already arisen. The period of detention would, therefore be 18 years as of 22 November 1995 to 19 November 2013.

(ii) Whether any allowance ought to be made for the appellant's failure to mitigate

[48] The learned judge, in arriving at an award of damages for three months, accepted the submissions of counsel for the respondents that the appellant had failed in his duty to mitigate because he sought alternate employment late, which was about a year and a half after the seizure of the aircraft. The focus of the learned judge was on what he saw as the appellant's ability "to earn an income otherwise than through the use of his own aircraft" (paragraph [52]). He opined, that the appellant "could have sought and gained employment with either a sole operator or a charter company or attempted to have leased an aircraft, as he had done before" (paragraph [52]). The learned judge found that the appellant did not act reasonably in all the circumstances in an effort to discharge the duty that was cast upon him to mitigate his losses. As he put it, at paragraph [52]: "A prudent and reasonable man would have acted with more celerity and at a much earlier point in time to keep his losses down". He concluded in this regard, at paragraph [54]:

> "In all the circumstances, the court finds the claim for 18 years to be unreasonable and to be unsupportable – given the requirement of every claimant or plaintiff to take steps to mitigate his losses. A period for the plaintiff to be allowed to gather his thoughts, as it were, after the aircraft was seized and map a strategy and a plan for the way forward, and attempt to obtain alternative employment (even interim) employment, is, in the court's view, three months."

[49] It is evident that the learned judge had used the appellant's employment prospects and the efforts he made to gain employment as a consideration in arriving at a conclusion that he failed to mitigate his losses and for that reason was only entitled to damages for three months. This was a clear error. Even if the appellant had obtained employment, that would have had nothing to do with the income that could have been derived from the hireage and use of the aircraft. The learned judge, therefore, would have proceeded on the wrong footing in concluding that there was a failure to mitigate.

[50] The law is quite clear that a claimant seeking loss of use of a chattel is entitled to take reasonable steps to mitigate his losses. There is no question that the appellant had a duty cast upon him to mitigate his losses. The question is whether he unreasonably failed to do so, so that his award of damages should be reduced on account of that failure. The burden would have been on the respondents to prove that there was a failure to mitigate and so if they failed to discharge that burden, then it would not be accurate to hold that the appellant had unreasonably failed to mitigate. The learned judge had no evidence from the respondents to prove such a failure on the part of the appellant.

[51] The learned judge fell in error when he held that because the appellant had failed to mitigate his losses by failing to seek alternate employment, he was entitled to no more than damages for loss of use for three months. For this reason, the appellant's contention that the appeal should be allowed on the ground that the damages to which

the appellant was entitled ought not to have been reduced on the basis that the appellant had failed to mitigate his losses is also meritorious.

[52] Ms Thomas had argued before us that the appellant had a duty to mitigate his losses and so he could have leased a substitute airplane, even if he could not have purchased a replacement. This submission is, however, rejected. The unrefuted evidence from the appellant was that he had saved and purchased the aircraft which was not airworthy and was in need of extensive repairs to make it functional. He undertook extensive repairs for almost one year at a high cost to make it airworthy. He was relying on it as a source of income at the time of its detention. In paragraph 7 of his supplemental witness statement, filed on 1 February 2013, he stated:

> "Since the incident in 1995 I have not been able to replace the aircraft. I had saved for a long time to be able to afford to purchase the said aircraft. And I've be [sic] doing standby work for the individual and companies as a source of income and other job such as construction and apartment management to make [a] living. This temporary income helps me to support my kids, assist with paying bills and the necessary daily substance [sic]."

[53] It is clear from the evidence that the appellant is saying that he did not have the funds to replace his airplane or to lease one. In this regard, he could be viewed in the same light as an impecunious claimant. In this connection, the authorities have settled the principle that if a claimant failed to mitigate his loss because of impecuniosity, this does not act to reduce the amount of damages he would recover. Therefore, as the authorities state, no argument based on mitigation could prevent full recovery by an impecunious claimant. See, for instance, **The Clippens Oil Company Limited v The**

Edinburgh and District Water Trustees (Et E Contra) [1907] AC 291. Given all the circumstances of this case, it would seem unreasonable for this court to hold that the appellant's failure to hire a substitute during the 18 year period would mean that he had failed to mitigate his losses. There was, therefore, no failure on the part of the appellant to mitigate his losses.

(iii) The appropriate quantum of damages for loss use of the aircraft

[54] Having concluded that the award of damages under this head is inordinately low, the question for this court is what the appropriate award should be. Mrs Hunter submitted that the normal loss occasioned through the detention of the aircraft is the sum for which the aircraft could have been hired during the period of detention. It is contended by her that the sum of US$5,316,000.00 should be granted. She relied on **Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd**.

[55] Mrs Hunter complained that the learned judge acted unreasonably in accepting the reasoning of counsel for the respondents in arriving at the net income figure for the purposes of the assessment of damages for loss of use. According to her, counsel for the respondents did not examine all the relevant evidence to arrive at a figure and so the learned judge wrongly exercised his discretion in rejecting the nearly accurate and comprehensive submissions by counsel for the appellant in favour of those of counsel for the respondents.

[56] The respondents contended otherwise. Ms Thomas insisted that the appellant ought not to be compensated for the loss of income for the full 18 years. She advanced

the argument that three to five years should be deducted from the period. She argued that the acceptance by the learned judge of the operating and maintenance costs put forward by the appellant's counsel did not oblige him to accept that the sum proposed as the total income lost was accurate. She maintained that the learned judge had a duty to arrive at an appropriate sum based on the evidence and he did so. She cited among her reasons for the suggested discount the fact that the plane was getting older, the possibility of it breaking down and the fact that it was being operated in a competitive industry. She submitted further that the approach of the learned judge was a realistic approach and is consistent with the dicta of Lord Denning in **Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd** that the wrongdoer must "pay a reasonable hire for [the goods detained]".

[57] It is clear from the evidence that the appellant was not in a position to state definitively what income he could have earned on a daily basis. He, himself, was giving guesstimates and expectations of hireage and earnings. He had just started operating the aircraft for three to four months before it was seized and so he was not so seasoned as an operator in the industry for him to be able to say what his earnings from the hireage of the aircraft would have consistently been over a sustained period. Consequently, the court has to do the best it can with the evidence in order to arrive at a reasonable sum for loss of use of the aircraft during the period of its detention, bearing in mind all the uncertainties and imprecisions surrounding the issue.

[58] The appellant, himself, had indicated that the airfare of US$60.00 per passenger (one way) would have remained the same over the period up to the date of the hearing of the assessment of damages. That airfare is accepted. He gave evidence as to the number of passengers he would have taken on each trip per day. Based on the evidence and the variables noted by the learned judge, following the submissions of the respondents, the learned judge's conclusion that an the appellant would have transported an average of three passengers per trip is reasonable and so cannot be faulted. I would, therefore base my assessment of the estimated income on the assumption that the appellant would have carried three passengers per trip over the 18 years. It means then that the daily sum of US$720.00 would have been a reasonable gross income earned from use of the aircraft (12 passengers at US$60.00 per passenger for two return trips). The appellant stated that he operated the airplane six days per week. The monthly gross income for the appellant would, therefore, be US$17,280.00.

[59] However, in arriving at a net income, the costs of operating and maintaining the airplane must be taken into account in arriving at the net income for the period of the detention. In relation to these matters, the learned judge, having reviewed the evidence, stated at paragraph [46] of the judgment, that the sum of US$1,821.17 per month, put forward by the appellant's counsel as the proposed maintenance costs, was "more nearly accurate and comprehensive [than] that proposed by counsel for the [respondents], as the former figure takes into account matters such as the costs of an engine overhaul; oil changes and so on, which were not included in the calculations of

the [respondents]". One would therefore have expected that the sum put forward as maintenance costs by the appellant, which was preferred by the learned judge, would have been deducted from the gross earnings to arrive at the net income. The learned judge, however, did not use the appellant's proposed maintenance and operational costs. At paragraph [48] of the judgment, he noted that the monthly net earnings of US$12,096.00 proposed by counsel for the respondents "is one that commends itself to the court".

[60] Unfortunately, the net sum of US$12,096.00, accepted by the learned judge, did not take into account all the maintenance costs that arose on the evidence and, by extension, on the submissions of both the appellant and the respondents. The only deductions that were made by the respondents in arriving at the sum of US$12,096.00 were fuel costs and landing fees, which could be classified as part of the daily operational costs of the airplane. The maintenance costs for the 18 years were not factored in by the learned judge, once he accepted the respondents' net monthly income of US$12,096.00, without more. In fact, the respondents had put forward their submissions that maintenance costs (as distinct from operational costs) would have been at least US$108,240.00 over 18 years. This, however, was not considered by the learned judge in the award of damages.

[61] It means then that the learned judge's use of US$12,096.00, as the predicate monthly net income, cannot be accepted by this court. While it may have been appropriate for an award for three months (when all the maintenance costs may not

have yet arisen, given the short operating period utilized by the learned judge), it surely cannot be accepted for the longer period of 18 years, when it is expected that the appellant would have had to maintain the airplane to keep it airworthy. The appellant, himself, agreed under cross-examination that "the aircraft would have required significant up-keep to ensure that it was airworthy". Therefore, the maintenance costs that the appellant would have incurred over the 18 years stand to be deducted. This court, therefore, will have to arrive at its own predicate net income for the purposes of the award of damages in the light of the fact that the learned judge's net income would have failed to take into account this relevant consideration.

[62] I have reviewed the evidence and the submissions of the parties as to the items and costs that should be accepted by this court in relation to the maintenance of the airplane. There is no basis for this court to totally accept the figures advanced by any of the parties, without more. It is noted that although the appellant's estimated maintenance costs were viewed by the learned judge as being nearly more accurate and comprehensive, there were critical omissions from those costs. One critical omission in the calculation of counsel for the appellant was the daily costs of fuel. The appellant, however, gave evidence that on each round trip, he would have spent US$91.00 on fuel. This translates into US$4,368.00 per month for fuel (at two round trips per day, six days per week). This did not form part of the appellant's calculation while it was taken into account by the respondents.

[63] The appellant gave his landing fees at US$1,404.00 per month, which was included as part of his maintenance costs (rather than daily operational costs). These daily operational costs (fuel and landing fees) totalled US$5,772.00 per month. It means that the net monthly income (taking into account only daily operational costs, as distinct from maintenance costs, as the immediately relevant deductibles) would be US$11,508.00 (US$17,280.00 – US$5,772.00). The net income for 18 years on this calculation would be US$2,485,728.00. This sum, however, must be further adjusted to make allowance for maintenance costs that would not have been part of the daily operational costs but which would have been incurred over 18 years for the upkeep and maintenance of the airplane.

[64] Both the appellant and the respondents have submitted on what the maintenance costs over 18 years should be. It is noted, however, that the overhauling of the engine was part of the evidence relating to maintenance costs but no figure was given by the appellant for this costs. This was also a critical omission in the appellant's calculations. It means that the appellant's estimated maintenance costs would be higher than what has been submitted on his behalf because no allowance was made for the cost of overhauling the engine. There no evidence to properly ground the use of a specific sum to represent the value of this expenditure. I have therefore taken the absence of evidence of the value of this expenditure into account as a basis that would justify a further reduction in the damages to be ultimately awarded to the appellant.

[65] The appellant also gave evidence as to the frequency of the maintenance of the avionics (annual inspection at a cost of US$500.00). However, counsel on his behalf submitted a very low figure of US$500.00 for their maintenance over 18 years, which cannot be accepted. The respondents have submitted that the frequency should be calculated to be every year for the 18 years, in keeping with the evidence of the appellant. This submission is accepted. It means that the cost of maintaining the avionics would be taken as being US$9,000.00 for the 18 years.

[66] Two items relating to maintenance that also warrant special consideration are the change of tires and the inspection of the airplane. In relation to the change of tires, the appellant's submission was that the cost to be allowed for this item should be US$7,560.00, being for the change of three tires once per year. The evidence of the appellant in cross-examination, however, was that he would change the tires "more than once for the year - at least three times a year". He testified that there were three tires on the airplane but that he had no idea how much was the cost of one tire in 1995. However, at the time of the hearing, he estimated the cost of a tire in 2013 to have been US$198.00 and gave a guesstimate that in 1995, it would have been US$90.00. Given that everything was imprecise, I think it fair to take the costs of a tire in 1995 to be US$100.00 and in 2013 to be US$200.00. The median between those two figures would be US$150.00, which would be used as the cost of one tire over 18 years. Since the appellant stated that he would change tires at least three times per year, I would accept the respondents' formula of the change of three tires four times

per year to arrive at the total cost. Therefore, the change of three tires at US$150.00 per tire, four times per year, would amount to US$32,400.00.

[67] In so far as the cost of inspection is concerned, counsel for the appellant submitted that the sum of US$51,300.00 should be awarded. This computation is based on the use of a median sum of US$950.00 (between US$700.00 and US$1,200.00) per inspection, three times per annum. The respondents contended, however, that the sum of US$64,800.00 should be awarded based on the evidence of the appellant that inspection on the plane itself would have had to be done after every 100 hours of flight time at a cost of roughly US$1,200.00. It was his evidence that "100 hours would go in about four (4) months". This equates to inspection three times per year. The respondents' submission is accepted as it is more consistent with the evidence of the appellant. There is no evidential basis to use the sum of US$700.00, which was for inspection after 50 hours (and the median figure of US$950.00), as part of the formula in computing the award. The estimated cost of inspection over 18 years would therefore be US$64,800.00.

[68] All the other figures proposed by the appellant as the estimated maintenance cost, for such items as propellers (US$15,000.00), oil change (US$5,400.00) and brakes (US$10,350.00), are accepted. When all the costs of the various maintenance items, as disclosed on the evidence, and as accepted by me, are combined, they total US$136,950.00 over the period of 18 years. This sum falls to be further deducted from

the net income already stated (US$2,485,728.00). With this deduction of the estimated maintenance cost, the net income would stand at US$2,348,778.00.

[69] It follows that if one were to award damages for the loss of use for the entire period of 18 years, as contended by the appellant, the award can be no more than US$2,348,778.00 (given that no allowance is yet made for engine overhaul, which according to the evidence would have been due once in 12 years, as well as other variables). The appellant's claim for US$5,316,000.00 for damages for loss of use is, therefore, not sustainable and is rejected. The ultimate question that now arises for consideration is: what is the final award that should be made when other relevant variables are weighed in the equation?

[70] The learned judge had used the delay in the resolution of the matter as another factor cutting down the period of the award to three months because, in his view, the delay was not attributable wholly to the respondents or to the respondents alone (see paragraph [55] of the judgment). In my view, the use of the delay as a basis for reducing the period to three months or any at all cannot be accepted. The respondents did not admit liability until 2012, which was unreasonable, bearing in mind that they had not produced the aircraft since the service of the writ on them in 1996. The respondents had caused the resolution of the matter to be unnecessarily delayed for almost two decades. The appellant ought not to be penalized in the circumstances on the ground of delay. Therefore, I would not use delay to reduce the period for the award of damages.

[71] In arriving at a reasonable sum for an award of damages for loss of use, I have noted several matters of interest (some of which have been pointed out by counsel for the respondents), that could have negatively affected the ability of the appellant to earn an income from the aircraft for the full period of 18 years. The age of the aircraft is one such matter. The aircraft would have been 43 years old at the time of the assessment of damages. The appellant had seen and operated it when it was 25 years old and this was following rehabilitative work done to restore it to airworthiness. There is no certainty that it would have flown efficiently or regularly, or at all, for the entire 18 years.

[72] Simillarly, there is no certainty (and there cannot be) that the aircraft would have been able to operate efficiently and without disruption for all those years for six days every week. The possibility of natural disaster affecting flying time; increased competition; period of rest of the aircraft for servicing/maintenance purposes; ill-health of the appellant, which could have resulted in his inability to personally operate the aircraft; the possibility of the need (and concomitant costs) to employ other pilots to operate the aircraft (as is seen from his evidence that two pilots had flown the aircraft to Jamaica at the time it was seized); and other increases in operational and maintenance costs, over and beyond what the appellant had indicated in evidence, are all matters for which allowance should be made. Also, as already indicated, the appellant has also failed to provide evidence as to what it would have cost to overhaul the engine over the 18 years.

[73] The appellant's evidence that the standard airfare of US$60.00 had not changed from 1995 up to the date of assessment of damages in 2013 also cannot be ignored as a material consideration within this context. So there was a real danger of reduced flying time as well as reduced profitability over the 18 years.

[74] I conclude, in all the circumstances, that there would have been several vagaries, imponderables and vicissitudes that could have affected the aircraft's continued operation, earnings and profitability. As such, there can be no precision in this award, especially when one bears in mind that a large part of the appellant's evidence, and the calculations proposed by counsel on his behalf, were based on guesstimates. This court will have to do its best to arrive at a fair and reasonable award for the loss of use during the period of detention. Therefore, taking into account all the evidence and the circumstances of the case, I do believe that allowing a discount of four years from the 18 years would be reasonable in making some allowance for the vagaries, imponderables, vicissitudes and imprecision in the evidence. This would translate into a discount from the damages of roughly 22%.

[75] I would award damages for a period of 14 years on the basis of the monthly net income of US$10,874.00 (being the monthly gross income minus monthly operational and maintenance costs). I would, therefore, award the sum of US$1,826,832.00 for loss of use/damages for the detention.

Special damages: travelling and legal expenses

Whether the learned judge erred in refusing to award the appellant damages for expenses incurred to travel to Jamaica and for legal representation to secure the release of aircraft (grounds (g) and (h))

[76] It is convenient to treat with grounds (g) and (h) together as they both relate to the refusal of the learned judge to award sums claimed for travel and legal expenses, which were claimed as special damages.

[77] Mrs Hunter submitted, quite strongly, that the learned judge erred in placing strict reliance on **Bonham-Carter v Hyde Park Hotel Ltd** (1948) 64 TLR 177 because the law has developed since then and the principle that special damages must be specifically proved is not an inflexible one. According to counsel, the court, in its endeavour to arrive at a reasonable conclusion, seeks to satisfy the demands of justice by looking at the circumstances of the particular case. The case of **Desmond Walters v Carlene Mitchell** is binding authority, she said, demonstrating that there are circumstances which commend a relaxation of the rule of strict proof. She argued that to demand strict adherence to the principle laid down in **Bonham-Carter v Hyde Park Hotel Ltd** will cause injustice to the appellant who has legitimately suffered damage. The justice of the case demands that the appellant be compensated for travelling expenses and the legal costs he incurred, she argued.

[78] Ms Thomas resisted the challenge to the learned judge's decision not to award damages for the items in question as the appellant, she said, had failed to strictly prove his claim in keeping with the requirements of the law. She maintained that the items of special damages, which were disallowed, were capable of strict proof and evidence of

them could have been obtained without much difficulty. The failure of the appellant to prove these alleged losses meant that he was not entitled to recover them, she contended.

[79] It is trite law that a claim for special damages must be strictly pleaded and strictly proved. **Bonham-Carter v Hyde Park Hotel Ltd** still stands as good and applicable law within this jurisdiction. It has been recognised, however, that the circumstances of a case may demand some measure of flexibility in the award of special damages in the interests of justice. Therefore, in determining the nature and degree of proof that should be insisted upon before damages may be awarded, regard must be had to the particular circumstances of each case. See **Desmond Walters v Carlene Mitchell**.

[80] The question for this court, therefore, is whether the learned judge was plainly wrong in refusing to award the special damages in question for the reasons given. The question is not whether a judge of this court would have acted differently.

The travelling expenses

[81] Both in his original statement of claim filed in 1995 and in his amended statement of claim filed on 2 July 2013, the appellant claimed the sum of US$964.00 for travelling expense to Jamaica to secure the release of his aircraft. The claim would have been in relation to travel expenses, allegedly incurred prior to the filing of the writ in 1995. In his amended statement of claim, he specifically pleaded the sum of US$241.00 per trip.

[82] In support of this claim, the appellant adduced evidence in his witness statement as follows, at paragraph 39:

> "…I came back to Jamaica on four separate occasions to meet my lawyer to secure the release of my aircraft. At the time he was in discussion with Superintendent Grant for its return. We were not successful in getting it back."

Then, in amplifying his witness statement, he later said:

> "I have also claimed damages for four (4) trips to Jamaica at US$241 per trip. I do not have receipts. I didn't keep the receipts..."

[83] The learned judge reasoned in paragraph [32] of his judgment that the narrative given in relation to the travelling expenses to Jamaica was "sparse" compared with other aspects of the appellant's witness statement. He noted that in relation to other matters, the appellant had given details of the several payments made by him to buy the relevant aircraft; the dates and payments; and the receipt numbers for the payments. The appellant, he said, had also indicated that he had receipts evidencing those payments. The learned judge then remarked:

> "This is the sort of standard in terms of the evidence that would be expected of the plaintiff in relation to his travelling expenses, However, neither in his witness statement; nor in his *viva voce* evidence does the plaintiff attempt to explain the absence of the receipts directly; nor has he given any other evidence from which their absence might be deduced. Applying, therefore, the principle in [**Bonham-Carter v Hyde Park Hotel Ltd**], the claim for this item fails." (paragraph [32])

[84] An examination of the learned judge's reasons for rejecting the claim for travel expenses cannot be held to be palpably or plainly wrong. The pleadings lacked

particularity, which is required by law. The extent of his evidence was that he came to Jamaica on four separate occasions to meet with his lawyers to secure the release of the aircraft, and nothing more. So he gave no details in evidence as to dates (period) of travel and mode of travel. He presented no documentary proof of travel, to at least establish the fact of expenditure, even in the absence of the receipts.

[85] Mrs Hunter submitted that the respondents had not challenged the evidence that the appellant travelled to Jamaica but it is not formally admitted by them that he did, in fact, travel to Jamaica and that he incurred costs in doing so. So, as long as these matters are not formally admitted, they must be proved by the appellant as the person who asserts them. Special damages must be strictly proved as they are to be strictly pleaded. The appellant failed to do so.

[86] It was therefore within the sole purview of the learned judge to determine the sufficiency, credibility and reliability of the evidence with regards to the expenses claimed. The learned judge's conclusion that the evidence was sparse and did not sufficiently prove the loss was based on no error of fact that would serve to undermine his decision. In the circumstances, I find no basis on which this court could properly hold that the learned judge was unreasonable or plainly wrong to insist upon adherence to the long settled principle that special damages must be strictly proved. The claim for travel expenses, in the circumstances of this case, does not fall within any special category of cases that would attract a relaxation of the rule.

[87] I, for my part, would dismiss the appeal on this ground and so would refuse to award the sum of US$964.00 claimed.

Legal expenses

[88] In relation to the US$2,000.00 claimed by the appellant for legal fees, my conclusion is no different. I can find no basis on which to hold that the learned judge erred in law in refusing to award that sum.

[89] In relation to this claim for damages for legal expenses incurred, the learned judge, having accepted the submissions of counsel for the respondents, stated at paragraph [35]:

> "The court finds itself in agreement with these submissions. And, again applying the principle in [**Bonham-Carter v Hyde Park Hotel Ltd**], the claim for this item also fails."

[90] The respondents' submissions that were accepted by the learned judge were to the following effect:

(i) The claim of US$1,000.00 ought to be disallowed out of hand as that sum was allegedly paid by the appellant to his attorneys-at law for his release from custody.

(ii) The claim for false imprisonment having been withdrawn, this claim must consequently go as well.

(iii) The appellant has failed to prove the US$1,000.00 he said that he had incurred to secure the release of the aircraft.

(iv) Even if he had misplaced the receipt as he had testified, he had failed to explain what efforts he had made, if any, to locate it.

(v) Further, even if he had misplaced it, he is still being represented by the firm of attorneys-at-law which represented him then and from which he could have sought assistance in locating some record of it or confirming by some means that it was paid. This he failed to do or to give any evidence of any efforts in that regard.

[91] In my view, these submissions of the respondents were not without merit and so it cannot be said that the learned judge was unreasonable or wrong in accepting them. I say this for the following reasons. From the very start of his pleadings in 1995, the appellant claimed US$2,000.00 for the expenses incurred in securing his release "from false imprisonment". In 2013, he amended his claim, following the withdrawal of his claim for false imprisonment, to state that the sum of US$2,000.00 was incurred for securing his release from custody as well as the aircraft, without any particularity as to what sum would have been for his detention and what sum for the aircraft.

[92] The evidence of the appellant, as contained in paragraph 35 of his witness statement (filed on 5 November 2007), was that in June 1995, when he was in custody, he paid the sum of US$2,000.00 to secure his release from custody. Upon amplifying his witness statement, he then said that he had paid US$1,000.00 for the release of his aircraft and US$1,000.00 for his release from custody.

[93] In the light of that evidence from the appellant, it is clear that at one point he said that the initial sum of US$2,000.00 claimed by him was connected to the false imprisonment claim that was withdrawn and then later on, there was a splitting of that figure in half for it to apply to the detinue claim. That is something that had to be considered by the learned judge and weighed in all the circumstances in coming to a finding whether the appellant had satisfactorily proved his claim.

[94] Furthermore, in explaining his inability to strictly prove his claim, all the appellant said was that he cannot locate the receipt. He gave no evidence of having tried to secure a copy from his attorneys-at-law, who, incidentally, were the same ones representing him at the hearing of the assessment of damages. The appellant was not operating in an informal structure in retaining the services of an attorney-at-law. He was operating at arm's length and so there must have been an intention to create legal relations with his attorneys-at-law. This, one would imagine, would have warranted a structured payment agreement and record of it being properly kept by the appellant as well as his attorneys-at-law. There was nothing put before the learned judge to say why some record of the payment of fees to the attorneys-at-law could not have been

received from them for use at the hearing. Attorneys-at-law and their clients are expected to operate far more formally and sophisticated in their dealings with each other than, say, the push cart vendor referred to by Wolfe JA (Ag) (as he then was) in **Desmond Walters v Carlene Mitchell** and so the flexible approach advocated in that case and others would not be appropriate in this situation.

[95] All that the appellant did in this regard was to throw figures at the court and demand payment, without any proof at all, and his only explanation for doing so was that he cannot locate the receipt. Indeed, the shifting of his pleadings to facilitate the withdrawal of the claim for false imprisonment would have served, in any event, to give credence to the submissions of the respondents that the sum was paid for his release from custody, which the learned judge accepted. The learned judge's insistence on strict proof in the face of the state of the evidence cannot, at all, be faulted.

[96] Indeed, I would go further to state, as I feel compelled to do, that even if it were accepted that the appellant had paid his attorneys-at-law the sum he belately put forward as being connected to the claim for detinue, it could not have been properly awarded by this court, in any event, given that the cause of action in detinue would not have arisen at the time of payment of the money. There is no evidence that at the time the money was paid, a demand was made for the return of the aircraft and there was a refusal (giving rise to detinue) and so the money was paid to secure its return. The sum must be found to have been reasonably incurred in connection with the claim for detinue for it to be recoverable and so there must be some evidence as to the work

done by the attorneys-at-law at the material time that was connected to the cause of action in detinue. No such evidence was placed before the learned judge and none is before this court.

[97] This court cannot properly hold that the sum of US$1,000.00 should be awarded on appeal because there is no evidential basis on which it could be found that the sum was reasonably incurred in connection with the claim in detinue. In the result, it cannot be said that the learned judge was plainly wrong in refusing to make this award as part of special damages.

[98] I would therefore refuse to award the sum claimed for legal expenses and dismiss the appeal on ground (h).

Exemplary damages

Whether the learned judge erred in not awarding the appellant exemplary damages (grounds (j) and(k))

[99] In my view, the learned judge cannot be faulted for not awarding exemplary damages to the appellant. In treating with the grounds advanced that the learned judge fell in error in not granting exemplary damages, I have chosen as my starting point the appellant's pleadings concerning this aspect of his claim. The appellant's amendment to his statement of claim was done in July 2013, in which he set out the pleadings on which he was relying to ground his claim for exemplary damages. In so doing, he stated that the facts pleaded in paragraphs 1-29 of his statement of claim were being relied on in support of this claim.

[100] The ground on which the claim for exemplary damages was based was stated in these terms:

> "The Claimant will say that the actions of the First Defendant were actuated by malevolence or spite toward the Claimant and they thereby intended to and did intimidate the Claimant and subjected him to ridicule and contempt in public by reason whereof the injury to the Claimant has been greatly aggravated and the Claimant claims Damages underfooting [sic] of Exemplary Damages."

[101] It is clear that the basis of the claim for exemplary damages was alleged malevolence and spite on the part of the 1st respondent only, as distinct from the narcotics police, in general. At the point at which he set out his claim for exemplary damages, the appellant did not particularise the specific acts on the part of the 1st respondent on which he was relying to show malevolence and spite that would relate to the detention of the aircraft or the cause of action in detinue and he did not plead the particulars of the public contempt and ridicule that he faced that would have resulted from the detention of the aircraft. What he did was to leave it to the court itself to examine the pleadings to see what could qualify as spite and malevolence on the part of the 1st respondent, without his assistance. This is not at all appropriate.

[102] It is also observed that despite the fact that the ground on which the appellant was relying was expressly stated in paragraph 30 of the amended statement of claim, during the course of the hearing, counsel on his behalf advanced different grounds for an award of exemplary damages. Counsel argued that the manner in which the detention of the aircraft was done made it arbitrary, unconstitutional and oppressive, particularly, because: (i) the appellant was not charged with a criminal offence; (ii) on

instructions from the appellant, the substance found was never tested and found to be marijuana; (iii) there was no judicial order from any Jamaican court for the aircraft to have been seized; and (iv) the respondents, by their actions, have shown persistent and continuing disregard for the appellant's proprietary rights. These were totally different grounds from those pleaded as being the basis for the claim.

[103] On appeal, Mrs Hunter continued to advance the same arguments in asking this court to find that the learned judge was wrong in not making an award for exemplary damages. She maintained that a continued detention for 18 years cannot be considered a mere abuse of power as in the case of **George Finn v Attorney-General** (1981) 18 JLR 120, which was relied on by the respondents at trial, and followed by the learned judge in refusing to award exemplary damages. Counsel relied, of course, on the celebrated case of **Rookes v Barnard and Others** [1964] AC 1129, among others, in contending that exemplary damages should be awarded. The respondents, also placing reliance on **Rookes v Barnard** as well as other authorities, argued otherwise.

[104] The critical question for this court is whether the learned judge was plainly wrong in refusing to grant an award of exemplary damages. It seems clear, following **Kuddus v Chief Constable of Leicestershire Constabulary** [2002] 2 AC 122, that exemplary damages may be awarded for the tort of detinue, "[p]rovided always that there is unacceptable behaviour on the part of the defendant, behaviour that displays features which merit punishment" such as malice, fraud, cruelty, insolence and the

like: McGregor on Damages, Seventeenth Edition (2003), paragraph 11-011 . As Lord Slynn stated in **Kuddus v Chief Constable of Leicestershire Constabulary** (at page 135), "it is the features of the behaviour rather than the cause of action" which must be looked at in order to decide whether the circumstances warrant an award of exemplary damages.

[105] As is well known, Lord Devlin had authoritatively laid down in **Rookes v Barnard** that exemplary damages may be awarded in three categories of cases. These categories are: (i) cases of oppressive, arbitrary or unconstitutional action on the part of government servants or agents; (ii) where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the claimant; and (iii) where expressly authorised by statute. Counsel for the appellant has argued that this case falls in the first category, albeit that this, as the basis of the claim, was never so pleaded.

[106] Despite the absence of pleadings in those terms, the learned judge, in determining whether an award of damages was appropriate, addressed the arguments advanced by Mrs Hunter within the legal framework of the principles enunciated in cases such as **Rookes v Barnard**; **Cassell & Co Ltd v Broome and another** [1972] 1 All ER 801; **George Finn v Attorney-General**; **Thompson v Commissioner of Police of the Metropolis; Hsu v Commissioner of Police of the Metropolis** [1997] 2 All ER 762 and **Kuddus v Chief Constable of Leicestershire Constabulary**.

[107] The learned judge also examined the circumstances in which the detention of the appellant and his aircraft was made. He then concluded that, in his view, there was no conduct warranting the award of exemplary damages. As part of his consideration in not making an award, he did take into account the fact that the damages would have had to be paid by the state (or the taxpayers of Jamaica, as he noted) and upon being influenced by dicta in **Kuddus v Chief Constable of Leicestershire Constabulary**; **Thompson v Commissioner of Police of the Metropolis** and **Hsu v Commissioner of Police of the Metropolis**, he formed the view that with the liability in the case being vicarious, exemplary damages ought not to be awarded. This aspect of his finding is the subject of challenge by the appellant in ground (j).

[108] I cannot agree with the learned judge that the fact that the liability is vicarious and damages are to be paid by the state should militate against an award of exemplary damages. I find that there is merit in the contention of the appellant in ground (j) that the learned judge would have erred in this aspect of his reasoning. This finding, however, does not end the matter in relation to the award of exemplary damages because the learned judge had given other reasons for denying the award, which cannot be ignored by this court in determining whether exemplary damages ought to have been awarded by the learned judge or should be awarded by this court. The mere fact that the learned judge may have been wrong on his finding that such damages ought not to be awarded in a case where the liability is vicarious and the tortfeasor is not being called upon to pay the damages does not automatically mean that exemplary damages are awardable.

[109] The mere fact that the conduct may be described as arbitrary or unconstitutional, as argued by counsel for the appellant, does not mean that there should be an award of exemplary damages. See **The Attorney General and Another v Gravesandy**, which cited the dicta of Lord Devlin in **Rookes v Barnard**; Lord Hailsham in **Cassell & Co Ltd v Broome**; and Windeyer J in **Uren v John Fairfax & Sons Pty Ltd** (1966) 117 CLR 118, a decision of the High Court of Australia.

[110] Windeyer J, in **Uren v John Fairfax,** usefully opined (at paragraph 11 of his judgment) that: (i) exemplary damages must be based on something more substantial than a jury's mere disapproval of the conduct of the defendant; (ii) there must be evidence of some positive misconduct to justify a verdict of exemplary damages; and (iii) there must be evidence on which the jury could find that there was at least, a "conscious wrong-doing in contumelious disregard of another's right".

[111] The crucial thing to note in the learning judge's reasoning, in refusing the claim for exemplary damages, was his finding on the key question as to whether the appellant had proved that which he had pleaded as the basis for such an award. At paragraph [68], the learned judge, in continuing to give his reasons for denying the award, stated:

> "**Additionally, when one looks at paragraph 30 of the particulars of claim and sees therein the basis of the [appellant's] claim for exemplary damages, it is the court's view that those bases have not been satisfactorily established..**." (Emphasis added)

[112] The learned judge then referred to the pleadings at paragraph 30 of the amended statement of claim (which, by way of reminder, pleaded malevolence or spite on the part of the 1st respondent) and concluded at paragraph [69] of the judgment:

> "The court has seen no evidence of malevolence or spite. No award for exemplary damages will, therefore, be made in this matter."

[113] This is a finding of fact that was made by the learned judge, based on the pleadings and evidence that were before him, and this court can only disturb it if is found that he was plainly wrong in coming to the conclusion he did. In my view, the learned judge was not wrong in stating that he found no evidence of malevolence or spite as was pleaded as the basis for the claim for exemplary damages.

[114] It should be noted within this context that the appellant's case for an award of exemplary damages was based on the conduct of the 1st respondent, personally. In this connection, the appellant pleaded in paragraph 25 of his amended statement of claim:

> "The First [respondent] informed the [appellant] that he would not be returning the aircraft to him and notwithstanding the [appellant's] demand to allow him to fly the aircraft out of Jamaica, the First [respondent] unlawfully, maliciously and without reasonable and probable [cause], forced the [appellant] to leave Jamaica without his aircraft and against his will."

[115] The allegation of misconduct in the pleadings was evidently directed at the 1st respondent to whom a particular state of mind was attributed and so one would have expected that the appellant would have adduced evidence in support of this pleading. Interestingly, however, his evidence before the court only made specific reference to

the 1st respondent's conduct towards him at the headquarters of the Narcotics Division, where he had met the 1st respondent for the first and (seemingly) only time. He explained this encounter at paragraphs 22 and 23 of his witness statement in this way:

> "22. When we got there I was taken to the office of Superintendent Grant, the 1st [respondent] who introduced himself to me. He told me he was investigating a case of suspicion of drug trafficking. He asked me what I was doing in Jamaica and I told him what I was doing. Superintendent Grant tried to intimidate me by telling me that Bahamians think they are smart and when he was through with me I would never return to Jamaica.
>
> 23. Superintendent Grant took my wallet from me and searched it. He took my original pilot's license and has never given it back to me. He also showed me pictures of other male Bahamians who he asked if I knew. I could not identify any of these persons."

[116] The appellant gave no evidence of any further dealing with the 1st respondent. It is evident that the evidence of what the 1st respondent allegedly did or said was not consistent with the pleadings at paragraph 25, and it is on the evidence that the court would have had to consider whether on the claim in detinue, exemplary damages ought to be awarded as a result of the conduct of the 1st respondent. Clearly, in the evidence of the exchange that the appellant said had ensued between him and the 1st respondent, there was nothing said pertaining to the detention of the aircraft, itself. Furthermore, there was nothing said or done by the 1st respondent himself that could account for the continued and unlawful detention of the aircraft, after a demand had been made for its return, that would constitute the tort of detinue in connection to

which exemplary damages were being sought. It does seem that the 1st respondent's conduct towards the appellant, as stated in the evidence, would have related more to the appellant's detention in custody than to the detention of the aircraft. Therefore, the conduct attributed to the 1st respondent would have been more relevant to the claim for false imprisonment (which was withdrawn) than it would have been to the claim in detinue, with which the proceedings before the learned judge was concerned.

[117] Even more importantly, when the appellant's evidence is closely examined, his evidence was that the policemen who dealt with the plane in Saint Mary, and who took him to the Remand Centre in Kingston, were the ones who, on taking him to the airport, had told him that he would not see his aircraft again. At paragraphs 31-32 of his witness statement, the appellant gave his evidence in this way:

> "31. On the morning of the 30th June, 1995 the same police officers from the Narcotics Department came to the Remand Centre and without any explanation took [us] to the Norman Manley International Airport....
>
> 32. I asked the police what about my plane. I was told that I would not be allowed to fly the plane out of Jamaica and I would not be seeing it again."

[118] This conversation about the aircraft, therefore, was not between the appellant and the 1st respondent. Also, the evidence did not reveal that the policemen told him that they were acting on the instructions of the 1st respondent when they told him that his aircraft would not be returned to him. So, contrary to what was pleaded at paragraph 25, the evidence as presented, has revealed nothing that was said or done by the 1st respondent, either personally or on his instructions, that would amount to

spite or malevolence on his part in relation to the unlawful detention of the aircraft after a formal demand was made for its return (which is necessary for the tort of detinue to arise). Detinue did not arise upon the mere seizure (or detention) of the plane in June 1995.

[119] There is, therefore, no evidence that there was malevolence or spite on the part of the 1st respondent and which, furthermore, would have been referable to the tort of detinue. Accordingly, there is nothing in the circumstances that would warrant punitive measures in the form of an award of exemplary damages over and above the ordinary compensatory damages to which the appellant is entitled in his claim in detinue. The averment that the respondents or their agents acted with malice and/ or without reasonable or probable cause has been accepted and has already been satisfied by an award of a reasonable sum for compensatory damages. There is thus no basis for an award of exemplary damages in the circumstances.

[120] I am content to hold, simply on the basis of the pleadings and the facts ultimately proved by the appellant by his evidence, that the learned judge was correct to find that the basis on which the award for exemplary damages was claimed was not established and that there was no basis to justify the making of such an award. This is not to say that this court does not strongly disapprove of the unreasonable and inexcusable detention of the aircraft for such a considerable period of time and the failure of the respondents to account to the appellant for it. However, I am of the view that the award of compensatory damages made by this court is sufficient to meet any

inappropriate conduct of the respondents in detaining the aircraft for the period in question.

[121] Having examined the totality of the case within the context of the applicable law, I cannot say that the learned judge was plainly wrong or that he exercised his discretion improperly in not making an award for exemplary damages. Accordingly, the complaint in ground (k) that the learned judge misconstrued and/or misapplied the facts and as a consequence erred in making no award for exemplary damages, is without merit. In the premises, I would dismiss ground of appeal (k). The appellant is, therefore, not entitled to exemplary damages.

Whether the learned judge erred in awarding interest for nine years (ground (l))

[122] The learned judge awarded interest on damages for only nine years on the basis that the history of the matter, and the delay in disposal of the claim, had rendered that fair. Having taken into account the delay in the disposal of the matter over the years, he formed the view (at paragraph [72] of the judgment) that it would have been unjust to award interest for the entire period because there were "periods of delay over which the [respondents] had no control, to which they did not contribute and for which delay no blame can fairly be laid at their feet".

[123] The appellant is aggrieved by that decision. Mrs Hunter argued that the appellant was not given an opportunity to make representations to the learned judge on the issue. The delay, she argued, must be viewed against the background of the date when the judgment on admission was entered. She maintained that the learned judge did

not take into account that the delay was due to the respondents' failure to admit liability until 17 years after the seizure of the aircraft and so the appellant ought not to be penalized for the court's delay in determining the matter.

[124] Ms Thomas accepted that the appellant should have been given an opportunity to be heard on the issue of delay before the decision was taken to reduce the period for which interest should be awarded. She argued, however, that the learned judge was correct in exercising his discretion to reduce the period to nine years for an award of interest based on the facts of the case.

[125] The award of interest for part of the period between the date the cause of action arose and the date of judgment was one that was solely within the discretion of the learned judge, in keeping with section 3 of the Law Reform (Miscellaneous) Act. However, like the exercise of judicial discretion in all matters, that discretion was required to be exercised judicially. The learned judge, to his credit, did not act arbitrarily or capriciously as he sought to rationalise his decision in reducing the appellant’s entitlement to interest on the basis of the delay in the matter, which, in his view, ought not to have prejudiced the respondents. The question, however, is whether it was reasonable for him to have arrived at such a conclusion in the absence of submissions from the appellant and in the light of all the circumstances of the case.

[126] Having examined all the circumstances of the case, and the reasons advanced by the learned judge for reducing the period for the award of interest, and in doing so without affording the appellant an opportunity to be heard, I find that I am unable to

agree with Ms Thomas that it was a proper exercise of his discretion. He ought to have given the appellant an opportunity to be heard so that all relevant matters, bearing on the issue of delay, could have been explored in the interests of justice. Even more importantly, the conduct of the respondents, in refusing to deliver up the aircraft, not accounting to the appellant for it, and then failing to admit liability until after 16½ years or so, should have militated against them having the benefit of reduced interest payment.

[127] The reduction of the interest on the mere basis of the delay in the proceedings in the Supreme Court cannot be accepted, given all the circumstances. For these reasons, it can be said that the learned judge erred in reducing the period of interest on the basis of delay. There is therefore merit in ground of appeal (l). The question as to whether interest should be awarded is now in the discretion of this court.

[128] The principle that underpins the inclusion of a sum for interest in an award of damages is explained in the oft-cited statement of Lord Herschell in **The London Chatham and Dover Railway Company v The South Eastern Railway Company** [1893] AC 429, at page 437 that:

> "...when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use."

[129] In Halsbury's Laws of England, Third Edition, Volume 38, at paragraph 1325, it is stated that interest may be allowed in an action for detinue in addition to the value of the goods at the time of judgment. It seems, therefore, that there is nothing in law precluding an award of interest on the replacement value of the aircraft as the learned judge had done.

[130] In relation to damages for loss of use, however, the same authors also noted:

> "It is doubtful, however, whether interest could be awarded in addition to damages for detention or for loss of use in an action for detinue without infringing the rule against giving interest upon interest."

They cited no other authority for this proposition except the proviso to section 3 of the Law Reform (Miscellaneous) Act, which expressly set out the rule that interest must not be awarded on interest.

[131] In McGregor on Damages, at paragraphs 15-037-15-038, it is intimated that where damages is awarded in cases at common law, where profit earning or non-profit earning chattels are destroyed (which, to my mind, seems analogous to the situation in this case where the chattel is not returned and accounted for), two courses are open: "Either the value of loss of use may be awarded as damages, as of right, on general principles, **and this would be equivalent to interest***,* or the discretion of the court should be exercised in favour of the award of [statutory interest] following principles applied in the admiralty cases". (Emphasis supplied)

[132] On the bases of these authorities, it seems in this case that the appellant, having obtained interest on damages for the replacement value ought not to receive interest on the damages for loss of use, since damages for loss of use is said to be equivalent to interest. It does seem that such an award of interest would infringe the rule against awarding interest upon interest. I agree with the argument of the learned President (as stated at paragraph [10] above) that if interest were allowed on the sum awarded as damages for loss of use, this would secure a windfall to the appellant at the expense of the respondents, which would not be fair. In fact, the appellant is adequately compensated for loss of his chattel, having been given its replacement value in addition to loss of use of it as it stood at the date of assessment in 2013. The damages under both heads would have given the appellant the money value of his chattel as it stood in 2013. There is therefore no reasonable basis for pre-judgment interest to be awarded in the circumstances on the damages awarded for loss of use.

[133] I am mindful, however, that there was no counter-notice of appeal on this aspect of the learned judge's decision and this had generated a measure of concern as to how the issue should be treated with. I would, however, follow the lead of the learned President and adopt his arguments set out in paragraph [10] of this judgment for interfering with the learned judge's discretion in awarding interest on the damages awarded for loss of use. The approach taken by the learned President is, in my view, necessary for the proper administration of justice. I would hold that no interest should be awarded on the damages awarded for loss of use.

[134] The remaining question now is the period for which interest should be awarded on the damages for the replacement value of the aircraft. In this connection, the submissions of counsel have been considered. Mrs Hunter insisted that the appellant was entitled to an award of interest for the entire period of detention (18 years) while Ms Thomas submitted that the nine years' interest awarded by the learned judge was reasonable. In considering what should be an appropriate period for the award of interest, I have taken into account the fact that the respondents had waited for almost 17 years to admit liability. It was this failure to admit liability that substantially led to the delay in the disposal of the matter in the court below. The respondents ought to have known, well before 2012, that they were not in a position to return the aircraft and so should have taken steps to compensate the appellant for the deprivation of his property. They failed to do so without any reasonable excuse. This failure on the part of the respondents in the circumstances of this case ought not to be used against the appellant and to the benefit of the respondents, without good reason.

[135] I hold that a reasonable period for the award of interest on the sum of US$56,236.00 (the replacement value of the aircraft), taking everything into account, should be from the date of the service of the writ on 19 January 1996 to the date of the admission of liability, being 6 June 2012.

Conclusion

[136] Accordingly, I would propose that the necessary orders be made to reflect the following terms:

(i) The appeal is allowed in relation to ground of appeal (a). The award of damages in the sum of US$47,722.14 (the replacement value of the aircraft) is set aside and substituted therefor is an award in the sum of US$56,236.00.

(ii) The appeal is allowed in relation to grounds of appeal (b), (c), (d) (e) and (f). The award of damages in the sum of US$36,288.00, for detention of the aircraft/loss of income from use of the aircraft, is set aside and the sum of US$1,826,832.00 is substituted therefor.

(iii) The appeal is dismissed in relation to grounds (g), (h), (i), (j) and (k). The decision of the learned judge in making no award for legal expenses, expenses for travelling to Jamaica, and exemplary damages is affirmed.

(iv) The award in the sum of US$910.00, being the cost of the amended market analysis (which was not appealed against but which is included as part of the order being sought in relation to special damages), shall remain undisturbed.

(v) The appeal is allowed on ground (l) and the order of the learned judge is set aside. A new order is substituted as follows: Interest is awarded at 3% per annum on the sum of US$56,236.00 (replacement value of the aircraft) from 19 January 1996 to 6 June 2012; and at 3% per annum on the sum of US$910.00, awarded for special damages from 22 November 1995 to 19 November 2013.

(vi) Costs of the appeal to the appellant to be agreed or taxed.

SINCLAIR-HAYNES JA (DISSENTING IN PART)

[137] This matter spans more than two decades. It is a classic case of highhanded, oppressive and unconstitutional action by state agents. On 26 June 1995, Mr Dion Moss (the appellant) was detained by police from the Narcotics Department who also seized his aircraft. To date no charge has been laid against the appellant, yet his aircraft cannot be accounted for. An attempt was made to cast blame at the feet of the United States government in the respondent's statement of facts and issues before the learned judge, however not only was the allegation not pleaded, no evidence was led to substantiate the claim.

[138] Consequently on 22 November 1995, the appellant instituted proceedings against Superintendent Reginald Grant and the Attorney General, claiming damages for false imprisonment, trespass and/or conversion and/or detinue *inter alia.* On 2 July 2013 the appellant in his amended claim particularized damages as below.

"i.	Loss of income from use of aircraft June 26, 1995 to June 30, 2013 @ US$1,000.00 per day, 6 days per week (312 days per year – 18 years). (Damages for Detention)	US$5,616,000.00
i.	Replacement value of a typical 1970 Piper PA-23-250 Aztec Aircraft @ January 25, 2013	US$56,236.00
ii.	Costs of Market Analysis prepared by Mark Hutchens of Aircraft Appraisals Unlimited	US$910.00
iii.	Travelling from the Bahamas to Jamaica to secure release of aircraft 4 trips @ US$241.00 per trip	US$964.00
iv.	Legal expenses incurred to secure release from custody and aircraft	US$2,000.00
v.	Loss of income of aircraft from July 1, 2013 and continuing (to be determined)	_____
	Total	**US$5,676,110.00"**

"The Claimant repeats and relies on paragraphs 1-29 of his Amended Statement of Claim in superintendentport of his claim for Exemplary and or/ Punitive Damages. The Claimant will say that the actions of the First Defendant were actuated by malevolence or spite toward the Claimant and they thereby intended to and did intimidate the Claimant and subjected him to ridicule and contempt in public by reason whereof the injury to the Claimant has been greatly

aggravated and the Claimant claims Damages under footing [sic] of Exemplary Damages."

[139] These claims were stoutly resisted by the respondents for approximately 17 years although a settlement had been urged by a number of judges at case management hearings from as early as 2004. On 6 June 2012, however, the respondents threw in the towel and admitted liability in respect of the appellant's claim for detinue and unlawful seizure of the aeroplane. In an effort to effect a rapprochement, the appellant withdrew his claim for false imprisonment and the matter was thereby set for damages to be assessed.

[140] F Williams J (as he then was) assessed the damages suffered by the appellant and awarded damages as follows:

" i. The sum of US$47,722.14 being the replacement cost of the aircraft.

ii. The sum of US$910.00, being the cost of the amended market analysis.

iii. The sum of US$36,288.00 being the sum awarded for loss of earnings from the aircraft.

iv. Interest on the said sum at the rate of 3% per annum from June 26, 1995 to June 30, 1999; and at the rate of 6% per annum from July 1, 1999 to June 26, 2004 (a period of nine (9) years);

v. Costs to the plaintiff to be agreed or taxed."

[141] The appellant, being dissatisfied with aspects of the learned judge's decision, consequently filed the following grounds of appeal and has challenged the following findings of fact and law.

Grounds of appeal:

"a) The learned trial Judge having accepted that the amended market analysis is objective, fair and unbiased erred in his assessment of the replacement value of the aircraft when he discounted the said market analysis by 15% as the appraiser was not able to see the actual aircraft. The learned trial Judge failed to take into account that the appraiser had already discounted the market analysis.

b) The learned trial Judge erred in awarding loss of use for only three (3) months and not the entire period of detention, as he failed to appreciate that the act of detention of the aircraft continues to be wrongful by reason of the Respondents failure to return it and the wrong continues until delivery and/or judgment, whichever is first in time.

c) The learned trial Judge in arriving at the sum payable for loss of use of the aircraft failed to properly apply the principle in **Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd** [1952] 2 QB 246 adopted in our Court of Appeal in the case of **Workers Savings & Loan Bank and others v Horace Shields,** SCCA No 113/1998(delivered on 20 December 1990) which is that "the owner of the profit earning chattel which is detained is entitled to a reasonable hire charge for the period of such detention".

d) The learned trial Judge having accepted that the aircraft was an income earning property, failed to recognize that the Appellant was entitled to recover loss of use at the normal market rate at which the said property could have been hired.

e) The learned trial Judge erred in finding that the Appellant ought to have mitigated his loss, and that a period of three months was sufficient time to do so. The learned trial Judge failed to apply the appropriate principle of *restitutio in integrum* in assessing the measure of damages.

f) The learned trial Judge failed to appreciate that detinue is a continuing wrong and the Respondents having waited in excess of sixteen and a half (16½) years to admit liability for the detinue and unlawful seizure of the Appellant's airplane cannot complain that the Appellant's claim for detention and/or loss of use is extravagant.

g) The learned trial Judge erred in refusing to make an award for legal expenses in that he failed to properly analyse the evidence before him to decide whether in the instant case the claim must fail because of a lack of receipt. There was no dispute that the Appellant retained the services of an attorney-at-law to secure the release of his aircraft before action was filed. The same attorneys-at-law represented him at the trial there was never any suggestion that this sum was not incurred or was unreasonable in amount.

h) The learned trial Judge erred in failing to award the sum claimed for travelling expenses to travel to Jamaica to secure the release of the Appellant's aircraft. The learned trial judge in analysing the evidence seemed to place great emphasis on the fact that he did not have documentary evidence without addressing his mind to whether the sum was incurred, it was reasonable to incur the sum claimed and/or whether the amount claimed is reasonable.

i) The learned trial Judge failed to properly analyse the evidence for the claim for damages for detinue. Having accepted that the analysis done on behalf of the Appellant was more comprehensive than that done on behalf of the Respondents, the learned trial Judge simply accepted the reasoning of counsel for the Respondents on the basis that is not unreasonable.

j) The learned trial Judge in coming to the decision not to award exemplary damages failed to appreciate that exemplary damages are not to compensate the Appellant, but to deter the Respondents from similar behaviour in the future. The fact that the damages will be paid by someone vicariously liable for his actions and not by the actual wrongdoer does not prevent an award being made for exemplary damages.

k) Further and/or in the alternative the learned trial Judge misconstrued and/or misapplied the facts and as a consequence he erred in making no award for exemplary damages. The learned trial Judge failed to appreciate that the conduct of the 1st Respondent, the servant and or agent of the 2nd Respondent in seizing and unlawfully detaining the Appellant's aircraft in circumstances where he was not charged with any criminal offence, there was no order from any court in Jamaica for the detention and/or seizure of the aircraft, the substance allegedly found on the aircraft while it was in the custody of the Respondents was never tested, the aircraft was not required as an exhibit in any court proceedings in Jamaica was oppressive, arbitrary and unconstitutional. After 18 years the Appellant's aircraft was still not returned by the Respondents. This continuing wrongful conduct by the agents of the state ought to be punished.

l) The learned trial Judge in awarding interest for only nine (9) years relied solely on the written submissions of the Respondents' counsel as to the history of the matter and did not afford the Appellant's counsel an opportunity to address him on same. Further, the learned trial Judge in exercising his discretion for the period for which interest is to be awarded failed to take into consideration that the Respondents were primarily responsible for the delay in the matter being heard. In the circumstances, the learned trial Judge failed to examine all the factors which contributed to delay in the matter proceeding, in particular the inexplicable delay by the Respondents in waiting

approximately 16 ½ years to admit liability for wrongful detention of the Appellant's aircraft."

Findings of fact and law challenged

"a) The amended market analysis would be more acceptable as a reliable and more-nearly accurate guide if the appraiser had been able to see the actual aircraft. To make allowances for this it does appear to the court to do some amount of discounting of the figure by 15% appears to be reasonable.

b) That the evidence given by the Appellant/Claimant was sparse in respect of his travelling expenses. Applying the principle in Bonham-Carter the claim for this item fails.

c) The Appellant's/Claimant's failure to produce a receipt for legal expenses must fail as he is unable to locate the receipt and he has failed to explain what efforts he made, if any to locate it.

d) It appears that the submissions of counsel for the Respondents/Defendants are not unreasonable – in particular where it is proposed that an average of three passengers be used and that allowances be made for the highly – competitive nature of the business in which the Appellant/Claimant was engaged – there having been competition from sole operators, such as he, as well as the charter companies.

e) In all the circumstances, the court finds the claim for 18 years to be unreasonable and to be unsupportable – given the requirement of every Appellant/Claimant or Plaintiff to take steps to mitigate his losses.

f) A period for the Appellant/Plaintiff to be allowed to gather his thoughts, as it were, after the aircraft was seized and map a strategy and a plan for the way forward, and attempt to obtain alternative (even interim) employment, is, in the court's view, three months.

g) The factor of delay, as well, that is not attributable to the Respondents/Defendants (or not the Respondents/Defendants alone), is another consideration that militates against an award of the full 18 years.

h) While the conduct of the police and the entire experience of being caught up in an investigation; and being detained and having his aircraft seized by the police would have perceived to have been an oppressive experience for the Appellant/plaintiff, one is not certain that an award of exemplary damages would be appropriate in the circumstances of this case, having regard to the authorities cited..

i) As the tortfeasors themselves (as suggested by the judgment on admission) are not before the court; and damages in the case fall to be paid by the state, this seems to be one of those cases of the ilk of **Kuddus**-the liability here being vicarious-and the consolidated cases of **Thompson** and **Hsu**-the damages here being payable by the 'employer' of the persons who might be regarded as the tortfeasors, which at the end of the day translates into the taxpayers of Jamaica...

j) When one looks at the basis of the Appellant's/Plaintiff's claim for exemplary damages, it is the court's view that the bases have not been satisfactorily established. The court has no evidence of malevolence or spite. No award for exemplary damages will be made in this matter...

k) It appears to the court that the reasons put forward (by the Respondents'/Defendants' counsel in her written submission) for the exercise of the court's discretion not to award interest for the entire period constitute quite a sound basis for the exercise of the court's discretion in the way requested. If interest should be awarded for the entire period, then that would mean that the Appellant/Plaintiff would in effect be allowed to benefit from, and the Respondents/Defendants would be saddled with, the making of added payments for periods of delay over which they had no control, to which they did not

> contribute and for which delay no blame can fairly be laid at their feet. That would not be just. Making an award for nine years seems to the court to strike a fair balance, having regard to history of the matter."

The background

[142] The appellant is a Bahamian citizen and an airline pilot who acquired an aircraft which provided charter and private travel service. On 19 June 1995, he arrived in Jamaica to finalize an arrangement with Mr Raphael D Barrett, the chairman and CEO of Reggae Sunsplash 1995, which would allow him "to provide a package deal for those patrons inclusive of air service".

[143] On 24 June 1995, his first charter flight arrived in Jamaica from The Bahamas. His aircraft was flown by two commercial pilots who landed the aircraft at the Donald Sangster International Airport and duly cleared customs. The aircraft was then flown to the Boscobel Aerodrome in Saint Mary where it "was left in the custody of the Aerodrome Security and Personnel".

[144] Two days later, on 26 June 1995, he was driven to the said aerodrome by Winston McKenzie. There he saw four men. Two sat under his aircraft and the others were on the ramp. They approached him and enquired of him whether he was the owner of the aircraft. His answer was in the affirmative. The men, who were not dressed in uniform, informed him that they were police from the Narcotics Department and requested the key to the aircraft. Superintendent Reginald Grant was the head of the Narcotics Department and was in control of the police officers.

[145] He informed one of the men who identified himself as a policeman that Mr Trevor Johnson, who had flown the plane, was in possession of the key. He further informed him that he was on his way to Kingston and, not having visited that area, had stopped to see the aerodrome.

[146] He was instructed by the police to take them to Mr Johnson for the keys, because they wished to search the aircraft. He was placed into a jeep which was driven by one of the police while the others rode in the car which had taken him to the aerodrome. Mr McKenzie directed them to the villa in Montego Bay where Messrs Trevor Johnson and John McDonald were staying. There Mr Johnson handed the keys to the aircraft to the police.

[147] Having received the keys, he, Mr Johnson, Mr McDonald and Mr McKenzie were informed that they were under arrest and would be transported to Kingston. They were ignorant as to the reason for their arrest. They were transported in the said jeep and Mr McKenzie's car was taken to the Narcotics Headquarters in Kingston. There Superintendent Grant introduced himself and informed the appellant that he was investigating "a case of suspicion of drug trafficking".

[148] He was questioned as to the reason for his presence in Jamaica and informed by Superintendent R Grant that "Bahamians think they are smart and when he was through with [him he] would never return to Jamaica". He searched his wallet and removed from it his original pilot's licence (which was never returned).

[149] On 28 June 1995, he and Mr Johnson were taken to the Boscobel Aerodrome by the police officers who had taken them into Kingston. The officers who had taken the keys from Mr Johnson opened the aircraft. They unscrewed the back panel from the baggage compartment. Parcels taped with grey duct tape to the flight control lining were seen. The appellant was questioned about the contents of the parcels and he told them he did not know and in turn enquired of them why the parcels were there. It was the appellant's evidence that persons who are knowledgeable about aircrafts "would never interfere with the flight control lining as this would result in the aircraft malfunctioning and would certainly result in the aircraft crashing".

[150] They were informed that the parcels appeared to contain ganja. On 30 June 1995 the same police officers attended the Remand Centre and without any explanation, took them (the appellant and Messrs Johnson and McDonald) to the Norman Manley International Airport; checked them on a flight to The Bahamas; escorted them to the plane and informed them that they were never to return. Upon inquiring about his plane, he was told that he would not be allowed to fly it out of Jamaica and he would never see it again. He has not seen his plane since 28 June 1995 and has consequently been deprived of its use for both personal and business purposes.

Ground (a)

The appraiser's assessment

Analysis

[151] It was the appellant's evidence that he purchased the aircraft, by making several payments over a period towards its acquisition. It was not a new aircraft. He provided the court with the necessary documentary evidence. Mr Hutchens, an appraiser of aircrafts, however did not rely wholly on the opinion of the appellant. He assessed the aircraft at a figure which was substantially lower than that which the appellant provided, at US$56,236.00. He explained the manner in which the annual rate of depreciation is calculated and provided his reason for arriving at the figure of US$56,236.00. The following questions were posed to Mr Hutchens on behalf of the respondents:

"2 Question:	How is it that you were able to provide a value for the air-craft without physically inspecting the aircraft itself?
Answer:	The Market Analysis Report is a desk top appraisal that does not involve the physical inspection of the aircraft. The intent of the report is to estimate the current value of a typical 1970 Piper PA-23-250 with 3000 hours total airframe time and both engines and propellers at 1000 hours, or the mid-time, of their time intervals between overhaul. This report was not based on any specific aircraft.
	...
6 Question:	In paragraph 6 on page 3 of your Report, you indicate that the airframe, paint and interior of the aircraft were

estimated to rate a 7 on a scale of 10. On what basis was a rating of 7 given to these items?

Answer: The rating of 7 was given to these items based on my estimate of the condition of a typical 1970 Piper PA-23-50."

[152] The learned judge was however not satisfied with Mr Hutchens' appraisal because he was not able to view the aircraft but rather relied on information from the appellant. At paragraphs [25]-[27] of his decision, the learned judge said:

> "[25] In the instant case, although the appraiser indicates in his report that his data are accepted by a number of corporations and agencies- such as the Federal Deposit Insurance Corporation (FDIC) and the Internal Revenue Service (IRS), and insurance companies, **there is nothing that this court has to verify this independently. Even if we should accept it as objective, fair and unbiased**, however, there still is one concern: it would no doubt have been more acceptable as a reliable and more-nearly-accurate guide if the appraiser had been able to see the actual aircraft and to not have had solely to rely on the information provided by the client plaintiff.
>
> [26] The information given by the client plaintiff has figured prominently in the appraiser's consideration of the matter and his ultimate assessment. For example, the items such as exterior paint condition; interior condition and cockpit condition are all listed as 'good' – based on information provided to the assessor by the plaintiff. Who is to say whether this was really so? Is it not possible that the plaintiff might have overstated the condition of these items in an effort to inflate the value that might ultimately be arrived at? There is no proof that he did. But, similarly, there is no proof that he did not. Is it likely that he would have understated the condition of his aircraft, the value of which he is trying to recover? This seems unlikely. To make allowances for such a consideration, it does appear to the court to be best to do some amount of discounting; and to discount the figure by 15% appears to the court to be reasonable.

> [27] The court will, therefore accept the submissions of counsel for the defendants that the figure that should be awarded under this head is US$47,722.14." (Emphasis supplied)

[153] Ms Carla Thomas, on the respondents' behalf, submitted that the learned judge correctly opined that the report would have been more reliable and accurate if Mr Hutchens had been able to inspect the aircraft rather than placing sole reliance on the appellant's information as to its condition. It was her further contention that although the learned judge recognised that there was no evidence that the appellant had overstated the aircraft's condition, there was nevertheless the possibility that the appellant's information might have been influenced by self interest. The approach employed by the learned judge ensured that there was some measure of reliability, accuracy and objectivity to the information which the appellant provided Mr Hutchens.

[154] Learned counsel submitted that the learned judge drew an analogy to the two-tier approach employed in motor vehicle claims to ensure objectivity to the value arrived at, and the 10-15% discount applied in the absence of the second tier. As there was no challenge to the accuracy of the calculation used to arrive at US$47,722.14, she submitted that the learned judge's award ought not to be disturbed.

[155] Counsel for the appellant, Mrs Nesta-Claire Hunter, however pointed out that the report was admitted into evidence with the consent of the respondents and the figure of US$56,236.00 was not challenged. It was her submission that this court therefore should accept Mr Hutchens' assessment of the current market value of the aircraft at

US$56,236.00 as a current and accurate assessment of the aircraft's value on a balance of probabilities.

Analysis

[156] In the light of the absence of any challenge to the appraiser's reliability, by the respondents, as to his assertion that his data are accepted by reputable corporation and agencies, including over 5,200 financial institutions, it seems to me that there was no basis for the learned judge to doubt the appraiser's reliability and credibility.

[157] There was no dispute that the aircraft was a typical six seater 1970 Piper PA-23-250 Aztec aircraft which condition was neither perfect nor deplorable. Importantly, as pointed out by Mrs Hunter, the respondents adduced no evidence nor did they attempt to obtain a valuation of the aircraft. In fact, the description of the aircraft on which Mr Hutchens relied in the preparation of his report, was one on which the parties had agreed.

[158] In resolving this issue, an important consideration must also be the fact that the appraiser was denied the opportunity of viewing the actual aircraft because of the actions of Superintendent Grant, who not only detained the aircraft without reasonable and probable cause and without due process, but has failed to account for its disappearance. In fact, the police from the Narcotics Department forcibly severed any contact by the appellant with the aircraft by ordering him "never" to return to Jamaica.

[159] It seems to me to be wholly unjust and unfair that in those circumstances the appellant should suffer as a result. If the aircraft were available, the respondents

would have been at liberty to have it physically appraised by their appraiser. Indeed I cannot see the justification for rejecting the estimate of a qualified appraiser whose experience spans 25 years, 23 of which he has personally appraised hundreds of aircraft and substituting instead a figure "plucked from the air" by persons wholly unqualified to provide any reliable estimate.

[160] I must agree with learned counsel Mrs Hunter that the learned judge erred in further discounting the appraiser's already discounted appraisal. Ground (a) therefore succeeds.

Grounds (b), (c), (d), (e), (f) and (i) as above quoted will be dealt with together.

The quantification of damages

[161] Learned counsel for the appellant assailed the learned judge's following findings:

> "[54] In all the circumstances, the court finds the claim for 18 years to be unreasonable and to be unsuperintendentportable – given the requirement of every claimant or plaintiff to take steps to mitigate his losses. A period for the plaintiff to be allowed to gather his thoughts, as it were, after the aircraft was seized and map a strategy and a plan for the way forward, and attempt to obtain alternative (even interim) employment, is, in the court's view, three months.
>
> [55] Additionally, the arguments as to delay that were advanced in relation to the matter of interest, also have a bearing on this issue – as the factor of delay, as well, that is not attributable to the defendants (or not the defendants alone), is another consideration that militates against an award for the full 18 years. These factors will be more carefully examined shortly.

> [56] The award under this head will **t**herefore be US$12,096 X 3=US$36,288."

[162] Learned counsel contended that the appellant was entitled to be compensated for the entire period the aircraft was unlawfully seized and detained. She relied on the cases **Rosenthal v Alderton and Sons Limited** and **The Attorney General** [1946] 1 KB 374 and **The Transport Authority v Aston Burey** [2011] JMC Civ 6. In relying on the case **The Attorney General & The Transport Authority v Aston Burey** learned counsel submitted that the measure of damages is the value of the chattel as well as the resulting loss consequent on the detention of the chattel. An award of damages is compensatory, she said. The appellant is therefore entitled to that which he has lost rather than that which another may have gained. For that proposition, she directed the court's attention to the case **Workers Savings and Loan Bank and others v Horace Shields** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 113/1998, judgment delivered 20 December 1999.

[163] Learned counsel has asked the court to consider the following in assessing the damages for detention of the aircraft:

i. it was a profit-earning property;

ii. It was for hire; and

iii. the refusal of the respondents to return the aircraft or its value for more than 18 years.

[164] Counsel contended that the loss occasioned by the detention of the aircraft is the amount which he could have hired it for during the period of its detention. For that

proposition she relied on the case, **Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd** [1952] 2 QB 246.

[165] Learned counsel also submitted that the issues to be resolved are:

(1) What is the reasonable rate of hireage of the aircraft during

the period of its unlawful seizure and detention?

(2) What is the current cost of replacing the aircraft?

(3) What deductions should be made from the damages to cover the operational costs?

The respondent's arguments

[166] Ms Thomas submitted that the learned judge's duty was to arrive at an appropriate figure which accords with the evidence. His acceptance of the appellant's figures as to the annual maintenance and operating costs did not oblige him to accept and award the sums proffered by the appellant. Learned counsel submitted that the learned judge's approach of accepting the sum proposed by the respondent which accounted for: the fluctuation in the number of flights made daily; the resulting variation of the income; and the vagaries associated with the occupation and the market was the more realistic one. That approach she said was more consistent with Lord Denning's dicta in **Strand**.

[167] The sum of US$5,616,000.00, she submitted, was properly rejected by the learned judge as it did not account for the variables to which the respondent drew his

attention. She listed the following as examples: whether an aircraft which was manufactured in 1970 would have been fit to be flown the entire 18 year period; and the appellant's failure to mitigate. She acknowledged that on the authority of **Uzinterimpex JSC v Standard Bank plc** [2008] EWCA Civ 819 mitigation is applicable to conversion in England as the tort of detinue had been abolished. She however urged the court to find that mitigation was also applicable to detinue.

Discussion/law

[168] Was the learned judge correct in awarding damages for three months and not the entire period the aircraft was detained? The **Rosenthal** case was a ground breaking one on the issue. The law is however now quite settled on the matter. At pages 377 and 378 of **Rosenthal**, Evershed J said:

> "In an action of detinue the value of the goods claimed but not returned ought, in our judgment, to be assessed as at the date of the judgment or verdict. **A successful plaintiff in an action of detinue was, under the old practice, entitled to judgment for the re-delivery of the goods or, in case they were not returned, to their value together with damages and costs;** and such value was either assessed by the jury at the trial or by the sheriff upon an inquest (see e.g., Viner's Abridgement, 2nd ed., vol 8., p. 40; Bullen and Leake, Precedents of Pleadings, 3rd ed., p. 313; *Phillips v. Jones* (I), per Parke B.). Unless the alternative methods of assessing value were liable to produce substantially different results, the time at which the value was in each case to be determined, must have been the date of the verdict...
>
> …**The significance of the date of the refusal of the plaintiff's demand is that the defendant's failure to return the goods after that date becomes and continues to be, wrongful, moreover, the plaintiff may recover damages in respect of the wrongful**

> **'detention'** after that date, e.g., where the plaintiff has suffered loss from a fall in value of the goods between the date of the defendant's refusal and the date of actual return, (see *William v. Archer* (2)), and such damages must equally continue to run until the return of the goods or (in default of return) until payment of their value. There is (as appears from the forms of judgment already mentioned) a clear distinction between the value of the goods claimed in default of their return and damages of their detention, whether returned or not."

[169] This court has repeatedly adopted that position. In the case **The Attorney General and The Transport Authority v Aston Burey** the respondent's Toyota Hiace motor bus was unlawfully seized by a police officer and handed over to the Transport Authority which compounded the wrong by selling the vehicle. The respondent instituted proceedings for detinue *inter alia*. In dealing with the appellant's claim for detinue, Harris JA at paragraph 7 of the judgment said:

> "...In detinue the measure of damages is the value of the goods as at the date of trial..."

[170] The learned judge of appeal (at paragraph [12] of the judgment) made it quite plain that in detinue, time begins to run from the date of the refusal of the demand and continues until judgment.

[171] The appellant was also entitled to a reasonable hire charge of the aircraft for the period of its detention. That is, from the time of the refusal of the demand to the time judgment was entered. Harrison JA's following statement in **Workers Savings & Loan Bank and others v Horace Shields**, erases any doubt as to the position this court holds on the matter. The learned judge of appeal said:

> "A person who is deprived of his chattel is ordinarily entitled to sue for its full value, together with any special loss that he may have suffered during the period of the unlawful detention, or he may sue in conversion or both, depending on the circumstances. If the said property detained is a profit-earning one, the loss to the plaintiff is the normal market rate at which the said property could have been hired out
>
> Referring to the tort of detinue, the author in **Mayne & McGregor on Damages**, 12th edition, said at paragraph 715:
>
> > 'The normal measure of damages is made up of two parts. First, it is the market value of the goods where they are not ordered to be returned to the plaintiff. Secondly, whether the goods are or are not returned, it is such sum as represents the normal loss through the detention of the goods, which sum should be the market rate at which the goods could have been hired during the period of detention'." (See pages 5- 6)

[172] The learned judge of appeal, at page 6, relied on the dicta of Romer LJ in **Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd** for the proposition that "the owner of goods detained by another was entitled to a reasonable charge for the hire of the goods from the date of their detention to the date of their return". The appellant's entitlement to damages therefore commenced at the latest date at which a refusal of a demand could have been made, that is from 22 November 1995, the date the claim was instituted and the respondent wrongfully refused to deliver up the airplane. It continued until judgment was entered against the respondents on 19 November 2013. The learned judge was therefore palpably in error in awarding damages for loss of use for only three months.

[173] The appellant's challenge to the learned judge's following finding of fact is also meritorious:

> "[48] It appears that the submissions of counsel for the defendants are not unreasonable – in particular where it is proposed that an average of three passengers be used and that allowances be made for the highly-competitive nature of the business in which the claimant was engaged - there having been competition from sole operators, such as he, as well as the charter companies..." (Paragraph 48)

[174] Harrison JA, dealt with a similar issue in the **Workers Bank Savings & Loan Bank and Others v Horace Shields**. In that case the respondent was deprived of the use of his front-end loader which had been unlawfully detained. He was thereby prevented from honouring his obligations under his contracts for a considerable period. In relying on the **Strand** case, the learned judge of appeal said at pages 6-7:

> "In dealing with the argument that the plaintiff was not entitled to the full amount of hireage because the equipment may not have been taken on hire, Romer, LJ., said at page 802:
>
> > 'In my judgment, however, a defendant who has wrongfully detained and profited from the property of someone else cannot avail himself of a hypothesis such as this. It does not lie in the mouth of such a defendant to suggest that the owner might not have found a hirer, for in using the property he showed that he wanted it and he cannot complain if it is assumed against him that he himself would have preferred to become the hirer rather than not have had the use of it at all'."

The mitigation issue

[175] The learned judge found that the appellant had failed to mitigate his losses. He said:

> "[52] To the court's way of thinking, these parts of the plaintiff's witness statement demonstrate that the plaintiff clearly was able to earn an income otherwise than through the use of his own aircraft. Unless circumstances had changed (of which there is no evidence), he could have sought and gained employment with either a sole operator or a charter company or attempted to have leased an aircraft, as he did before. He gave no evidence whatsoever of any attempt to find employment in his field of endeavour. Instead, from his evidence, he only attempted to gain employment some one year and a half after the aircraft was seized; and he did so (on his evidence) by doing 'standby' work; and some five years after the aircraft was seized, as a manager of an apartment complex and some three years after the aircraft was seized, through work in the construction industry. He has not indicated in his testimony what efforts, if any, he made to obtain stable employment in the field of aviation or what difficulty confronted him as he made those efforts. He has not, in the court's finding, acted reasonably in all the circumstances in an effort to discharge the duty that is cast on him to mitigate his losses. A prudent and reasonable man would have acted with more celerity and at a much earlier point in time to keep losses down."

[176] Ms Thomas apparently conceded that the learned judge ought not to have considered the income the appellant would have earned as a pilot, and his failure to secure alternate employment but rather the income the appellant would have earned from the aircraft. The appellant's claim is for the loss of use of his plane. His acquiring alternate employment is immaterial as he is in any event entitled not only to damages loss suffered as result of the detention, but also the market value of the aircraft.

[177] Learned counsel for the appellant also directed the court's attention to Harris JA's statement in the **Aston Burey** case which clarifies this court's position on the matter. At paragraph [11] Harris JA said:

> "The remedy offered in detinue takes a claimant outside of the range of that which is afforded by conversion. It accords him a considerably larger remedy and a minimal larger right."

[178] In **General & Finance Facilities v Cooks Cars (Romford)** [1963] 1 WLR 644, Diplock LJ speaking to the advantages a claimant enjoys in bringing an action in detinue, said at page 650:

> "...an action for detinue today may result in a judgment in one of three different forms: (1) for the value of the chattel as assessed and damages for its detention;(2) for return of the chattel or recovery of its value as assessed and damages for its detention; or (3) or return of the chattel and damages for its detention."

[179] The English Court of Appeal case **Uzinterimpex JSC v Standard Bank plc** [2008] EWCA Civ 819, on which the respondents relied, is in my view unhelpful. By virtue of the Tort (Interference with Goods) Act 1977, the tort of detinue was abolished in England. The appellant's case is governed by common law principles. The **Uzinterimpex** case is therefore distinguishable as its claim was grounded in conversion.

[180] In any event, the circumstances of the instant case are wholly dissimilar. As said by Lord Scarman in **Owen v Tate and another** [1976] QB 402: "circumstances alter cases". In this case the subject matter is a chattel which could have been operated

independently of the owner whereas the **Uzinterimpex** case concerned cotton which Uzinterimpex unreasonably refused to agree to sell and have the proceeds placed in an account which would have avoided storage costs and depreciation.

[181] In that case the Court of Appeal held that Uzinterimpex's failure to take advantage of an opportunity which was available to him could not be ignored. At paragraph [69] Moore-Bick LJ said:

> "For these reasons I have reached the conclusion that in principle a duty to avoid or minimise loss arises when goods are converted in the same way as in the case of other legal wrongs. Whether it will be possible to achieve that end will depend on the circumstances of the case and the nature of the loss flowing from the wrongful act, but the person whose goods have been wrongfully interfered with must do what he reasonably can to keep the loss to a minimum. The duty to avoid or minimise, where possible, the loss flowing from a wrongful act is an important principle of the common law and I can see no reason why it should be subject to an exception in this case."

[182] Although the appellant in these circumstances was under no obligation to mitigate because he is in any event entitled to damages for the loss of use of his aircraft, the assertion that he failed to mitigate is inaccurate. As pointed out by Mrs Hunter, the appellant has taken reasonable steps to mitigate his loss by travelling to Jamaica on several occasions to attempt to redeem his aircraft. It was also the appellant's evidence that after about a year and a half of waiting for the matter to be resolved, he did "stand-by work" and about three years after he worked construction for a short period. Some four or five years after, he commenced working in apartment management. He was still engaged in "standby work", construction and apartment

management at the time he testified. It cannot therefore be reasonably asserted that the appellant failed to mitigate his loss.

[183] Moreover, the appellant's failure to mitigate is now circumscribed by the respondent's duty to notify the appellant of their intention to argue such failure. In **Geest Plc v Lansiquot (St Lucia)** [2002] UKPC 48 (7 October 2002), an appeal from the Eastern Caribbean Court of Appeal, Lord Bingham who delivered the decision on behalf of the Board said:

> "It should however be clearly understood that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to prepare to meet it. If there are no pleadings, notice should be given by given by letter."

Grounds (b), (c), (d), (e), (f) and (i) also succeed.

Grounds (j) and (k)

Is the appellant entitled to exemplary damages?

[184] The appellant has challenged the learned judge's findings of fact for denying him an award for exemplary damages. Learned counsel, Ms Hunter, submitted that in the circumstance of this case, an award of exemplary damages was appropriate. Learned counsel referred the court to the English case **Rookes v Barnard and others** [1964] 1 All ER 367. She contended that the actions of Superintendent Grant, an agent of the Crown and the officers under his command, were arbitrary, oppressive and unconstitutional for the following reasons:

i. The appellant was not charged with any criminal offence.

ii The allegedly found substance was never tested.

iii No order from any court was obtained for either the detention and /or seizure of the aircraft.

iv. The aircraft was not required as an exhibit in any court proceedings in Jamaica.

[185] She argued that the respondents have persistently and continuously acted in disregard of the appellant's proprietary rights. Learned counsel pointed out that more than 18 years have elapsed since the aircraft was seized, not returned and no compensation made. The respondents' highhanded approach deserves an award of exemplary damages as the respondents' "conduct was and continues to be egregiously insidious" she said. In support of her contention, she relied on the case, **The Attorney General & The Transport Authority v Aston Burey**.

[186] Ms Thomas submitted that although the respondents have admitted the claim of detinue and unlawful seizure of the aircraft, those actions did not warrant an award of exemplary damages. There must be some added element which is deserving of punishment over and above the level of compensatory damages. She relied on the Supreme Court decision **George Finn v Attorney-General** (1981)18 JLR 120 in support of her submission that there was no evidence on which the court could find

that Superintendent Grant's act of seizing and detaining the aircraft went beyond mere abuse of authority to meet the threshold of being "exceptional". According to her, there are no exceptional circumstances which warranted an award of exemplary damages.

[187] It was her further submission that even if Superintendent Grant's actions met the category of exemplary damages, the court ought not to make any award for exemplary damages. She postulated that it does not automatically follow that in every case which falls into the category of exceptional, exemplary damages should be awarded if a significant sum is awarded for compensation which has the effect of not only punishing but deterring the respondents. According to her, the amount which was awarded the appellant as compensation for the detention of the aircraft was sufficiently significant not only to compensate the appellant, but has the effect of punishing and deterring Superintendent Grant's conduct. She cited Lord Devlin's statements in **Rookes v Bernard** and **Cassell** and **Co v Broome** [1972] 1 All ER 801 in support of that proposition.

[188] It was posited by counsel in the court below that a relevant consideration is that the government was responsible for paying damages to the appellant and not Superintendent Grant. She referred the court to the cases, **Thompson v Commissioner of Police of the Metropolis** [1997] 2 All ER 762 and **Hsu v Commissioner of Police of the Metropolis** [2002] 2 AC 122.

The learned judge's findings

[189] The appellant's claim for exemplary damages did not find favour with the learned judge. At paragraphs [63] - [64] and [67]-[69] he said:

> "[63] In assessing these various dicta in the cases that have been cited, it is important to bear in mind the background of this matter. From all indications, parcels were in fact found by the police aboard an aircraft owned by the plaintiff and their contents suspected by the police to have been ganja. The plaintiff and other Bahamians were taken into custody on what appeared to have been suspicion of trafficking in and possession of marijuana by members of the Narcotics Division, in what apparently were normal police investigations.
>
> [64] Whilst the conduct of the police and the entire experience of being caught up in an investigation; and being detained and having his aircraft seized by the police would have perceived to have been an oppressive experience for the plaintiff, one is not certain that an award of exemplary damages would be appropriate in the circumstances of this case, having regard to the authorities cited.
>
> ...
>
> [67] ...as the tortfeasors themselves (as suggested by the judgment on admission), are not before the court and the damages in this case fall to be paid by the state, this seems to be one of those cases of the ilk of **Kuddus** – the liability here being vicarious – and the consolidated cases of **Thompson** and **Hsu** – the damages here being payable by the 'employer' of the persons who might be regarded as the tortfeasors, which at the end of the day translates into the taxpayers of Jamaica.
>
> [68] ...when one looks at paragraph 30 of the particulars of claim and sees therein the basis of the plaintiff's claim for exemplary damages, it is the court's view that the bases have not been satisfactorily established. The bases were:
>
> > '30 The Claimant will say that the actions of the First Defendant were actuated by malevolence

> or spite toward the Claimant and they thereby intended to and did intimidate the Claimant and subjected him to ridicule and contempt in public by reason whereof the injury to the Claimant has been greatly aggravated and the Claimant claims Damages on [the] footing of Exemplary Damages.'
>
> [69] The court has seen no evidence of malevolence or spite. No award for exemplary damages will therefore be made in this matter."

He cited the case of **George Finn v The Attorney-General** in which the Supreme Court declined to award exemplary damages where the police had shot an unarmed fleeing felon in their attempt to apprehend him.

[190] The learned judge continued at paragraph [66] thus:

> "Adopting the approach taken by Wolfe, J in the **George Finn** case, this court is unable to hold that these circumstances are exceptional; or that this is a case of abuse of power, as opposed to over-exuberance in its exercise. The actions were taken in what appears to have been the course of attempts at legitimate policing..."

[191] He declined making such an award for two other reasons which can be encapsulated as follows:

(a) the damages awarded were sufficient compensation for the appellant, "while, at the same time, signalling its disapproval of these unfortunate occurrences";

(b) the state and not the tortfeasors themselves would be liable to pay the damages; and

(c) lack of evidence of malevolence or spite.

Law/analysis

[192] For the avoidance of doubt, examination of the appellant's pleadings and evidence is important to clarify the roles of Superintendent Grant and the officers under his command to demonstrate that not only was the claim pleaded, but evidence was provided as to the roles each played in respect of the claim for exemplary damages.

The pleadings

> "14. That on his arrival at Boscobel Aerodrome he observed that **several police officers attached to the Narcotic Department of the Jamaica Constabulary Force of which the First Defendant is the Superintendent and having control of the Police Officers and men attached men attached to the said Narcotics Department.**
>
> **15. That on the said 26th day of June, 1995 the said Narcotics Officers detained the Claimant and took him to the villa where John McDonald and Trevor Johnson were staying in Montego Bay. The Claimant requested the keys for the aircraft from Trevor Johnson who gave them to the police along with the registration papers for the aircraft and other items.**
>
> 16. That the Claimant was from Montego Bay taken to 230 Spanish Town Road the headquarters of The Narcotics Department of The Jamaica Constabulary Force where he was questioned by the First Defendant and other police officers of the said department concerning his presence in Jamaica.
>
> ...
>
> 25. **That the First Defendant informed the Claimant that he would not be returning the aircraft to him and notwithstanding the Claimant's demand to allow him to fly the aircraft out of Jamaica** the First

Defendant unlawfully, maliciously and without reasonable and or probable force, [sic] forced the Claimant to leave Jamaica without his aircraft and against his will.

...

28. The Claimant will say that the detention and seizure of his aircraft is and was done maliciously and without reasonable or probable cause or was done illegally by the **First Defendant and members of his staff while acting in the course of their duty as servants and/or agents of the Crown.**

29. The Second Defendant is sued by virtue of The Crown Proceedings Act."

The evidence

"16. When we arrived at the Boscobel Aerodrome I noticed about four men dressed in civilian clothes. Two were sitting under my plane and the other two men who were on the ramp came up to me and asked me if I owned the plane and I anwered yes. **They identified themselves as police from the Narcotics Department**.

17. One of them asked me for the keys to the plane...

18. The police said they wanted to search the plane. They told me I had to take them to Trevor Johnson to get the keys. I was placed in the land cruiser jeep which was driven by one of the police and other police went in the car which was driven by Winston McKenzie.

...

20. When we got there I asked Trevor for the keys to the plane and he gave them to the police. At that point the police told us, that is Trevor Johnson, John McDonald, Winston McKenzie and myself that we were under arrest, and we would be taken to Kingston. We were not exactly sure why we were being arrested.

21. We were taken in the police jeep and Winston McKenzie's car from Montego Bay to 230 Spanish Town Road which is the Headquarters of the Narcotics Department in Jamaica.

22. **When we got there I was taken to the office of Superintendent Grant, the 1st Defendant who introduced himself to me. He told me he was investigating a case of suspicion of [sic] drug trafficking.** He asked me what I was doing in Jamaica and I told him what I was doing. Superintendent Grant tried to intimidate me by telling me the Bahamians think they are smart and when he was through with me I would never return to Jamaica.

23. Superintendent Grant took my wallet from me and searched it. He took my original pilot's license and has never given it back to me. He also showed me pictures of other Bahamians who he asked me if I knew. I could not identify any of these persons.

...

26. On the 28th June, 1995 the same police men who had taken us into Kingston, from Saint Mary and Montego Bay took Trevor Johnson and myself to the Boscobel Aerodrome.

...

31. On the morning of the 30th June, 1995 the same police officers from the Narcotics Department came to the Remand Centre and without any explanation took Trevor, John and myself to the Norman Manley International Airport. They had our passports and tickets. We were checked in on a flight to the Bahamas and escorted us to the plane. This was a regular commercial flight to the Bahamas. The police said we were never to come to Jamaica again.

32. I asked the police what about my plane. I was told that I would not be allowed to fly the plane out of Jamaica and I would not be seeing it again." (see witness statement of Dion Moss)

[193] In my view, on the pleadings and the evidence, the actions of Superintendent Grant and the officers under his control, support the appellant's claim for exemplary damages.

[194] In **Rookes v Bernard and others** Lord Devlin enumerated three circumstances which would warrant an award of exemplary damages. At pages 411-412, Lord Devlin's said:

> "I wish now to express three considerations which I think should always be borne in mind when awards of exemplary damages are being considered. First, the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence. Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the *Wilkes'* case, can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal; and moreover a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint. It may even be that the House may find it necessary to follow the precedent it set for itself in *Benham v. Gambling*, and place some arbitrary limit on awards of damages that are made by way of punishment. Exhortations to be moderate may not be enough. Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. **Everything which aggravates or mitigates the Defendant's conduct is relevant.**
>
> Thus a case for exemplary damages must be presented quite differently from one for compensatory damages; and the judge should not allow it to be left to the jury unless he is satisfied that it can be brought within the categories which I have specified. But the fact that the two sorts of damage differ essentially does not necessarily mean that there should be two awards. In a case in which exemplary damages are appropriate, a jury **should be directed that if, but only if, the sum which they have in mind to**

> **award as 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 disapproval of such conduct and to deter him from repeating it, then they can award some larger sum.**
>
> ...
>
> It would not be right to take the language that judges have used on such occasions to justify their non-intervention and treat their words as a positive formulation of a type of case in which exemplary damages can be awarded. They have used numerous epithets—wilful, wanton, high-handed, oppressive, malicious, outrageous—but these sorts of adjectives are used in the judgments by way of comment on the facts of a particular case. It would on any view be a mistake to suppose that any of them can be selected as definitive and a jury directed, for example, that it can award exemplary damages whenever it finds conduct that is wilful or wanton. When this has been said, there remains one class of case for which the authority is much more precise. **It is the class of case in which the injury to the plaintiff has been aggravated by malice or by the manner of doing the injury, that is, the insolence or arrogance by which it is accompanied.** There is clear authority that this can justify exemplary damages, though (except in Loudon v. Ryder) it is not clear whether they are to be regarded as in addition to, or in substitution for, the aggravated damages that could certainly be awarded."

White JA in **The Attorney General and another v Noel Gravesandy** (1982) 19 JLR 501 observed at page 504 that:

> "The judge has to be careful to understand that nothing should be awarded unless he is satisfied that the punitive or exemplary element is not sufficiently met within the figure which has been arrived at for the plaintiff's solatium which is the subject of the compensatory damages in the assessment of which aggravated damages will be awarded."

Wolfe J (as he then was) in George Finn v The Attorney-General at page 126 said:

> "It is my considered opinion that a distinction must be drawn between the mere abuse of authority and the demonstration of exuberance in the exercise of such authority. Abuse conveys a deliberate misuse of power, whereas in the latter case, the exercise of the authority is accompanied by over-enthusiasm.
>
> I am not convinced that the actions of the officers were such an abuse of power that would qualify the plaintiff for an award of exemplary damages.
>
> In any event, exemplary damages should only be awarded in exceptional circumstances. The circumstances of this case do not permit me to hold that they were exceptional."

[195] In my view, the facts of this case are not analogous with those of **George Finn v Attorney-General**. The unchallenged evidence is that a substance resembling ganja was found on the aircraft whilst it was in the possession of the police. It evokes more than a little suspicion that having demanded the keys to the aircraft, the police waited two days to take the appellant to the aircraft and to search the airplane.

[196] Significantly, the substance was never tested. It cannot therefore be declared to be ganja. Furthermore no trial has been conducted. Indeed the appellant was never charged. He was unceremoniously placed aboard a plane with orders never to return and his aircraft has suspiciously disappeared. The appellant has over a period of nearly 17 years endeavoured to have the matter ventilated but Superintendent Grant has successfully avoided any hearing.

[197] In the light of not only the unusualness of this case, that is: the circumstances under which the substance was allegedly found; the failure by the police to have the same tested; and the unexplained haste to remove the appellant from Jamaica and his

property (the aircraft); and the apparent purloining of the aircraft, I cannot agree with the learned judge that the members of the Narcotics Division, were caught up in "what apparently were normal police investigations" as in the **George Finn** case.

[198] Furthermore, **George Finn** was afforded his constitutional right to a fair hearing before a constitutionally constituted court while the appellant was deprived of his right to a fair hearing as guaranteed by the Constitution of Jamaica (the Constitution) prior to its amendment on 8 April 2011. Assuming the substance seen on the aeroplane was indeed ganja, Superintendent Grant and the officers under his command entirely ignored the appellant's rights to a trial as afforded him by the Constitution. Indeed a judge might have been hard pressed to accept the Crown's case in circumstances where there was the vital issue of control, the police having been in possession of the aircraft two days before the parcels were found.

[199] Not only did Superintendent Grant and the officers under his command act contrary to normal police investigations, they also acted in flagrant disregard of the appellant's constitutional rights to: property, information as to the reason for the detention of his aircraft when it was initially detained and also the reason he was taken into custody; and due process.

[200] On the evidence, he was repeatedly interrogated as to his presence on the island without being told the reason he was taken into custody. It was only after having been transported to the Narcotics Department that the appellant was informed of the reason for his arrest. Section 15(2) of the Constitution provides that:

> "Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language which he understands, of the reasons for his arrest or detention."

[201] Curiously, the police were in possession of the keys to the aircraft but it was not searched in the appellant's presence until two days after. Superintendent Grant and his officers ignored the appellant's request to return his aircraft. In fact Superintendent Grant categorically refused to do so. In complete disregard of the appellant's sacrosanct constitutional rights to his property, his aircraft was seized. Section 19(1) of the Constitution provides for the protection of property rights.

[202] The police's action of seizing the appellant's aircraft and ordering him not to return to Jamaica was also in direct contravention of section 18(1) of the Constitution which states plainly that:

> "No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that..."

[203] Undoubtedly, the behaviour of the police is captured by all three categories of the first limb of Lord Devlin's celebrated statement. They have patently misused and abused the power invested in them. Indeed their actions were outrageously exceptional. I am fully persuaded the punitive element is not sufficiently met by mere compensatory damages.

[204] In the court below, counsel who represented the respondents had placed much reliance on the following passages from **Thompson v Commissioner of Police of**

the Metroplois and **Hsu v Commissioner of Police of the Metropolis** [1998] QB 498 and **Kuddus v Chief Constable of Leicestershire Constabulary** [2002] 2 AC 122 in support of the argument against an award of exemplary damages on the basis that the respondents will not be personally responsible for payment.

[205] In **Thompson v Commissioner of Police of the Metropolis**; **Hsu v Commissioner of Police of the Metropolis**, a case of false imprisonment and assault by police officers, at page 772 the following words of Lord Woolf MR were not determinative of the matter. The learned judge held the view that:

> "The fact that the defendant is a chief officer of police also means that here exemplary damages should have a lesser role to play. Even if the use of civil proceedings to punish a defendant can in some circumstances be justified, it is more difficult to justify the award where the defendant and the person responsible for meeting any award is not the wrong doer, but his 'employer'."

[206] In **Kuddus v Chief Constable of Leicestershire Constabulary** Lord Scott, at paragraph 131, expressed the opinion that:

> "... the defendant should not be liable to pay exemplary damages unless he has committed punishable behavior. This principle leaves no room for an award of exemplary damages against an individual whose alleged liability is vicarious only and who has not done anything that constitutes punishable behaviour."

The learned judge also relied on these passages in rejecting the appellant's for an award of exemplary damages. At paragraphs [67]-[68] he said:

> "[67] The other two considerations in the various cases also influence the court towards not making such an award: that

> is, the court is of the view that the damages being awarded in this case are sufficient to compensate the plaintiff, while at the same time signalling its disapproval of these unfortunate occurrences. Additionally, as the tortfeasors themselves (as suggested by the judgment on admission) are not before the court; and the damages in this case fall to be paid by the state, this seems to be one of those cases of the ilk of **kuddus**- the liability here being vicarious- and the consolidated cases of **Thompson** and **v Husu**- the damages here being payable by the 'employer' of the persons who might be regarded as the tortfeasors, which, at the end of the day translates into the tax payers of Jamaica.
>
> [68] Additionally, when one looks at paragraph 30 of the particulars of claim and sees therein the basis of the plaintiff's claim for exemplary damages, it is the court's view that those bases have not been satisfactorily established. The bases were:
>
> > '[30] The Claimant will say that the actions of the First Defendant were actuated by malevolence or spite toward the Claimant and they thereby intended to and did intimidate the Claimant and subjected him to ridicule and contempt in public by reason whereof the injury to the Claimant has been greatly aggravated and the Claimant claims Damages on [the] footing of Exemplary Damages'."

[207] A reading of Lord Woolf's decision in the **Thompson** and **Hsu** cases reveals that the learned Master of the Rolls was by no means laying down any principle against the award of exemplary damages in cases in which the person meeting the award was not the wrongdoer. The learned Master of the Rolls sought to provide guidance as to the directions to be given by judges to juries in respect of an award of exemplary damages. Indeed the learned Master of the Rolls said, at pages 775-776:

> "Finally the jury should be told in a case where exemplary damages are claimed and the judge considers that there is evidence to support such a claim, that though it is not

> normally possible to award damages with the object of punishing the defendant, exceptionally this is possible where there has been conduct, including oppressive or arbitrary behaviour, by police officers which deserves the exceptional remedy of exemplary damages. It should be explained to the jury..."

[208] In the **Thompson** case, the award for exemplary damages was upheld as "the court regarded the conduct of the police as outrageous and totally inconsistent with their responsibilities".

[209] The issue for the court's determination in **Kuddus v Chief Constable of Leicestershire Constabulary** was expressed clearly Lord Mackay at paragraph 45 of the decision. He said:

> "It follows from what I have said that I consider that the question whether the tort of misfeasance in public office carries the power to award exemplary damages should be answered by saying that the mere fact that the tort sued upon is that of misfeasance in public office does not determine the issue. The issue is determined by whether the factual situation is covered by either of Lord Devlin's formulations. In the present case it is accepted that the factual situation does come within Lord Devlin's first category and although on the facts so far as pleaded I regard this as extremely doubtful, for the purposes of this appeal I would be prepared to accept it and accordingly I am of the opinion that the appeal should be allowed and that the claim for exemplary damages should proceed without in any way restricting the judge in his consideration of the issue."

[210] Lord Huttons' speech in **Kuddus v Chief Constable of Leicestershire Constabulary** is helpful. In determining the appropriateness of exemplary damages in

circumstances where the tortfeasor would not be personally liable, he referred to the case of **Pettigrew v Northern Ireland Office** [1990] NI 179 in which the prison officers who were dog handlers in a prison had deliberately not restrained their dogs from biting the plaintiff. At paragraph 78, he quoted his statement in awarding exemplary damages **Pettigrew v Northern Ireland Office** in that case thus:

> "...Mr Campbell submitted that as the purpose of awarding exemplary damages is to punish a defendant whose conduct was oppressive and in the opinion of the court deserves punishment, exemplary damages should not be awarded against the Northern Ireland Office because it had done nothing deserving of punishment. There could be no suggestion that the Northern Ireland Office connived at or condoned the conduct of the prison officers responsible for the attacks on the plaintiff, and when allegations were made of attacks upon the prisoners the Northern Ireland Office caused an investigation to be carried out. 'I accept Mr Campbell's submission that there are no grounds upon which exemplary damages could be awarded against the Northern Ireland Office in respect of its own conduct as a government department. But there are a number of decisions in this jurisdiction which make it clear that exemplary damages can be awarded against a defendant where that defendant is vicariously liable for the conduct of its or his servants or agents and the conduct of those servants or agents calls for exemplary damages. These cases are *Lavery v Ministry of Defence* [1984] NI 99, *Walsh v Ministry of Defence* [1985] 4 NIJB and *Hamilton v Chief Constable of the Royal Ulster Constabulary* [1986] 15 NIJB. The same view of the law is implicit in the judgments of the Court of Appeal in England in **Holden v Chief Constable of Lancashire** [1987] QB 380."

At paragraph 79 Lord Hutton said:

> "In my opinion the power to award exemplary damages in such cases serves to uphold and vindicate the rule of law because it makes clear that the courts will not tolerate such conduct. It serves to deter such actions in future as such awards will bring home to officers in command of individual

> units that discipline must be maintained at all times. In my respectful opinion the view is not fanciful, as my noble and learned friend Lord Scott of Foscote suggests, that such awards have a deterrent effect and such an effect is recognised by Professor Atiyah in the passage from his work on *Vicarious Liability* (1967) cited by Lord Scott of Foscote in his speech. Moreover in some circumstances where one of a group of soldiers or police officers commits some outrageous act in the course of a confused and violent confrontation it may be very difficult to identify the individual wrongdoer so that criminal proceedings may be brought against him to punish and deter such conduct, whereas an award of exemplary damages to mark the court's condemnation of the conduct can be made against the Minister of Defence or the Chief Constable under the principle of vicarious liability even if the individual at fault cannot be identified."

[211] Lord Scott of Foscote in the **Kuddus** case was the lone proponent against the award of exemplary damages in circumstances in which employers are vicariously responsible for the misfeasance of their employers. That issue was not, in any event determinative of the matter. The subsequent English Court of Appeal case of **Rowlands v Chief Constable of Merseyside Police** [2007] 1 WLR 1065 certainly makes it plain that an award of exemplary damages can be made against both the head of the force and the individual officers pursuant to section 88 of the Police Act (see paragraph 36).

[212] Of significance also is the fact that section 3 of the Crown Proceedings Act provides that the Crown is responsible for the wrongful acts of its officers. It is open to the Government to devise a scheme to enable it to recover from the tortfeasor. In my view, the victim ought not to suffer.

Has the appellant established the bases for his for exemplary damages?

[213] I must respectfully differ from my colleagues that the learned judge's finding that the appellant has not satisfactorily established the bases for his claim for exemplary damages is a correct one. It is necessary to revisit the appellant's amended statement of claim in respect of this claim. It must also be borne in mind that the appellant's claim for exemplary damages was twofold.

[214] At paragraph 30 of his amended statement of claim, he relied on his averments enumerated at paragraphs 1-29 "in support of his claim for Exemplary and/or Punitive damages" which included the fact that he was:

1. remanded without charge or explanation;
2. he was taken to the airport, placed on an airplane and told never to return; and
3. the detention and seizure of his aircraft was done maliciously and without reasonable or probable cause.

He provided the necessary evidence, as outlined above, to buttress this aspect of the claim for exemplary damages.

Having so claimed, the appellant continued by asserting that:

i. Superintendent Grant's actions were actuated by malevolence or spite towards him;

ii. the actions were intended to and in fact intimidated him; and

iii. subjected him to ridicule and contempt in public.

[215] It is noted that the evidence on which the appellant relied to ground this aspect of his claim that he was subjected to ridicule and contempt in public was excluded. That fact notwithstanding, in the light of the evidence discussed above, the appellant's assertion that Superintendent Grant's actions "were actuated by malevolence" has been properly supported. Malevolence is in fact a synonym for both spiteful and malicious.

[216] Although the appellant was prevented from providing the evidence in support of his assertion that he "was subjected to ridicule and contempt in public" (that portion was struck out) he has certainly, in my view, satisfactorily supported his pleaded case. Importantly the actions of Superintendent Grant were deliberate, excessive and an arbitrary use of the power of state invested in him which resulted in the deprivation of the appellant's income earning asset for 18 years.

[217] I am satisfied that the exemplary element in the instant case cannot be adequately addressed with mere compensatory damages for the appellant's solatium. Like the **Thompson** and **Hsu** cases in which awards of exemplary damages were upheld, the conduct of Superintendent Grant and the officers under his control was similarly "outrageous and totally inconsistent with their responsibilities". In my opinion, an award of exemplary damages is necessary to expiate and maintain the law. Such an award is intended to register the court's disapproval of the officers' conduct and

hopefully make plain to officers that such highhanded, arbitrary and unconstitutional conduct will not be countenanced. I cannot agree with my learned sister that no culpability attaches to Superintendent Grant to ground an award for exemplary damages. The unchallenged evidence is that Superintendent Grant was not only in control of the operations, he was an active participant. Grounds (i) and k in my view also succeed.

Grounds (g) and (h)

The claim for legal and travelling expenses

[218] Should the appellant's claim for legal and travel expenses fail? The respondents stoutly resisted these claim and submitted that the appellant's failure to provide documentary proof disentitles him from making such a claim. Counsel who appeared in the court below relied on Lord Goddard CJ's oft cited dictum in **Bonham-Carter v Hyde Parke Hotel Ltd** (1948) 64 TLR 177 for that proposition.

[219] The learned judge, in agreeing with the respondents, essentially said:

> "(1) That the evidence given by the appellant was sparse in respect of his travelling expenses, and applying the principle in **Bonham-Carter v Hyde Park Hotel Ltd**. the claim for this item failed (paragraph [32]).
>
> (ii) The appellant's claim for legal expenses also failed as he did not produce the receipts for his legal expenses, which he testified he was unable to locate but has failed to explain what efforts were made, if any to locate them." (paragraph [34])

[220] Learned counsel for the appellant however postulated that the law has developed since **Bonham-Carter v Hyde Park Hotel Ltd** with the court adopting a more flexible approach. She relied on the case of **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173 in support of her submission that the court, in its effort to arrive at a reasonable conclusion which satisfies the demands of justice, examines the circumstances of the particular case.

Analysis/law

Travelling expenses

[221] Lord Goddard CJ in **Bonham-Carter v Hyde Parke Hotel Ltd** at page 178 said:

> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost. I ask you to give me these damages.' They have to prove it." (Page 178)

[222] His statement remains, in my view, a correct one. The issue however is the stringency with which it has been applied in some instances, ignoring the peculiar circumstances of the particular case thus sacrificing justice. This court has in a number of cases expressly adopted a less intransigent approach, preferring to consider the circumstances of each case. Indeed in **Hepburn Harris v Carlton Walker** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 40/1990, judgment delivered 10 December 1990, Rowe P, while discouraging the practice of claimants merely throwing up figures without substantiating them nevertheless, upheld

the learned trial judge's acceptance of the appellant's claim which he observed was "unsupported by a even tittle of documentary evidence".

[223] This court has also adopted the following more acquiescent approach and reasoning postulated by the learned authors of Mayne and McGregor on Damages Twelfth Edition.

> "However, with proof as with pleadings the courts are realistic and accept that **the particularity** must be tailored to the facts. Bowen L.J. laid this down in the leading case on pleading and proof of damage, *Ratcliffe v. Evans* [[1892] 2 QB 524 (CA)]. In relation to special damage he said:
>
> '...
>
> 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 ...proved. As much certainty and particularity must be insisted on... in... proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest of pedantry."
>
> ..." (Paragraph 994).

[224] The similarly flexible approach was also adopted by Wolfe JA (Acting) (as he then was) in **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173 and more recently in **Dalton Wilson v Raymond Reid** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 14/2005, judgment delivered 20 December 2007. In looking at the cases emanating from this court on the issue, it is plain that in determining what amounts to strict proof the court considers "the particular

circumstances of each case". (See **Grant v Montilal Moonan Ltd and Another** (1988) 43 WIR 372 and **Barbara McNamee v Kasnet Online Communications** (unreported) Court of Appeal, Jamaica, Resident Magistrates Civil Appeal No 15/2008), judgment delivered 30 July 2009.)

[225] The appellant claimed the sum of US$964.00 for four trips to Jamaica to secure the release of his aircraft. In his amended claim, each of the four trips was pleaded at US$241.00. It was however his evidence that he was unable to find the receipts. The particular circumstances of this case ought to have been examined before rejecting the appellant's claim. An important consideration was the 18 year wait to have the matter disposed of. It is in the circumstances not unreasonable that such receipts could have been become misplaced.

[226] Further, the detention of the appellant's aircraft in a foreign country necessitated him incurring the cost of travelling overseas to redeem his valuable property. Property which, on the unchallenged evidence, he laboured and saved to acquire over a period of nearly one year and expended further sums repairing to make airworthy. It is therefore not unreasonable on a balance of probabilities that the appellant, as a non-Jamaican, would have had to journey to Jamaica on at least four occasions over the period of 18 years. The claim for four trips would have been made at the filing of claim and amended claim. Subsequently there were several case management conferences and pre trial review. The appellant also attended the trial of the matter. There was no amendment to include a claim for these additional trips.

[227] In light of the eminently reasonable assertion that he came to Jamaica on four occasions, even if the learned judge was not convinced that the amount claimed was reasonable, as Rowe P in **Hepburn Harris v Carlton Walker** said:

"Courts have experience in measuring the immeasurable..."

In all the circumstances, the absence of receipts ought not to have troubled the learned judge to have caused him to reject this claim. Ground h in my view also succeeds.

Legal expenses

[228] On a balance of probabilities it is unlikely that appellant would have received free service from his attorney. The appellant was represented by the same attorneys since the commencement of the matter. This has not been denied.

The assessment

Loss of income

[229] The learned judge accepted the appellant's evidence and his attorney's submission that his average monthly maintenance expenses would have been US$1,821.17 as "more nearly accurate and comprehensive" than the figure of US$501.11 which was proposed by the respondents' counsel. He however rejected the appellant's counsel's proposal that his monthly gross earnings would have been US$26,000.00 and accepted instead the respondents' submission of US$12,096.00 as being his net monthly earnings. The learned judge proffered the following reason for his acceptance of the submission on behalf of the respondents:

> "[48] It appears that the submissions of counsel for the defendants are not unreasonable - in particular where it is proposed that an average of three passengers be used and that allowances be made for the highly-competitive nature of the business in which the claimant was engaged - there having been competition from sole operators, such as he, as well as the charter companies. The monthly figure proposed by counsel for the defendants for the plaintiff's earnings of US$12,096 is one that commends itself to the court."

The evidence

[230] It was the appellant's evidence that:

> "37 ...Typically, with charter flights it is possible to make two flights per day to any island in the Bahamas, just by catering to the needs of the travelling public. The minimum is usually two passengers per flight. I earned an average of US$1000.00 per day.
>
> 38 ...The Piper Aztec is a six seater airplane inclusive of the pilot's seat. Two return trips from Nassau to San Andros @ US$60.00 per seat is US$300.00 one way. Two return trips is therefore US$1200.00. This is the minimum number trips I would do for the day, six days a week. Some days I earned as much as US$2,400.00. The distance from Bahamas to San Andros is about thirty-two miles, which is fifteen (15) minutes flying time..."

[231] Under cross-examination he admitted that he was at the time competing with larger and more established operators than himself, having only acquired the aircraft about three to four months before it's seizure. In respect of the number of passengers he transported, and the flights he made, I find it useful to quote him:

> "...On each and every flight I took five (5) going, but normally coming back it can vary because you don't want to stay in Andros too long because it's more lucrative from in Nassau. You could bring 5 or 4 or 3 from Andros.

> Referred to paragraph 37–'the minimum is usually two (2) passengers per flight'. That is normally on the way back if you want to. It could be 2 or 3 or you could wait until you get 5, - that's on the way back. Normally you would wait about half an hour to get at least 2 but the time varies, it ain't a set time, it is like a first come, first served. Not like a taxi system like first, second, third – you have to solicit them. If they know you they will come. I myself solicited the passengers. On each flight from Nassau I did not have five (5) passengers every time. There were never times when I had only there [sic] 3 from Nassau. I would never leave without five (5) from Nassau but that's just me. It is close, only like a fifteen – minute flight – that's the most lucrative route really. They go to look about their business. I did not have an assistant pilot. In the 3 – 4 months I made at least two (2) trips or more – that's the minimum." (Page 38 of the record)

[232] The appellant's evidence in respect of the airworthiness of the aircraft; the number of flights on a typical day; the basic cost of US$60.00 for transporting a passenger from Nassau to San Andros in 1995, among other things, was corroborated Mr Ricardo Laing, a commercial pilot who operated a similar aircraft the same area albeit he provided charter flights. It is also important to note that at that point in time the appellant had been a commercial pilot for 10 years. He therefore was not exactly a neophyte in the business. On a balance of probabilities he would have had some knowledge of the airfare and the regularity with which maintenance would be required.

[233] The learned judge accepted the respondents' submission that "in attempting to arrive at any award under this head, "an average of 3 paying passengers per trip should

be used to calculate the Claimant's earnings". Even if this court might have arrived at a different finding, there is no basis for interfering with his finding in this regard.

[234] At US$60.00 per person, six persons per round trip, the weekly earnings for a six day week would have been US$4,320.00 for two round trips per day. Monthly that would have amounted to US$17,280.00. Upon deducting the monthly expenses of US$1,821.17, his net monthly earnings amounted to US$15,458.83. His yearly income would therefore have been US$185,505.96. The claim was instituted on 22 November 1995 and judgment was delivered on 19 November 2013. The relevant period is therefore 18 years. The appellant would, on the authorities, be therefore entitled to an award of US$3,339,107.28 for the loss of income he would have earned.

[235] The learned judge however omitted to include in his calculation the cost of fuel and the cost of overhauling the engine. On the appellant's evidence, he spent US$91.00 on fuel for each round trip. It was his evidence that, "[i]t is only fuelled [sic] where you are leaving from". His expenditure on fuel for a six day week would therefore have been US$1,092.00 weekly and US$52,416.00 annually. Over 18 years that sum amounts to US$943,488.00. The sum of US$3,339,107.28 reduced by US$943,488.00 is US$2,395,619.28.

[236] There is no basis for interfering with the evidence which the learned judge accepted in respect of the loading fee. It is necessary to quote from the table entitled "Item of Costs –Frequency-Costs" which the learned judge accepted:

> "Loading fee (San Andros)- the median fiqure of US$7.00 and US$12.00 is US$9.50. This was paid twice each day for 6 days for 52 weeks over 18 years- US$106,704.00
>
> Loading fee for (Nassau) the median figure of US$10.00 and US$25.00 is US$17.50. This was paid twice each day for 6 days for 52 weeks over 18 years-US$196,560.00."

[237] In my view, whether it is regarded as maintenance or operational cost is irrelevant. The important issue is whether it was accounted for and whether there was any basis on which to impugn its veracity or its accuracy.

[238] The learned judge accepted the cost of a tyre which was presented in the Item of Costs- Frequency-Cost document which stated:

> "Tyre- three tyres once a year(the median figure of $90.00 and $190.00 being $140.00). This is 140 x 3 x18 years Cost –US$7,560.00."

[239] The learned judge however failed to take into account the appellant's evidence that the tyres would require changing thrice per year. His expenditure on tyres over 18 would therefore amount to US$22,680. The sum of US$2,395,619.28 is further reduced by the sum of US$22,680.00 to US$2,372,939.28.

[240] Avionics was listed as an item of costs at US$500.00. There was however no evidence as to the frequency this cost was incurred. The respondents submitted that the aircraft would have been inspected yearly. Over 18 years the appellant would have expended US$9,000.00. The sum of US$2,372,939.28 is further reduced by US$9,000.00 to US$2,363,939.28.

[241] No evidence was provided as to the cost of an engine overhaul which was required at 12 year intervals which is understandable because the aircraft had been recently acquired. It should however be noted that the market analysis computation is dated October 2012. Each engine had gone 3,000 hours. On the appraiser's evidence, engines are over hauled after 2,000 hours or 12 years. Another overhaul would therefore be due after another 1,000 hours.

[242] In my view, no deduction ought to be made for engine overhaul, as in the absence of evidence, this court would have to venture too far into the realm of speculation. Moreover consideration must be given to the fact that the arrangements he had with the operators of Reggae Sunsplash was truncated because of his detention and forced departure from Jamaica. It was his evidence at paragraph 33 of his witness statement that:

> "As a result of being imprisoned between the 26th June-30th June, 1995, I was unable to conclude the arrangements the arrangements to transport tourists and patrons from the Bahamas to Jamaica to attend Reggae Sunsplash."

[243] My learned sister pointed out that the plane was flown to Jamaica by other pilots. There is no evidence as to whether these pilots were merely his business partners or whether they were paid. If it is deemed appropriate to speculate, it would not in the circumstances be farfetched to consider that the appellant could have taken vacation during which time he could have rented his aircraft or have it flown by another pilot. For these reasons I would decline to further reduce the figure.

[244] It was the appellant's evidence that he was not required to pay tax. He could have paid NIS tax but he chose not to pay NIS because "[he] had his [his] own private insurance". I am not of the view that any deduction should be made in the circumstances.

Should an award be made for the entire relevant period?

[245] Although the relevant period is 18 years, consideration must be given to the fact that the aircraft would not have operated continuously for six days per week for 18 years.

[246] Mr Hutchen's unchallenged evidence is that, the aircraft was acquired "between 1994-1995". It was a 1970 Piper PA-23-250 Aztec with "3000 hours total airframe time and both engine and propellers at 1000 hours, or the mid-time, of their intervals between overhaul". On a scale of 10, the airframe, paint, and interior were estimated to rate a 7. The airframe condition was rated as "High Average".

[247] In respect of the aircraft status, the exterior paint, interior paint and cock pit were in good condition. There was no known modification to the airframe or engine. Neither was there any finding of historical or current damage. The avionics were considered to be average. It is helpful to quote Mr Hutchens in respect of the condition of the engine and propeller.

> "Engine #1
> Total time: 3000hrs
> Time Since O/H Factory Limits 1000 Hrs
> Recommended TBO: 2000 Hrs

Engine #2
Engine Total Time 3000hrs
Time since O/H factory limits 1000hrs
Recommended TBO 2000 hrs

Propeller #1
TSO/New 1000
No known or reported engine modification"

[248] On both the appellant's and Mr Hutchen's evidence, the aircraft would have required servicing. The appellant's evidence was that the aircraft "required significant up-keep to ensure that it was airworthy". It was his evidence that the propellers are overhauled "either 2000 hours or five (years), which one comes first". For convenience I will quote his evidence which he gave undercross-examination.

> "I did not have to get them overhauled...For the engines its 2000 hours or twelve (12) years... You have to change the oil like every fifty (50) hours flight time. You have 100 hours inspection on the plane itself (of flight time)...No maintenance on the wings. Some accessories need inspection every, year - like the altimeter - one was in my aircraft... The brakes in a 100 hour period - you check the brakes. It's like a service - it depends on how they feel to you. If you have to get them checked you get them checked. Given how often I was flying - 6 days, 100 hours would go in about four (4) months but that's not the only place you fly. I had flights to Freeport -to service the brakes it depends...The frequency of the inspection depends on the owner. Changing the tyres depends on how they wear. I would do it more than once for the year - at least three times a year. There are three tyres on the aircraft..
>
> Servicing would include changing spark-plugs, filters, gaskets sometimes. The oil filters have to be changed every time the oil is changed - like 50 hours or 100 hours. Spark-plugs change like 100 hours. Gaskets were changed as required if something is leaking. There is no set time. If the aircraft was damaged I would have to find it from my own personal money. (Shown document). I am still saying I did

> not have to validate my US licence to fly an N-registered aircraft." (Pages 39-40 of Index to Record of Appeal)

[249] On the appellant's evidence, the aircraft would have been out of operation for approximately thrice per year for minor servicing, every five years for servicing of the propeller and every 12 years for overhauling of the engine. There was also time out for inspection which occurred annually. There is however, no evidence as to the period the aircraft would have been out of commission for servicing and inspection. In the absence of evidence, I am of the view that a reasonable allotment for minor repairs/upkeep and inspection is five days for each minor repairs/upkeep and inspection. Regarding the overhauling of the engine and major body work, I consider one month annually, a reasonable period.

Maintenance and inspection

[250] Minor maintenance and inspection of the aircraft is estimated to last for five days for at least three times per year. The total number of days would therefore be 15 days yearly. Over the 18 year period, the total number of days that the plane would have been out of service for maintenance would be 270 days. This translates to a period of nine months.

Propeller

[251] The period required for maintenance of the propeller of the aircraft is estimated at two weeks at intervals of every five years. Therefore, over a period of 18 years, the aircraft would be unavailable for approximately two months.

Engine

[252] The engine is estimated to be serviced every 12 years with service duration lasting for one month; the aircraft would have been out of operation for one month over the 18 year period.

[253] The aircraft would have been out of service for approximately one year for general maintenance, inspection and maintenance of the propeller and the engine. The sum of US$2,363,939.28 ought therefore to be reduced by US$131,329.96 which sum represents loss of income for one year. On that calculation, the appellant would therefore entitled to recover the sum of US$2,232,609.32 as damages for the loss of use of the aircraft for 17 years.

[254] A further consideration however is that the appellant flew the aircraft himself. On a balance of probabilities he would not have flown the aircraft for 17 year without rest or vacation. In my view, an allotment of three weeks per year for rest/vacation is reasonable. Over 17 years, that amounts to 51 weeks which can reasonably be rounded off to 52 weeks. The sum of US$131,329.96, which sum represents a year's income, ought therefore to be deducted. He is therefore entitled to recover loss of income for 16 years which amounts to the sum of US$2,101,279.36.

Exemplary damages

[255] In **Thompson v Commissioner of Police of the Metropolis; Hsu v Same**, Lord Woolf MR, regarded the following directions to a jury to be necessary for their guidance in respect of awards of exemplary damages:

> "13 Where exemplary damages were appropriate they were unlikely to be less than £5,000. Otherwise the case was probably not one which justified an award of exemplary damages at all. The conduct had to be particularly deserving of condemnation for an award of as much as £25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendenterintendent...
>
> The figures given would of course require adjusting in the future for inflation..."

An award of £50,000.00 converts to JA$8,250,000.00.

[256] In the Barbadian High Court case of **Anthony Ricardo Ward v The Attorney General of Barbados** [Unreported] No 1495 of 2005, an award of BD $15,000.00 as exemplary damages was made to the plaintiff. The plaintiff in that case was assaulted, battered and wrongfully imprisoned by the police. That award now amounts to JA$960,000.00. I am mindful that the Barbadian "socio-economic conditions, including GDP, are different" from ours, nevertheless, it is a useful guide.

[257] In arriving at an appropriate figure I also bear in mind Lord Woolf's advice that:

> "That the sum awarded by way of exemplary damages should be sufficient to mark the jury's disapproval of the oppressive or arbitrary behaviour but should be no more than was required for that purpose."

I also consider the fact that the tortfeasor, Superintendent R Grant will not be paying, rather, it is the Jamaican tax payers who will be called upon. In the circumstances an award of JA$1,000,000.00 is in my opinion appropriate.

Interest

[258] The learned judge rejected the appellant's claim for interest for 18 years and awarded interest for nine years. He advanced the following as reasons for so doing.

1. The two year delay by the registry in setting the matter for trial.

2. The appellant's delay of two years in giving security f or cost.

3. The three years period which elapsed after the case management conference before the matter came up for trial.

4. The adjournments on two occasions to facilitate discussions which resulted in the matter being taken off the list for two years.

[259] The learned judge expressed the view that it would have been unjust to award interest for the entire period because the appellant would as he put it:

> "be allowed to benefit from, and the defendants would be saddled with, the making of added payments for periods of delay over which they had no control, to which they did not contribute and for which delay no blame can fairly be laid at their feet."

He was of the view that an award for nine years struck "a fair balance, having egard to the history".

[260] The award of interest was at the learned judge's discretion. Section 3 of the Law Reform (Miscellaneous Provisions) Act provides:

> "In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment: Provided that nothing in this section-(a) shall authorise the giving of interest upon interest;.."

The issue is whether he exercised his discretion judicially.

[261] The appellant says he has not. Mrs Hunter complained that she was not invited to address the court on the issue. She said it is of importance that no witness was called to refute the appellant's case. It was also her submission that the learned judge erred in his finding that the respondent had no control over the delays. The delays, she said, must be examined against the background of the judgment on admission. Counsel argued that the learned judge did not consider that the ultimate delay in the matter was the respondent's failure and or refusal to admit liability until 17 years after the seizure of the airplane.

[262] Counsel further submitted that the learned judge drew the wrong inferences in relation to the delays. She argued that the appellant ought not to be penalized for the court's delay in hearing the matter. An award of interest for the entire period of detention is the fairer balance having regard to the history, she said.

Discussion

[263] Delays which are attributable to the court ought not, in the circumstances of this matter, be laid at the feet of the appellant. As pointed out by counsel for the appellant, the respondents unreasonably waited 17 years before conceding. A perusal of the respondents' chronology indicates the respondents were guilty of delays which could not be attributed to the court. Superintendent Grant's memorandum of appearance was filed on 14 December 1995 and on 11 April 1996 the appellant filed an application for leave to enter judgment. On 24 September 1996 the application was heard and the respondents were granted an extension of time within which to file their defence.

[264] On 15 April 1997 the court heard the appellant's summons for directions and ordered that the trial be set down within 30 days. The following day the appellant requested the Registrar to place the matter on the cause list for trial. The matter was set down for trial on the week which commenced 14 June 1999.

[265] On 19 May 2001, the respondents applied for security for costs in the sum of $100,000.00. The outcome of the matter reveals that the application was unjustified and only served to delay the matter. It was not until 6 June 2012 that the respondents threw in the towel in respect of the claim for detinue. Whatever delays might have been attributable to the court could have been avoided had the respondents conceded within a reasonable period.

[266] The learned author of Halsbury's Laws of England third edition volume 38 at paragraph 1325, expressed the following view on the award of interest in actions for detinue:

> "Interest maybe allowed in an action of detinue or conversion in addition to the value of the goods at the time of judgment (b) or conversion (c) if the court thinks fit (d). It is doubtful, however, whether interest could be awarded in addition to damages for detention (e) or for loss of use (f) in an action of detinue without infringing the rule against giving interest upon interest (g).

[267] In the English Court of Appeal case of **Jefford and Another v Gee** [1970] 2 QB 130, although that was a personal injuries case, Lord Denning MR examined the applicability of section 3 of the Law Reform (Miscellaneous Provisions) Act of 1934 generally. At page 144 he said:

> "We applied this principle very recently in *Harbutt's 'Plasticine' Ltd. V Wayne Tank and Pump Co. Ltd* [1970] 1Q.B. 447, where we were all agreed in saying:
>
> > 'the basis of an award of interest is that the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly'."

[268] The purpose for an award of damages is to compensate the appellant for the losses he suffered as a result of the respondent's tort. The objective of assessing damages is *restitution in integrum.* (See Clerk & Lindsell on Torts, the seventeenth edition at paragraph 27-0.4.)

[269] The learned authors in Clerk & Lindsell stated:

> "The general principle is, in the oft-quoted words of Lord Blackburn, that the court should award "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

[270] The circumstances of the instant case, in my view, justify an award of interest on the sum awarded for loss of use. The sum awarded for loss of use is income which the appellant would have earned if he had not been deprived of the aircraft. The appellant was and still has been kept out of his money. Having been deprived of his income for so many years, he ought not to be further deprived of his right to interest which on a balance of probabilities could earned interest in a bank account.

[271] In my view, he is therefore entitled to interest at the rate of 3% per annum for 16 years from 30 June 1995 to 19 November 2011, on the award for loss of income and from 30 June 1995 to 19 November 2013, on the expenses he incurred. The award of interest on these items is justified because he has been kept out of his money by the respondents. To avoid infringing the rule "interest upon interest" there shall be no post judgment interest on the award for loss of income.

[272] There shall be no award of interest on the sum US$56,236.00 for the replacement of the aircraft. The rationale for not awarding interest on the sum awarded for the replacement of the aircraft is that he has been awarded a reasonable sum for its replacement and has also received compensation for loss of the income he would have earned and therefore has been placed "in the same position as he would" had the aircraft not been taken.

Conclusion

[273] In light of the foregoing, I would set aside the learned judge's award and substitute instead the following:

i. Loss of income of aircraft for 16 years- US$2,101,279.36

ii. Replacement value of the aircraft-US$56,236.00

iii. Travelling expenses incurred to secure the release of the aircraft- US$964.00

iv. Legal expenses incurred –US$1,000.00

v. Cost of Market Analysis Report-US$910.00

vi. Interest at the rate of 3% per annum from 30 June 1995 to 19 November 2011 (16 years) for loss of income and from 22 November 1995 to 19 November 2013 for the expenses stated at paragraph [249] above.

vii. Exemplary damages in the sum of JA$1,000,000.00.

viii. Costs here to the appellant to be agreed or taxed.

MORRISON P

ORDER

(1) By majority (Sinclair-Haynes JA dissenting) the appeal against the judgment of F Williams J, delivered on 19 November 2013, is allowed in part.

(2) The appeal is allowed in relation to grounds of appeal (a), (b), (c), (d), (e), (f), (i) and (l).

(3) By majority (Sinclair-Haynes JA dissenting) the appeal is dismissed in relation to grounds (g), (h), (j) and (k).

(4) The award of damages in the sum of US$47,722.14 (the replacement value of the aircraft) is set aside and substituted therefor is an award in the sum of US$56,236.00.

(5) By majority (Sinclair-Haynes JA dissenting) interest is awarded at 3% per annum on the said sum of US$56,236.00 from 19 January 1996 to 6 June 2012.

(6) The award of damages in the sum of US$36,288.00 for detention of the aircraft/loss of income from use of the aircraft is set aside.

(7) By majority (Sinclair-Haynes JA dissenting), the sum of US$1,826,832.00 is awarded as damages for detention of the aircraft/loss of income from use of the aircraft. There shall be no award of interest on this sum.

(8) By majority (Sinclair-Haynes JA dissenting), the decision of F Williams J, refusing to make an award of damages for travelling and legal expenses, is affirmed.

(9) By majority (Sinclair-Haynes JA dissenting), the decision of F Williams J, refusing to award exemplary damages, is affirmed.

(10) The award in the sum of US$910.00 (being the cost of the amended market analysis which was not appealed against but which is included as part of the order being sought in relation to special damages), shall remain undisturbed.

(11) Interest is payable on the said sum of US$910 at 3% per annum from 22 November 1995 to 19 November 2013.

(12) Costs of the appeal to the appellant to be agreed or taxed.