Neutral Citation Number: [2020] CA (Bda) 14 Civ

Case No: Civ/2020/6

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. MRS. ASSISTANT JUSTICE BELL
CASE NUMBER 2016: No. 199

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 13/06/2020

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL ANTHONY SMELLIE QC
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- -

Between:

MINISTER FOR TELECOMMUNICATIONS

Appellant

- and -

DWIGHT LAMBERT

Respondent

Mr Michael Taylor of the Attorney-General's Chambers for the Appellant

Mr. Peter Sanderson of Beesmont Law Ltd for the Respondent

Hearing date(s): 11 June 2020

- -

APPROVED JUDGMENT

GLOSTER JA:

Introduction:

1. This is an appeal by the defendant in the underlying action, the Minister Responsible for Telecommunications ("the appellant"), against the decision of the Honourable Assistant Justice Kiernan Bell ("Bell AJ" or "the judge"), following a quantum hearing, in which the judge awarded compensatory and vindicatory damages of $125,000.00 to Dwight Lambert, the plaintiff in the underlying action and the respondent in this appeal ("the respondent"), by way of redress for contravention of his rights under the Bermuda Constitution pursuant to section 15 thereof.

2. Section 15 of the Constitution provides so far as material:

> ***"Enforcement of fundamental rights***
> *15 (1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*
>
> *(2) The Supreme Court shall have original jurisdiction—*
>
> *(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and*
>
> *(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled: Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."*

3. The judge's judgment ("the Bell judgment") was dated 21 August 2019 and it followed a judgment on liability of Hellman J ("the Hellman judgment") dated 24 November 2017 given in the Supreme Court of Bermuda Civil Suit 2016: No. 199.

4. Mr Michael Taylor, Crown Counsel, appeared for the respondent and Mr Peter Sanderson appeared for the respondent on the appeal. Both counsel also appeared below. The Court is grateful to them for their written and oral submissions.

Factual and procedural background

5. In 2006 the respondent imported 29 pornographic Digital Video Discs (DVDs) into Bermuda in a series of shipments. Some of the DVDs showed graphic sexually explicit photos of naked men displayed on the casings, but some were encased in paper envelopes and did not have covers

with photos. The DVDs were seized and viewed by H.M. Customs; some of the photos included graphic sexually explicit acts between men, including oral copulation and anal penetration. H.M. Customs interviewed the respondent under caution. He was advised of his rights to ask legal counsel to attend, which he declined. The respondent was never detained or arrested at any time.

6. In 2007 the respondent was charged with importing obscene material contrary to section 3 (1) (a) of the Obscene Publications Act 1973 ("the 1973 Act") and was prosecuted in the Magistrates' Court in open court. The respondent was acquitted after a trial on the basis that the material was not obscene. The DVDs were returned to the respondent. No constitutional issues under section 15(3) of the Bermuda Constitution were referred to the Supreme Court from the Magistrate's Court.

7. In 2013 the respondent, as plaintiff in Suit 2013: No. 47, brought an action by writ against three defendants; the Director of Public Prosecutions ("the DPP"); the Bermuda Broadcasting Commissioners ("the Commissioners"); and the Minister responsible for Telecommunications (the appellant). The indorsement of claim on the writ alleged negligence and/or breach of statutory duty. As was common ground, the claim contained no allegations of malice or homophobic motivation.

8. In an ex tempore judgment dated 11 June 2014, the Honourable Chief Justice, Ian Kawaley, struck out the respondent's action against all three defendants.

9. The following paragraphs in the ex tempore judgment of Kawaley CJ are relevant by way of general background:

> *"17. .... So the broad picture, and the question of the way in which the Act interferes with the freedom of expression, which is protected by section 9 of the Constitution, is something that might be explored in the concept of an application for relief under section 15 of the Bermuda Constitution".*

and

> *31. Mr. Smith sought to persuade the Court to afford the Plaintiff the opportunity to amend, to add a new cause of action in malicious prosecution. In my judgment, there is no reasonable basis for believing that any genuine cause of action for malicious prosecution can be formulated. Generally, the Court takes a liberal attitude towards amendments but in this particular case we are concerned with the events that happened approximately seven years ago and the notion of a malicious prosecution claim being formulated against a public prosecutor, when there has been no hint of any malice asserted by the Plaintiff before, really beggars belief.*
>
> *33. Having said that, I do have considerable sympathy for the Plaintiff's general position. It does appear to me to be the case that the way in which the obscene publications are currently dealt with under the law does leave room for prosecutions to be launched in circumstances of doubt, where clearer and more*

modern rules through regulations might well reduce the room for such doubt. And the courts should not really be exercising the function of policy-maker. The courts should be deciding prosecutions under the Act where it is clear that prosecutions should be laid.

34. it does appear to me, admittedly on the basis of very limited information and a very cursory analysis of the Act and the only regulations that appear to be passed under it, that the Plaintiff's central grievance that the law is not up to date does have some substance to it.

35. Unfortunately, the particular legal route that the Plaintiff has sought to channel those grievances through has no merit. And it is for these reasons that the claim is stuck out."

10. The respondent sought leave to appeal against the strike out, but leave was refused by the Court of Appeal.

11. On 18 May 2016, the respondent filed an Originating Summons (Constitutional application 2016: No 199) against the same three Defendants; the Commissioners, the Appellant and the DPP ("the constitutional action"). He claimed that the 1973 Act:

    1. was "a content based blanket restriction on freedom of expression";
    2. that it lacked the precision required by the Bermuda Constitution when a statute regulates the content of expression and that it was also arbitrary in application, ill-defined and misunderstood; and
    3. that it should be read in line with the Constitution.

12. Accordingly, the respondent sought:

    (a) "a declaration as to whether the 1973 Act was void [unconstitutional] as of 2007, the year of his being charged and placed on trial"
    [see paragraph 13 of the respondent's Originating Summons]; and

    (b) "declaratory relief as to whether the Bermuda Broadcasting Commissioners, the Minister for Telecommunication and the Director of Public Communications [Prosecutions] are liable for any damages";
    [see paragraph 14 of the respondent's Originating Summons.]

13. The constitutional action was dealt with in two parts; the constitutionality of the offences under the 1973 Act being considered first, followed by the question of quantum of any redress for constitutional infringements being determined at a separate hearing should that be necessary.

14. Hellman J heard the first part on 6 November 2017 and delivered his judgment (the Hellman judgment as defined above) on 24 November 2017. Hellman J determined that the respondent's

constitutionally protected rights had been breached and granted him the following declaration at paragraph 69:

> *"Pursuant to section 15 of the Constitution that as at the date of his prosecution the offences involving obscenity contained in section 3 and 3A of the 1973 Act breached the right to a fair hearing in section 6[1] of the Constitution and the right to freedom of expression in section 9 of the Constitution in that a person thinking of committing an action which was potentially criminalized by either of those sections could not reasonably have foreseen whether the definition of obscenity in section 2(1) of the 1973 Act covered articles portraying sex in a manner which was explicit but was without any additional features which would render the activity portrayed degrading or humanizing."*

There does not seem to have been any order reflecting the terms of the Hellman judgment. This is to be deplored. There should have been an order setting out the terms of the declaration, and consequential directions for the trial of redress issues.

15. The Hellman judgment fully canvassed the law on obscenity. In deciding whether obscenity was defined with sufficient precision in section 2 of the 1973 Act, Hellman J adopted the reasoning of the European Court of Human Rights in *Muller v. Switzerland* [1991] 13 EHRR 212, which was a case where the complaint had been that the appellant's conviction for obscenity under the Swiss Criminal Code infringed the protected right of freedom of expression under Article 10(2) of the European Convention. The ECHR held: "whether an article is likely to be held obscene must be reasonably foreseeable"; see paragraph 53 of the Hellman Judgment. Hellman J found that it was not reasonably foreseeable to the respondent that the importation of the DVDs, the material in relation to which he was charged, would fall within the definition of obscenity; see paragraph 61. He stated in paragraph 68:

> *"What [the Constitution] requires is that any such definition is sufficiently clear that a person should know whether they are at risk of being prosecuted and convicted for an offence in relation to obscene material".*

16. Hellman J also considered whether the rights protected by section 9 of the Constitution, relating to the protection of the freedom of expression of individuals, had been breached. Section 9 provides, so far as relevant:

> *"9(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes …freedom from interference with his correspondence…"*

[1] Section 6 provides: "(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law; (2) Every person who is charged with a criminal offence - (a) shall be presumed to be innocent until he is proved or has pleaded guilty; (b)shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged; and (4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence."

17. Hellman J decided that, whether offences contained in section 3 and 3A of the 1973 Act offended section 9, also depended on whether obscenity was defined with sufficient precision in section 2 of the 1973 Act (see paragraph 53 of the Hellman judgment). He held that the respondent's constitutional right to freedom of expression under section 9 had been breached by the State's actions (see paragraphs 61 and 69, *ibid*.). As Bell J said at paragraph 12 of her judgment:

> *"The wrongful interference can be summarized as the interference with the delivery up of the Plaintiff's DVDs by HM Customs, followed by the subsequent decision to prosecute the Plaintiff for the importation of same."*

18. The appellant did not appeal against any of the orders following the Hellman judgment or against Hellman J's declaration that the respondent's constitutional rights had been infringed, in that his right to a fair hearing in section 6 of the Constitution and his right to freedom of expression in section 9 of the Constitution had been breached.

The Bell Judgment

19. The second part of the Constitutional Action, namely the determination of the quantum of any redress to which the respondent was entitled, arising from the breaches of the respondent's constitutional rights, was heard by Bell AJ.

20. At paragraph 12 of her judgment she summarised the question decided by Hellman J regarding the Bermuda Constitution as follows:

> *"12 The learned judge determined that whether offences contained in section 3 and 3A of the 1973 Act [The Obscene Publications Act 1973] offend section 9 also depends on whether obscenity is defined with sufficient precision in section 2 of the 1973 Act (see paragraph 53). The learned Judge determined that the Plaintiff's constitutional right to freedom of expression under section 9 had been breached by the state's actions (Paragraphs 61 and 69). The wrongful interference can be summarized as the interference with the delivery up of the Plaintiff's DVDs by HM Customs, followed by the subsequent decision to prosecute the Plaintiff for the importation of same".*

21. At paragraphs 21 - 28 of her judgment, she summarised the respondent's affidavit evidence setting out the harm and damage he had suffered as the result of the infringements of his constitutional rights, including the humiliation at work and in a social context, and the negative effect which it had had on all aspects of his life. The respondent was not cross-examined or otherwise challenged in relation to his evidence as to his emotional distress and suffering.

22. At paragraphs 29 to 40 of her judgment, Bell AJ analysed the relevant principles relating to constitutional redress and, rightly, in my view, concluded by reference to the decision in the Privy Council case of *Maharaj v. A.G. of Trinidad and Tobago (No 2)* [1979] AC 385, that monetary compensation was an available, and the appropriate, form of redress in the present

case. I quote her judgment *in extenso* because, in my judgment, she correctly articulated the relevant principles to be derived from the Privy Council cases. She said:

> *"32. Counsel for the Plaintiff referred to the Privy Council case of Maharaj v. A.G. of Trinidad and Tobago (No 2) [1979] AC 385, where Lord Diplock, in delivering the majority judgment, considered the meaning of 'redress' in the Constitution of Trinidad and Tobago. Lord Diplock held:*
>
> > *"What then was the nature of the "redress" to which the appellant was entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning, which, in the Shorter Oxford English Dictionary, 3rd ed, 1944 is given as: "Reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this." (page 398 at F)*
>
> *33. In that case the constitutional right which had been infringed was the complainant's right not to be deprived of his liberty except by due process of law. Lord Diplock held "the contravention was in the past; the only practicable form of redress was monetary compensation" (page 398 at G). He continued: "In their Lordships view an order for payment of compensation when a right protected under section 1 'has been' contravened is clearly a form of 'redress' which a person is entitled to claim under section 6(1) and may well be the only practicable form of redress; as by now it is in the instant case" (page 399 at A).*
>
> *34. In this instance, the constitutional rights which 'have been' breached are the rights to a fair hearing protected under section 6 and the right to freedom of expression protected by section 9 of the Constitution. The only 'redress' now available to the Plaintiff for these infringements of his constitutional rights is monetary compensation. Furthermore, there are no other available means of redress for the Plaintiff other than under section 15 of the Constitution.*
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> *35. Counsel for the Plaintiff referred the Court to the Privy Council case of Merson v. Cartwright [2006] 3 LRC 264, a case on damages for breach of constitutional rights from the Court of Appeal for the Bahamas. The issue before the Court concerned the question of whether or not in awarding $100,000 for the infringement of Ms Merson's constitutional rights there had been duplication of the damages awarded for the nominate torts of assault and battery, false imprisonment and malicious prosecution. The trial judge awarded the appellant $90,000 in damages for assault, battery and false imprisonment, $90,000 damages for malicious prosecution and $100,000 for the contraventions of the appellant's constitutional rights.*
>
> *36. Lord Scott delivered the judgment of the court and in doing so referred to the function of constitutional damages or redress as had been recently considered by the Privy Council in A-G v. Ramanoop [2005] UKPC 15. The Privy Council in Ramanoop set out certain principles applicable to cases concerned with constitutional redress in a case on appeal from Trinidad.*

37. Lord Nicholls in Ramanoop held:

> *"[18] When exercising this constitutional jurisdiction the Court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the Court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide, because the award of compensation under s. 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.*
>
> • *An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award.*
> *"Redress" in s. 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much of the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.*
>
> • *For these reasons their Lordships are unable to accept the Attorney General's basic submission that a monetary award under s. 14 is confined to an award of compensatory damages in the traditional sense". (Emphasis added)*

38. Lord Scott in Merson, in adopting the above principles, held:

> *"These principles apply, in their Lordship's opinion, to claims for constitutional redress under the comparable provisions of the Bahamian Constitution. If the case is one for an award of damages by way of constitutional redress (and their Lordships would repeat that 'constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate*

> *to take that course')… the nature of the damages awarded may be compensatory but should always be vindicatory, and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount….The purpose of a vindicatory award is not a punitive purpose. It is not to teach the Executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified Executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary" (at p273 paragraph 18.) (Emphasis added)*

39. Notably, in Merson, the Court held that on the extreme facts of the case an award of $100,000 by way of vindicatory damages (compensatory damages having been already awarded under the other causes of action) "as high but within the bracket of discretion available to the judge".

40. Section 15 of the Constitution provides for redress in similar language to the Constitutions of Trinidad and the Bahamas. Accordingly, the following principles distilled from the leading cases of Ramanoop and Merson should be applied by trial judges considering the quantum of any redress for infringements of constitutional rights under section 15 of the Bermuda Constitution:

> *a. Persons carrying on their life in Bermuda should be free from unjustified interference, mistreatment or oppression from the state;*
>
> *b. If a person has suffered damage from such unjustified interference, mistreatment or oppression, that person is entitled to compensation;*
>
> *c. The equivalent common law level of damages is a useful guide for the compensatory element;*
>
> *d. In addition to compensation for any damages suffered, the purpose of redress is to vindicate or uphold the constitutional rights which have been infringed;*
>
> *e. The purpose of vindication is to vindicate the constitutional rights which have been infringed not to punish the state or Executive;*
>
> *f. The vindicatory element of redress may be an additional award of*

> *damages, may be a declaration, or may be both, depending on the circumstances of the case;*
>
> *g. The sum will be at the discretion of the trial judge."*

23. At paragraphs 44 – 50 of her judgment, Bell AJ accepted Mr Sanderson's submission that the English decision in *Mosley v. News Group Newspapers Ltd* [2008] EWHC 1777, a case which was concerned with misuse of private information, and where the claimant sued for breach of confidence and unauthorised disclosure, was a useful analogy for the purposes of considering the quantum of compensatory redress in the present case, because the tort of intrusion on privacy in English law was predicated on "the right to respect for his private and family life, his home and his correspondence" as protected by Article 8 of the European Convention on Human Rights. She accepted Mr Sanderson's submission that Article 8 was analogous to section 9 of the Bermuda Constitution which protects an individual's freedom of expression including "freedom from interference with his correspondence." She agreed that:

> *"The comprehensive analysis by Mr Justice Eady in Mosley on the nature of compensatory damages in privacy cases is both cogent and relevant to the question of quantum of redress for infringement of the Plaintiff's constitutional rights in this case."*

24. At paragraphs 51 to 59 she dealt with the appellant's arguments in relation to damages as follows:

> *"51. In contrast, counsel for the Defendant argues as his primary position that there should be no damages, and as a secondary position, that any damages awarded should be nominal. Counsel for the Defendant did not dispute the evidence of general damage suffered by the Plaintiff.*
>
> *52. Counsel for the Defendant contend that as there was no malice and the Plaintiff had a fair trial in which his rights were protected and he was acquitted and no public outrage has been shown that any damages and costs "ought only to be minimal" (Paragraph 17 Defendant's skeleton argument).*
>
> *53. Counsel referred to Durity v. Attorney-General [2009] 4 LRC 376, a Privy Council case on appeal from Trinidad and Tobago on damages for breach of fundamental rights under the Constitution. Counsel rely on the headnote to that 15 case, which summarises paragraphs 18 and 19 from the leading Privy Council case of Ramanoop (cited in full at paragraph 37 above). Counsel rely on Durity and Ramanoop to contend that the proper interpretation of Ramanoop is that without 'public outrage' damages should only be minimal.*
>
> *54. I disagree with counsel's contention. The starting position when considering redress under section 15 of the Constitution is the compensatory element – and the common law on damages in analogous cases provides a useful guide. If the*

Plaintiff has suffered damage as a result of unjustified interference with his constitutional rights he is entitled to be compensated. Furthermore, as Ramanoop makes plain, an award of compensation goes some way to vindicating the infringed right – but may not go far enough. As the Court held in Ramanoop: "the fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches. All these elements have a place in this additional award." The factors cited as giving rise to the vindicatory element are disjunctive, the presence of any one of these can give rise to a vindicatory award. In this case, for example, it is relevant that not just one, but two significant constitutional rights were infringed. Indeed, the Plaintiff was threatened with prosecution if he continued to insist on his right to receive his DVDs.

55. So far as the suggestion by counsel that quantum of any redress should be nominal because the Plaintiff did have a 'fair trial', this is incorrect as a matter of fact in light of Mr Justice Hellman's finding and Declaration that the Plaintiff's constitutional right to a fair hearing was infringed.

56. Counsel for the Defendant also urge that the Court "should not set a precedent by awarding damages to punish the prosecution for doing its job where no malice has been shown, it would be opening the flood gates for claims where a person is acquitted of a charge".

57. This argument too is misconceived. The claim for redress for infringement of the Plaintiff's constitutional right to a fair trial is based on what has been done in the exercise of the prosecutorial power of the state itself. No malice need be established. Constitutional redress is not for the purpose of punishing the prosecution, but rather to recognize and uphold the importance of the right or rights infringed and to compensate for any harm caused by infringement. The actions of the Plaintiff in importing the DVDs did not amount to a criminal offence. Per Justice Hellman, it was not reasonably foreseeable to the Plaintiff that the purchase and importation of the DVDs would be a criminal offence, and prosecuting him therefore infringed his constitutional rights. A decision by the state to prosecute an individual for an act which is not reasonably foreseeable to be a criminal offence at all, must be exceptionally rare. I do not accept that awarding redress to the Plaintiff will have any bearing on future criminal prosecutions, or open the floodgates, when a person is acquitted of a charge, which would have been, if proven, a criminal offence.

58. Additional arguments were made that there should be no compensation for any distress due to the attendant publicity and matters said or addressed in open court because the Plaintiff should pursue the third parties who reported on the case and/or the Court did not order the proceedings to be held in camera. It was

also argued that no redress or damages should be paid to the Plaintiff because the Judgment of Mr Justice Hellmann at paragraph 61 gave guidance as to how the law could be updated, and this came about by the law being tested which is of benefit and therefore, it contended, any damages should be nominal.

59. I do not find these arguments persuasive. The Plaintiff has no recourse against the Court, or any third parties such as the press who were simply reporting accurately on proceedings in open court. In fact, the Plaintiff's only available avenue for redress is in the Constitutional Action."

25. In making her decision that the respondent should be awarded $125,000 by way of redress for breach of his constitutional rights, Bell AJ stated as follows:

"60. I accept the evidence of the Plaintiff that he has suffered severe emotional distress, humiliation, embarrassment, loss of personal dignity and hurt feelings as a result of the infringements of his constitutional rights. I find that his suffering was severe for an extended period of time particularly in the lead up to and during the trial. I accept that he suffers from anxiety and embarrassment to this day, and the airing in public of matters he intended to remain private can never be undone.

61. I further find that it is an aggravating factor that counsel for the prosecution, at the trial, advanced its case based on allegations that the content of the DVDs would incite sexual deviants and child molesters. I accept that these arguments were advanced without malice. This is not the test. Paraphrasing the words of Lord Reid in Cassell v. Broome (see paragraph 47 above) counsel have aggravated the injury by what they argued in Court. These actions certainly increased the hurt feelings, embarrassment and injury suffered by the Plaintiff. This justifies going to the top of the bracket of damages that could be fairly regarded as compensation.

62. I further find that the breach of section 9 and the Plaintiff's freedom of expression and right to freedom from interference in his correspondence was compounded by the further infringement of section 6, and his right to a fair trial. These are significant constitutional rights and it is appropriate to recognize and uphold the importance of these rights with a vindicatory award.

63. In the end, constitutional redress can only go so far – and the Court is mindful that no sum will truly compensate the Plaintiff for the distress, humiliation, embarrassment, loss of personal dignity and hurt feelings he has suffered and continues to suffer as a result of the infringements of his constitutional rights. In considering the circumstances of the case and the comparable common law measure of damages in privacy cases, I award to the Plaintiff $125,000 in redress. $100,000 is a compensatory award and $25,000 is an additional award to vindicate the importance of the constitutional rights which were breached."

The appellant's grounds of appeal and related submissions

26. In his oral submissions before this court Mr Taylor pursued only certain of the various grounds of appeal set out in the appellant's notice of appeal. His submissions may be summarised as follows.

27. Bell AJ erred in law or otherwise misdirected herself in that she entertained matters not pleaded and therefore not before the Court, in particular:

(1) Bell J had no jurisdiction to adjudicate on matters not before the Court. There were no pleadings before the Court on which liability for damages relating to the wording of sections 3 and 3A of the 1973 Act could be established against the Appellant and therefore the issue was not properly before the Court.

(2) There was nothing to say what head of damage the respondent was alleging. It was unclear whether he was claiming damages for a direct tort or an indirect tort; or whether the claim was for damages at common law or for negligence. Failure to plead damages made the respondent's claim impossible for the appellant to have defended.

(3) Bell AJ breached natural justice in that she assumed the appellant was liable for damages by considering the question of quantum only, without first considering, hearing or deciding to the issue of liability for damages. The Hellman judgment, which Bell AJ adopted in its entirety, granted a declaration which was the issue before the Court. There was no declaration by Hellman J that the appellant was liable for damages because none was pleaded and the question was not before the Court. Hellman J was now functus.

(4) The hearing before Bell AJ should have determined that there was indeed a remedy in damages, a liability in damages and that the constitutional breach, as a matter of causation, led to the alleged damage suffered by the respondent. Bell AJ erred in law, or otherwise misdirected herself, in failing to consider the test or any test, as laid down by the House of Lords in dealing with tort against public officers and matters of indirect tort, in *Caparo Industries Plc v Dickman* [1990] 2 AC 605. Thus, Bell AJ failed to deal with issues of foreseeability, proximity and public policy in the context of being fair, just and reasonable in dealing with negligence and damages for indirect tort by public officers

(5) Furthermore, the respondent had failed to plead any or any sufficient particulars relating to how the appellant could be held to be liable for damages for the wording of sections 3 and 3 (a) of the 1973 Act.

(6) Bell AJ erred in law or otherwise misdirected herself by failing to take into account a fundamental consideration, namely:

> *"It is, first of all, clear that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional…."; see Grant v The Queen [2006] UKPC 2 page 10, at para 15.*

That, submitted Mr Taylor, was a case where the prosecutor used hearsay evidence in the trial; the Privy Council rejected the defendant's application to strike out the hearsay evidence: a priori, an enactment of the Bermuda Legislature was presumed to be constitutional until it was shown to be unconstitutional by the Supreme Court. Based on that decision, the prosecutor and the Magistrates' Court were bound to consider section 3 and 3A of the 1973 Act as lawful and enforceable before the issue of the constitutionality of those sections were considered by Hellman J. The DPP was acting under a valid law at the time the respondent was charged with an offence under the 1973 Act. Accordingly, the DPP placed the respondent before the Court to answer the charge and the case progressed to a full trial. The respondent did not make a "no case to answer" application. The safeguards in law operated so that the respondent was given a fair hearing and was acquitted of the charges against him. The respondent attended the Magistrates' Court hearing but at no time was he detained in custody. A person was presumed innocent until it had been proved that he was guilty or he had pleaded guilty. A suspect might make a no case to answer submission and would be acquitted without a trial, if the Court upheld his submissions. If the matter progressed to trial and, after being given a fair hearing to defend himself, a defendant was acquitted, there was no law which enabled him to claim damages from the Crown, because he was found not guilty. The case had been heard in open Court and the media had had the entitlement to report the case subject to directions of the Court in certain cases. To compensate such a respondent would be repugnant, arbitrary and lead to undesirable consequences where every suspect acquitted of an offence would have a right to claim damages from the Crown, without any finding of liability on the part of the Crown where a provision in a statute is subsequently found to be imprecise. (It was to be noted that the respondent made application to the Supreme Court by way of judicial review in Suit 2013 No 47 for damages for breaching his rights which he was entitled to do under section 15 of the Constitution. The respondent's judicial review action was unsuccessful and dismissed. The respondent's Application for Leave to Appeal that decision was also refused by the Court of Appeal.) Accordingly, the Supreme Court was bound to treat the statutory definition as lawful, constitutional and enforceable before it was challenged. In support of this submission Mr Taylor referred in addition to the cases of: *Fay and Payne v The Governor and the Bermuda Dental Board* [2006] Bda LR 65; and *ibid* [2006] Bda LR 72 (Taxation of costs).

(7) In any event the quantum of damages was too high. This was the first case in relation to damages for breach of the Constitution and would set the standard for Bermuda in this area. Bell AJ erred in law, or misdirected herself, in awarding damages which were excessive and wholly disproportionate. In the past, where damages had been awarded in Bermuda for constitutional matters, awards had been low. Mr Taylor referred to: *Michael Barbosa v Minister of Home Affairs* [2016] SC Bda 63 Civ, where an award of $8,000.00 was made involving breach of constitutional right under section 12 of the Bermuda Constitution; and *Melvern Williams v Minister of Home Affairs et al* [2015] SC Bda 46 Civ, where an award of

$5,000.00 was given for breach of constitutional rights under section 11 of the Bermuda Constitution where employment was terminated wrongfully.

(8) Bell AJ was wrong as a matter of law to rely upon, and apply, the Privy Council case of *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15; see, in particular, paragraph 37 of her judgment. She failed to appreciate that the constitution of the Republic of Trinidad and Tobago was enacted in different terms from those of the Bermuda Constitution, as was the State Liability and Proceedings Act of the Republic of Trinidad and Tobago. (This argument was only faintly pursued in the appellant's oral submissions.)

28. In the appellant's written skeleton argument, although not pursued in Mr Taylor's oral presentation to any, or any great extent, or, in some cases, at all, the following arguments were also addressed on the alternative basis that they might have been relevant, if damages had been properly pleaded. (In my view, some of these arguments necessarily duplicated to a certain extent some of the arguments referred to above):

(1) Bell AJ erred in law or otherwise misdirected herself by taking into account irrelevant considerations, which breached the appellant's rights to a fair hearing. That was because she wrongly referred in paragraph 12 of her judgment to the "wrongful interference" "as being the interference with the delivery up of the Plaintiff's DVDs by HM Customs, followed by the subsequent decision to prosecute the Plaintiff for the importation of same".

In fact, the remedy granted by Hellman J was a declaration in relation to sections 3 and 3A of the 1973 Act, not a finding of liability for damages against the appellant. It was accordingly wrong for Bell AJ to make a finding regarding the DPP and HM Customs without them being heard. Hellman J had already made an order removing the DPP from the proceedings, and he did not find that there was wrongful interference by HM Customs followed by the subsequent decision to prosecute. There was no finding of wrongful interference by the appellant.

(2) Bell AJ erred in law or otherwise misdirected herself in erroneously considering breach of fundamental rights under Chapter 1 of the Constitution pertaining to actions of the prosecutors /DPP and applying a remedy of damages under section 15 of the Constitution. Hellman J was of the opinion that fundamental rights under Chapter 1 of the Constitution were breached as a result of the imprecise statutory definition enacted by Bermuda Legislators. Acts of the Bermuda Legislators did not form part of the fundamental rights enshrined in Chapter 1 of the Constitution. Therefore, Bell AJ was in error to enforce rights under Chapter 1 of the Constitution, by way of section 15, as a remedy relating to wording in legislation.

(3) Bell AJ erred in law by awarding damages against the appellant (Minister responsible for Telecommunications) who had no connection, in respect of matters of the Constitution, with bringing legislation into effect. The Legislature enacted the Obscene Publications Act 1973 which came into effect after the Bermuda Constitution and all the sections in the 1973 Act were presumed to be constitutional when the Act was passed. No determination was made by

Bell AJ that the appellant was liable in damages for the 1973 Act and accordingly, she erred in awarding damages against the appellant.

Discussion and determination of the relevant issues

29. I do not consider it necessary for me to rehearse the arguments of the respondent in reply in any detail. That is because, largely for the reasons which Mr Sanderson presented to the Court, I am in no doubt that this appeal should be dismissed. However, I should acknowledge my gratitude to Mr Sanderson for his short and focused submissions.

30. I now turn to deal with the appellant's submissions. Necessarily I do not address each and every one of the points raised in those submissions.

Lack of any adequate pleadings of damages

31. The first two of the appellant's submissions, as summarised above, were basically that there was no adequate claim, or pleading, for damages, and that therefore Bell AJ should not have addressed the issue of damages at all. I agree with Mr Sanderson that this argument is wholly without merit. The respondent adequately articulated his claims for damages and the appellant can have been under no illusion as to the fact that the respondent was claiming damages and the basis upon which he was doing so, namely the personal trauma which he had suffered as a result of having to face trial on charges that were constitutionally deficient, and in breach of his rights to a fair trial and to freedom of expression.

32. My reasons for reaching this conclusion are as follows:

(1) The Respondent's originating summons for constitutional relief in the constitutional action (as defined above) contained the following specific claims for relief:

b. at paragraph 10 that:
"The 1973 Act lacks the precision that the Bermuda Constitution requires when a statute regulates the content of expression, also, that the 1973 Act is arbitrary in application, ill-defined and misunderstood.";

c. at paragraph 11 declaratory relief that the 1973 Act should be read in line with the Constitution;

d. at paragraph 13 a declaration as to whether the 1973 Act was void [subsequently substituted by the word "unconstitutional" pursuant to the order of Hellman J dated 1 September 2016] as of 2007, the year of his being charged and placed on trial
e. at paragraph 14, "declaratory relief as to whether…… [the appellant] [is] liable for any damages";
f. in the prayer, the respondent sought "declaratory relief", "further or other relief" and "interest according to law".

Thus, although the prayer itself did not specifically claim damages, it would have been perfectly clear to any normal reader that the claimant was indeed seeking damages against the defendant to the summons.

(2) The order made by Hellman J dated 1 September 2016, prior to the hearing of the respondent's claim for a declaration and the Hellman judgment dated 24 November 2017, again made it perfectly clear that the respondent was seeking damages for the breach of his constitutional rights. Thus, paragraph 2 of that order in terms states that:

> *"the claim for damages against the Second Defendant [i.e. the appellant] is salvaged only insofar as it relates to Paragraph 13 of the Originating Summons [i.e. the paragraph seeking a declaration as to whether the 1973 Act was unconstitutional as of 2007, the year of his being charged and placed on trial]."*

(3) The first affidavit of the respondent dated 13 April 2017, following the Hellman judgment, "submitted", albeit briefly, in paragraph 10(c) that the "plaintiffs [sic] Originating Motion ought to be engaged with costs and damages."

(4) Hellman J's order dated 11 January 2018, following the Hellman judgment and giving directions in effect for the trial of the damages claim made in the Originating Summons, expressly directed that the respondent was "to file and serve affidavit evidence regarding damages within 14 days, and that the appellant was to "have 14 days to respond" with the respondent to file and serve any affidavit in rejoinder, if so advised, within 14 days. In addition, the "costs relating to damages" were reserved.

(5) The affidavit of the respondent dated 29 January 2018, served pursuant to that order, made it absolutely clear that the respondent was seeking damages against the appellant for breach of his constitutional rights. The basis upon which the respondent had suffered mental distress, as a result of the invasion of his privacy and his prosecution on the basis of an uncertain definition of obscenity in relation to articles "portraying sex in a manner which was explicit, but which was without any additional features which would render the activity portrayed degrading or dehumanising" (category (iii) material) was also clearly set out in that affidavit. Moreover, in an originating summons procedure, one would not have expected to have seen specific pleadings.

(6) There was no response by way of affidavit or otherwise to that claim by the appellant. Nor, as emphasised by Mr Sanderson, was any procedural, or indeed substantive, point taken by the appellant prior to, or at, the hearing before Bell AJ, whether in skeleton argument, oral submissions, or otherwise, that the claim for damages has not been adequately pleaded, or that there was any confusion as to the basis of the claim, or as to whether it was made on the basis of negligence (which it clearly was not) or otherwise.

33. Accordingly, I would reject these grounds of appeal. It must have been perfectly clear to the appellant that the whole purpose of the hearing before Bell AJ was to consider the respondent's

claim for damages for breach of his constitutional rights, following on from his prosecution under sections 3 and 3A of the 1973 Act and the Hellman judgment that section 2(1) of the 1973 Act did not include category (iii) material, and that, accordingly, the respondent should not have been prosecuted.

No finding on liability or causation on which to base an award of damages

34. I would also reject the appellant's arguments as summarised under sub-paragraphs 26 (3)(4) and (5) above that there was no adequate finding of liability on the part of the appellant upon which to base an award of damages, or (a different point), that there was no adequate finding of causation.

35. The respondent's complaint under this head, as summarised above, was that the judgment of Hellman J did not of itself determine that the appellant was liable for damages; all he did was to make a declaration as to the breach of the respondent's constitutional rights. Nor, Mr Taylor contended, did Bell AJ determine that the respondent had a remedy in damages against, or that there was a liability in damages on the part of, the appellant, or that the constitutional breach, as a matter of causation, resulted in the alleged damage suffered by the respondent.

36. I would reject these arguments for the following reasons:

(1) Following the Hellman judgment, the respondent issued a notice of motion on 18 December 2017 for the Supreme Court to hear the respondent "on the issues of costs and damages". The order made by Hellman J on 11 January 2018 required the respondent to file and serve affidavit evidence "regarding damages" within 14 days and for the appellant to serve any affidavit in answer within 14 days thereafter. No jurisdictional point was apparently taken at that time by the appellant that there should be no damages hearing at all, because there was no statutory liability, in any circumstances, on the part of the appellant for the breach of the respondent's constitutional rights. Nor was any affidavit evidence filed by the appellant setting out any statutory or other materials stating, or supporting, the proposition that in no circumstances could the appellant be liable in damages for the constitutional breach, or that some other Department of State was the appropriate department to meet such liability, if any.

(2) In his skeleton arguments in relation to the damages hearing before Bell AJ, dated 2 October 2018 and 31 January 2019 (both in the same, or substantially the same, form), the respondent referred to various relevant cases by way of an "Overview in respect damages in Constitutional cases" in relation to the appropriateness of awarding damages where there had been a breach of a plaintiff's constitutional rights and the principles for awarding damages in such cases; these included the English cases of *Merson v Cartwright* [2006] 3 LRC 264, PC; *Mosley v News Group Newspapers Ltd* [2008] EMLR 20; and *Richard v BBC* [2018] EWHC 1837.

(3) In its responsive submissions, namely its skeleton argument dated 4 October 2018, its supplemental submissions dated 12 December 2018, and its "Response" dated 4 February

2019, the appellant raised various arguments to the effect that damages should be minimal and that, in the circumstances, no claim for damages arose at all, whether under the common law or under the Bermuda Constitution. The arguments expanded their scope over time. Thus, for example:

a. in its skeleton argument dated 4 October 2018, the appellant concluded:

"Given that legislation is deemed to be constitutional until it is found to be otherwise and that the Court provided guidance as to how it could be updated and there was no malice and the Plaintiff had a fair trial in which his rights were protected and he was acquitted and no public outrage has been shown, it is submitted that any award of damages as well as any costs ought only to be minimal."

b. in its supplemental submissions dated 12 December 2018, the appellant contended:

"The Plaintiff is claiming damages under the Bermuda Constitution; entitlement to damages as a form of relief would need to be specifically expressed; damages (compensation) is only provided for under section 5 (4) [of the Constitution – unlawful arrest] .....No other section of the Bermuda Constitution provides for compensation for matters relating to sections 1 to 15.";

"Constitutional damages are different from common law/tortious actions. To claim damages in tort, there needs to be a duty which was breached and damage suffered. To claim damages/compensation under the Bermuda Constitution, there needs to be a breach of a fundamental right and a section of the Bermuda Constitution would need to provide for payment of compensation; this is only found under section 5 (4)."

"The present proceedings are constitutional in nature and pertain to a provision in an Act of the Legislature. It is submitted that no claim for compensation arises against the Legislature for not updating Laws for the peace, order and good government of Bermuda. The Plaintiffs action does not come under section 5 (4); an attempt to re-litigate the matter to seek common law damages in a Constitutional matter regarding a provision in a statute would be a misuse or abuse of process."; and

"In the circumstances, the Plaintiff ought to be only entitled to costs on the standard basis fit for a litigant in person up to the date of Judgment"; and

c. in its "Response" dated 4 February 2019, the appellant argued:

"Any impact on the Plaintiff due to a law not being updated is not a matter that gives rise to the award of damages under the Bermuda Constitution and there is no entitlement to damages or compensation.";

> *"The 'vindicatory' or 'constitutional' element of damages does not arise where a law is not updated; the Bermuda Constitution makes no provision for awarding damages in such cases and as such there is no entitlement to damages or compensation".*

(4) Accordingly, it is clear that Bell AJ had before her the relevant arguments raised by the appellant and the respondent at that stage relating to the liability of the Crown (if any), in relation to damages for breach of the respondent's constitutional rights and the principles governing the award of such damages. It is also abundantly clear from a reading of the Bell judgment as a whole, that she clearly considered and determined the various issues which were raised by the appellant as to liability, and his submissions to the effect that there was no statutory basis for imposing any liability on the Crown. Although, in paragraph 5 of her judgment, she referred to the fact that:

> *"This hearing concerned the second part of the Constitutional Action, namely the determination of the quantum of any redress to the Plaintiff arising from the breaches of the Plaintiff's constitutional rights ……."*

it is plain from the operative parts of her judgment (see, in particular, paragraphs 32-40, and 51-59) that she was not merely addressing the *quantum* (i.e. amount) of any damages, but also considering, and determining, whether a claim for *monetary redress* arose under section 15 of the Constitution 15 *at all,* and, if so, on what basis. That is clear, *inter alia,* from her references to, and citations from, cases such as *A-G v. Ramanoop (supra)*; *Merson (supra), Mosley* (supra) and *Maharaj v. A.G. of Trinidad and Tobago (No 2) (supra)*. It is also clear from her determination at paragraph 40 that section 15 of the Constitution provides for redress and that the principles distilled from the leading cases of *Ramanoop* and *Merson* should be applied by trial judges in Bermuda, that she rejected the appellant's submissions in so far as they contended that no basis for liability arose, whether on grounds of causation or otherwise.

(5) The appellant's submission - that Bell AJ failed to consider, in the context of torts against public officers, relevant tests of foreseeability, proximity and public policy as set out in *Caparo Industries Plc v Dickman supra* -was, in my judgment, misconceived. Claims for redress for breaches of constitutional rights are *not* a species of tort law; they are claims *sui generis* as the decision in *Gairy v A-G of Grenada* [2002] 1 AC 167 demonstrates; see in particular the discussion at paragraph 19 (3) and paragraph 21.

37. Accordingly, I would reject these grounds of appeal.

The actions taken against the respondent should be considered lawful until the point that they were challenged, and so no damages can arise as a consequence

38. As I have summarised above, the point taken by the appellant under this head was that, until there was an actual challenge to an enactment, it was presumed to be valid and constitutional, until it was shown not to be so by the Supreme Court. Mr Taylor relied in this context on the statement of unconstitutionality in *Grant v The Queen supra* quoted above. Again, this was part

of the appellant's submission that there was no constitutional duty on the executive or the legislature to update a law and, accordingly, no entitlement to redress under the Constitution if that did not happen.

39. I do not accept this submission. The doctrine of the presumption of constitutionality, namely that an enactment is presumed to be constitutional unless it is shown to be unconstitutional (see paragraph 15 of *Grant)*, cannot, as a matter of construction of the Constitution, prevent a plaintiff from making a claim for redress under section 15 in respect of a *past* contravention of his rights under the Constitution, simply because, at the time of making his claim, there has been no previous declaration of unconstitutionality by the Supreme Court. That point is borne out by the wording of section 15(1), which provides:

> *"If any person alleges that any of the foregoing provisions of this Chapter has been … contravened in relation to him, then … that person may apply to the Supreme Court for redress." [My emphasis.]*

There is no suggestion that such a person is precluded from obtaining financial redress in respect of past breaches, and can only obtain redress by way of declaration. Nor does the decision in *Grant* provide any assistance to the appellant. That case held that admission of hearsay evidence did not breach the relevant sections of the Jamaican Constitution. In referring to the presumption of constitutionality, the Privy Council did not suggest that, even if such admission had breached the Constitution, the trial court, the Court of Appeal or the Privy Council would not intervene, or could not have intervened, because, at the date of the criminal trial, no prior declaration of unconstitutionality had been made.

40. It follows that I reject Mr Taylor's submission that the prosecutor and the Magistrates' Court were bound to consider sections 3 and 3A of the 1973 Act or the statutory definition of obscenity, as lawful, constitutional and enforceable before those provisions were challenged, or Hellman J. delivered his judgment. Moreover, the fact that the respondent made no submission of "no case to answer" at his criminal trial is, in my judgment, irrelevant.

41. I likewise gained no assistance from the cases of: *Fay and Payne v The Governor and the Bermuda Dental Board* [2006] Bda LR 65; and ibid [2006] Bda LR 72 to which Mr Taylor referred. In that case, Kawaley J concluded that the plaintiffs' constitutional rights to a fair hearing of disciplinary complaints against them under relevant dental professional regulations had been breached. That was the case even though the relevant statutory provisions had been enacted before the Constitution came into force, and that no claim at common law or for judicial review lay against the Governor. He summarised his conclusions (so far as material) as follows:

> *"95. The Dental Practitioners Act 1950 and the Dental Hygienists Regulations 1950 are inconsistent with the constitutional right to a fair hearing before an independent and impartial tribunal for the determination of civil rights and obligations, which right is guaranteed by section 6(8) of the Bermuda Constitution. This is because sections 13, 14 and 16 of the Act and regulation 8 of the Regulations provide for disciplinary proceedings to be instituted by and*

> *adjudicated by the Dental Board, which is effectively required to act as a judge in its own cause. The Board is manifestly not an independent and impartial tribunal, applying the common law rules of natural justice as fortified by their constitutionally protected status under section 6(8) of the Constitution.*
>
> *96. The Applicants would not be able to complain of the fact that the procedure before the Board infringed their section 6(8) right to an independent and impartial tribunal if the statutory provisions conferred upon them a right of appeal (including the right to a full rehearing on the merits) to a tribunal which complied with section 6(8) of the Constitution. But the relevant statutory provisions, including section 25 of the 1950 Act and regulation 12 of the 1950 Regulations only create a right of appeal to the Governor. They do not confer a right to a full rehearing, and the Governor does not qualify as an "independent and impartial tribunal" in any event.*
>
> *97. The appeal provisions do not confer an absolute right to be orally heard at all, nor do they entitle an appellant to a full rehearing. In addition, the appeal provisions confer a right of appeal to the Governor, the Head of the Executive in Bermuda, while the scheme of the Constitution reflects a clear separation of powers between the judicial and the executive and legislative branches of government, and does not contemplate the Governor performing such a judicial role. There is, accordingly, no appeal under the applicable legislation to a tribunal which is independent and impartial in the requisite constitutional sense.*
>
> *98. The Applicants are therefore entitled to a declaration that the offending statutory provisions contravened their constitutional fair trial rights, and to an order setting aside the adverse disciplinary decisions of the Dental Board and the Governor made on July 28, 40 2004 and September 24, 2004, respectively, to the extent that relief was not granted in their judicial review application herein. Because the relevant statutory provisions are existing laws enacted before the Constitution came into force, the Court is also obliged by section 5(1) of the Bermuda Constitution Order to indicate how the legislation should be adapted or modified so as to conform to the Constitution. Subject to hearing Counsel, if desired, the Court is also minded to declare that the references to an appeal to the Governor should be modified so as to refer instead to an appeal to this Court, and to include a right to a full rehearing of any case heard before the Board."*

42. That analysis is inconsistent with the argument that no constitutional redress can be awarded in respect of earlier breaches of a claimant's constitutional rights, where there has been no prior declaration of unconstitutionality prior to the events complained of.

43. Accordingly, I would not allow the appeal on this ground.

Quantum of damages was too high

44. Mr Taylor submitted that, in any event, the quantum of damages was too high and that Bell AJ had erred in law, or misdirected herself, in awarding damages which were excessive and wholly disproportionate. I cannot agree. Leaving on one side the technical objection that there was no claim in the Notice of Appeal for this court to vary the order for damages, as opposed to quashing it, Mr Taylor's challenge appears only to have been addressed to the constitutional element of the damages, i.e. the $25,000.

45. I see no reason to reverse the findings of Bell AJ as to quantum. It is trite law that an appellate court will be disinclined to reverse the finding of a trial judge as to the amount of damages, merely because it thinks that if it had tried the case in the first instance it would have given a lesser sum. This was emphasised by the English Court of Appeal in *Flint v Lovell* [1935] 1 KB 354, in a passage approved by the Privy Council on numerous occasions (most recently in *Cadet's Car Rentals v Pinder* [2019] UKPC 4, at [7]):

> *"[T]his Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."*

45. In my judgment, Bell AJ correctly applied the relevant principles of law and, on the evidence before her, which she carefully considered, was perfectly entitled to conclude:

(a) that $100,000 was an appropriate sum to award the claimant by way of *compensatory* damages to recompense him for the distress, humiliation, embarrassment, loss of personal dignity and hurt feelings he had suffered and continued to suffer, and

(b) that $25,000 should be awarded by way of additional *vindicatory* damages to vindicate the importance of his constitutional rights which had been breached.

46. The principles relating to the nature of redress for breach of a person's constitutional rights are clearly set out in *Maharaj v. A.G. of Trinidad and Tobago (No 2), Merson v Cartwright* and *Ramanoop*, in the passages quoted by the judge at paragraphs 32, 37 and 38 of her judgment. In summary (and without any attempt to restate them):

(1) "redress" means "Reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this"; and can clearly include a monetary payment; see per Lord Diplock in *Maharaj*;

(2) if the person wronged has suffered damage, the court may award him compensation; the comparable common law measure of damage will often be a useful guide in assessing the

amount of this compensation, but that measure is no more than a guide, because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the comparable cause of action at law; see per Lord Nicholls in *Ramanoop;*

(3) the nature of the damages awarded may be compensatory but should always be vindicatory, and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount; see per Lord Nicholls in *Maharaj* and per Lord Scott in *Merson*.

47. It is clear that the judge applied these principles; see paragraphs 32-39 of her judgment. It was faintly argued by the appellant in his written submissions that they did not apply to the Bermuda Constitution, because of differences in the language between the terms of the former and those of Trinidad and Tobago and the Bahamas. These submissions were rightly not developed in oral argument. The fact that the Bermuda Constitution is enacted in slightly different terms from the Constitutions of Trinidad and Tobago and that of the Bahamas is irrelevant. The approach to redress should clearly be the same in Bermuda cases. I cannot fault the judge's articulation as to the approach to be applied by trial judges considering the quantum of any redress for infringements of constitutional rights under section 15 of the Bermuda Constitution, as set out in paragraph 40 of her judgment.

48. The judge was also, in my view, correct to adopt, by way of analogy, the approach of Eady J in *Mosley v. News Group Newspapers Ltd* to the issue of the quantum of compensatory damages in privacy cases, in order to arrive at an appropriate figure to compensate the respondent. It was the obvious comparator.

49. Nor is there any other basis to upset the judge's conclusion as to the quantification of the compensatory or vindicatory awards.

50. Accordingly, I would dismiss the appeal under this head.

The remaining arguments

51. Mr Taylor's remaining arguments may be dealt with briefly. I do not propose to deal with all the points he made in his written submissions.

52. Complaint was made by the appellant that it was wrong for Bell AJ to make a finding regarding the DPP and HM Customs without them being heard. That is an irrelevant point so far as the appellant is concerned. The notion that that finding "breached the appellant's rights to a fair hearing" is fanciful. Accordingly, I reject it.

53. A further argument was raised (at least in the appellant's written submissions), that Bell AJ erred in law by awarding damages against the appellant (Minister responsible for Telecommunications) who, it was said, had no connection, in respect of matters of the Constitution, with bringing legislation into effect. It was contended that the Legislature enacted the 1973 Act, which came into effect after the enactment of the Bermuda Constitution in 1968, and that, accordingly, all the sections in the 1973 Act were presumed to be constitutional when

the Act was passed. So, the appellant argued, no determination could have been made by Bell AJ that the appellant (i.e. the Minister of Telecommunications) was liable in damages for the legislative enactment of the 1973 Act. Thus, it was said, Bell AJ erred in awarding damages against the appellant.

54. In my view, this argument has no substance. The claim does not lie against the legislators for passing an unconstitutional law. As was demonstrated by the Privy Council decisions in *Maharaj* and *Gairy v AG of Grenada*, it is only necessary to identify the most appropriate figure to answer the claim. A claim for constitutional redress is not against a particular public official but against the government as a whole, and it is only necessary to identify the most appropriate figure to answer the claim. As held by Kawaley CJ in *Harkin v Commissioner of Police [2015] Bda LR 105*, *"When public authorities are being sued, the question of who the right defendant is may often be somewhat academic. The central concern is to ensure that the appropriate Crown servants responsible for the most directly involved emanation of the Crown (be it a Government Department or Ministry) are able to participate in the furnishing of instructions, and are not accidentally left out in the cold. Thus, the Crown Proceedings Act provides that, for actions in tort, the Attorney-General may be sued in cases of doubt. The Crown Proceedings Act 1966 has no formal application to public law proceedings, be it applications for judicial review or complaints under the Human Rights Act…."*

55. In the present case, the respondent's claim was for redress that his constitutional rights had been violated. He sought redress from the government; the appellant was clearly the most appropriate, or, at least, an appropriate, defendant to that action whom, as a litigant in person, the respondent identified. In my judgment, it could not be said that the appellant, being one of many emanations of the Crown, and with conduct over obscenity matters, was not an appropriate party to join to the respondent's claim.

56. Moreover, as Mr Sanderson submitted, the question as to who is a proper party is a procedural point, which ought to have been raised as an objection in the Supreme Court. In the circumstances of this case, I do not regard it as permissible for this procedural point to have been taken on appeal for the first time. It ought to have been raised before in the Supreme Court. If there had been any merit in the objection, it could have been cured by substituting the appropriate Minister or other Crown servant responsible.

57. In my judgment, none of these further points provide the appellant with any justifiable grounds to support his appeal.

Disposition

58. It follows that I would dismiss this appeal.

SMELLIE JA:

59. I agree. I too would dismiss the appeal.

CLARKE P:

60. I concur with my Lady's disposition. Accordingly, the appeal will be dismissed and the stay imposed by the Chief Justice on 5 December 2019 is lifted. The parties should submit a draft order to the Court by no later than 12 noon on Tuesday, 17 November, including any proposed order(s) as to costs. The draft order should be agreed, if possible, but, in the absence of agreement, the parties should identify the areas of disagreement and provide written submissions in support of their respective positions by the said date. The Court will then determine any outstanding issues on the papers.