

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV 2023/0143

BETWEEN

WADE SMITH

CLAIMANT

AND

THE SENIOR MAGISTRATE

FIRST DEFENDANT

COMMISSIONER OF POLICE

SECOND DEFENDANT

Appearances: Terrence Williams and Karlene Thomas-Lucien, instructed by Chase Law and Co. for the Claimant
Nicosie Dummett, Principal Crown Counsel and Shonice Warner, Crown Counsel for the First and Second Defendants

Re-issued: 14th May, 2024
2024: February 16th
April 24th

DECISION

[1] **YOUNG J:** This is a claim for judicial review. The parties all agree that on the 14th February, 2023 the Claimant's home and vehicle were searched by police on the execution of four search warrants issued under the hand of the Senior Magistrate on an ex parte application made by the Commissioner of Police. During that search a number of items were taken including two cellular phones and two computers. The Claimant was arrested that morning but has not been charged.

- [2] Most items were returned to the Claimant by 6th June 2023 after the application for leave was filed herein. Only the electronic devices remain and those are kept in the Court's possession along with any data recovered through interrogation allowed pursuant to two of the issued warrants.
- [3] The Claimant alleges that the Defendants then failed to disclose the factual or legal basis for the issuing of the warrants. Notwithstanding the Claimant's repeated request, the Defendants provided none of the information used to support the application for the warrants and the First Defendant furnished no reasons for issuing same. The warrants themselves lacked sufficient specificity as to subject property, data and information. Again, despite repeated requests to the First Defendant there was no subsequent inter partes hearing held to determine whether the property seized ought to be retained by the Second Defendant.
- [4] The Claimant, therefore, sought to quash the First Defendant's order to issue the warrants, have the warrants and the retention of his property seized declared unlawful and/or unconstitutional and have all the items taken including any data extracted from the phones and other devices returned to him. Finally, he claimed damages (compensatory, vindictory and aggravated) and costs.
- [5] The Defendants counter that the claim is now academic as the warrant has been spent, the items returned, save for the electronic devices and any possible redress now lies in the realm of tort for trespass and detainment.
- [6] They added that in any event, the Claimant failed to plead any facts relating to the validity of the warrant and the authority of the Second Defendant to issue the warrant. He also failed to present any evidence that the warrants were unlawful or contravened his fundamental rights. There was simply no claim to answer for a breach of section 19 or any other section of the constitution. The matter ought to be dismissed in its entirety.

Preliminary Issue:

- [7] The Defendants raised that the Claimant ought to seek his remedy in Tort. As stated in **Magnum Investment and R (Energy Financing Team Limited)**¹ a person affected by a warrant is to seek his remedy in judicial review. That is placed quietly to bed.

The Issues:

- [8] There had originally been an allegation that the search had been conducted partially outside the Claimant's presence and without an inventory being prepared. This was abandoned during the hearing.
- [9] The Claimants issues are therefore now confined to the following:
1. Is the search and retention of the Claimant's property unlawful and/or unconstitutional.
 - A. Did the Defendants fail to disclose the factual or legal basis of the warrants
 - B. Was the warrant sufficiently precise
 - C. Did the Defendants fail to bring or cause to be brought the seized property so that an inter partes hearing could be conducted to determine whether the items should be retained
 2. What remedies, if any, are the Claimant entitled to

Is the search and retention of the Claimant's property unlawful and/or unconstitutional

A. Did the Defendants fail to disclose the factual or legal basis of the warrants

The Evidence:

- [10] The Claimant's evidence is that items were removed from his premises by the police after they conducted a search. These included 2 cellular phones, 2 iPads, a BVI and UK Passport, a USA passport, and a bank card. His Counsel made several requests by letter to the First Defendant for a hearing or a date when the items seized would be returned. "They never received an adequate response."

¹ VG 2018 HC 8

- [11] All of the items were returned by the police on the 1st June, 2023 except the two cellular phones and 2 iPads. He has never been informed of the legal basis under which the warrant was issued and the items seized were never brought before the Senior Magistrate.
- [12] DC Bolude in her affidavit confirmed that she went to the Claimant's home to arrest him and to conduct a search pursuant to four warrants issued under the hand of the Senior Magistrate. Those warrants had been issued after a more than one hour long hearing. During that hearing, DC Bolude had presented a four page document setting out the findings of the investigation into payments made to a named Entity between the period of September 2020 to January 2021. The Senior Magistrate also took additional oral evidence from her, asked questions and appeared to take contemporaneous notes.
- [13] The First Defendant attested that before issuing the search warrants she convened a hearing on the 13th February, 2023 which was over an hour long. There, she was presented with information on oath from DC Bolude which DC Bolude extracted from a typed document. DC Bolude exhibited a document to her affidavit which she confirmed she presented to the First Defendant. Her testimony remains uncontested.
- [14] The Senior Magistrate made no mention of taking notes but said she kept a copy of the typed document and four Form 4A forms were also presented. The affiant's reference to these forms as warrants (paragraph 9) must be in error as she explains at paragraph 12 that they were "confirming of information which the informant provides under oath to procure the said warrants".
- [15] The Senior Magistrate continued that she also asked questions to clarify the testimony being given. She could not recall all that was asked or answered. She found the evidence given was sufficient to satisfy her:
- "that there was reasonable cause to believe that there was property whatsoever on or with respect to the commission of the offences of Breach of Trust and Making a False Claim by a Public Officer in relation to the Claimant. I was satisfied that that the data contained on the devices situate at his premises at Fresh Water Pond, West End, Tortola, Virgin Islands and in his Nissan Titan as aforesaid would assist the police in their investigation."

- [16] Consequently, she issued the four warrants which respectively authorised the search of the Claimant's apartment, vehicle and the interrogation of the data found on any devices found in either his car or his apartment.
- [17] Around the 17th February, 2023, about three days after the warrants had been executed, the Senior Magistrate received correspondence, copied to the Second Defendant, from the Claimant's Attorney. It requested disclosure of the information under oath, which had been presented to her for the issuance of the warrants and an inter partes hearing to determine "a date for the return of our client's personal items." It also referenced section 37(1) of the Magistrates' Code of Procedure Act and enquired of a date when the matter would be called up before her.
- [18] Three days later (20th February) the Senior Magistrate instructed the Court Manager to seek from the Claimant's counsel the relevant law which grounded his application for disclosure of information. The Court Manager complied.
- [19] She received a response on the 22nd February which cited section 19 of the Constitution (which provides for the protection of family life and privacy of home and other property) and the case of **Commissioner of Inland Revenue v Tucker**². The Senior Magistrate informed that although a quotation seemingly from the judgment was included in the letter, the case itself was not attached.
- [20] The final paragraph of that letter explained:
- "Having regard to the foregoing, the information laid to obtain the warrant is being requested by our client to determine whether its issuance was indeed lawful."
- Please be guided accordingly.
- We look forward to your prompt response."

² [1979] UKHL J1213-1

- [21] That same day the Senior Magistrate asked the Court Manager to follow up with Counsel for a copy of the case cited but heard nothing further. There is exhibited correspondence dated 20th February, sent by the Court Manager, to counsel, in terms as she had been instructed. Around the 17th April, 2023 the Senior Magistrate again asked the Court Manager to follow up.
- [22] The Court Manager sent an email to counsel seeking a copy of the case and the section of the Magistrate's Code of Procedure Act being relied on to request the inter partes hearing and to compel the attendance of the Commissioner of Police.
- [23] The Senior Magistrate in her affidavit referenced a letter of the 24th April from Counsel which she said attached the originally cited decision, noted a specific paragraph (one) and quoted a phrase. She stated that she was unable to find the quoted section (paragraphs 39 – 40 of her affidavit).
- [24] She referred the Court to her exhibit TNR 15. Although that exhibit is a letter dated the 24th April, it does not contain any of the information she stated it did. The particular contents are actually contained in an email dated the 25th April sent from Counsel to the Court Manager. It is not exhibited to the First Defendant's affidavit at all but can be found as part of WS3 an exhibit to Wade Smith's affidavit.
- [25] The Senior Magistrate added that it was only during these proceedings for judicial review that she saw the letters stated to have been sent by Counsel for the Claimant dated the 7th March, 13th April and 24th April. She, assuming there had been no response, had formed the view that the Counsel was simply not forthcoming with their legal arguments.
- [26] The letter dated 7th March informed that the authority requested had already been cited and again prayed the inter partes hearing and a prompt response. It was not copied to anyone. By that of the 13th April, a renewed request for the inter partes hearing and a prompt response was made. This was copied to the Second Defendant.

[27] The Senior Magistrate reasoned at paragraph 38 that even around the time of the correspondence of the 13th April:

“(g)iven the sensitivities of this matter, as the evidence disclosed to me was disclosed in confidence and for use of the warrant as an investigative tool in preliminary investigations, I instructed the Court Manager to cease communication with the Claimant’s Legal Practitioners.”

[28] The 24th April, 2023 letter stated and I reproduce it almost in full as its contents are crucial:

“Dear Mrs. Williams-Sylvester,

Re: Mr. Wade Smith – Search Warrants

Reference is made to your electronic mail of the 17th instant.

We continue to act for Mr. Wade Smith.

The RVIPF purportedly acting under the warrant forcibly entered Mr. Smith’s premises and seized items without observance of the ordinary relevant protections.

First, there was no outline of the statutory authority for the warrant and any disclosure of the information under which that the warrant was procured. It is respectfully submitted that such information ought not to be withheld unless the state makes a successful public interest immunity application, in which we would have a right to be heard (**Haralambous v St Albans Crown Court [2018] AC 236**).

Secondly, our client has not been given reasons for the order of the warrant (**R (Glenn & Co. (Essex) Ltd) v HM Commissioners for Revenue and Customs [2018] AC 236**).

Thirdly, the RVIPF has not enumerated the items taken (**Mickiel Robbin v DPP and AG Criminal Case No. 4 of 2023 BVI delivered 31 March 2023**).

Fourthly, there has been no magisterial review as regards the items seized and retained by the RVIPF. This review is required by s. 37 of the Magistrate’s Code and its omission robs the process of any oversight by the court, and submission by Mr. Smith, with regards to the legality of the retention of each item.

Given the foregoing, we humbly but urgently request:

- 1) Disclosure of the information in support of the warrant;
- 2) A copy of the court’s reasons for ordering the warrant; and
- 3) an inter partes hearing with regards to the retention or return of the items seized by the RVIPF.”

- [29] This letter was copied to the Director of Public Prosecutions as well as the Second Defendant.
- [30] Having seen the letter of 24th April the Senior Magistrate commented at paragraph 42:
“I also now realise that the Claimant made additional claims in their correspondence of 24th April, 2023. They also now relied on a new set of authorities. While these lengthy authorities were attached, again I am not directed to the paragraphs in the judgments that I ought to have directed my attention to ascertain the legal principles applicable to the facts at bar.”
- [31] Suffice it to say that no inter partes hearing was held and nothing was shared with the Claimant until the Claim Form in these proceedings were filed and the Defendants filed affidavits in Response with exhibits.
- [32] The Senior Magistrate also explained (in her affidavit) her decision not to disclose the information requested or to hold the inter partes hearing. It appears that when the first request was made seeking disclosure she considered that only three days had passed since the search and seizure so the police would not have had a reasonable opportunity to examine any of the items to determine their evidential value.
- [33] She then added that in her twelve (12) years as a magistrate she had never interpreted section 37 of the Magistrate’s Code as imposing a mandatory requirement to have an inter partes hearing after a warrant had been executed.
- [34] The request was unfamiliar and unusual and she was not convinced by what was provided by Counsel for the Claimant that the application was properly grounded in law. It was Counsel’s obligation to provide the legal authority on which he relied, to reference and direct the court to the relevant paragraphs of the 26 page decision quoted and the other lengthy authorities provided.
- [35] She determined that it would not have been proper to disclose the information provided to secure the warrants as it was of a sensitive nature, had been disclosed to her “in confidence” by the police and she did not “think it proper to breach their confidence by making disclosure of their preliminary investigations to the Claimant...”

[36] She submitted that disclosure at such an early stage could have jeopardized or hampered the investigation. Particularly so since the investigation also involved persons other than the Claimant and that investigation was not as advanced as the Claimant's. In her "considered opinion, the RVIPF would have been able, as the investigators, to determine how much of the information could be disclosed without hampering their investigation."

[37] In any event she remained unaware of any mandatory requirement under the Act to conduct the requested review and so did not consider it necessary to do so.

[38] She concluded that the absence of written reasons is not fatal to the issuance of the search warrant. She then briefly offered her reasons. They spanned 5 paragraphs, four of which related to her reasonably held belief that the offence or offences may have been committed. There was only one paragraph which spoke to her reasonable belief that there was property with respect to the offence, or offences, which was in the Claimant's apartment, his vehicle or stored on his devices.

[39] Paragraph 22 of her affidavit stated:

22. I issued the warrants because pursuant to Section 38 of the Magistrate's Code, I was satisfied on the evidence of DC Bolude given on oath that there was reasonable cause to believe that there was property whatsoever on or with respect to the commission of the offences of Breach of Trust and making a False Claim by a Public Officer in relation to the Claimant. I was satisfied that the data contained on the devices situate at his premises at Fresh Water Pond, West End, Tortola, Virgin Islands and in his Nissan Titon as aforesaid would assist the police in their investigations.

[40] The Second Defendant has never explained why there had been no disclosure to the Claimant, but in these proceedings DC Bolude disclosed the document she had presented to the First Defendant at the ex parte hearing and the basis on which she sought the search warrant.

[41] There is still no evidence before the court of what questions were asked or responses given during the ex parte hearing.

The Statutory Framework for the issue of a search warrant:

[42] Section 9 of the Constitution guarantees certain fundamental rights of every person in the British Virgin Islands. Those rights are to be applied:

“subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-

- (c) protection for private and family life, the privacy of the home, and other property and from deprivation of property save in the public interest and on payment of fair compensation.

[43] Section 19(1) reads:

Protection of private and family life and privacy of home and other property

- (1) Every person has the right to respect for his or her private and family life, his or her home and his or her correspondence, including business and professional communications.
- (2) Except with his or her own consent, no person shall be subjected to the search of his or her person or property or the entry by others on his or her premises.
- (3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society –
 - (a) in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development of mineral resources, or the development or utilization of any other property in such manner as to promote the public benefit;
 - (b) for the purpose of protecting the rights and freedoms of other persons;
 - (c) to enable an officer or agent of the Government of the Virgin Islands, a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything on them for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government of the Virgin Islands or that authority or body corporate, as the case may be;
 - (d) to authorise, for the purpose of enforcing the judgment or order of a court in any proceedings, the search of any person or property by order of a court or the entry upon any premises by such order; or
 - (e) for the prevention or detention of offences against the criminal law or the customs law.

[44] The Magistrate's Code of Procedure Act directs that:

21. The Magistrate shall have jurisdiction –

(b) to issue search warrants as hereinafter provided;

[45] It is then provided at section 37 as follows:

Search warrant

37. (1) Where a Magistrate is satisfied on evidence on oath that there is reasonable cause to believe that any property whatsoever on or with respect to which an offence has been committed is in any place or places, he or she may grant a warrant to search the place or places for the property and if the property or any part of it is found, **to bring the same before the Magistrate granting the warrant or some other Magistrate.**

(2) A search warrant may be issued and executed at any time, and may be issued and executed on a Sunday.

(Emphasis mine).

The Parties' Case:

[46] Counsel for the Claimant relied primarily on **Magnum Investment Trading Corporation v The Attorney General of the British Virgin Islands** for his contention that not only must a Magistrate give reasons for the decision to issue a search warrant and while the late furnishing of reasons may be received, such reasons must always be considered with caution.

[47] He postured that in the present case the Magistrate's refusal to disclose her reasons including the evidence on which she made her decision denied the Claimant the ability to determine whether or not the validity of the warrant ought to be disputed. When reasons were belatedly offered, they consisted of only the conclusions drawn without the analysis applied. This is insufficient to justify the issuance of the warrant. Following **R (Van der Phil) v Crown Court at Kingston**³ the warrant ought to be quashed.

[48] Counsel for the Defendants maintained that the Senior Magistrate had the legal authority to issue the search warrants. Although the Senior Magistrate had given her reasons late, the evidence

³ DC) [2013] 1 WLR 2706 at 96

revealed that she had “conducted the ‘specific assessment’ embodied in **Shankeil Myland v Commissioner of Police et al**⁴ (the Myland test described below). Her reasons were not merely conclusions drawn and the mental exercise she attested to have undertaken has not been disproved. Moreover, failure to provide reasons or timely reasons could not invalidate the warrant.

- [49] The decision of the Commissioner of Police not to disclose the information could not invalidate the warrant either since the Commissioner of Police can not invalidate the Magistrate’s decision making process.

The Court’s Consideration:

- [50] It is undisputed that the Senior Magistrate did not disclose to the Claimant the information she considered nor her reasons for issuing the search warrants prior to the issuing of this claim. The Second Defendant as well did not disclose to the Claimant the information proffered in support of the ex parte application made for the search warrant before the claim was issued. The Second Defendant’s only explanation seemed to be that DC Bolude had never received any correspondence from Counsel from the Claimant although they had spoken.
- [51] It is important to be reminded early that a search warrant is a necessary yet serious infringement into an individual’s reasonable expectation of privacy and property. Section 19(3) of the Constitution limits such an intrusion to where it is reasonably justifiable in a democratic society and where it is authorised by order of a court.
- [52] **Thanh Long Vu v Her Majesty the Queen and the AG of Ontario et al**⁵ assured that one must therefore strike “a balance between the right to be free of state interference and the legitimate needs of law enforcement.”

- [53] The Court explained:

“[22] First, the police must obtain judicial authorization for the search before they conduct it, usually in the form of a search warrant. The prior authorization requirement ensures that,

⁴ GDAHCV 2012/0045

⁵ (2013) 3 RCS 657 at 669 (paragraph 21)

before a search is conducted, a judicial officer is satisfied that the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance the goals of law enforcement.

Second, an authorized search must be conducted in a reasonable manner. This ensures that the search is no more intrusive than is reasonably necessary to achieve its objectives. In short, prior authorization prevents unjustified intrusions while the requirement that the search be conducted reasonably limits potential abuse of the authorization to search."

- [54] Justice Ellis, as she then was, was guided by the **Vu** case when in **Shankeill Myland and Commissioner of Police** she opined:

"97. The Court is satisfied that section 3 and 7 of the Constitution vest all individuals with the right to be free from unreasonable search and seizure as well as the relevant legislative provisions of the Code seek to strike an appropriate balance between the right to be free of state interference and the legitimate needs of law enforcement. This balance is generally achieved in two main ways. First, the police must obtain judicial authorization for a search before they conduct it, usually in the form of a search warrant. Second an authorized search must be conducted in a reasonable manner, ensuring that the search warrant is no more intrusive than is reasonable necessary to achieve its objectives."

- [55] The framework under which the Senior Magistrate acted is as set out in the Magistrate's Code of Procedure Act. Section 21(b) prescribes the magistrate's jurisdiction to issue search warrants while section 37(1) circumscribes the circumstances under which a search warrant must issue. It is quite clear that the magistrate must not only have reasonable cause to believe that an offence had been committed but also that property relating thereto is located in a particular place.

- [56] This ensures that the warrant is reasonably justifiable and a warrant must be reasonably justifiable to be constitutional **R (Energy Financing Team Ltd.) v Bow Street Magistrates' Court and others (Practice Note)**⁶. The very wording of section 37(1) empowers the magistrate to issue a warrant but requires the Magistrate to guard the public interest from the risk of excessiveness and arbitrariness in a search and the unlawful invasion of privacy. This is not to be taken lightly.

⁶ [2006] 1 WLR

[57] **Sweeney v Westminster Magistrates Court and another**⁷ laid down the principles relating to the legality of a warrant. Although the principles rely on PACE for interpretation the guidance translates well and ought to be applied. At paragraph 12 the court provided:

LEGALITY OF THE WARRANT – CASE LAW

The principles relating to the legality of a warrant are identified in the following authorities:

“R (on the application of S, F, and L) v Chief Constable of the British Transport Police, the Southwark Crown Court [2003] EWHC 2189 (Admin). The court noted 37 that PACE seeks to reconcile two important and contrasting public interests identified by Bingham LJ in **R v Crown Court at Lewes ex parte Hills [1991] 1993 Cr App Rep 60, 66.**

‘There is, first of all, a public interest in the effective investigation and prosecution of crime. Secondly, there is a public interest in protecting the personal and property rights of citizens against infringement and invasion. There is an obvious tension between these two public interests because crime could not be most effectively investigated and prosecuted if the personal and property rights of citizens could be freely overridden and total protection of the personal and property rights of citizens would make investigation and prosecution of many crimes impossible or virtually so.’

[58] At paragraph 38 it was stated:

“Courts have always had a vital role in ensuring that any necessary invasion in the privacy of citizens is properly controlled. The power of the judiciary to scrutinize independently the requests of officers of the executive to enter a persons premises, search his belonging and seize his goods is a vital part of this role. Thus, Lord Hoffman explained in A-G for **Jamaica v Williams [1998] AC 351 at 358** that:

“The purpose of the requirement that a warrant be issued by a Justice is to interpose the protection of a judicial decision between the citizen and the power of the State. If the legislature has decided in the public interest that in particular circumstances it is right to authorise a policeman or other executive officer of the State to enter upon a person’s premises, search his belongings and seize his goods, the function of the Justice is to satisfy himself that the prescribed circumstances exist. This is a duty of high constitutional importance. The law relies upon the independent scrutiny of the judiciary to protect the citizen against the excesses which would inevitably flow from allowing an executive officer to decide for himself whether the conditions under which he is permitted to enter upon private property have been met.”

⁷ [2014] EWHC 2068

[59] At paragraph 45 the court dealt with the Information and stated:

(ii) It must show, for each of the relevant statutory requirements, how that requirement is satisfied by setting out all the relevant facts relied on including all facts and matters which are said to show that a particular 'reasonable belief' is justified. It is not enough to assert that a particular requirement is satisfied without explaining how it is said to be so. It is only when the judge can review the facts set out in the Information that he can decide for himself if a requirement has actually been satisfied. Furthermore, it is only then that a party wishing to challenge the warrant can decide whether the order could be challenged because of a failure to satisfy that particular requirement. Hence, an assertion that there are 'reasonable grounds' for a belief will require that basis of the belief to be explained in detail.

[60] The consideration and decision to issue a warrant is serious and never to be treated as a formality (**The Queen on the Application of AB et al v The Chief Constable of Wiltshire Police**)⁸. There ought to be rigorous scrutiny of the information provided so that the Magistrate satisfies himself of the statutory requirements.

[61] It is, therefore, proper to presume that when a warrant is issued, any search and seizure conducted in compliance is both reasonable, adequate and proportionate. This presumption can, however, be rebutted. As stated in the **Myland** case at paragraph 45 to 46:

[45] It is in any event clear that there is a rebuttable presumption in law that all things are done correctly and properly. This presumption favours public bodies in the decision making *process*. So that in the absence of any evidence of mala fides on the part of the administrative body or evidence that it has acted without lawful authority, it would be pure speculation and wrong in law to draw the conclusion that the relevant statutory requirements have not been met.

[46] It is also clear that in displacing the presumption, the Claimant bears the burden of proof, on a balance of probabilities. The Court is not satisfied that the Claimant has in any way discharged this significant burden. Certainly, it is not for the Defendant to prove the validity of the warrant or the process of obtaining the warrant. This is especially so in circumstances where the Claimant has by his pleadings and evidence filed in support, provided no indication of a nature of the challenge proposed to be raised in that regard. “

⁸ [2011] EWHC 3385

- [62] In the case at bar the Defendants boldly state that the Claimant has not discharged this “significant burden” of displacing the presumption. But what facts could the Claimant really rely on, where until the claim was filed, he had sought and been denied disclosure at every turn for reasons which are non-existent or simply do not pass muster.
- [63] The Defendants have never denied that a right to disclosure exists. What the Senior Magistrate revealed was doubt about the requirement, the changing requests being made by Counsel, Counsel’s unhelpfulness in extracting the relevant paragraphs from the various lengthy authorities referenced and presented and her belief that if she divulged what had been told to her in confidence she would be in breach of that confidence and the investigation might somehow be prejudiced.
- [64] **R (Energy Financing Team Ltd) v Bow Street Magistrates’ Court (Practice Note)**⁹ outlined a number of recognised general conclusions regarding warrants at paragraph 24. Number 10 of which informed and is important to state here:
- “Often it may not be appropriate even after the warrant has been executed, to disclose to the person affected or his legal representatives all of the material laid before the District Judge because to do so might alert others or frustrate the purposes of the overall enquiry, but the person affected has a right to be satisfied as to the legality of the procedure which led to the execution of the warrant, and if he or his representatives do ask to see what was laid before the District Judge and to be told about what happened at the hearing, there should, so far as possible, be an accommodating response to that request. It is not sufficient to say that the applicant has been adequately protected because discretion has been exercised first by the Director and then by the District Judge. In order to respond to the request of an applicant it may be that permission for disclosure has to be sought from an investigating authority abroad, and/or that what was produced or said to the District Judge can only be disclosed in an edited form...”
- [65] This Senior Magistrate’s refusal to disclose the evidence on which she had made her decision to issue the warrant and her reasons was clearly not grounded on any evidence provided by the police or any reasoned decision made on the consideration of an application. It was grounded solely on her intention to protect the investigation and her admitted unfamiliarity with the process.

⁹ [2006] 1 WLR 1316

- [66] Although the Second Defendant did not make any disclosure themselves, they had provided nothing to the Senior Magistrate that the evidence should not be disclosed or that the investigation needed protection beyond the issuing of the warrant. That seemed to have been the Senior Magistrate's own assumption.
- [67] The correct procedure as outlined in **Commissioner of Police v Bangs**¹⁰ presented by the Defendants, should have been applied even in the absence of statutory rules. This rests firmly on principles of fairness and natural justice. Once the Claimant had made his request for disclosure known to the Defendants, there ought to have been an application by the Second Defendant to the Senior Magistrate or another magistrate to determine whether there should be a refusal of disclosure in the public interest. It is possible to have such a hearing ex parte if the circumstances so require. But it could also have been done at an inter partes hearing when the items seized were returned to court (this is discussed in more detail below).
- [68] It is here that the decision to withhold disclosure could have properly been made. The reasons given by the Senior Magistrate could have been limited if necessary, but the Claimant had a certain right to know the legal and factual basis of the warrants.
- [69] Rather, the Senior Magistrate merely directed her Court Manager to cease communication with Counsel and issued no reasons whatsoever. She, unfortunately, ignored the safeguards intended by the Constitution and the Act and diminished any intended fairness in the process. She wittingly or unwittingly yielded her decision making function to maintain a confidence.
- [70] The Senior Magistrate's refusal to disclose her reasons was unlawful. This was made more troubling by her reasons not to do so. The sentiments expressed in relation to a Lay Magistrate's refusal to give reasons following the issue of a search warrant in **The Matter of an Application by Martin O'Neill for Judicial Review**¹¹ bears repeating: "Parliamentary intent and the need for transparent compliance cannot be treated with the degree of casualness exhibited by the respondent in this

¹⁰ [2014] EWHC 546 (Admin)

¹¹ [2017] NIQB 37

instance if public confidence is to be preserved in a matter as solemn as the right to enter private property.”

The Disclosure at trial:

- [71] The Claimant in this case has never denied that the power to issue a search warrant exists. What he has said quite clearly is that he was unable to even consider and determine for himself whether or not the warrants had been properly and lawfully issued since he had been furnished with neither the information tendered by the Second Defendant nor the Senior Magistrate’s own assessment of what had been tendered.
- [72] Counsel for the Defendants was swift to indicate that the burden of rebutting the presumption of lawfulness thereby proving the invalidity of the warrant lay with the Claimant. This Claimant had been left in the unenviable position of being unable to even provide the type of evidence which the court in the **Myland** case anticipated.
- [73] He certainly could not say whether the **Myland** test had been properly or conducted at all. He had been stonewalled at every turn, he could not test the lawfulness of the proceeding until disclosure was given and reasons shared.
- [74] By way of reasons, the Senior Magistrate eventually stated in her affidavit that she took evidence on oath and satisfied herself that there was reasonable cause to believe an offence had been committed and evidence of that offence could be found at the home and vehicle of the Claimant. She however, provided nothing to the Claimant to support the assertion and conclusion that evidence of the offence could be found at the stated places.
- [75] In **Magnum Investments** relied on by the Claimant, the Court stated at paragraphs 167 – 169 “There can be no doubt that that (sic) a magistrate making a decision leading to the issue of a search warrant must give reasons for either granting or refusing the same.”

- [76] The Learned Judge in that case accepted that there was no statutory mandate to do so in the Criminal Justice (International Cooperation) Amendment Act, as do I, in relation to the Magistrate's Code of Procedure Act. Nonetheless the rationale remains unchanged. Giving reasons avoids challenges to the decisions made on the ex parte application, such as the one now before this court. It allows transparency in the system and constitutional fairness which is fundamental.
- [77] Justice Ellis, as she then was, explained what is expected from a magistrate at paragraph 171:
- “Applying this guidance in the present context, it is clear that a magistrate's reasons need not be elaborate but they should be recorded and ought to be sufficient to enable the subject of the warrant to understand why she would have been satisfied that the evidence justified its issue. There must be sufficient to identify the substance of any relevant information or representation put before the magistrate in addition to the written information. They should set out what inferences she has drawn from the material relevant to the statutory conditions governing the content and form of the warrant.....”
- [78] The reasoning given by the Senior Magistrate was, to my mind, not adequate. The Senior Magistrate did not present the notes she had taken but she explained, in some detail, why she felt an offence may have been committed by the Claimant.
- [79] However, nowhere in all that she stated did she explain why she believed there was any property with respect to the commission of the particular crime of breach of trust (the only offence stated on any of the warrants) at the Claimants home, in his vehicle or on his devices. There really only was stated the conclusions drawn in that regard.
- [80] This is indeed unsurprising since the very information presented by DC Bolude never addressed that issue. The duty is on the police to place all the necessary material before the court. DC Bolude explained in her affidavit that the investigation had “reached a critical point and the team believed that the Claimant was in possession of documents, financial documents, media devices, cellular devices, computers and CCTV at his home...” All this stated without any indication of the foundation on which this belief was grounded.

[81] The document which she said she presented to the court stated only “We strongly believe that Wade Smith is in possession of documents, financial documents, media devices, computers and CCTV at his home address and (with the exception of CCTV) in his vehicle(s). Evidence from correspondence, banking documents and electronic devices may prove or disprove his involvement in any criminality.”

[82] In **Attorney General v Danhai Williams and Others (Jamaica)**¹² the Privy Council assured:

“Their Lordships do not underestimate the difficulty and delicacy of the task which is put upon Justices and other judicial officers to whom application is made for search warrants. The applicant is generally a police or other law enforcement officer who knows far more than the Justice about the investigation. The application is made ex parte; there is naturally a predisposition upon the part of the Justice to be helpful to the officer who is present and assures him that a search is necessary. The officer may be known to the Justice, who may have learnt to trust his judgment and veracity. Their Lordships do not suggest that this is something which should be ignored. On the other hand, the citizen whose rights the Justice is constitutionally required to protect is absent and seldom depicted in the most favourable light. Nevertheless, if the constitutional safeguards are to have any meaning, it is essential for the Justice conscientiously to ask himself whether on the information given to him upon oath (in the case of section 203, either orally or in writing) he is satisfied that the officer's suspicion is based upon reasonable cause.”

[83] This vagueness was transferred to the very wording of the warrants issued which we will consider now.

Was the warrant sufficiently precise:

[84] The warrants were of two types; one type to search the apartment and the vehicle and another to search data stored on devices found in either the apartment or the vehicle. Each type is similarly worded so the Court will reproduce one of each below:

1. To Each and All of the Peace Officers of the Territory

Evidence on oath has been given this 12th day of February 2023 by Dele Bolude DC 1383, Road Town Police Station that there is reasonable cause to believe that stored data, which is necessary for the purposes of an investigation, namely but not limited to, files, documents, accounts and other records used in computer and cellular telephone communication whether those records are in written form or any other form of electronic data retrieval mechanism, inter-accounts transfers, or correspondences with other parties are on certain property, to wit, the cellular telephones, computers found within the vehicle Nissan Titon, Registration Number PI 771 controlled by Mr. Wade Smith.

¹² [1997] UKPC 22

And having found probable cause for the issuance of this Search Warrant, you are therefore hereby commanded, with proper assistance to:

- a. seize and secure the said cellular telephone(s) and computer(s);
- b. access, inspect and check the operation of the said cellular telephone(s) and computer(s);
- c. collect data associated with the said cellular telephone(s) and computer(s) including, but not limited to call listings, SMS/MMS messages, recording, GPS Data, calendar, photographs, WhatsApp messages, Facebook Messenger messages;
- d. use or cause to be use the relevant equipment to search any data contained in and available on the said cellular telephone(s) computer(s);
- e. access any information, code or technology which has the capability of transforming or unscrambling encrypted data contained or available to a cellular telephone/computer into a readable or comprehensive format for the purposes of your investigations; and if such property as aforesaid or any part thereof be found to bring the same and the person to whom it belong before this court to be dealt with as the law directs.

2. To EACH AND ALL OF THE PEACE OFFICERS OF THE TERRITORY

Evidence on oath has been given this 13th day of February 2023 by Dele Bolude DC 1383 that there is reasonable cause to believe that certain property to wit

Evidence pertaining to the offence of Breach of Trust namely Documents, Financial Documents, Media Devices, Cellular Devices and Computers

You are therefore hereby commanded, with proper assistance, to enter the said premises, by force and breaking doors, if necessary, and to search the same, and if such property as aforesaid, or any part thereof, be found therein, to bring the same, and the person or persons in whose possession the said property are, before this Court to be dealt with as the law directs.

[85] The Claimant alleges that the warrants were deficient as their wording lacked sufficient precision for validity. He pointed the Court to **Sweeney v Westminster Magistrates Court and another**¹³ where the lawfulness of a search warrant was challenged. No notes were taken at the ex parte hearing for the issue of the warrant, no written reasons were provided and the warrant was drafted in extremely wide terms. **The warrants were quashed.**

¹³ [2014] EWHC 2068

[86] In response, Counsel for the Defendants seemed to say that by the very nature of the offence it would have been difficult to add any greater specificity as this would have limited the required thoroughness of the search.

The Court's consideration:

[87] It is accepted that too much specificity in a warrant may undermine an investigation of an offence as sensitive and many times complexed as breach of trust. But too little specificity may allow an unwarranted intrusion and unlawful interference with the rights and liberties of the person concerned - a fishing expedition if you will.

[88] **Sweeney** at paragraph 16 emphasized the need for precision in a warrant such that it is capable of being understood as a free standing document by those conducting the search and those whose premises are being searched (**R (Energy Financing Team Ltd) v The Director of Serious Fraud Office**¹⁴). This is another safeguard, the importance of which can not be diminished.

[89] **Sweeney** also accepted that the nature of the investigation may affect the practicability of identifying the articles sought. For example, a case of fraud may cause greater difficulty in identifying the nature of the documents sought. When this happens the Magistrate must balance the two competing factors - the need for precision and the nature of the investigation. So that even if a term is wide it would "not simply be fishing if it is directed to support an investigation which has apparent merit" - **R (Energy Financing Team Ltd) v The Director of Serious Fraud Office**¹⁵.

[90] The Court considered that the offence was one of breach of trust by a public official. Section 93 of the Criminal Code places frauds and breaches of trust affecting the public in the same category with the same sentence. The allegation in this case however, seemed straightforward enough. Nonetheless, the Court acknowledges that there may have been some difficulty in limiting the terms of the warrant significantly.

¹⁴ [2005] EWHC 1626 paragraph 37

¹⁵ [2005] EWHC 6126 paragraph 37

- [91] For example, it may have been difficult to limit temporally. Although the Senior Magistrate said she found sufficient to satisfy her regarding a contract between 23 December 2000 and 22 January, 2021. Those arrangements may easily have stretched beyond the specified dates. Placing such a limit would serve no worthy purpose.
- [92] But certainly the offence should have appeared on all the warrants. Most alarmingly, those for the interrogation of the electronic devices stated absolutely nothing about an offence. They simply said an investigation. This authorised an unrestrained intrusion, a free hand to extract information from a place where the contents are vast and varied and demand serious protection.
- [93] Further, the nature of the investigation in this matter related to a specific company only, yet that company's name or its principal's appeared nowhere on the warrant. That could have usefully given some indication to both parties as to what was expected to be uplifted if found.
- [94] The warrants as worded simply allowed the police to take up every "document and financial document" relating to 'breach of trust' and to interrogate all devices seized for "namely but not limited to, files, documents, accounts and other records used in computer and cellular telephone communication whether those records are in written form or any other form of electronic data retrieval mechanism, inter-accounts transfers, or correspondences with other parties."
- [95] The warrant was not even limited to the documents relating to the Claimant. He was the subject of the investigation and he was the one arrested that morning. Although DC Bolude attempted to say that all was explained to the Claimant so he well knew what the search entailed. That is, with respect, not the test to be applied. The searchers and the searched should be able to look at the warrant and know quite clearly its limits.
- [96] So, unsurprisingly, the Claimant's passports and other identification documents, bank cards, paper work relating to land and to other family members (one deceased), meter readings for apartments among other items were seized. What relevance or importance could these have had to the investigation at hand!

[97] This fact is most indicative of the exceptionally broad terms in which those warrants were issued. Neither the police nor the Claimant knew what their scope actually was.

[98] It is also troubling that DC Bolude's testimony was that they went to the Claimant's home that night to arrest him for the offences not just to execute search warrants. It becomes even less believable then, that the lack of precision evidenced had anything to do with a need for thoroughness in a search. The consequence was that it allowed a certain arbitrariness which the Magistrate was lawfully bound to guard against. A Magistrate must issue a warrant which contains the safeguards intended by section 19 of the constitution and expressed in section 37(1) of the Act.

[99] In **Lees v Solihull Magistrates Ct.**,¹⁶ Tracey, L.J. states:

"41. It is clear that the parameters of the material identified to the Magistrates was by reference to specific offences under investigation and connection to the three named companies. Given the vague and general terms contained in the four bullet points and the absence of precision in contrast to the information provided to the Magistrates, I am satisfied that there was a failure to identify, as far as was practicable, the articles sought. Whilst the officers executing the warrant may well have understood the basis which underlay their search, that is nothing to the point. The occupiers of the affected premises were not in a position to know from the warrant itself the extent of the powers of search and seizure available to the officers. It is an essential part of the citizen's safeguards that he or she can learn of the scope of the authorised search from the warrant rather than from the warrant as interpreted by the executing officers."

[100] This Court finds that the warrants lacked sufficient precision to be lawful.

The Retention of Items:

[101] The fact remains that after the warrants had been executed, the Second Defendant did not bring the items seized to the Senior Magistrate or any other magistrate as is mandated by section 37(1) of the Magistrate's Code of Procedure Act and the very Warrant on its face. Instead the electronic devices and contents in particular were detained despite the Claimant not having been charged and the Claimant's repeated requests.

[102] The First Defendants response seemed to be that the process was unfamiliar and had never been seen by her during her many years on the bench. Since no assistance was forthcoming from the

¹⁶ [2013] EWHC 3779 (Admin) at para. 41

Claimant's counsel, any communication with the Court Manager was ceased. Beyond this there was no explanation or interpretation offered of the very clear words at the end of section 37(1) (see paragraph 45)

- [103] The Second Defendant stated nothing about why the items had not been brought to a magistrate. She explained only why the devices had not been returned. They had been "securely sent to be downloaded to the Caribbean hub and when his other documents were returned to him on the 6th June 2023 when the other items seized were returned. There is a lot of information on the devices and investigations are still ongoing into the data. The data is a significant amount and because of the sensitivities of this case and to protect the confidentiality of the Claimant only a select few officers have access to review the data."

Court's consideration:

- [104] The **Myland** case relied upon by the Defendants is the perfect launching pad for this discussion. Following the execution of a search warrant issued by a justice of the peace the Claimant had been charged. At the first hearing he sought the return of the unused items and despite several verbal and written requests to the police, the items were not returned. He brought his claim seeking among other things, declarations as to the unlawful removal and retention of the items and an order for their return.
- [105] The police, by way of reason, deposed that the investigation was ongoing and the items continued to be subject of same. They had been diligent and the items had not been kept longer than was reasonably necessary. Nonetheless the items seized had never been brought before a magistrate.
- [106] The Court found that "the reasons advanced by the Defendants do not justify the decision of the Police not to bring the items before the Magistrate. It seems to the Court that all of the matters which are raised could properly have been ventilated before the appropriate judicial officer and could well have informed the continued detention of the items." Any remaining items were ordered to be brought before a Magistrate to be dealt with in accordance with section 15 the equivalent to our section 37.

[107] This Court also finds that there was no good reason why the items could not have been brought before the Senior Magistrate even when in June items had been returned. They could have been brought once the Claim form had been filed in this matter. The Defendants by that time would have realised that there was a procedure under the Code which ought to be strictly adhered to. There was also an implication embedded that the items seized should be brought to the magistrate within a reasonable time. No matter how convenient it may be, there was no need to wait until a charge was laid and the person brought before the Court.

[108] If this was the only issue it could have been cured with an order now that the items be taken before a magistrate. But this case concerns far more. If the additional issue was also only the lack of precision of the warrant even, then the court may have made orders to ensure that all irrelevant material be returned. But there is also the issue of inadequate reasons.

[109] In Magnum at paragraphs 183 – 184 the learned Judge stated:

“The Court is satisfied that if no collateral unlawfulness is established, in the case where no or inadequate reasons are provided, a court has a discretion to simply quash the substantive decision as procedurally flawed or to afford relief in the form of an order of mandamus to give decisions.”

184the Court is satisfied that the decision to seek the warrant, the decision to grant the warrant and the decision to transmit the documents must be quashed.”

Conclusion:

[110] This Court has considered that the decision to issue the warrants was flawed as insufficient reasons have been given by the Senior Magistrate. The warrants were also unlawful as they were drafted in extremely wide terms. The search, based on the warrants, was, therefore, unlawful.

[111] For these reasons the court will make an order quashing the Senior Magistrate’s decision to grant the search warrants. All property seized pursuant to the search warrants issued which have not yet been returned to the Claimant must be forthwith returned including any data extracted from his electronic devices.

[112] The court shall award damages for the trespass in the sum of \$5,000.00.

[113] The Court recognizes the lack of emphasis in the Claimant's submissions on the constitutional breaches alleged. This was with good cause. There will be no award of vindictory or any other damages in this regard.

[114] All other claims are dismissed.

[115] The court shall hear submissions as to costs at an appropriate time.

[116] It is important before closing that this Court echoes the sentiments expressed in **Cayman Islands Urgent Care Limited, Kaiser Day Cannaceuticals Limited and Kaiser Day Pharmaceuticals Limited v H.M. Director of Customs, O'Neil, Commissioner of the Royal Cayman Islands Police Service and Chief Medical Officer**¹⁷ beginning at paragraph 388 as it gives perspective to what has transpired in this matter:

"The court fully recognizes that the respondents individually and collectively have at heart the interest of the public of the Cayman Islands. All of them are engaged on duties that are important and valuable and which should be suitably appreciated. Errors of judgment from time to time are unfortunately both inevitable and regrettable. However, where they occur as they have done in the circumstances of this case it imperative (**sic**) that they be recognized, addressed and mitigated as soon as is practicable. Allowing them to persist as the first respondent and the fourth respondent have done can increase the injustice to which such errors give rise in the first place.

Judicial review is concerned essentially with the fairness and the lawfulness of procedures rather than with the substance or merit of decisions themselves. In this case the procedures which were adopted were the wrong procedures and therefore they led to what were clearly the wrong outcomes. These are important and elementary principles, the primacy and simplicity of which have to some extent been obscured by the length and the complexity of the present proceedings. If the decisions of public officials are arrived at in the right manner, they can then become the right resulting decisions but if, as here, they are arrived at in the wrong manner, they can never be the right resulting decisions."

Sonya Young
High Court Judge

By the Court

Registrar

¹⁷ [2021 (1) CILR 443]