

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2011/CLE/GEN/FP 00170
BETWEEN

ROBERT KANE

Plaintiff

AND

THE ATTORNEY GENERAL

1st Defendant

AND

THE COMMISSIONER OF POLICE

2nd Defendant

AND

THE DIRECTOR OF FISHERIES

3rd Defendant

AND

GILFORD LLOYD

4th Defendant

AND

INSPECTOR HENRY ROLLE

5th Defendant

AND

CPL. 1608 HANNA

6th Defendant

AND

CUSTODY SUITE OFFICER UN-NAMED

unlawful arrest and detention and false imprisonment, resulting, he alleges, in him experiencing pain, suffering, physical and psychological injury as well as personal and economic loss and damage; and for breach of his constitutional rights; together with interest and costs.

5. In their defence filed on 20 January 2012, the defendants deny the plaintiff's claim and assert, in summary, that the plaintiff was lawfully arrested and detained during a lawful period and that he was subsequently discharged by a nolle prosequi. The defendants put the plaintiff to strict proof of his claim.

6. At the trial evidence on behalf of the plaintiff came from the plaintiff and his two witnesses, Mr Shawn Miskura and Mr William Fischer; and on behalf of the defendants, from the 4th, 5th and 6th named defendants as well as seventeen other witnesses.

7. The evidence by the plaintiff and his witnesses is that on 25 May 2011 the plaintiff and his crew were onboard the fishing vessel, Janice Ann returning home to Florida, U.S.A., from a long-line fishing trip to a fishing ground off Cape Canaveral, Florida, U.S.A. About 80 miles southwest of Pompano Beach, Florida, the Janice Ann experienced engine trouble and began drifting into international shipping lanes. The plaintiff dropped anchor to stop the vessel from drifting and to conduct repairs thereto. The plaintiff said he called the coast guard and others, including his wife and the commercial fish buyers to get some assistance. While they were anchored waiting for help, Defence Force vessel, P-128 approached the Janice Ann at about 1:30 p.m. on Wednesday, 25 May 2011. The plaintiff told the officers that the Janice Ann was having engine trouble. The officers boarded the vessel and searched the same. The plaintiff told the officers that he had about 4,000 to 4,500 pounds of sword fish, tuna and dolphin on board. He said he also told the officers that the Janice Ann was a U.S. documented long-line fishing vessel which targeted swordfish and tuna. He said the officers then arranged for the Janice Ann to be towed by the Black Pearl to the Bradford Marine Shipyard in Freeport, where the plaintiff and his crew were arrested and taken to Central Police Station. The plaintiff says that he was never told that he was under arrest. However, he and the members of his crew were detained at the Central Police Station from Thursday, 26 May 2011, until Monday, 30 May 2011, when they were taken to the Magistrate Court and formally charged with several offences under the Fisheries Act. The plaintiff said he and his crew were later released on cash bail of \$10,000 each and the matter adjourned; that on 21 June 2011, the Attorney General entered a nolle prosequi with respect to the case against them and he and his crew were discharged and released. The Magistrate also ordered the return of the Janice Ann, the fish, the firearm and ammunition. However, the plaintiff said that he received the keys for the Janice Ann and the fishing equipment, but not the other items, namely: the shot gun, the ammunition and the fish,

8. Under cross-examination Mr Kane said that the fishing trip that ended in the arrest of himself and his crew began on 19 May 2011 when they left Pompano Beach, Florida, and headed to the area in American waters in which they have permission to fish. He admitted that he sailed via engine propulsion into Bahamian waters and also that at the time the Janice Ann was spotted by the Defence Force officer, the vessel was anchored in Bahamian waters; that there was long-line fishing equipment, a rifle and ammunition on board the Janice Ann in plain view, and that he had several thousand pounds of fish in the cooler on board the Janice Ann. The plaintiff also admitted that by the time the Janice Ann was approached by the Defence Force officers, they had spent about 15 hours anchored in Bahamian waters.

9. Although in his evidence-in-chief the plaintiff had said at paragraph 5 of his witness statement that he called the US Coast Guard on two separate occasions with the position of the Janice Ann, under cross-examination he said that he had called them but that he got no response. He said he gave his position when he called out a distress but that he did not speak to anyone.

10. In his statement of claim and at paragraph 12 of his witness statement, the plaintiff avers that he and his crew were placed under arrest and taken to Central Police Station. However, under cross-

examination, Mr Kane denied having been cautioned and told that he was under arrest. He said that he was told that the officers were going to question him and his crew.

11. Included amongst the documentary evidence is a copy of the Royal Bahamas Police Force detention record with respect to the plaintiff which indicates that the plaintiff was arrested by Fisheries, Officer C. Campbell at 3:05 p.m. on 26 May 2011 and that he arrived at the Central Police Station at 5:00 p.m. on that date. The detention record also includes the following note at 5:45 p.m. on 28 May 2011: "Instructions from Insp. Rolle that prisoner can be released on \$30,000.00 cash bail."

12. Under cross-examination, the plaintiff denied having been given cash bail by the police in the sum of \$30,000.00 or any other sum, and said that he was not aware that instructions there for had been given by Inspector Rolle or anyone else.

13. The plaintiff admitted that he was allowed to meet with his attorneys, Messrs Samuel Rahming and Carlson Shurland, although he said he was not certain of the time. When confronted with the detention record, the plaintiff accepted that he met with his attorneys on at least 3 occasions while he was detained. He admitted under cross-examination that he was also permitted to speak to his wife and American Embassy personnel in New Providence, although he denied that he spoke to his wife on 26 May 2011, the date he was arrested.

14. As for the injury to his hand, although he said it was 24 hours before he was taken to the hospital, the plaintiff accepted that according to the detention record he made a complaint to a police officer about an infection in his hand at about 3:45 p.m. on 27 May 2011 and that the detention record shows that he was taken to the Rand Memorial Hospital at 9:10 p.m. that same night; that he saw Dr Francisco at the hospital; that she diagnosed the injury as an abscess and gave him a prescription for infection; and that the sum of \$15 was taken from funds held on his behalf to pay for the medication, which the officers allowed him to take at the prescribed times. The plaintiff also acknowledged that while he was in police custody, the door to the cell in which he was housed was left open, although he says that was to accommodate one of the prisoners who had a prostate problem and had to use the restroom frequently. However, the plaintiff said that for 24 hours he was not permitted to leave his cell or use the wash room. When asked if he told his attorney about the situation, the plaintiff said that he told Erica Thibault from the U. S. Embassy about the way he was being treated. He admitted leaving the cell on two occasions after he was detained: once to go to the hospital and the other to go to the vessel to check it and to get some clothes. He insisted that he was treated inhumanely.

15. When confronted with the note in the detention record that Corporal Hanna had interviewed him under caution and told him that he was being charged with certain offences, the plaintiff said he did not remember that happening and said that he was not informed of the charges until he was taken to the Magistrate Court on 30 May 2011 at about 1:10 p.m., where he was, in relation to the charges, granted bail in the sum of \$10,000 and released.

16. The plaintiff said that after he paid the bail, he was released into the custody of the Immigration Department and subsequently placed on an airplane and sent back to the United States. He said he later returned for the trial, which was discontinued by the Attorney General. He also repaired his vessel and returned with it to Florida.

17. Mr William Fischer's evidence-in chief mirrored the plaintiff's.

18. Under cross examination Mr Fischer said that he has been a commercial fisherman for about 40 years and a crew member on the Janice Ann since 1991, that is, for about 24 years. He said that on 25 May 2011 the Janice Ann sailed in international waters; that the Janice Ann began experiencing engine problems and so they dropped anchor about 60 miles off of West End, in international waters. He agreed that the Janice Ann would have been at latitude 27.16.4 and minus 79.09.1 longitude when they dropped anchor and he accepted that that position was in Bahamian waters. He also accepted counsel for the defendants' suggestion that they were in the exclusive fishing zone of The Bahamas; and that

when the Defence Force vessel came alongside the Janice Ann, the Janice Ann was in Bahamian waters. He said that at the time the captain was in the engine room and had to be told that the Defence Force had pulled up to the Janice Ann. Mr Fischer said that he was on the back deck at the time. He said that when the Defence Force officers boarded the Janice Ann they had about 5,000 pounds of fish in the ice hole, one weapon and fishing apparatus which were stored to the side of the vessel, in plain view.

19. Mr Fischer said that the plaintiff called the Coast Guard and another vessel, the Christian Lee, to come to tow the Janice Ann. He said that the Defence Force was there first, but both the Coast Guard and the Christian Lee came a couple hours later – after the Defence Force would have boarded the Janice Ann. He said they were never arrested until they made it to the jailhouse; that he was not allowed to make any telephone calls while at the police station. However, when confronted with the note in the detention record that he was able to communicate with an American Embassy representative by phone, Mr Fischer said that was not until the following day, but he was not allowed a phone call at the time of his arrest. When counsel for the defendants drew to Mr Fischer's attention that he was allowed to speak to the American Embassy representative by phone on 26 May 2011, he said that they were pulled in on 25 May, did not make it in until 26 May and were not allowed to speak to the American Embassy representative until 27 May (notwithstanding what the detention record may show). He denied that they were allowed phone calls an hour after they got to the police station. He said he did not remember seeing Mr Shurland on 27 May 2011; that he did not know if he was given the option to be granted cash bail on Saturday 28 May 2011; that he did not call anyone for the cash bail. He said that the Customs officer told him that he and the others would be charged with illegal fishing and for entering the country illegally. He said that when they first got to Central Police Station he got to use the restroom but after about four hours the police locked the cell and he was not allowed to use the restroom for about seven hours after that.

20. According to Mr Fischer, when he and the others first went in the cell, the door was locked; that when the shift changed, the cell door was opened; that it stayed open for a couple of hours then it was locked again for seven hours straight. In response to counsel for the defendant's suggestion that he was treated humanely, Mr Fischer responded "after I got to the police station, yes." However, later in response to the same suggestion, he said that the police treated him "wrong".

21. Mr Fischer denied that the crew of the Janice Ann were fishing in Bahamian waters/the exclusive fisheries zone of The Bahamas, when they were boarded by the Defence Force officers. He denied that he was afforded all courtesies, or allowed to see his attorney. He admitted that he was well fed and that he was allowed to use the bathroom freely because his cell was open, but said that that was when he first got there. He denied that he was given the opportunity to be released from custody from Saturday, 28 May 2011 and not 30 May 2011, as he claimed.

22. On re-examination, Mr Fischer said that he did not have \$20,000.00 on him when he was arrested, nor did he have access to that sum while he was in police custody. He said he did not call the American Embassy; that it was a representative from the Embassy who called the police station and then each of the prisoners was asked to go and speak to the representative. He said he was not allowed to use the phone to call anyone else. He said that he knew the Janice Ann dropped anchor in Bahamian waters and that they did so intentionally because if they had kept going the boat would have broken down in deeper water and they would have ended up in the Gulf stream and probably get run over by a big ship, as they would not have been able to drop anchor in the deeper water. He said that although he did not see the attorney while at the police station, the plaintiff did. He said that he met the immigration authorities after they had been released on bail by the Magistrate. He said that after they left the courthouse they went to the Immigration Department and were then taken to the airport by Immigration officers.

23. In response to the Court's question as to what he understood by "arrest", Mr Fischer said "somebody put handcuffs on you and read me my rights". He says he was never placed in handcuffs; that it was only when he arrived at the jail and was told to take everything out of his pockets that he knew he had been arrested. He said that up to that point he thought the Defence Force officers had brought them to Freeport to help them fix their boat so that they could get back on their way.

24. Mr Shawn Miskura's evidence-in chief also mirrored the plaintiff's.

25. Under cross examination Mr Miskura said that he had been a crew member on the Janice Ann off and on for about 15 years. He said he was familiar with the NOAA charts. He accepted that their fishing trip started on 18 May 2011 and ended on 25 May 2011. He said that the Janice Ann began experiencing engine problems near to West End. He says he remembers because he was on his watch when the engine broke down and he woke up the captain and told him that the engines were making noise. He said he also knows that they were in shallow waters because that's where they go through to go home and that because they were in shallow waters, they were able to put down the anchor. He said that the captain/plaintiff said he made a call to the Coast Guard and to Ally – a guy that works on their fishing boat offshore and a friend of theirs who was going to tow them. Mr Miskura denied that they were fishing during the time that they were anchored in Bahamian waters. He said that they knew better and that he had never fished in Bahamian waters in his life. He said that at the time the Defence Force officers boarded the Janice Ann they had about "six, seven thousand pounds" of fish, to his knowledge; that they had long-line fishing apparatus in plain sight, wrapped up but put away. He said that they had a shot gun on board as well. Mr Miskura said when he asked "the guy" if they were under arrest he said "no, you going to go in, answer some questions, in and out." He said he did not know that he was under arrest until they were in the jail and he was asked to take everything out of his pockets and he saw jail cells behind him. However, he said he was never told that he was being arrested. Mr Miskura said he expected to have his rights read to him and told that he was under arrest, but that did not happen.

26. Counsel for the defendants put to the witness that he was never under arrest and that was why he was never told that he was under arrest. In response Mr Miskura said: "I was put in jail. That's being under arrest, isn't it?" However, he said that although they were placed in a jail cell as soon as they got to the police station, they were never told that they were under arrest.

27. Mr Miskura denied that he was allowed to speak to the American Embassy on the first day or that he was allowed to see an attorney on the second day. He said that on the first day the four crew members were all in the same cell. However, they were split up on the second day and he and the plaintiff were in a cell together. He denied that his cell door was left open; then he said that at one time the door was left open for one of the men who had a urine problem; that the guard came in the next day and closed the doors and after that the doors were always closed so they had to yell and scream to use the restroom.

28. Mr Miskura admitted that while he was in custody he was taken to the Janice Ann by a police officer so that he could get his blood pressure medicine. However, he denied having been told on 28 May 2011 that he could be released or that he had been given \$20,000.00 cash bail.

29. Mr Miskura denied that they were fishing in Bahamian waters when the Janice Ann was boarded by Defence Force. He denied that they were treated humanely by Bahamian officials. He denied that he had the opportunity to be released on 28 May 2011 or that he was offered cash bail on that date. He admitted that they were allowed to eat and drink water while in custody.

30. Defence Force Chief Petty Officer ("CPO") Jonathan Evans' evidence is that, while he and his crew were onboard Defence Force Vessel P-128 on routine patrol they spotted the Janice Ann anchored in Bahamian waters. He said he contacted the vessel via VHF radio and asked pre-boarding questions of the captain, who identified himself as Robert Kane. When asked what he was doing in the area, the plaintiff told him that he was off the coast of Florida fishing when his engine broke down and

that he had drifted to the position where he was found. CPO Evans said that from his knowledge of the area and the weather conditions at the time, he was of the view that it was unlikely that the Janice Ann would have drifted to the position where it was found, so he became suspicious as to whether the plaintiff was telling the truth. Furthermore, he said, there were inconsistencies in the plaintiff's responses. For example, the plaintiff said that he had contacted the Coast Guard who knew about his whereabouts; and that he was expecting another vessel to arrive at his location at about 11:00 p.m. to render assistance to them. However, CPO Evans said that when contacted, the U.S. Coast Guard said they had not heard from the Janice Ann or its captain; and up to 3:00 a.m. on 26 May 2011, no other vessel had come to the aid of the Janice Ann. CPO Evans said that when he asked whether he had any fish on board, the plaintiff said that he had a swordfish and a tuna, which led CPO Evans to believe that the plaintiff had only two fish on board. However, CPO Evans said that when other Defence Force Officers boarded and searched the Janice Ann they found a large quantity of fish in the freezer. CPO Evans said it was only then that the plaintiff admitted to having more than 4,000 pounds of fish in the freezer. However, he said, the plaintiff never admitted that he had caught the fish in Bahamian waters.

31. CPO Evans said that upon instructions from his superiors to detain the Janice Ann, arrangements were made for the Janice Ann and its crew, including the plaintiff, to be towed by the Black Pearl to Bradford Marine Shipyard in Freeport, Grand Bahama, where they were met by Mr Gilford Lloyd and Mr Clement Campbell of the Ministry of Agriculture and Marine Resources, as well as police officers, to whom "the Janice Ann, its catch, captain and crew, gun and ammunition, fishing gear and the like were turned over."

32. Under cross examination CPO Evans said that he took the captain's word that his vessel had broken down; that he did not personally see the crew of Janice Ann fishing in Bahamian waters. However, he said that he did not have to see them fishing in Bahamian waters because the offence of poaching is committed when any foreigner is caught in Bahamian waters fishing or with potential fishing products in their possession.

33. CPO Evans admitted under cross examination that while Defence Force officers were securing the vessel none of the crew was permitted to leave. However, he said that at no time did he tell the plaintiff that he and his crew were under arrest. He said he merely told the plaintiff that he was to be questioned about some of the inconsistencies in his story.

34. On re-examination, CPO Evans said it would have been impossible for the Janice Ann to have drifted where it was if the vessel was travelling from the Northeast as it was impossible to drift south with a current that continuously runs two to four knots north.

35. In his witness statement filed 27 March 2013 Mr Michael Braynen, Director of Fisheries at the Ministry of Agriculture and Marine Resources, stated that, as a result of information which he received on 25 May 2011 that the Defence Force had arrested a long-line fishing vessel, the Janice Ann, which was expected to arrive in Freeport, Grand Bahama, around midday on 26 May 2011, he instructed Mr Gilford Lloyd to go to Freeport, relative to the matter; that he was subsequently advised by Mr Lloyd that there was sufficient evidence to arrest and charge the plaintiff and others. Mr Braynen said that on 28 May 2011 he received certain information from Mr Shurland, counsel for the plaintiff, a review of which led him to the opinion that the plaintiff and his crew would be able "to present reasonable arguments and data to support their claim of fishing on their usual grounds outside the waters of The Bahamas and encountering problems as stated by the plaintiff". Officer Braynen said that Mr Shurland also complained about the treatment of the plaintiff and the others and he also made mention of the fact that the police had not given his clients a cash bond. Mr Braynen said that he promised to look into the matter; that he contacted Royal Bahamas Defence Force Lieutenant Commander Nedley Martinborough and shared with him all the information that he had. Mr Braynen said he tried unsuccessfully to reach a senior officer with the Royal Bahamas Police Force in Freeport in connection with the matter and that around 1 June 2011, he spoke at length with Mr Collie, Chief Prosecutor in the

Office of the Attorney General during which time he gave Mr Collie the information he had received, including his review of the GPS chart data information. Mr Braynen said that he subsequently instructed Mr Clement Campbell that the items that had been taken from the plaintiff were to be returned to him, including any fishing gear and equipment as well as the marine products that had been removed from the vessel and he later became aware that the Attorney General had nolle prosequi the matter.

36. Under cross examination Mr Braynen said that at some point during the course of his investigation he came to the conclusion that the plaintiff was fishing outside Bahamian territorial waters; that he arrived at that conclusion based on information supplied to him by Mr Shurland showing the vessel track that they customarily followed in a particular pattern to a fishing ground and return to their home port.

37. In his witness statement filed 27 March 2013 Mr Gilford Lloyd Senior Fisheries Officer at the Ministry of Agriculture and Marine Resources stated that as a result of information he received from Mr Braynen he went to Freeport, Grand Bahama, where he was met by Mr Clement Campbell. Both of them went to Bradford Marine and awaited the arrival of the Defence Force vessel and the vessel "Janice Ann" and its crew. That upon its arrival the Janice Ann was boarded by the relevant enforcement officers including fisheries personnel and the police; that he and Mr Campbell conducted an inspection of the vessel and found long-line fishing gear; that he checked the fish hold and found marine resources associated with long lining, namely: tuna, swordfish, dolphin and shark and he concluded that there was sufficient evidence that long-line fishing had taken place in Bahamian waters. That he then cautioned the plaintiff and others and placed them under arrest. He said that the plaintiff and crew were then escorted by the police to the Central Police Station. He gave a report to Inspector Henry Rolle, then he and Mr Campbell returned to Bradford Marine where they assisted staff of Grand Bahama Foods in removing the marine resources from the Janice Ann and transporting the same to Grand Bahama Foods, where they were weighed and photographed. Mr Lloyd said that Mr Shurland showed him a nautical chart, which he intended to discuss with Defence Force personnel. However, when he returned to Bradford Marine to do so the Defence Force officers had left so he took the chart to New Providence without having discussed the matter further.

38. Under cross examination Mr Lloyd said that he came to Grand Bahama on 26 May 2011, the day he arrested the plaintiff. He said he identified himself to the plaintiff and the crew, read them a caution and then placed them under arrest. He said the plaintiff did not give him an official log record nor did he give him the GPS reading of where he had been fishing. He said some of the items found on the vessel were stored properly while others were lying on the deck in plain sight, but that the fish was in the hold. He said he placed the plaintiff under arrest because he had done an investigation and concluded that there was sufficient evidence that long-line fishing had taken place in Bahamian waters. In that regard, Mr Lloyd said that the items he saw on the Janice Ann are considered illegal in The Bahamas: that is, long-line fishing apparatus and maritime resources associated with long-line fishing. Mr Lloyd said he concluded that the fish on the vessel came out of Bahamian waters.

39. Mr Lloyd said he did not speak to any of the Defence Force officers or anyone else about whether the vessel had broken down; that he came to his conclusion based on what he saw and that that was the basis upon which he recommended the plaintiff and his crew be charged. According to Mr Lloyd, the Little Bahama Bank is shallow water and it is possible to find dolphin in there, although he would not expect to find tuna and swordfish in that area.

40. Mr Lloyd said he did not check with Customs or Immigration to see if the men had been cleared; that he merely arrested them and turned them over to the police. He said that illegal foreign fishing means any foreign vessel fishing in The Bahamas commercially without the proper permits and that commercial fishing is a catch exceeding 300 pounds. Initially Mr Lloyd denied that he had recommended that the plaintiff and his crew be charged with illegal foreign fishing. However, when directed to his handwritten report included amongst the agreed documentary evidence, Mr Lloyd

accepted that he had, in fact, recommended that the plaintiff and his crew be charged with illegal foreign fishing contrary to sections 7 and 20 of Chapter 244. The particulars being that they were in waters near Mantanilla Shoal, Little Bahama Banks for the purpose of foreign fishing. Mr Lloyd said he made that determination upon his inspection of the vessel – not from any information he received from others. He said he boarded the boat and found the violation, although he could not recall how he determined how the plaintiff and the Janice Ann came to be in Mantanilla Shoal.

41. According to Mr Lloyd's aforesaid hand-written report, the men were charged because they were found in the area in possession of a quantity of prohibited fishing apparatus and marine resources of scale fish, tuna, swordfish, dolphin and shark and could not give a satisfactory account of the same. However, under cross examination Mr Lloyd said that he had not asked the men about the fish as that would have been done in the interview with the police department.

42. On re-examination Mr Lloyd said all of the fish are likely to be found in Bahamian waters. He said that the charges were laid because when he searched the boat he found long-line fishing apparatus/gears and because of the type of marine resources on board.

43. The evidence-in-chief of Nedley Martinborough a commissioned officer of the Royal Bahamas Defence Force and the officer-in-charge of Administration at the Defence Force is that on 28 May 2011, he received an email from Mr Michael Braynen, Director of Marine Resources Department wherein he was asked to review the NOAA chart depicting the track of the Janice Ann, which was found in Bahamian waters on 25 May 2011. Mr Martinborough said that having reviewed the GPS generated track, he concluded that the said foreign fishing vessel which was found in Bahamian waters with a large quantity of marine resources, had fished in waters which are presently in dispute between the United States and Bahamian governments. According to Mr Martinborough, although the area is customarily accepted by the United States as a part of their Exclusive Economic Zone, there is no agreement between the United States and the Bahamian governments which clearly expresses any lines of maritime delimitation. Mr Martinborough said that the examination of the VMS track led him to conclude that the Janice Ann had intentionally entered into Bahamian waters and was anchored in Bahamian waters for twenty-three (23) hours. Mr Martinborough said that based on the GPS generated track, nothing indicated that the said vessel was drifting while in Bahamian waters and that this was also confirmed from the report of CPO Jonathan Evans. However, he said he made no conclusion as to whether the vessel was in the Bahamian waters as a result of force majeure or innocent passage. Mr Martinborough said that based on his experience, the officers had reasonable suspicion to detain the vessel and acting on instructions from the Fisheries Marine Resources Department, to escort the vessel into Freeport Harbour for further investigation into these matters by the relevant authorities.

44. Under cross-examination Commander Martinborough said that the information he provided was based on what other persons had given him; that he was not at the scene and he did not speak to anyone from the Janice Ann.

45. The evidence of Police Inspector Henry Rolle, the 5th defendant, is that on 26 May 2011 he received certain information concerning the crew of the Janice Ann who had been arrested on 25 May 2011 by members of the Royal Bahamas Defence Force and brought into Bradford Marine. The plaintiff and others were taken into Police custody on Thursday, 26 May 2011 and Officer Rolle was given a chrome Winchester twelve gauge shot gun by Mr Campbell from the Department of Fisheries, which gun was said to have been retrieved from the Janice Ann vessel. Officer Rolle said he also contacted US Inspection and Border Patrol/US Customs and Border Protection Supervisor/Port Director Mr Timothy Lund and gave him information concerning the arrest of the plaintiff and his crew. He said that after perusing the file and based on all the evidence including the report from Mr Lloyd and CPO Evans, as well as the evidence collected by the arresting officers, he decided that the plaintiff and others should be charged with the aforesaid offences and they were so charged on Saturday, 28 May 2011. He sent the completed file to the Officer-in-charge of prosecutions on 30 May 2011.

46. Under cross-examination Officer Rolle said he recalled speaking to Messrs Campbell and Gilford Lloyd about this matter but could not recall the details of the conversations.

47. Although in his witness statement Officer Rolle said that the men were arrested by Defence Force officers on 25 May 2011, under cross-examination he said they were re-arrested by Mr Lloyd after being handed over by the Defence Force. He later withdrew the statement and said that he gave instructions for the men to be charged with offenses contrary to the Fisheries Act and that those instructions were based on the recommendations of Mr Lloyd. He said he did not recall having a conversation with Mr Clement Campbell in which he said "I will show you how sloppy you fellows are in Court today".

48. On re-examination Officer Rolle said that he granted the plaintiff and his crew police bail but they did not meet their bail. He also said he received the file of the investigating officer before recommending the charges to be preferred against the plaintiff and his crew.

49. On further cross-examination Officer Rolle said he did not tell the plaintiff that he had been granted police bail; that he had told the police officers. He said that as a police officer the upper limit of bail that he was authorized to grant without seeking additional authority was \$10,000.00.

50. The evidence of Police Officer Bradley Stubbs is that on 27 May 2011, he was the Manager of the Custody Suite at the Central Police Station; that when the plaintiff and crew of the Janice Ann were brought into the Custody Suite, detentions records were filled out in connection with them; that he escorted the plaintiff and the others to the Interview Room where they met with their lawyer Mr Shurland; that upon Mr Shurland's request, he permitted the prisoners, including the plaintiff, to call their relatives, using their cell phones. He said that Mr Shurland informed him that the plaintiff needed to see the doctor as his hand had been injured; that prior to the end of his shift, he instructed another officer that the plaintiff needed to see the doctor; that when he returned to work the following Monday, he was informed that the plaintiff had been taken to the doctor. According to Officer Stubbs, no other complaint was made to him by the plaintiff or any other prisoner at that time. He said that one of the prisoners indicated to him that he needed to go back to the vessel to secure the boat and to retrieve some medication and he, Officer Stubbs, along with Officer Goddard took the prisoner to Bradford Shipping Marina and permitted him to board the vessel and collect some personal effects and his medication; that they then returned to the Central Police Station where the prisoner was placed back in the cell. Officer Stubbs said he was not aware that any of the prisoners or the plaintiff was threatened by an officer to be, "gutted like a fish"; that when he returned to work on Monday, 30 May 2011, he saw the plaintiff and the other prisoners, but he received no complaints from any of them. He said that during his shift the prisoners, including the plaintiff, were all treated humanely.

51. Under cross examination Officer Stubbs said in some cases it was common practice for officers in the custody suite to leave the cell door open for the prisoners to go back and forth to the bathroom whenever they wanted to; that it was also common practice for the prisoners to use the suite's desk telephone for local calls to call their families and friends whenever they wanted to; that for long distance calls if a prisoner had a cell phone he would be allowed to use his cell phone to make the call.

52. Officer Stubbs said that the air condition system in the Custody Suite gets very cold, especially at night.

53. On re-examination, Officer Stubbs said that in this case, the cell door was left open to allow the plaintiff and his crew access to the bathroom

54. Sgt 1821 Charles Forbes was the shift supervisor at Central Police Station on 27 May 2011. His evidence is that on that date around 9:10 p.m., he along with police officer, 3431 Demeritte took the plaintiff to the Rand Memorial Hospital where he was seen by a doctor, who gave him a prescription for medicine. He said that the prescription was filled the following day and he gave the medicine to police officer 2516 Seymour to give to the plaintiff. Officer Forbes said that afterwards, he saw the plaintiff on

several occasions but the plaintiff made no complaints to him. Officer Forbes said that the cell door had been left opened but he instructed Officer Seymour to close the same, which he did.

55. Under cross-examination, Officer Forbes said that it was not common practice to leave the cell door open while prisoners are in the cell, although he acknowledged that it happens.

56. Chad Adams, a Grade I Officer with the Department of Immigration gave evidence that after their arraignment in the Magistrate Court the plaintiff and his crew were turned over to the Immigration Department where they were placed in a holding cell. They were formally processed at the Immigration Department and then escorted by Immigration officers to the Grand Bahama International Airport where they were seen out of the country.

57. Under cross-examination, Officer Adams said that the plaintiff and the crew of the Janice Ann told him that they had been arrested for some breaches of the Fisheries Act and that their boat had some kind of problem. He said the men told him they did not intend to come to The Bahamas, but were seamen in distress.

58. Corporal Romeo Seymour's evidence-in-chief is that when the plaintiff and his crew were brought to the police station on 26 May 2011 he secured all their personal property, including money, found in their possession. He informed them of their right to counsel; they were searched and placed in the cell. He left the cell door open as one of the prisoners had complained that he had a weak bladder and as a result, all of the men, including the plaintiff, were able to use the bathroom freely. He said that neither the plaintiff nor any of the other men brought any concerns to his attention at that time. Officer Seymour said that the plaintiff's wife called the station on several occasions and he permitted the plaintiff to speak with her; that a representative from the United States Embassy called and spoke with each of the prisoners, including the plaintiff. He said that he was aware that the plaintiff and other crewmen were given food during his shift, namely the 4:00 pm – 12:00 midnight shift; and that the plaintiff was allowed to speak with his attorney when he came to the station. Officer Seymour said that the plaintiff had a complaint about his finger and was taken to the Rand Memorial Hospital for treatment. Officer Seymour denied that he threatened to, "gut the prisoner like a fish". He said neither he nor any of the other officers to his knowledge made any threats in regards to any of the prisoners, including the plaintiff; and that at all times he treated the plaintiff and the others humanely and with consideration, accommodating them in every way possible.

59. Under cross examination Officer Seymour said that the representatives from the American Embassy called while the plaintiff and others were in the Custody Suite and they were allowed to speak to them.

60. In May 2011 Inspector Annmarie Neely was the Officer-in-charge of the Prosecutions Department, Grand Bahama District. Her evidence is that following the entry of a *nolle prosequio* 21 June 2011 by the Attorney General, the plaintiff and crew were discharged and the Magistrate ordered that:

- 1) The \$40,000.00 recognizance against the bail of the captain and three (3) crew members to be repaid to the persons who paid it.
- 2) The fishing vessel "Janice Ann" and the keys are to be turned over to Captain Robert Kane.
- 3) A reasonable time has been granted for the Captain to repair and remove the 'Janice Ann' pending a decision of the Bahamas Immigration Department.
- 4) The frozen fish, some 5000 lbs stored at the Grand Bahama Farms are to be returned to Captain Kane.
- 5) Some 600 gallons of fuel to be returned to Captain Kane from the towing company Black Pearl that removed it from the "Janice Ann".

- 6) Once the Bahamas Customs regulations have been met, the shotgun and seven (7) rounds of ammunition are to be returned to Captain Kane.
- 7) The knives in the possession of the Department of Fisheries are to be returned to Captain Kane.

61. Officer Neely said that the vessel and keys, the knives, the shotgun, the ammunition and the fish were handed over to Mr Kane by her in the presence of Mr Clement Campbell. As evidence of that, Officer Neely produced a receipt signed by the plaintiff indicating that he had received the mentioned items. She said she was verbally informed by the plaintiff that the fish was spoiled and had to be thrown away. However, she said he signed as receiving the full amount.

62. Under cross examination Officer Neely said she "physically" gave the plaintiff the gun; that he would have collected it from her in the Police Prosecutions Office; that she had the gun and keys, but not the fish, which the plaintiff collected from somewhere else. When counsel for the plaintiff suggested to Officer Neely that the plaintiff had signed in anticipation of receiving the gun, but that it was never returned to him, Officer Neely insisted that she gave the gun and keys to the plaintiff on 22 June 2011, the date he signed for them. Officer Neely said that from what she could remember the gun was in a black case; that she saw ammunition in the case. As for the fish, Officer Neely said she told the plaintiff where it was. Later in her evidence, Officer Neely said that she and Mr Campbell, Fisheries Officer, accompanied the plaintiff to the farm near the airport, where she was taken to a location and shown some fish which she believed to be the same fish she had seen prior to the plaintiff's arraignment. She said she handed the fish back to the plaintiff on 21 June 2011; that they were spoiled, but still under ice. She said she saw big fish; groupers; all kinds of fish.

63. According to Officer Neely she got the gun from the exhibit room and handed it to the plaintiff.

64. After Officer Neely had given her evidence, the Court directed counsel for the defendants to make inquiries as to the whereabouts of the firearm and ammunition. In compliance therewith, the defendant filed a witness statement by Nicola Sears in which she stated, inter alia, that on Wednesday, 2 September 2015, she made a check of the police armory and verified that the 12 gauge Winchester pump action shot gun serial number L1345042 confiscated from the plaintiff and handed over to her on 27 May 2011 was still in the custody of the armory.

65. In his witness statement filed 11 April 2013, Mr Minas Vardaoulis owner/manager of Grand Bahama Food Services said that he assisted the Department of Fisheries in storing the marine resources weighing about 5000 pounds, found on the Janice Ann. He said he was initially instructed by Mr Campbell to place the fish on ice for a few days; that over time the fish started to deteriorate; that he was then instructed by Mr Campbell to throw away the smaller fish which had spoilt and to store the larger fish in the freezer to prevent their further deterioration; that eventually all of the fish spoiled and had to be thrown away. He said he was never asked by the plaintiff or his counsel nor directed by the Police or the Department of Fisheries to release the fish to the plaintiff.

66. Officer Dellington Munroe, a police photographer, said that he photographed the fish on a truck, in the freezer onboard the Janice Ann and at Grand Bahama Food Services after they had been weighed.

67. Dr Catherine Franciscoa practicing physician and Registrar at the Accident and Emergency section at the Rand Hospital, Freeport, Grand Bahama, confirmed having seen and attended to the plaintiff at the Emergency Room of the Rand Memorial Hospital on 27 May 2011. She said that at the time he was accompanied by a police officer; that his complaint was an abscess on his fifth digit (finger) on his left hand. She noted that he had an abscess along with abrasions or cuts alongside the fifth digit. She said she then gave the plaintiff an injection of antibiotic and prescribed antibiotics to be taken by him orally for one (1) week. She said that he had no other complaints and appeared to be a normal healthy person. She released him and he left with the police officers.

68. Mr Clement Campbell, Assistant Fisheries Superintendent, said that he is assigned to patrol from Sweetings Cay to West End, Grand Bahama; that on 25 May 2011, he was in West End on his regular patrol when CPO Evans informed him about the situation with the Janice Ann, including what they had discovered while on routine patrol at Mantanilla Shoal; that as a result of that information he engaged the Black Pearl Company to tow the Janice Ann to Freeport Harbour; that the vessel arrived in the Freeport Harbour at about 3:00 p.m. on Thursday, 26 May 2011, but the Port Authority did not give permission for the vessel to be docked in the Harbour so he contacted Bradford Marine Shipping and got permission to have the vessel docked there. He said that he along with Mr Gilford Lloyd and police officers boarded the vessel after identifying themselves as Fisheries and Police officers; that they obtained permission from the plaintiff to search the vessel and discovered a large quantity of fish in a walk-in freezer. They also discovered a quantity of long-line and other fishing apparatus as well as a twelve gauge shot gun, with seven shells, which he gave to Mr Lloyd. Mr Campbell said that he asked the police to secure the boat over night as Bradford Marine did not provide security; that the plaintiff and crew were then taken into custody by the police. Mr Campbell said that he contacted Grand Bahama Foods for assistance in off loading and storing the fish until the investigation into the matter was completed.

69. Mr Campbell said that later while he and Mr Lloyd were having lunch, Mr Shurland came to the restaurant and presented to them a NOAA Chart which depicted the movement of the Janice Ann from 18 through 26 May 2011 or up to the time of its interception at sea by the Defence Force. He said that Mr Lloyd then took the NOAA Chart and the Janice Ann's log book to New Providence so that the Royal Bahamas Defence Force could examine them and verify the tracking on the vessel; that in the meantime he conducted an investigation into the matter, in connection with which he spoke to several persons, including the plaintiff, in the presence of his attorney, and the police on 27 May 2011 at the police station. Mr Campbell said that as a result of his investigation he tried to get the police to release the plaintiff and others and not to press charges against them. He said that on Sunday 29 May 2011, he wrote again to Inspector Henry Rolle asking him not to press charges against the plaintiff and others and that he was informed a few weeks later that the Attorney General entered a nolle prosequi in the matter.

70. Mr Campbell denied that he arrested the plaintiff and crew of the Janice Ann, or that it was upon his instructions that they were arrested.

71. According to Mr Campbell, it was the Defence Force that arrested the plaintiff and his crew. And while he agreed that the Janice Ann and its crew were brought into Freeport on his instructions, he disagreed with counsel for the plaintiff's suggestions that (i) the Defence Force only detained the plaintiff and crew on his instructions; and (ii) that it was he who placed them under arrest.

72. Mr Campbell confirmed that it was he who instructed Mr Vardoulis to secure the fish, to put the large fish on ice. However, he said he did not recall telling Mr Vardoulis to put them in the freezer after they started to rot. When asked whether he gave the rotten fish back to the plaintiff, Mr Campbell, after some persistence by counsel for the plaintiff, said he did not know the fish was rotten. He said that the fish was given back to the plaintiff but that he was not the person to determine if the fish was rotten or not. He said that Mr Rolle was correct when he said that Fisheries people were slack.

73. Corporal 1608 Thomas Hanna, the 6th defendant, said that on 27 May 2011 he was instructed by Inspector Henry Rolle to investigate the matter concerning the crew of the Janice Ann who had been arrested on 25 May 2011 by members of the Royal Bahamas Defence Force and brought into Bradford Marine. He said he went to Bradford Marine where he along with Police Constable 2952 Moxey boarded the Janice Ann and conducted a search which revealed a large quantity of tuna, swordfish and dolphins in a freezer; that the fish was taken to Grand Bahama Foods where it was placed in a freezer to be preserved for evidentiary purposes. He said that he requested and received reports from Messrs Clement Campbell and Gilford Lloyd and that the latter suggested the charges to be laid against the

plaintiff and others in connection with this matter; that on Saturday, 28 May 2011, while at the Custody Suite he interviewed the plaintiff under caution and informed him of the complaint against him and asked whether he had anything to say or whether he wished to give a statement under caution. He said the plaintiff said his attorney had instructed him not to say anything, so he declined to give a statement.

74. Officer Hanna said that based on the evidence that he had at the time and the relevant Act, and after consultation with Inspector Rolle, his immediate supervisor, they came to the "reasonable conclusion" that there was sufficient evidence to charge the plaintiff; that he, therefore, charged the plaintiff and others with the offences on the court docket pursuant to the instructions of Inspector Rolle, Officer Hanna said that he cautioned the men about the charges, but they said nothing in response.

75. Officer Hanna said that later that evening, 28 May 2011, while at work at Central Police Station he was approached by attorney Carlson Shurland and Fisheries Officer, Clement Campbell; that Mr Shurland showed him a GPS tracking map of the vessel Janice Ann with coordinates and dates. He said that on 29 May 2011 Mr Campbell asked him to check the Janice Ann as the freezer was not working. He said that he and PC 3220 Demeritte, escorted the plaintiff to Bradford Marine; that they checked the freezer and discovered that the same was in order. He said that while at the shipyard, the plaintiff requested and was permitted to run the vessel's engine; that the engine started after two to three attempts and was allowed to run for approximately 15 to 25 minutes, after which the plaintiff was returned to the Custody Suite at Central Police Station.

76. Under cross examination Officer Hanna said that he had a conversation with Mr Clement Campbell in regard to charging the crew of the Janice Ann with violations under the Fisheries Act, but it was Mr Lloyd who suggested the charges that should be laid against the men. He said he did not recall whether Officer Rolle had told him to charge the crew, but when referred to paragraph 14 of his witness statement, he said that Officer Rolle had told him to charge the plaintiff and crew.

77. The evidence of Mr Ole Strom, the agent for the Black Pearl 1 Tug Boat, is that on 25 May 2011 at 5:30 p.m. he was asked by Mr Clement Campbell to tow the Janice Ann into Freeport Harbour. He was given the position of the anchored vessel as 27.16 North and 79.09 West. He along with the captain of the Black Pearl arrived at the location at 2:30 a.m. on 26 May 2011 and commenced the tow at 3:13 a.m. He said that they docked at Bradford Marine at about 3:00 p.m. on 26 May 2011.

78. According to Mr Strom, the fuel consumption for the Black Pearl towing the Janice Ann was about 280 gallons and on 28 May 2011 he pumped approximately 250 gallons of diesel out from the Janice Ann which brought the Black Pearl up to full fuel capacity.

79. In his witness statement Mr Strom also stated at paragraphs 23 through 38 as follows:

- 23) We also inspected the engine room to make sure that the Janice Ann engine was in running condition and the problem the captain stated that he had experienced.
- 24) I observed that he had been changing fuel filters, however, the engine appeared to have no technical problems and that the boat was ready to go.
- 25) That on further inspection, I observed that there were two fuel tanks on the vessel, one on the starboard side which appeared to be full and one on the port side which appeared to be low on fuel.
- 26) That on the 29 May 2011 the generator on the Janice Ann was off as the fuel in that tank had run out.
- 27) That on 5 June 2011, the status remained the same; however, we had to remove the Janice Ann to a different location at Bradford Marine.
- 28) That on 8 June we were again instructed by Bradford personnel to move the Janice Ann to another location at Bradford Marine.

- 29) That on 9 June 2011 we cleaned up the holding compartment where the fish was stored, hosed down the cargo holding area and bleached it.
- 30) That we then entered the wheelhouse and emptied out a big freezer which contained rotten decomposed bait and poured bleach in the compartment to kill the bacteria.
- 31) That we also emptied out the fridge and freezer where the crew's personal food was kept which area was highly infested with maggot.
- 32) That on 10 June 2011, I contacted Royal Bahamas Police Force, Marine Patrol Unit and offered the officer to tow the Janice Ann to the waterway at the Marine Patrol Station.
- 33) That this move was approved by the police on 11 June 2011.
- 34) That on 12 June at 1:00 a.m. we left Bradford Marine en route to the Marine Patrol Unit.
- 35) At 2 p.m. we arrived at the police station and tied up and secured the vessel to the dock and put the battery charger on to keep power to the bilge pump and turned the vessel over the police.
- 36) That on 13 June we disconnected the vessel and left it in the care of the Royal Bahamas Police.
- 37) That later, after the Janice Ann had been released back to the captain and crew I offered our assistance to repair the alleged problem, however, the captain did not accept.
- 38) That on the following day I returned to the Police Patrol Unit but the vessel was gone.

80. Under cross-examination Mr Strom said that he had offered to tow the Janice Ann to the waterway at the Marine Patrol Station. He said he was supposed to move the boat but it became a tow because they could not get it started. He said he knew that the boat needed to be repaired.

81. On re-examination Mr Strom said that he was there when the Captain of the Black Pearl tried but could not start the Janice Ann's engine.

82. (It is, however, unclear whether that was when the Janice Ann was originally towed in or when they attempted to move it from its original docking space at Bradford Marine.

83. Mr Thurber Withey, the Operations Superintendent of Bradford Marine, said that on 26 May 2011, by agreement with the Defence Force, the Black Pearl brought the vessel Janice Ann to Bradford Marine's dock where both vessels remained until 12 June 2011).

84. Sgt. 1365 Earl Campbell's evidence is that on 26 May 2011 he was informed that the Janice Ann had been arrested on 25 May 2011 by members of the Royal Bahamas Defence Force and brought into Bradford Marine and he instructed Officer 3440 Hart to provide security for the vessel at Bradford Marine from midnight to 8:00 o'clock the following morning.

85. Lieutenant Commander Frederick Brown, the Commanding Officer of the Defence Force Northern Command stated that on 25 May 2011, he was advised by CPO Jonathan Evans that there was a vessel in the vicinity of Mantanilla Shoal Northwest section of the Little Bahama Bank; that it appeared to be a fishing vessel; that they had boarded the vessel and had found four (4) persons on board; that during their routine search of the vessel they found a fairly large quantity of marine products. As a result of that, they proceeded to make an arrest and following that, contact was made with the Fisheries Inspector, Mr. Clement Campbell.

86. Lt Commander Brown said that he was advised by CPO Evans that the Captain of the Janice Ann was experiencing some mechanical failures on the boat which they were not able to fix at that time. Lt Commander Brown said that CPO Evans gave him the coordinates for the location of the Janice Ann, which he sent to base so that they could map out the coordinates to determine whether the persons were in Bahamian waters. He said that from the coordinates provided, it was determined that the Janice Ann was on the contour line that separates the Little Bahama Bank from the Ocean in the

deep water about 35-40 miles off West End, Grand Bahama. He said he advised CPO Evans to prepare to tow the vessel, and they received instructions from Mr Campbell at the Department of Fisheries to have the vessel towed to Freeport. He said that the Janice Ann and its crew were in Bahamian waters and did not pull into a port of entry as a commercial fishing vessel.

87. Under cross examination Lt Commander Brown said that most of the information as to what transpired between the Defence Force officers and the Janice Ann crew was communicated to him by CPO Evans, because he, Brown was on shore. He said he believed Evans when he told him that the Janice Ann had mechanical problems.

88. The parties agreed that Sgt Michelet Meronaud's witness statement would be admitted as his evidence-in-chief. He was not cross-examined. Sgt Meronaud's evidence is, inter alia, that Mr Clement Campbell informed him after the arrest of the crew of the Janice Ann, that he came into possession of the GPS coordinates showing where the fishing vessel would have been moored during the fishing expedition; and he "alleged that based on those coordinates, the fishing vessel was outside the jurisdiction of Bahamian territorial waters when the fish were caught".

THE ISSUES

89. The issues to be determined as identified by the plaintiff are:

- 1) Was the plaintiff and his vessel protected by the Treaty that governs Innocent passage of which the Bahamas is a signatory?
- 2) Whether the plaintiff was fishing illegally in Bahamian waters?
- 3) Whether the plaintiff was arrested by officers of the Royal Bahamas Defence Force?
- 4) Whether the Defence Force had lawful authority to arrest and detain the plaintiff? And if yes, were they obligated to inform the plaintiff of the reason for his arrest and/or detention pursuant to Article 19 of the Constitution?
- 5) Whether the arrest, detainment and subsequent charges against the plaintiff were unlawful and therefore, unconstitutional?
- 6) Whether the seizing and detention of the Janice Ann and the confiscation of the cargo and catch were unlawful and/or illegal?

90. From the defendant's perspective, in determining the question of liability, the following issues arise:

- 1) Whether the Department of Marine Resources formed a reasonable suspicion when they arrested and detained the plaintiff?
- 2) Whether there was any basis for the Royal Bahamas Defence Force to arrest and detain the Janice Ann and its crew, including the plaintiff?
- 3) Whether the police acted lawfully by subsequently detaining and charging the plaintiff?
- 4) Whether the police infringed the plaintiff's constitutional rights as alleged or at all.
- 5) Whether in all the circumstances the defendants acted lawfully regarding the plaintiff's property?

91. For ease of reference, I set out hereunder, so far as they are relevant to the issues raised in these proceedings, provisions of the various legislations referred to and or relied on by the parties.

92. Article 19 of the Constitution of The Bahamas reads, inter alia, as follows:

- (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases:-
 - (a) ...

(d) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;

(2) Any person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language that he understands, of the reasons for his arrest or detention and shall be permitted, at his own expense, to retain and instruct without delay a legal representative of his own choice and to hold private communication with him...

(3) Any person who is arrested or detained in such a case as is mentioned in subparagraph ... (d) of this Article and who is not released shall be brought without undue delay before a court... and if any person arrested or detained in such a case as is mentioned in the said subparagraph (1)(d) is not tried within a reasonable time he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

93. Sections 18 and 20(3) and (4) of the Criminal Procedure Code Act, chapter 91, statute laws of The Bahamas provide:

18. A peace officer making an arrest without a warrant, in exercise of any powers conferred upon him by the Penal Code, the Police Act or any other law for the time being in force, shall, without unnecessary delay and not later than forty-eight hours after such arrest, take or send the person arrested before a magistrate appointed to preside in a magistrate's court having jurisdiction in the case, unless the person arrested be earlier released on bail by a police officer having power in that behalf under the provisions of section 32 of the Police Act.

20. (1) ...

(3) Any person arresting a person under the powers conferred by subsection (1) or (2) of this section, or under any powers under any law conferring powers of arrest upon persons other than a peace officer, shall without unnecessary delay make over the person so arrested to a peace officer or bring him before a magistrate.

(4) If any arrested person referred to in this section is brought before a peace officer and the peace officer is satisfied that there are grounds to suppose that he has committed an offence for which he may be arrested without a warrant, he shall re-arrest him, or if there is reason to believe that he has committed another offence, he shall be dealt with as if he had committed such other offence in the view of the peace officer concerned. Any person re-arrested by a peace officer under the provisions of this section shall thereafter be dealt with in accordance with the provisions of section 18 of this Code.

94. Section 2 of the Fisheries Act, chapter 244, statute laws of The Bahamas, defines "fishing" as "the catching, taking or harvesting of any fishery resource or any other activity which can be reasonably expected to result in the catching, taking or harvesting of such fishery resource"; and "foreign fishing" as "fishing by a vessel other than a vessel owned by a Bahamian".

95. Sections 3, 7, 14, 15, 20, 22 and 24 of the Fisheries Act provide:

"3. Every member of the Defence Force, every officer of the revenue, every peace officer and every officer of the Department of Agriculture and Fisheries appointed for the purpose by the Minister by instrument in writing shall be a fisheries inspector for the purpose of this Act and shall have and may exercise the functions assigned to a fisheries inspector by or under this Act."

"7. No foreign fishing is authorised within the exclusive fishery zone for any fishery resource in respect of which The Bahamas exercises the sovereignty and authority specified in section 6 unless such foreign fishing —

(a) is authorised by virtue of a treaty to which The Bahamas is a party and such treaty is made subject to sections 8 and 10 and is conducted under and in accordance with a valid licence granted by the Minister under section 9;

(b) is authorised by the Minister and is conducted by a vessel owned or operated by an international organisation of which The Bahamas is a member;

(c) is authorised by the Minister and is conducted for scientific or research purposes under the authority of and in accordance with the terms and conditions of a permit in that behalf granted by the Minister to the person operating the vessel;

(d) is conducted for sporting purposes in accordance with any regulations made under this Act, by a vessel which has first made entry in respect of the voyage on which it is engaged at a port of entry in The Bahamas or by a vessel which has been imported into The Bahamas or constructed in The Bahamas.

“14. (1) A fisheries inspector may at any time stop, go on board and search any fishing vessel within the exclusive fishery zone and if he has reason to suspect that any person on board such vessel has contravened any of the provisions of this Act or of any regulations made thereunder, he may without summons, warrant or other process seize the vessel and detain it and any person found on board;

(2) A fisheries inspector may at any time without summons, warrant or other process seize and detain any vessel or thing which is liable to forfeiture under this Act or which he has reasonable grounds to believe is so liable

(3) A fisheries inspector and any person whom he may call to his assistance may arrest and detain without warrant any person whom such inspector has reason to suspect committed or permitted any offence against this Act

(5) Where any vessel or thing is seized or detained or any person is detained under this section by a fisheries inspector the inspector shall take such vessel, thing or person as soon as may be to the nearest or most convenient place in the Bahamas and there deliver it or him into the custody of the most senior police officer.

“15. Where on delivering any person into the custody of a police officer in accordance with the provisions of section 14 —

(a) the fisheries inspector makes a complaint to such officer that such person has committed an offence against this Act, the police officer shall as soon as may be cause such person to be brought before a magistrate's court to be dealt with according to law; or

(b) the fisheries inspector does not make any such complaint, the police officer shall forthwith release such person.

“20. Subject to subsection (3), where any fishing vessel engages in foreign fishing in the exclusive fishery zone for any fishery resource —

(a) the owner and also the master or other person in charge of the vessel and every person who so uses it shall be guilty of an offence and liable on summary conviction, subject to the provisions of section 23, to a fine of fifty thousand dollars or to imprisonment for a term of one year or to both;

(b) the vessel used in such fishing shall be liable to forfeiture whether by the court upon such conviction or on acquittal or otherwise by any court in proceedings taken for its condemnation.

(2) Where any fishery resource is found on board any fishing vessel within the exclusive fishery zone or where any fishery resource is landed, or placed in any crawl, from any such fishing vessel at any creek, island or cay within The Bahamas, such fishery resource shall be deemed, until the contrary be proved, to have been taken within the exclusive fishery zone by a person on board such fishing vessel and where the fishery resource is the result of anything done in contravention of the provisions of this Act, it shall be seized and be liable to forfeiture.

“22. (1) Except with written permission of the Governor-General, no person shall:

(a) have in his possession on a fishing vessel, any apparatus intended for use in long-line fishing; or

(b) use for fishing within the exclusive economic zone, any apparatus for long-line fishing, and such permission may only be given where it is shown to the satisfaction of the Governor-General that the pursuit of long-line fishing, in the particular instance, would not endanger elements essential to sustainable fishery development and would not prejudice the development and expansion of eco-tourism in The Bahamas.

(2) For the purposes of proceedings (for an offence of being in possession of any apparatus or for using any apparatus in breach of the provisions of this section, it shall be presumed until the contrary is shown that —

(a) the captain or other person in charge of the vessel wherein the apparatus is proven to have been found and every member of the crew of the vessel at the time, were each in possession of the apparatus;

(b) the captain or other person in charge of the vessel on or from which the apparatus is proven to have been used and every member of the crew at the time, were each using the apparatus;

(c) fish found in any vessel on which any apparatus is proven to have been found, have been captured or taken by means of that apparatus; and

(d) apparatus proven to have been found on vessel within the waters of The Bahamas, was intended for use in long-line fishing within those waters, if the apparatus found is normally used in long line fishing.

(3) Any person who contravenes the provisions of subsection (1) is guilty of an offence and liable on summary conviction, subject to the provisions of section 23, to a fine of not less than fifty thousand dollars but not exceeding one hundred thousand dollars or to imprisonment for a term of one year or to both such fine and imprisonment; and the court shall, in addition to any other penalty, order the confiscation of any apparatus used in the commission, or that is the subject matter, of the offence and the apparatus so confiscated shall be forfeited to the Crown.

(4) In this section — “long-line fishing” includes fishing by means of a line or cable to which is attached along the line or cable, not less than ten fish hocks and which line or cable extends or is capable of extending beyond twenty yards from the point where it is cast.”

“24. (1) Any person, whether holding a licence or permit or not, found in possession of any article prohibited to be used, or any fishery resource prohibited to be taken, by virtue of any licence, permit or regulation made under this Act and failing to give a satisfactory explanation of such possession shall be guilty of an offence and liable on summary conviction, subject to the provisions of section 23, to a fine of five thousand dollars or to imprisonment for a term of one year or to both.

(2) The fact that any act or omission constitutes an offence both under subsection (1) and a regulation made under this Act shall not render that regulation invalid and proceedings for that offence may be instituted under that subsection or regulation but so that no person shall be punished twice in respect of the same offence.

96. Regulation 69 of The Fisheries Resources (Jurisdiction and Conservation) Regulations states that:

“69. For the purpose of being in possession of any prohibited apparatus or for using any prohibited apparatus, substance or anything in breach of any of the provisions of these regulations, it shall be presumed until the contrary is shown that:

(a) ...

(b) ...

- (c) fish found on any vessel on which prohibited apparatus, substance or other thing is proven to have been found, has been captured or taken by means of that apparatus, substance or thing;
- (d) the possession of any prohibited apparatus, substance or other thing proven to have been found on a vessel within the exclusive fishery zone was for the purpose of being used for fishing.”

97. Articles 17, 18 and 19 of the United Nations Convention on the Law of the Sea (UNCLOS) provide, inter alia, that ships of all states, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea; and that a passage is innocent so long as it is not prejudicial to the peace, good order or security of the coast state. The passage of a foreign ship is considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in, inter alia, any fishing activities.

98. Section 5 the Archipelagic Waters and Maritime Jurisdiction Act, chapter 282 (“the Archipelagic Waters Act”), Statute Laws of The Bahamas states, inter alia, that :

“5. (1) Subject to subsections (2) and (3) and section 13 and without prejudice to sections 7 or 11, a foreign ship shall be entitled to enjoy the right of innocent passage through the archipelagic waters and territorial sea of The Bahamas.

(2) The passage of a foreign ship shall be deemed to be prejudicial to the peace, good order or security of The Bahamas if, the ship while in the archipelagic waters or territorial sea of The Bahamas, engages in any of the following activities —

- (a) ...
- (g) any fishing activities other than in accordance with the Fisheries Act;
- (h) ...
- (i) such other activity as the Governor-General may by Order prescribe.”

99. By section 6 of the Archipelagic Waters Act:

“6(1) Where a foreign ship engages in any of the activities specified in subsections (2) and (3) of section 5 or prescribed under paragraph (i) of section 5(2) as the case may be or where a law enforcement officer suspects on reasonable grounds that a foreign ship is engaged in any such activity such law enforcement officer may in the course of his duty—

- 1) Stop, board and search the ship for the purpose of carrying out inquiries and investigations;
- 2) Without warrant or other process seize and detain the ship and bring it into a port of The Bahamas;
- 3) Without warrant or other process arrest the captain and any person on board the ship whom he reasonably suspects to be participating in the activity of the ship which is deemed to be prejudicial to the peace, good order or security of The Bahamas.”

100. Were the plaintiff and his vessel protected by the Treaty that governs innocent passage of which the Bahamas is a signatory?

101. Put another way: Were the Janice Ann, a foreign registered vessel, and its crew entitled to the right of innocent passage through Bahamian territorial waters?

102. Articles 17, 18 and 19 of the United Nations Convention on the Law of the Sea, which have been codified in section 5 of the Archipelagic Waters Act, provide that ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea of The Bahamas.

103. In that regard, “passage” includes “stopping and anchoring”, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress; and a passage

is considered innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. In that regard, a passage is prejudicial if, in the territorial sea, the ship engages in, inter alia, any fishing activities other than in accordance with the Fisheries Act.

104. I, therefore, find that the Janice Ann, as a foreign vessel, was at the material time, entitled to the right of innocent passage through the archipelagic waters and territorial sea of The Bahamas, provided that, at the time, such passage was not prejudicial to the peace, good order or security of The Bahamas.

105. Was the passage of the Janice Ann prejudicial to the peace, good order or security of The Bahamas?

106. The answer to that question depends on whether the plaintiff and his crew were engaged in fishing activities other than in accordance with the Fisheries Act?

107. It is not disputed that the Janice Ann and its crew were sighted on 25 May 2011 while anchored in the territorial waters of The Bahamas.

108. It is also not disputed that neither CPO Evans nor any of the defendants' witnesses saw the plaintiff and or the crew of the Janice Ann fishing in Bahamian waters. Indeed, the evidence is that when Defence Force officers boarded the Janice Ann the fishing gear had been stowed away, although in plain sight.

109. CPO Evans' evidence, which I accept, is that having sighted and approached the Janice Ann, he realized it was a long-line fishing vessel because he saw long-line fishing gear on the vessel's aft deck, in clear view; and that upon boarding and inspecting the Janice Ann, Defence Force officers also discovered on board fish caught by such apparatus. That evidence is not disputed by the plaintiff.

110. Section 22 (a) and (b) of the Fisheries Act provides that, except with the written permission of the Governor General, no person shall have in his possession on a fishing vessel, any apparatus intended for use in long-line fishing; or use any such apparatus for fishing within the exclusive economic zone.

111. Therefore, possession of long-line fishing apparatus on a fishing vessel within the waters of The Bahamas is "a fishing activity other than in accordance with the Fisheries Act" for the purposes of section 5(2) of the Archipelagic Waters Act.

112. In that regard, section 22(2) of the Fisheries Act states that it shall be presumed until the contrary is shown, firstly, that the captain or other person in charge of the vessel wherein the apparatus is proven to have been found and every member of the crew of the vessel at the time, were each in possession of the apparatus; secondly, that the fish found in any vessel on which any apparatus is proven to have been found, have been captured or taken by means of that apparatus; and thirdly, that the apparatus proven to have been found on a vessel within the waters of The Bahamas was intended for use in long-line fishing within those waters, if the apparatus found is normally used in long-line fishing.

113. Consequently, the defendants say, the presence of long-line fishing apparatus and fish caught with such apparatus on board the Janice Ann, which was, at the time, anchored in the territorial waters of The Bahamas and captained by the plaintiff, created a presumption that the aforesaid offences under section 22(a) of the Fisheries Act had been committed. Therefore, they say, the passage of the Janice Ann was not innocent, but rather, that it was prejudicial to the peace, good order or security of The Bahamas.

114. On the other hand, the plaintiff asserts that the Janice Ann was a foreign fishing vessel in distress and, therefore, entitled to the right of innocent passage.

115. In that regard, the plaintiff's evidence is that he had been on a fishing trip at a fishing spot off Cape Canaveral, Florida, and on his return trip to Florida, about 80 miles from Pompano Beach, the Janice Ann's main engine failed; that the vessel began drifting into international shipping lanes and he decided to drop anchor, where the Janice Ann was sighted, for the safety of the vessel and its crew and to effect repairs to the vessel's engine and that when he was questioned by the Defence Force officers, he told them that the Janice Ann's main engine had failed.

116. However, CPO Evans said that the plaintiff also told him that the Janice Ann had drifted to the position where it was sighted by Defence Force officers, but that from his knowledge of the area and the weather conditions at the time, it was unlikely that the Janice Ann would have drifted to that position. Therefore, CPO Evans said, he became suspicious as to whether the plaintiff was telling the truth. However, CPO Evans, under cross examination, said that he took the captain's word that his vessel had broken down.

117. So, assuming without deciding, that the Janice Ann's engine had broken down and the Janice Ann was indeed a vessel in distress, the Janice Ann and its crew, including the plaintiff, would have been entitled to innocent passage, which included stopping and anchoring in the territorial waters of The Bahamas.

118. However, the evidence is that instead of assisting the plaintiff in repairing the Janice Ann's engine or rendering other aid, CPO Evans, upon the instructions of his superiors, had the Janice Ann and its crew towed by the Black Pearl into Freeport Harbour where they were arrested and handed over to the police.

Where and by whom was the plaintiff arrested?

119. There is, however, some confusion, both on the pleadings and the evidence as to by whom, when and where the plaintiff was arrested.

120. In that regard, the plaintiff in his generally indorsed writ of summons alleged that he was unlawfully arrested and wrongfully detained by the defendants in the Central Police Station from 25 May 2011 to 30 May 2011. In his statement of claim, he alleged that on Thursday, 26 May 2011, Mr Gilford Lloyd along with Mr Clement Campbell boarded the Janice Ann and arrested him and his crew.

121. At paragraph 3(iii) of their defence, the defendants aver that Mr Lloyd, Fisheries Officer, cautioned the plaintiff and crew, informed them of the offences and placed them under arrest at 3:05 p.m. on 26 May 2011. At paragraph 3(v) of the defence, the defendants assert that the plaintiff was again cautioned and charged with offences contrary to the Fisheries Act. They do not say by whom. Then, at paragraphs 5(i) and 5(ii) of the defence, the defendants assert that the plaintiff was placed under arrest at Bradford Marina by Mr Clement Campbell, Senior Fisheries Officer, and was then transported to the Central Police Station where he was informed of the charges and processed.

122. The plaintiff's evidence-in-chief is that the Defence Force officers approached the Janice Ann at about 1:30 p.m. on Wednesday, 25 May 2011; that they subsequently boarded the vessel and had the same along with its crew towed into Freeport where they were arrested upon their arrival on the afternoon of Thursday, 26 May 2011. However, he said he was never told that he was under arrest. According to the plaintiff, he was told by the Defence Force officers that he and his crew were being taken into Freeport for further questioning. One of the plaintiff's witnesses and a member of his crew, Mr Miskura, said that he thought they were being towed into Freeport so that they could get help to fix their boat; that he did not realize that they were arrested until they were at the police station and were asked to empty their pockets.

123. The defendants' evidence on this issue came from several sources.

124. CPO Evans' evidence is that the plaintiff, his crew and the Janice Ann were detained by him upon instructions from his superiors from about 3:15 p.m. on Wednesday, 25 May 2011. However, he

said, at no time did he tell the plaintiff that he was under arrest. Indeed, CPO Evans said that he did not arrest the plaintiff and that he merely told the plaintiff that he was to be questioned about some of the inconsistencies in his story.

125. On the other hand, Police Inspector Henry Rolle and Mr Michael Braynen, Director of Fisheries, each said that he had received information that on 25 May 2011 members of the Defence Force had arrested a long-line fishing vessel, the Janice Ann. Although he later retracted the statement, Inspector Rolle said under cross-examination that the plaintiff was arrested by the Defence Force officers and re-arrested by Mr Lloyd, Fisheries Officer.

126. Included amongst the documentary evidence are a hand-written report by Mr Lloyd dated 27 May 2011 and a Royal Bahamas Police Force incident/complaint/report form, both of which say that the vessel was arrested by officers of the Defence Force on fisheries related violations.

127. Also included amongst the documentary evidence is a copy of the Royal Bahamas Police Force detention record with respect to the plaintiff which indicates that the plaintiff was “arrested by Fisheries Officer, C. Campbell” at 3:05 p.m. on 26 May 2011.

128. However, while Mr Clement Campbell admits that the Janice Ann and its crew, including the plaintiff, were brought into Freeport Harbour upon his instructions, he denies that he arrested them or that it was upon his instructions that they were arrested.

129. Notwithstanding the plaintiff having pleaded that he was arrested by Messrs Lloyd and Campbell at Bradford Marine, counsel for the plaintiff, in his written closing arguments, argued that the plaintiff and his crew were arrested when Defence Force officers boarded the Janice Ann on 25 May 2011 and that such arrest was unlawful. Further, that the plaintiff having been arrested on 25 May 2011 and not brought before a Magistrate Court until 5 days later, his constitutional rights under Article 19 of the Constitution had been breached.

130. Furthermore, notwithstanding that two of the issues identified by counsel for the defendants to be determined in these proceedings had to do with the basis for the arrest and detention of the plaintiff and his crew by Defence Force officers, as well as the evidence of several of the defendants’ witnesses that the plaintiff and crew were arrested by the Defence Force, counsel for the defendant interrupted counsel for the plaintiff’s cross-examination of CPO Evans on at least two occasions, to say that the plaintiff and his crew were not under arrest while they were being towed.

131. Then in her written closing submissions, counsel for the defendants argued at paragraph 9 that the plaintiff was “arrested and cautioned by personnel from the Department of Marine Resources, based on them reasonably believing that the plaintiff had fished illegally in Bahamian waters using long-line fishing apparatus”.

132. According to Halsbury's Laws of England (vol 11(1), 4th Edn, para 693)—

“Arrest’ consists in the seizure or touching of a person's body with a view to his restraint; words may, however, amount to an arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he is under compulsion and he thereafter submits to the compulsion.’

133. In *Hussein v Chong Fonk Kam* [1969] 3 ALL ER 1626, Lord Devlin (PC) opined that: “An arrest occurs when an officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when, by words or conduct, he makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go.”

134. In relation to whether or not a person has been arrested, Winn LJ, when giving the judgment of the English Court of Appeal in *R v Palfrey, R v Sadler*[1970] 2 All ER 12 at 17, [1970] 1 WLR 417 at 423, 424, expressed the view that whether a person is under arrest or not “depends on whether he is free to go as he pleases.”

135. Sawyer J (as she then was) in the case of *Merson v Cartwright et al* [1994] BHS J. No. 54; No. 1131 of 1987, noted at paragraph 211 that:

“...neither Article 19(3) of the Constitution nor, section 17 [18] of the CPC gives the police the authority to detain a person, e.g., for questioning which may be permissible in some different legal systems but not in a system based on the Westminster model of a constitutional democracy with the fundamental rights provisions which are contained in the Constitution.”

136. A similar view was expressed by Allen J (as she then was) in the case of *Francis v Cornish* [2001] BHS J. No. 76; No. 1432 of 1999, where she said at paragraph 35: “there is no procedure authorised by Bahamian law such as taking a person into custody for questioning”.

137. In that case, the learned judge concurred with the sentiments expressed by Devlin J in *R v Roberts* (unreported) *Manchester Guardian*, March 25, 1953, where he said: “You may sometimes read in novels and detective stories perhaps written by people not familiar with police procedure that persons are sometimes taken into custody for questioning. There is no such power in this country. As far as I am aware, a man cannot be detained unless he is arrested.”

138. I accept that that is still the position in The Bahamas.

139. In this case, the evidence which I accept is that armed Defence Force officers boarded, inspected and searched the *Janice Ann*, and while CPO Evans said that their intention was simply to secure the vessel and to question the plaintiff further in relation to some inconsistencies in his responses to pre-boarding questions, CPO Evans also admitted under cross examination that neither the plaintiff nor any of the crew of the *Janice Ann* was free to leave once the Defence Force officers boarded their vessel or during the subsequent tow thereof to Freeport Harbour.

140. In the circumstances, I find that the plaintiff was arrested, without a warrant, by the Defence Force officers when they boarded, detained and or “secured” the Janice Ann at or about 3:15 p.m. on 25 May 2011.

141. As opined by Viscount Dilhorne in *Spicer v Holt* [1976] 3 All ER 71 at 79 (HL): “whether or not a person has been arrested depends not on the legality of the arrest but on whether he has been deprived of his liberty to go where he pleases.”

142. Section 6(2) of the Archipelagic Waters Act and Section 14(5) of the Fisheries Act provide that persons arrested and or detained by Defence Force officers in their capacity as law enforcement officers and fisheries inspectors are to be taken to the nearest or most convenient place in The Bahamas and delivered into the custody of the most senior police officer; or before a magistrate to be dealt with according to law.

143. The *Janice Ann* and its crew, including the plaintiff, were towed into Freeport Harbour by the *Black Pearl*. They docked at Bradford Marine at about 3:05 p.m. on Thursday, 26 May 2011, and were met, inter alia, by Messrs Lloyd and Campbell of the Ministry of Agriculture and Marine Resources and police officers.

144. Mr Lloyd’s evidence is that he and Mr Campbell boarded the *Janice Ann* and, along with the plaintiff, conducted an inspection of the vessel, during which he saw onboard, among other things, long-line fishing apparatus and fish caught by such apparatus. He said he then concluded that there was sufficient evidence that long-line fishing had taken place in Bahamian waters, so he, arrested and cautioned the plaintiff and his crew.

145. Nevertheless, counsel for the plaintiff argues that, on the defendants’ evidence, it is unclear as to who arrested the plaintiff at Bradford Marine. In that regard, counsel for the plaintiff pointed out that according to the detention record the plaintiff had been arrested by Mr Clement Campbell, who denied that he had arrested the plaintiff. And, as for Mr Lloyd’s assertion that it was he that arrested and cautioned the plaintiff, counsel for the plaintiff argued that there was no evidence to corroborate Mr

Lloyd's statement in that regard, particularly, counsel argued, in light of the evidence of the plaintiff and his witnesses denying that they had been arrested at Bradford Marine.

146. However, I note that at paragraph 3 of the plaintiff's statement of claim, the plaintiff pleads that "on Thursday, May 26th, 2011, Mr Gilford Lloyd, the fourth defendant along with Mr Clement Campbell, Fisheries Inspector and police officers boarded the vessel and arrested the plaintiff and his crew."

147. In their defence, the defendants admit paragraph 3 of the statement of claim and assert further that Mr Lloyd cautioned the plaintiff and crew, informed them of the offences and placed them under arrest at 3:05 p.m. on 26 May 2011.

148. So, while there appears to be some confusion on the evidence as to who, in fact, arrested the plaintiff at Bradford Marine, there is, in my view, no confusion or issue on the pleadings that the plaintiff was arrested while at Bradford Marine as he so pleaded; and I do not think he should be allowed to resile from his pleadings.

149. Moreover, while the plaintiff, at paragraph (13) of his witness statement, said that he was never told that he was under arrest, at paragraph (12) thereof he said that he and his crew were placed under arrest and taken to Central Police Station where they were detained. Further, each of the plaintiff's witnesses in their evidence-in-chief said that he along with the plaintiff and crew members were placed under arrest by the Royal Bahamas Police Force and taken to Central Police Station where he was detained for four days.

150. Consequently, in my judgment, it matters not whether the plaintiff was arrested by Mr Lloyd or Mr Campbell, as there appears to be no dispute that the plaintiff and his crew were arrested, or re-arrested, when they docked at Bradford Marine in Freeport Harbour.

151. In the circumstances, I accept Mr Lloyd's evidence that it was he who arrested and cautioned the plaintiff and his crew and in that regard, I find that the plaintiff was arrested, or re-arrested, and cautioned by Mr Lloyd at Bradford Marine Shipyard in Freeport.

152. Did the Defence Force Officers and or Mr Lloyd have authority to arrest the plaintiff?

153. By section 6 of the Archipelagic Waters Act, a law enforcement officer who, on reasonable grounds, suspects that a foreign ship is engaged in any fishing activity other than in accordance with the Fisheries Act, is empowered to stop, board and search the ship for the purpose of carrying out inquiries and investigations and without warrant or other process to seize and detain the ship and bring it into a port of The Bahamas.

154. Further, section 14 of the Fisheries Act empowers any fisheries inspector to stop, go on board and search any fishing vessel within the exclusive fishery zone of The Bahamas and if he has reason to suspect that any person on board such vessel has contravened any of the provisions of that Act, or any regulations made thereunder, to, without a summons, warrant or other process, seize the vessel and detain it and any person found on board; and such fisheries inspector may arrest and detain without warrant any person whom he has reason to suspect committed or permitted any offence against that Act.

155. By virtue of section 6(6) of the Archipelagic Waters Act, members of the Defence Force are law enforcement officers for the purpose of that Act; and by section 3 of the Fisheries Act), every member of the Defence Force and every officer of the Department of Agriculture and Fisheries shall have and may exercise the functions assigned to fisheries inspectors under that Act.

156. Consequently, I find that CPO Evans and the other Defence Force officers who boarded the Janice Ann, as law enforcement officers and or as fisheries inspector, as well as Mr Lloyd, a fisheries officer, had the authority, on reasonable grounds, to stop, board, search, and without warrant or other process seize, detain and or arrest the Janice Ann and its crew, including the plaintiff.

157. The issue that arises then, is whether the plaintiff was lawfully arrested either by the officers of the Defence Force or by Mr Lloyd, or by both?

158. Article 19(1) of the Constitution provides that no person shall be deprived of his personal liberty save as may be authorised by law, in certain cases, one of which is:“(d) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence”.

159. The onus of proving that an arrest and or detention was legally justified is, therefore, on the arrestor, in this case, the defendants: See *Christie v Leachinsky* [1947] AC 573; [1947] 1 All ER 567.

160. In the case of *Fifita v Fakafauna* [2000] 5 LRC 733 at 737, the Court of Appeal of Tonga said that that onus requires the arrestor to provide evidence, failing appropriate admissions, to answer affirmatively the two questions posed by Woolf LJ in *Castorina v Chief Constable of Surrey* (1988, Times, 15 June, and cited in *Chapman v DPP* (1989) 89 Cr App R 190 (DC) (referred to in *Archbold Criminal Pleading Evidence and Practice* (1993) vol 1 para 15–144). Those questions are:

“(1) Did the arresting officer suspect that the person who was arrested was guilty of the offence?
and

(2) Assuming the officer had the necessary suspicion, was there reasonable cause for that suspicion?

161. The answer to the first question depends on the findings of fact as to the officer’s state of mind; while the second question was a purely objective requirement to be determined by the judge if necessary on facts found by a jury.

162. I have found that the plaintiff was first arrested at about 3:15 p.m. on Wednesday, 25 May 2011 when the Janice Ann was boarded and detained by Defence Force officers; and that he was re-arrested the following day, that is Thursday, 26 May 2011, at about 3:05 p.m. by Fisheries officer, Mr Lloyd, at Bradford Marine Shipyard.

163. So, what, in the case the Defence Force officers was the arresting officer’s state of mind?

164. The evidence is that the plaintiff told CPO Evans that the Janice Ann was experiencing problems with its main engine, which accounted for why it was anchored, admittedly, in Bahamian waters. The plaintiff was charged with breaches under the Fisheries Act, specifically illegal foreign fishing and possession of long line fishing apparatus.

165. CPO Evans admitted that he had not seen the plaintiff or any of his crew fishing in Bahamian waters. He also said he took the plaintiff’s word that he was having problems with the Janice Ann’s engine. Further, while CPO Evans admitted that he detained the Janice Ann and its crew and had them towed into Freeport upon the instructions of Lt Commander Brown and Mr Campbell, he denied that he arrested the plaintiff. None of the Defence Force officers who boarded the Janice Ann was called as a witness.

166. And while CPO Evans said that he had the Janice Ann and its crew towed into Freeport Harbour because of the inconsistencies in the plaintiff’s responses to pre-boarding questions, I agree with counsel for the plaintiff that there is no evidence that CPO Evans or any of the Defence Force officers who boarded the Janice Ann suspected that the plaintiff was guilty of the offences with which he was subsequently charged.

167. In the circumstances, then, I find that the plaintiff’s arrest by the CPO Evans and or the Defence Force officers who boarded the Janice Ann was unlawful.

168. If I am incorrect in my finding that the plaintiff’s arrest was unlawful for the reason that the arresting officers did not suspect that he was guilty of the offences with which he was subsequently charged, I am, nevertheless, of the view that the plaintiff’s arrest by the Defence Force officers

was unlawful because there is no evidence that the plaintiff was told by the Defence Force officers of such suspicion at the time of his arrest, or subsequently.

169. Article 19(2) of the Constitution imposes a duty on the person or persons responsible for the arrest and or detention of another to inform the person who is arrested, as soon as is reasonably practicable, in a language he understands, of the reasons for his arrest or detention.

170. In the leading case in this area of the law, *Christie v Leachinsky supra*, Viscount Simon at page 572-573 opined that the authorities established the following propositions:

- “1. If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.
2. If the citizen is not so informed, but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment.
3. The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.
4. The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is one of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substance the reason why it is claimed that restraint should be imposed.
5. The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, eg, by immediate counter-attack or by running away.”

171. Lord Simonds at pages 575-576 in that case said:

“...it is a condition of lawful arrest that the man arrested should be entitled to know why he is arrested...Arrested with or without a warrant, the subject is entitled to know why he is deprived of his freedom, if only in order that he may, without a moment's delay, take such steps as will enable him to regain it...it is not an essential condition of lawful arrest that the constable should at the time of arrest formulate any charge at all, much less the charge which may ultimately be found in the indictment...But this, and this only, is the qualification which I would impose upon the general proposition. It leaves untouched the principle, which lies at the heart of the matter, that the arrested man is entitled to be told what is the act for which he is arrested. The 'charge' ultimately made will depend upon the view taken by the law of his act.”

172. In my judgment, none of the exceptions noted in *Christie v Leachinsky supra* to the general rule that the plaintiff be told the reason for his arrest “as soon as is reasonably practicable” apply in this case, as regards the plaintiff's arrest and detention by the Defence Force officers.

173. The plaintiff is an American citizen. He speaks the English language. He was arrested without a warrant. He was not resisting arrest. While he admits to being anchored in the territorial waters of The Bahamas, he says that was there because his vessel's main engine had broken down. There is no evidence that CPO Evans or any of the other Defence Force officers gave the plaintiff reason to believe that they did not believe that the Janice Ann was in distress.

174. Furthermore, the fact that the plaintiff told CPO Evans that the Janice Ann was a vessel in distress was, in my judgment, reason for CPO Evans and/or the other Defence Force officers, if they suspected otherwise, to have told the plaintiff that they suspected him of having committed or being

about to commit an offence under the Fisheries Act, or other Bahamian law, and that that was the reason for his detention.

175. Instead, CPO Evans told the plaintiff that he and his men were being taken to Freeport Harbour for further questioning in regard to the aforesaid alleged inconsistencies.

176. As opined by Sawyer, J (as she then was) in *Merson v Cartwright supra*, and Allen, J (as she then was) in *Francis v Cornish supra*, there is no procedure in Bahamian law that permits a person to be taken into custody or detained for questioning.

177. And while CPO Evans said that as Defence Force vessel, Enduring Friendship P128, approached the Janice Ann he saw long-line fishing apparatus in clear view, there is no evidence that he or the other Defence Force officers arrested the plaintiff for being in possession of long-line fishing apparatus or for engaging in any illegal fishing activities in The Bahamas. And if they did, they certainly did not tell that to the plaintiff.

178. I also note that under cross examination, in response to counsel for the plaintiff's question as to whether he had seen the plaintiff or his crew fishing in Bahamian waters, CPO Evans said that he did not have to see them fishing in Bahamian waters because the offence of poaching is committed when any foreigner is caught in Bahamian waters fishing or with potential fishing products in their possession. However, not only was the plaintiff not charged with poaching, but there is also no evidence that he was told that he was suspected of poaching by CPO Evans or the other Defence Force officers before or during the Janice Ann's tow into Freeport.

179. As opined by Viscount Simon in *Christie v Leachinsky supra*, the arrestor must inform the person arrested of the true ground of arrest and he is not entitled to keep the reason to himself or to give a reason which is not the true reason.

180. Moreover, having been instructed by his superiors to have the Janice Ann towed into Freeport Harbour, it seems to me that as soon as he returned to the Janice Ann on the evening of 25 May 2011, CPO Evans ought to have told the plaintiff that he and his men were being detained because they were suspected of having committed breaches of the Fisheries Act; that is, if he so suspected.

181. However, he did not.

182. So, while I agree with counsel for the defendants that the presence of long-line fishing apparatus and fish caught therewith on board a foreign fishing vessel anchored in Bahamian waters, coupled with what CPO Evans considered to be inconsistencies in the plaintiff's replies to his pre-boarding questions, were reasons to arouse, and may, in fact have aroused CPO Evans' suspicion that the crew of the Janice Ann may have committed or were about to commit offences under the Fisheries Act, there is no evidence that CPO Evans or any of the other Defence Force officers told the plaintiff of such suspicions at any time before they docked at Bradford Marine.

183. In my judgment, then, the failure of CPO Evans and or the said Defence Force officers to advise the plaintiff firstly, that he was under arrest, and secondly at some point during the almost 24 hours that he was detained at sea and en route to Freeport Harbour, the real reason for his detention, rendered such arrest and detention by the Defence Force officers unlawful.

184. I, therefore, find that the arrest of the plaintiff by Defence Force officers at about 3:15 p.m. on Wednesday, 25 May 2011, was unlawful for the reason that the Defence Force officers did not suspect the plaintiff of being guilty of having committed or about to commit any offence under the Fisheries Act or otherwise. Further, even if they had reasonable cause to suspect the plaintiff as having committed an offence or offences under the Fisheries Act for which he could be arrested without warrant, that was not what was operating in their minds when they detained the Janice Ann and its crew, including the plaintiff, and had them towed into Freeport. Moreover, if they had such suspicion, then they failed to tell the plaintiff the real reason for his

arrest and subsequent detention at the time of the arrest or as soon as was reasonably practicable.

185. The law is that if a citizen is not informed of the reason for his arrest, but is nevertheless arrested, the arrestor, apart from certain exceptions, may be liable for false imprisonment. See, Viscount Simon in *Christie v Leachinsky supra*.

186. As I said, in relation to the arrest and detention by the Defence Force officers, none of the exceptions to which Viscount Simon referred are, in my judgment, applicable and I, **therefore, find that the plaintiff's detention by the Defence Force officers amounted to a false imprisonment for the period of 23 hours and 50 minutes, that is, from about 3:15 p.m. on Wednesday, 25 May 2011, to about 3:05 p.m. on Thursday, 26 May 2011, and that he is entitled to damages therefor.**

187. What about the plaintiff's subsequent arrest by Mr Lloyd at Bradford Marine?

188. The evidence of Mr Michael Braynen, Director of Fisheries at the Ministry of Agriculture and Marine Resources, is that, as a result of information which he received on 25 May 2011 that the Defence Force had arrested a long-line fishing vessel, the Janice Ann, which was expected to arrive in Freeport, Grand Bahama, around midday on 26 May 2011, he instructed Mr Gilford Lloyd to go to Freeport, relative to the matter.

189. Mr Lloyd's evidence, which I accept, is that having seen the long-line fishing apparatus and the fish caught with such apparatus on board the Janice Ann, he concluded that there was sufficient evidence that long-line fishing had taken place in Bahamian waters, so he arrested and cautioned the plaintiff and the crew of the Janice Ann.

190. In the circumstances, I find that at the time Mr Lloyd arrested the plaintiff, he suspected that the plaintiff was guilty of having committed an offence or offences under the Fisheries Act.

191. Was there reasonable cause for Mr Lloyd's conclusion?

192. Counsel for the plaintiff argues that Mr Lloyd arrested the plaintiff without conducting an investigation; that his arrest of the plaintiff was, therefore, without reasonable cause and unlawful.

193. In counsel for the plaintiff's submission, had Mr Lloyd communicated with CPO Evans prior to arresting the plaintiff, he would have satisfied himself that: (i) the Janice Ann was a U.S. documented long-line fishing vessel and, therefore, expected to have onboard long-line fishing apparatus; (ii) that the vessel was in distress en route to the Florida Cays; (iii) that neither CPO Evans nor any of the Defence Force officers who boarded the Janice Ann saw the plaintiff fishing in the waters of The Bahamas; and (iv) that the aforesaid fishing apparatus which takes hours to assemble and or disassemble, was secured on the vessel. Further, that had Mr Lloyd addressed his mind to those issues, rather than simply focusing on the mere presence of the long-line fishing apparatus, he would not have arrested the plaintiff.

194. By section 22(a) and (b) of the Fisheries Act, being in possession of long-line fishing apparatus and or fish caught with such apparatus on board a vessel in the territorial waters of The Bahamas without the written permission of the Governor General, are offences under the Fisheries Act. By section 22(2) of that Act, it is presumed until the contrary is shown that the captain in charge of such vessel, in this case, the plaintiff, as well as the crew were each (i) in possession of the apparatus and (ii) using such apparatus. Further, that the fish found on the vessel would have been captured or taken by such apparatus; and that such apparatus was intended to be used in long-line fishing.

195. Consequently, counsel for the defendants argues that the presence of long-line apparatus and marine resources associated with such apparatus onboard the Janice Ann while it was anchored in the waters of The Bahamas was sufficient to provide reasonable cause for Mr Lloyd to arrest the plaintiff.

196. So, while, as counsel for the plaintiff argues, further investigation in this case may have resulted in the plaintiff being earlier released and or with no charges being filed against him, in the circumstances, I agree with counsel for the defendants that the presence of long-line fishing apparatus along with more than 4,000 pounds of marine resources caught with such apparatus on board the Janice Ann, a foreign-registered vessel, anchored in the waters of The Bahamas, coupled with the information that the vessel and its crew had been arrested by Defence Force officers and was being towed into Freeport Harbour, provided reasonable cause for Mr Lloyd's suspicion that the plaintiff had committed an offence against the Fisheries Act, and I so find.

197. Counsel for the plaintiff argues further that the arrest at Bradford Marine was also unlawful because the plaintiff's evidence is that he was not told the reason for his arrest. In counsel's submission, because of the confusion among the defendant's witnesses as to who arrested the plaintiff at Bradford Marine, it is reasonable to assume that the plaintiff was not told the reason for his arrest.

198. As indicated, the defendants aver at paragraph 3 of their defence that both Mr Campbell and Mr Lloyd having determined that there was sufficient evidence that the offence of long-line fishing had occurred in The Bahamas, Mr Lloyd cautioned the plaintiff and crew, informed them of the offences and placed the captain and crew under arrest at 3:05 pm on 26 May 2011.

199. So, while no evidence was solicited from Mr Lloyd by either side of the actual words used by him at the time he arrested, or re-arrested, the plaintiff, I do not doubt that by the time the plaintiff was handed over to the police, if not before, that he was aware not only that he was under arrest, but also that it had to do with breaches of The Bahamas Fisheries laws, even if not the specific offences.

200. Furthermore, the evidence is that the day after the plaintiff and his crew were taken into police custody and before they were charged with the aforesaid offences, Mr Shurland, counsel for the plaintiff, provided Messrs Lloyd and Campbell with a copy of the NOAA chart showing the movement of the Janice Ann since it left Florida on 19 May 2011 and up to the time it was boarded by Defence Force officers and towed into Freeport Harbour. To my mind that was because the plaintiff knew that the reason he had been arrested and detained was that he was suspected of having been engaged in fish activities while in the territorial waters of The Bahamas.

201. In the circumstances, I find that the plaintiff was told the reason for his arrest by Mr Lloyd, when he arrested or re-arrested him at Bradford Marina; and if I am incorrect in that finding, then, I find that the plaintiff knew the reason for his arrest because of the circumstances that existed at the time he was arrested or re-arrested by Mr Lloyd.

202. As opined by Viscount Simon in *Christie v Leachinsky*, the requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.

203. I, therefore find that the plaintiff's arrest, or re-arrest, by Mr Lloyd was not unlawful.

204. Having arrested the plaintiff, Mr Lloyd delivered the plaintiff into the custody of a police officer, who was required by section 15 of the Fisheries Act, as soon as may be, to have caused the plaintiff to be brought before a magistrate's court to be dealt with according to law.

205. That requirement is also in keeping with the provisions of the Constitution and the Criminal Procedure Code Act.

206. Article 19(3) of the Constitution provides that any person who is arrested or detained, inter alia, upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released shall be brought without undue delay before a court.

207. By subsections (3) and (4) of section 20 of the Criminal Procedure Code Act, a person exercising the powers of arrest under any law is required to take the arrested person without unnecessary to a peace officer or a magistrate. If he is taken to a peace officer, and the peace officer is

satisfied that there are grounds to suppose that the arrested person has committed an offence for which he may be arrested without a warrant, the peace officer is to re-arrest him and thereafter deal with the arrested person in accordance with the provisions of section 18 of the Criminal Procedure Code Act.

208. By section 18 of the Criminal Procedure Code Act, a peace officer is required, without unnecessary delay and in any event not later than forty-eight hours, to take a person who has been arrested without a warrant before a magistrate unless the person is earlier released on bail.

209. In this case, a complaint was made to the police on 26 May 2011 as evidenced by the aforesaid Royal Bahamas Police Force incident/complaint/report form which provides, inter alia, the following details:

“Date: 26 May 2011

Time: 3.05 p.m.

Details of incident/complaint/report – Breach of the Fisheries Regulations

Reported by Clement Campbell c/o Fisheries Department, G.B. to the police that on 25-05-11 at 3:15 p.m. CPO Jonathan Evans c/o Defence Force vessel P/128 HMBS while at the little Bahama Bank arrested four (4) U.S. nationals on board a vessel namely “Janice Ann”...reference to possession of a large amount of scale fish and illegal fishing apparatus”.

210. Also included amongst the defendants’ documentary evidence is Mr Lloyd’s hand-written report, dated 27 May 2011, in which he recommended the offences with which the plaintiff and his crew should be, and were subsequently, charged.

211. The plaintiff’s detention record shows that at 7:49 a.m. on Saturday, 28 May 2011, the plaintiff was informed by the police of the complaint against him; then at 9:00 a.m. on that date, he was told of the specific charges. I accept that evidence.

212. Having been arrested by Mr Lloyd at about 3:05 p.m. on Thursday, 26 May 2011, and, thereafter, handed over to the police, the plaintiff ought, pursuant to section 18 of the Criminal Procedure Code Act, to have been brought before a magistrate without unnecessary delay and in any event, by my calculation, not later 3:04 p.m. on Saturday, 28 May 2011, unless, of course, he was earlier released on bail by a senior police officer.

213. In that regard, the detention record also shows that Inspector Henry Rolle gave instructions at 5:45 p.m. on 28 May 2011 for the plaintiff to be given cash bail in the sum of \$30,000.00.

214. The plaintiff denies having been told that he was granted police bail and while there is an entry in the detention record indicating that the information regarding bail was given to Mr Shurland, counsel for the plaintiff, there is no evidence that that information was conveyed to the plaintiff. In any event, Officer Rolle said that he gave instructions for the plaintiff be given bail but he admitted that he did not personally tell the plaintiff that he had been granted bail. There is also no evidence that any other police officer told the plaintiff that he was granted bail.

215. Moreover, Officer Rolle admitted under cross examination that, as a police officer, the upper limit of bail that he was authorized to grant without seeking additional authority was \$10,000.00 and there is no evidence that he sought additional authority to grant bail in the sum of \$30,000.00 cash to the plaintiff.

216. Furthermore, as pointed out by counsel for the plaintiff, the aforesaid instructions were purportedly given at 5:45 p.m. on a Saturday, when no banks would have been opened even if the plaintiff were able to make arrangements with family members or friends in the United States or locally to raise the amount required.

217. So, in addition to exceeding the amount that he was authorized to grant for cash bail, I agree with counsel for the plaintiff that in the circumstances, the purported granting of bail by Officer Rolle was very likely an attempt on the part of the defendants to justify the plaintiff's continued detention, rather than to permit his release.

218. In the circumstances, I find that the plaintiff was not granted bail at 5:45 p.m. on Saturday, 28 May 2011, or at all by the police.

219. If I am incorrect in that finding, then I find that if Officer Rolle did grant bail in the sum of \$30,000.00, cash, to the plaintiff, the time at which such bail was granted and the amount of such bail, which exceeded the officer's authority to grant, was tantamount to no bail having been granted to the plaintiff.

220. In any event by 5:45 p.m. on Saturday, 28 May 2011, the plaintiff would have been in police custody for more than 48 hours after being arrested, or re-arrested, by Mr Lloyd, which is unlawful.

221. Moreover, the plaintiff having been detained without a warrant since Wednesday, 25 May 2011, and re-arrested and placed in police custody on Thursday, 26 May 2011, I do not accept that it was not possible for the police to have given him bail or have him brought before a magistrate prior to 5:45 p.m. on Saturday, 28 May 2011.

222. It is also common ground that the plaintiff was taken before a magistrate at about 10:40 a.m. on Monday, 30 May 2011, when he was arraigned on the aforesaid charges. He pleaded "not guilty" to all of the charges.

223. It is clear that section 18 of the Criminal Procedure Code Act imposes a duty on the police to bring a person detained without a warrant before a Magistrate as soon as reasonably practicable and in any event not later than 48 hours from the time of arrest. Any time beyond 48 hours is, therefore, an unauthorised detention and is unlawful, unless of course the plaintiff was charged with an offence to which section 19 of the Criminal Procedure Code Act applies.

224. In that regard, section 19 of the Criminal Procedure Code Act, provides that the police may with the leave of a magistrate hold a person for up to 96 hours before taking him before a Magistrate Court. However, counsel for the plaintiff pointed out, and I accept, that no leave was sought or granted for the period of detention to be extended beyond 48 hours. In any event, it seems to me that that provision relates only to offences set out in the First Schedule to the Bail Act, none of which, it appears, are offences under the Fisheries Act.

225. On this issue of post-arrest detention, Sawyer, J, as she then was, in the case of *Merson v Cartwright*, at paragraphs 205 to 217 made the following observations, with which I respectfully agree and adopt:

"205 The CPC was enacted after the 1963 Constitution came into force and Article 19(3) has been included in the Constitution since 1963 in exactly the same words so that if there is any difference of wording in section 17 [18] of the CPC, then that section will either have to be conformed to the provisions of Article 19(3) (since it is the successor of an earlier, statutory provision in the Magistrates Act (Ch. 42)) or be declared void.

206 Section 17 [18] of the CPC uses the phrase "unnecessary delay" instead of the phrase "undue delay" used in Article 19(3) of the Constitution. In my view, the two phrases are synonymous. They both mean that when a person has been arrested either under a warrant or on reasonable suspicion that he/she has committed or is about to commit a crime, that person must be brought before a court as soon as possible; that is, as soon as the charge sheet or complaint can be drawn or made.

207 Where I think the first defendant, and no doubt others in his position may be in error is, that they have interpreted the latter part of section 17 [now 18] of the CPC as giving them the authority to detain a person for up to 48 hours before they must charge them or set them free.

208 What I think section 17 [now 18] of the CPC means is that if e.g., a person is arrested under a warrant or on reasonable suspicion of having committed a serious crime on a dies non [a day on which no

legal business can be done, or which does not count for legal purposes] and it is not possible to find a magistrate or J.P. before whom to bring them and if the matter is not one for which a senior police officer may authorise the grant of bail, then if the person is brought before a magistrate before the expiry of 48 hours following his arrest, there would be no prima facie breach of his constitutional rights under Article 19(3) of the Constitution.

- 209 What section 17 [18] of the CPC cannot be taken to mean is that if a police officer arrests a person without a warrant and ostensibly on reasonable suspicion of the person having committed a serious offence in the middle of the week, they can then detain that person for the rest of the week without ever once bringing that person before a magistrate's court or a magistrate.
- 210 In this regard, it must be pointed out that it is not unusual in complex fraud cases or other cases involving, allegations of serious commercial crime that the investigations usually take longer to complete than say the investigation of an offence of obstructing a police officer in the execution of his duty because of the nature of the kind of transactions which may call for investigation.
- 211 Nevertheless, neither Article 19(3) of the Constitution nor, section 17 [18] of the CPC gives the police the authority to detain a person, e.g., for questioning which may be permissible in some different legal systems but not in a system based on the Westminster model of a constitutional democracy with the fundamental rights provisions which are contained in the Constitution.
- 212 In other words, you cannot arrest a person "on suspicion" and then begin to look for facts or grounds to justify that suspicion and in the meanwhile hold the person for 48 hours while you do so.
- 214 In my view, in light of the mandatory language of Article 19(3) of the Constitution, it is not open to the police, for example, to detain a person on suspicion of that person may have committed a criminal offence and keep the person in custody for 48 hours before charging the person with any offence or let them go after that time without charging them with any offence.
- 215 There is nothing in the law which precludes the police from investigating offences even during the trial of such offences but they cannot have any power in normal times to arrest and detain any person for any period while they look to see if there is any evidence that the person may have committed a criminal offence. The courts have to consider the position at the time of arrest.
- 216 Indeed, since the law requires that they may arrest without a warrant, inter alia, on "reasonable suspicion" that an offence has been committed by an accused person, when a person is arrested, they must at that time, have reasonable grounds (which need not amount to prima facie proof) for suspecting that an offence has been committed by that person. If that is done, in the majority of cases (I accept e.g., cases of persons arrested at sea in the Southeastern or Northwestern Bahamas) there would be no reason why the arrested person could not be brought before a magistrate in much less than 48 hours after arrest.
- 217 The period of 48 hours referred to in s.17 [18] of the CPC marks the outer limit of the time for which a person, lawfully arrested on e.g., reasonable suspicion of felony, may be detained by the police and only where the actual circumstances of the case justify it."

226. In my judgment, the actual circumstances of this case do not justify the police's failure to have had the plaintiff taken before a Magistrate or released on reasonable bail before the expiration of 48 hours after his arrest.

227. While counsel for the defendants argued that the plaintiff was brought before the Magistrate as soon as was reasonably practicable, none of the defendants' witnesses gave any evidence as to the reason for the plaintiff not being taken before a Magistrate or released on reasonable bail within the

outer-limit of 48 hours prescribed by section 18 of the Criminal Procedure Code. Particularly, as in this case, the plaintiff was charged with the same offences recommended by Mr Lloyd in his hand-written report given to the police shortly after the plaintiff's arrest.

228. By my calculation, the time that had elapsed from the plaintiff's arrest, or re-arrest, by Mr Lloyd, to the time he was taken before a magistrate was approximately 91 hours and 35 minutes, calculated as follows:

- 1) Thursday at 3:05 pm to Friday at 3:04 p.m. = 24 hours
- 2) Friday at 3:05 p.m. to Saturday at 3:04 p.m. = 24 hours
- 3) Saturday at 3:05 p.m. to Sunday at 3:04 p.m. = 24 hours
- 4) Sunday at 3:05 p.m. to Monday at 10:40 a.m. = 19 hours and 35 minutes

229. **In the circumstances, I find that the plaintiff was unlawfully detained for a period of approximately 43 hours and 35, that is, the aforesaid period of 91 hours and 35 minutes less the period of 48 hours, being the maximum time the police could lawfully detain the plaintiff before taking him before a Magistrate and that he is entitled to damages therefor.**

230. **I find further that the plaintiff's statutory right under section 18 of the Criminal Procedure Code Act, as well as his constitutional right under Article 19(3) of the Constitution, to be brought before the Magistrate as soon as reasonably practicable or without undue delay, were breached, and that he is entitled to damages therefor.**

Other allegations

231. In his statement of claim, the plaintiff also alleges that:

- 1) He was never given the opportunity to contact a lawyer or make a phone call;
- 2) At the time of his detention he suffered from a hand injury and his request of the 7th defendant for medical treatment was initially denied for almost 24 hrs.
- 3) He was denied the use of the bathroom and verbally threatened to be "Gutted like a Fish" by the Custody Suite Officer, the 7th defendant, on the shift 4 to 12.

232. By Article 19(2) of the Constitution an arrested person is to be permitted at his own expense to retain and instruct without delay a legal representative of his own choice and to hold private communication with him.

233. While the plaintiff alleged in his statement of claim that he was never given the opportunity to contact a lawyer or make a phone call, he gave no such evidence in his evidence-in-chief; and, when confronted with his detention record, he admitted under cross examination that he had met with two attorneys while he was in custody.

234. In that regard, entries in the plaintiff's detention record show that the plaintiff met with attorney Samuel Rahming at 6:45 p.m. on 26 May 2011; that is, within two hours after his arrival at the Central Police Station; and that he was permitted to meet and have private communication with attorney Carlson Shurland, his current counsel, for the first time the following morning at 11:28 a.m., as well as subsequently.

235. The plaintiff, also admitted, under cross examination, that while he did not call them himself, he was also permitted to speak to personnel from the American Embassy. According to the copy case diary in evidence, the U.S. Homeland Security Office was contacted by Inspector Rolle and informed of the arrest of the plaintiff and crew of the Janice Ann. Cpl Bradley Stubbs' evidence is that upon Mr Shurland's request, he permitted the plaintiff and his crew to use their cell phones to call their relatives. The plaintiff admits that he was permitted to use his cell phone to call his wife on at least one occasion.

236. It is clear that Article 19(2) of the Constitution imposes a duty on the officers responsible for his arrest and or detention to allow the plaintiff to retain and instruct a legal representative and to hold private communication with such representative, if he so chose. However, there is no evidence that the plaintiff requested to see an attorney and was not permitted to do so. There is also no evidence that the plaintiff indicated to the police that he wished to engage an attorney other than those with whom he was permitted to meet; nor is there any evidence that either of those attorneys was prevented from meeting with the plaintiff.

237. So, while I accept the plaintiff's evidence that he did not call or engage the services of counsel personally, the evidence, which I accept, is that he was permitted to meet and have private communication with his attorneys, by whomever they were engaged on his behalf, and, therefore, the obligation constitutionally imposed on his custodians at the time was, in my judgment, met.

238. I, therefore, find the plaintiff has not proven that his constitutional right under Article 19(2) of the Constitution to retain and instruct without delay a legal representative of his own choice and to hold private communication with such legal representative was breached.

239. At paragraph 26 of his statement of claim the plaintiff states that "by reason of the matters aforesaid the plaintiff lost his liberty, suffered emotional trauma, pain and abuse of his Human Rights and breach of constitutional Rights." He provided the following particulars of Injuries and Physical Shock:

- a) Infection to his right hand
- b) Nightmares and sleepless nights
- c) Shock.

240. The plaintiff also asserted that he would rely on his detention record, medical record from the Rand memorial Hospital and Psychological report.

241. It is not disputed that the plaintiff complained to the defendants of an injury to the little finger on his left hand. He says, which is denied by the defendants, that his request of the 7th defendant for medical treatment was denied for almost 24 hrs.

242. According to the detention record, at about 3:45 p.m. on 27 May 2011, the plaintiff complained to Cpl Seymour about an injury to his left hand and asked to see a doctor. That information was conveyed to Sgt Forbes. At 9:10 that evening, Sgt Forbes and Constable Demeritte took the plaintiff to the Rand Memorial Hospital where he was seen and treated by Dr Francisco.

243. Dr Francisco's evidence is that she diagnosed the plaintiff as having an abscess to the fifth digit on his left hand, a non-life threatening injury. She prescribed medication and discharged the plaintiff, who admitted that the medication was purchased for him by the police from funds which they held on his behalf. The plaintiff also admitted that he was given the medication at the prescribed times. And while he says that he had to obtain further treatment when he returned home to Florida, because the wound had become infected, the fact is, the police did allow him to obtain medical treatment while he was in custody.

244. It is not contended that the plaintiff sustained the aforesaid injury while in police custody or that such injury was caused by any of the persons responsible for his detention. Moreover, as the evidence is that the injury was not life threatening, I cannot say that not taking the plaintiff to see a doctor within seven hours after the injury was brought to their attention, which I find was at 3:45 p.m. on Friday, 27 May 2011, was a violation of any of his constitutional rights.

245. In the circumstances, I find that the plaintiff's allegation that he was denied medical treatment for 24 hours and that his constitutional rights were breached thereby was not proven.

246. As for the plaintiff's allegations of nightmares, sleepless nights and psychological shock, I agree with counsel for the defendants that the plaintiff, nor any witness on his behalf,

led any evidence in respect to those allegations. In the circumstances, I find that they have not been proven.

247. Again, while the plaintiff in his statement of claim alleged that he was denied the use of the washroom and verbally threatened to be “gutted like a fish” by the Custody Suite Officer the 7th defendant on the 4 p.m. to 12 midnight shift, neither he, nor his witnesses, made any statements to that effect in their evidence-in-chief.

248. However, it is common ground that at some point during the plaintiff’s stay at Central Police Station, the door to the cell in which he and his crew were housed was left open and they were able to use the washroom freely, at least until the door was closed. It is unclear when that occurred. Officer Forbes said that he instructed Officer Seymour to close the cell door, and he did.

249. According to Mr Fischer, when he and the others went in the cell, the door was locked; that it was opened when the shift changed and it stayed open for a couple of hours then locked again for “seven hours straight”.

250. Mr Miskura, at first, denied that his cell door was left open; then he said that at one time the door was left open for one of the men who had a urine problem, but that the guard came in the next day and closed the door; that after that the doors were always closed.

251. Under cross-examination, the plaintiff said that after the door was closed, he was not permitted to leave his cell or use the washroom for 24 hours. Mr Miskura’s evidence is that “they” had to yell and scream to use the restroom after the cell door was closed.

252. There is, however, no evidence that the plaintiff, in fact, asked to use the washroom and was not permitted to do so. When asked if he told his attorney about the situation, the plaintiff’s reply was that he told Erica Thibault from the U. S. Embassy about the way he was being treated.

253. The plaintiff later admitted that in addition to leaving the police station to go to the hospital for medical attention, he was also allowed, accompanied by police officers, to go to Bradford Marine to check on the Janice Ann and to get some clothes.

254. I, therefore, find it difficult to believe that the plaintiff would not have been permitted to use the restroom if he had requested permission to do so.

255. As for the plaintiff’s allegation that he was threatened to be “gutted like a fish”, as I said, the plaintiff did not mention that in his evidence-in-chief and, of course, none of the defendants’ witnesses admitted to having made, or hearing, such a threat.

256. In the circumstances, I agree with counsel for the defendants that the plaintiff’s allegations that he was denied the use of the bathroom and verbally threatened to be “Gutted like a Fish” by the Custody Suite Officer the 7th defendant on the shift 4 to 12 have not been proven.

Malicious Prosecution

257. At the commencement of this trial, Mr Shurland, in his opening remarks, stated the plaintiff’s case as follows:

“The plaintiff is alleging that without reasonable suspicion and probable cause, the defendants jointly or individually are liable for acts which are tantamount to breach of the plaintiff’s constitutional rights under Article 19 of the Constitution, breach of international treaties, specifically Articles 17 and 18 of the United Nations Convention of the Law of the Sea, which dictate the right of innocent passage in territorial seas; [and] that as a result of such breaches the plaintiff was unlawfully arrested, falsely imprisoned, and maliciously prosecuted.”

258. Further that the plaintiff intended to prove that:

"The defendants brought criminal charges against the plaintiff without reasonable suspicion and without probable cause. In that regard, the plaintiff was detained for 5 days and brought before the Court on seven counts of breaches of the Fisheries Act, but the charges were subsequently nolle prosequi".

259. However, while it may, in my judgment, be gleaned from the plaintiff's generally indorsed writ of summons and his statement of claim that he is alleging therein unlawful arrest and detention as well as false imprisonment, breaches of his "human and Constitutional" rights, and a violation of his "right to innocent passage" through the territorial waters of The Bahamas, nowhere in his generally indorsed writ of summons or statement of claim does the plaintiff allege that he was maliciously prosecuted or provide particulars from which, in my judgment, one may glean an intention so to allege.

260. Indeed, even in his opening remarks, while alleging that the defendant brought criminal charges against the plaintiff without reasonable suspicion and without probable cause, counsel for the plaintiff did not allege malice on the part of the defendants or any of them.

261. Further, while some 43 paragraphs of counsel for the plaintiff's closing submissions were devoted to arguments and submissions on the issue of malicious prosecution, the plaintiff could not in my judgment, "plead" malicious prosecution or provide particulars thereof by way of submissions, where he failed so to do in his statement of claim.

262. In that regard, RSC Order 18 rule 12 is clear that where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies must be contained in the pleading.

263. The learned authors of Atkins Court Forms, volume 25 1998 Issue, state, inter alia, at page 400:

"The statement of claim must set out facts rendering the original prosecutor liable. To succeed, the plaintiff in an action for malicious prosecution must plead and prove each of the following:

1. That the defendant prosecuted civil or criminal proceedings against the plaintiff before a tribunal into whose proceedings the civil courts are competent to inquire;
2. That the proceedings terminated in the plaintiff's favour if, from their nature, they were capable of so terminating.
3. That the defendant instituted the proceedings maliciously;
4. That there was no reasonable and probable cause for the proceedings;
5. That the plaintiff has thereby suffered damage."

264. During the course of the trial, it was drawn to counsel for the plaintiff's attention that malicious prosecution had not been pleaded. His response at the time was that the claim did not have to be made; that if it was alleged, it was not for the plaintiff to prove it, but rather, it was for the defendants to disprove it. Counsel promised to bring authorities to that effect.

265. Then, in his written closing submissions, counsel for the plaintiff, in "rejecting" counsel for the defendants' argument that the claim for malicious prosecution had not been pleaded, made the following observations and submissions at paragraphs 143 through 148 [verbatim] thereof:

143. It is the plaintiff's submission that the defendant without reasonable and probable cause, and with malice, committed the tort of malicious prosecution. The defendant, during its evidence, directed the Court's attention to the plaintiff's statement of claim whereby, it was pointed out that a specific claim of malicious prosecution was not identified and/or included in its statement of claim. The plaintiff rejects this argument and submits that the RSC is illustrative of O. 18 r 9 whereas:

Subject to rules 69(1), 10 and 15(2), a party may in any pleading plead any matter which has arisen at any time, whether before or since the issue of the writ.

144. By virtue of O.18 r 6 the plaintiff submits that the only defense against not allowing a claim for malicious prosecution to be heard is if the claim would have caused prejudice to the defendant having been submitted without notice. Evidently, it is patent that there was no surprise that the plaintiff would have relied on a claim of malicious prosecution. By virtue of paragraph 9 of the statement of claim, the plaintiff claimed: "On the 30th May 2011 the plaintiff was arraigned at Magistrate Court #1 where the plaintiff pleaded not guilty to the charges...."
145. Further, the plaintiff submits that by virtue of its skeleton arguments submitted to the defendants, the plaintiff gave notice that it will address the claim of malicious prosecution at trial to which the defendants acknowledged by specifically defending the claim in its closing submissions after the trial. If the defendants sought to reject the claim of malicious prosecution, then the plaintiff submits that the defendant would not have taken the time to defend the claim.
146. In fact, at paragraph 70 of its closing submission, the defendants directed the Court's attention to Lord Denning in *Glinski v McIver* as their authority to defend against the claim of malicious prosecution. The defendants cited:

"The plaintiff must prove to the satisfaction of the Judge that at the time when the charge was made, there was an absence of reasonable and probable cause for the prosecution."
147. Having relied on the position of *Glinski* in the defendants closing submissions, it cannot be disputed that the defendant did not accept the claim of malicious prosecution as a triable issue and as a result, put the plaintiff to strict proof against the warranted allegation before this Court.
148. Therefore, the plaintiff submits that the elements to establish the tort of malicious prosecution are live and actionable for the Court to make a proper determination.

266. While, I accept that RSC Order 18 rule 9 allows for a party to plead any matter which arises before or since the issue of the writ, in my judgment the matter has to be pleaded and where the matter arises since the issue of the writ, the writ must be amended to include such a pleading, which is, of course, permitted by RSC Order 20.

267. As regards counsel for the plaintiff's observation that counsel for the defendants at paragraph 70 of her written closing submissions did refer to the case of *Glinski v McIver* in opposition to a claim for malicious prosecution, the fact is that during her oral submissions, counsel for the defendants pointed out that as malicious prosecution had not been pleaded by the plaintiff, she would not refer to paragraphs 70 through 73 of her written closing submissions as those paragraphs dealt with that issue; and she did not.

268. It is well established that a party is bound by his pleadings, and having made no claim for malicious prosecution in his generally indorsed writ of summons or his statement of claim, the plaintiff cannot, in my judgment, do so by counsel's submissions.

269. Furthermore, contrary to counsel for the plaintiff's submission that it was not for the plaintiff to prove malicious prosecution, but rather, it was for the defendants to disprove it, as I understand the authorities, in order to succeed in an action for malicious prosecution, the plaintiff must plead and prove each of the elements of the tort.

270. In the circumstances, then, I find that the plaintiff, not having pleaded or particularized a claim for malicious prosecution, the claim for malicious prosecution has not been made out and, therefore, does not arise for consideration by this court.

CONCLUSION/ORDERS

271. In the result then, as regards the plaintiff's claims for unlawful arrest, false imprisonment and unlawful detention, this Court finds, on the issue of liability, for the plaintiff.

272. Article 19(4) of the Constitution provides that any person who is unlawfully arrested or detained by any other person shall be entitled to compensation there for from that other person.

273. I, therefore, find that the plaintiff is entitled to damages, in an amount to be agreed by the parties, or, in the absence of such agreement, to be assessed by the Court, together with interest and costs, to be taxed if not agreed.

DELIVERED this 12th day of May A.D. 2017

Estelle G. Gray Evans
Justice