

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

MONTSERRAT

CASE NO. MNIHCR 2023/0003

BETWEEN:

[1] The King

Crown

and

[1] John Ryan

[2] Alford S. Dyett

[3] Dion Weekes

[4] Fitzroy Buffonge

[5] Kato Kimbugwe

[6] Lei Meng

[7] Paradise Development Company Ltd.

Defendants

Appearances:

Mr. Anu Mohindru KC and Mrs. Rasheema Kanhai Britton for the Crown

Mr. Dane Hamilton KC and Ms. Chivone Gerald for the Defendants

2024: MAY 8

2024: JUNE 14

RULING

FITZPATRICK [AG.]:

THE COURT CONSIDERED THE FOLLOWING:

[1] John Ryan, Alford S. Dyett, Dion Weekes and Fitzroy Buffonge (the “Accused”) were alleged to have committed various financial and related offences. The Accused each entered not guilty pleas before the assembled jury panel on May 7, 2024.

- [2] Prior to the commencement of this trial, the Accused brought an Application to exclude evidence on the basis of solicitor and client privilege, namely various emails extracted from the computer of Fitzroy Buffonge (the “Accused Application”).
- [3] Court and counsel agreed that the Accused Application would be argued immediately following the jury being selected and in advance of the Crown’s opening statement.
- [4] A jury of nine plus two alternates were selected on May 7th and the Crown’s opening address scheduled for the start of the following court day. The Accused Application was argued and the decision of the Court reserved to the next morning of May 8th.
- [5] The Court provided its ruling orally at the start of the day on May 8th. The Court dismissed the Accused Application undertaking to provide written reasons at a later date to facilitate the intended Crown opening statement to the jury and commencement of the Crown’s case, which immediately followed the Court ruling.
- [6] These are the reasons for the dismissal of the Accused Application.
- [7] The Accused Application sought the exclusion of evidence seized following the execution of a search warrant at the law office premises occupied by Fitzroy Buffonge.
- [8] The search warrant for Mr. Buffonge’s office was granted on April 8, 2022 by Justice of the Peace, Charles Ryan. A related warrant was subsequently issued on April 25, 2022 by the Chief Magistrate, Ivenia Benjamin.
- [9] The Court met with all counsel on April 30th to vet the content and process for the hearing of the Accused Application. On that date, counsel for the four Accused confirmed that the requested exclusion of evidence was based upon the flawed **execution** of the search warrants. The Court, specifically, then asked whether any challenge was being made to the issuance of the warrants and was told unambiguously, “no” by counsel for the Accused.
- [10] Despite the assurances received on April 30th and without any prior warning, counsel for the Accused indicated on May 7th that he also intended to argue that the **issuance** of the warrants was flawed. So, ultimately, the Accused Application sought to exclude the

subject email evidence on the basis of the flawed issuance and/or flawed execution of the warrants and, failing that, on the basis of legal privilege.

[11] Both counsel filed written submissions and case law for this hearing. Counsel for the Accused also provided copies of the two warrants. The Court had nothing further. No affidavit evidence. No transcript or other record of the warrant hearing before Justice of the Peace Ryan. No transcript or other record of the warrant hearing before Chief Magistrate Benjamin.

[12] As noted, Justice of the Peace Ryan granted a warrant to search Mr. Buffonge's office on April 8, 2022 (the "Initial Warrant") with the following language:

WHEREAS the court is satisfied by information on oath that there is reasonable suspicion of the commission of an offence of **Conspiracy to defraud and obtaining pecuniary advantage by deception and has in his possession cellular phones and sim cards, electronic devices, electronic storage devices, physical documents, records and information including all communications (physical or electronic), and financial transactions relating to Paradise Development Company LTD and its Directors** and it has been made to appear to the Justice of the Peace Charles Ryan that there are articles essential to the inquiry into the said offences in or upon the premises, namely a dwelling house/office occupied or controlled by Fitzroy Buffonge situated at Olveston, in the parish of Saint Peters.

Any material obtained, later discovered, deemed or believed to be subject to legal professional privilege will be sealed until reviewed by independent counsel.

NOW, THEREFORE, this warrant is to authorize and require you to take possession and search the said Cellular Phones and Sim Cards, electronic devices, and electronic storage devices physical documents, records and information including all communications (physical or electronic), and financial transactions and if any such devices or documents are discovered to take possession of such items and produce them forthwith before the court, returning

this warrant to the court with and endorsement certifying the manner of execution thereof.

[13] The Initial Warrant was executed with the result that Mr. Buffonge's computer, cell phone and physical file for Paradise Development Company Ltd. were seized from his office. The challenged evidence on this Application is comprised of various email communications extracted from Mr. Buffonge's computer covering a period from February, 2016 to November, 2019.

[14] A second Search Warrant was issued on April 25, 2022 by the Chief Magistrate Benjamin (the "Secondary Warrant") in relation to the Initial Warrant with the following language:

It has been made to appear to the Magistrate Ivenia Benjamin that there are articles essential to the inquiry into the said offences which are currently in the possession of the Royal Montserrat Police Service at Police HQ, Brades in the parish of Saint Peters having been handed to the Police on by Fitzroy Buffonge on the 12th of April 2022.

Any material obtained, later discovered, deemed or believed to be subject to legal professional privilege will be sealed until reviewed by the Office of the Director of Public Prosecutions.

Now, Therefore, this warrant is to authorize and require you to search the said Cellular Phones and Sim Cards, electronic devices, and electronic storage devices physical documents, records and information, including all communications (physical or electronic), and financial transactions and if any such devices or documents are discovered, to take possession of such items and produce them forthwith before the court, returning this warrant to the court with and endorsement certifying the manner of the execution thereof.

The Challenge to the Warrant

[15] The Accused directed most of their arguments to the Initial Warrant excepting for the language contained in the Secondary Warrant nominating the Director of Public

Prosecutions to be the one responsible for reviewing any seized material believed to be protected by privilege. This was a sensible approach by Accused's counsel given the Secondary Warrant does not provide anything meaningful in addition to what was authorized by the Initial Warrant.

[16] A quick comparison shows the language of both Warrants is identical where authorizing the search of Mr. Buffonge's electronic devices. The Secondary Warrant simply authorizes the police to "search" the items in their possession following the execution of the Initial Warrant, which they would clearly be entitled to do by the authority of the Initial Warrant. The Secondary Warrant is redundant.

[17] Given the redundancy of the Secondary Warrant, the analysis to follow shall focus on the Initial Warrant. This is also in keeping with the arguments advanced by the Accused. That said, the direction in the Secondary Warrant for the Director of Public Prosecutions to be the one responsible for reviewing any seized material believed to be protected by privilege will be addressed further below.

[18] The Accused challenge the issuance of the Initial Warrant by Justice of the Peace Ryan based on the language within the Warrant itself when compared with the wording found at section 4 and 6 of the Criminal Procedure Code ("CPC").

[19] The relevant language of sections 4, 5 and 6 of the CPC provide as follows:

Section 4(1) If a Court or magistrate or justice of the peace is satisfied by evidence on oath that there is reasonable cause to believe that property with respect to which an offense has been committed is in any place, the Court or magistrate or justice of the peace may issue a warrant directed to a police officer or other person to enter and search the place in any part of Montserrat, by reasonable force if necessary, at any time.

Section 5(4) If anything is seized and brought before a Court under powers conferred by any search warrant, it may be retained until the conclusion of the case of investigation in respect of which its seizure was authorized, reasonable care being taken for its preservation.

Section 6(1) A search warrant shall be in the form set out at Schedule 1 and shall be under the hand of the person issuing it and when issued by a Court shall bear the Court seal.

- [20] The Accused argue that the Search Warrant is flawed on its face evidencing that the justice of the peace applied the wrong test when he issued the Warrant. Specifically, the Accused say that Justice of the Peace Ryan incorrectly applied the “reasonable suspicion” test not the “reasonable cause” test required by CPC section 4(1). I do not agree.
- [21] The Accused argue that there is a difference in law between the phrase “reasonable suspicion” and “reasonable cause”. The Prosecution submits they are interchangeable without distinction. The Court’s experience is that some jurisdictions use these phrases without distinction whereas others demarcate. The Court was not provided with any source to determine what approach has been adopted in Montserrat. Regardless and for the purpose of this analysis, the Court shall presume the two phrases to be legally distinct.
- [22] The Accused incorrectly place their emphasis on that part of the Initial Warrant that states, “the court is satisfied by information on oath that there is reasonable suspicion of the commission of an offence”, arguing this fails to meet the threshold of reasonable cause for the issuing of a warrant mandated by section 4(1) of the CPC.
- [23] The focus of the Initial Warrant when referencing “reasonable suspicion” is on the offences, not the property that the Warrant is directed to. Here, Justice of the Peace Ryan is confirming that the information presented provides reasonable suspicion of the named offence(s). He is not saying the information provides reasonable suspicion that there is relevant property at the targeted location.
- [24] The requirement of having reasonable cause to issue a warrant is with respect to the property sought not the offences. In other words, the judicial official issuing the warrant must have reasonable cause to believe that the property being sought is at the target location and relevant to the investigation of the subject offences. The requirement for reasonable cause speaks to the property not the offences.

- [25] The Court finds that the Initial Warrant on its face evidences that Justice of the Peace Ryan was satisfied that he had reasonable cause to believe that the property being sought was at the target location and relevant to the investigation of the subject offences where the Warrant states “it has **been made to appear** to the Justice of the Peace Charles Ryan that there are articles essential to the inquiry into the said offences in or upon the premises” [emphasis mine].
- [26] The first thing to recognize is that Justices of the Peace are presumed to know and apply the law in which they work day in and day out (the presumption of regularity). Again, I was not provided with any transcript or other materials of any kind from the attendance(s) before Justice of the Peace Ryan. All that I have is the Warrant itself.
- [27] Flowing from the above, where the Warrant states “it has **been made to appear** to the Justice of the Peace Charles Ryan” this language confirms that Justice of the Peace Ryan had been provided with information sufficient for him to have reasonable cause to believe that property items relevant to the offences were located at the target premises.
- [28] The last point on this argument is to note that the language used in the Initial Warrant repeats the standard form phrasing found in the search warrant template at Schedule 1 of the CPC.
- [29] While this Court finds that the language used in the Initial Warrant does satisfy the requirements of CPC section 4(1), there is no doubt that the language used could be improved. This Court strongly recommends that the Schedule 1 template be amended to more closely mirror the language at section 4(1).
- [30] The Accused challenge the execution of the Initial Warrant on the basis that the police removed Mr. Buffonge’s computer, cell phone and physical file from his office. I do not agree that this presents any meaningful concern.
- [31] The items seized were removed to allow the police to review and preserve the contents for relevant evidence. The Warrant specifically authorizes the police to take possession of the seized items.
- [32] Taking possession of items authorized by a warrant to be seized is the normal course. It is not realistic in most instances of a search for the seized items to be inspected on

site. Here, the police were required to undertake the extraction and analysis of a large amount of data from the electronic devices. This could only be done by the police taking possession of the seized items and retaining them for investigative purposes.

[33] The Accused also challenge the execution of the Initial Warrant on the basis that the police removed Mr. Buffonge's computer, cell phone and physical file from his office in April, 2022 and retained these items until they were returned in December, 2023. I do not agree that this presents any meaningful challenge to the Warrant execution.

[34] Items seized pursuant to a warrant issued in a criminal investigation where charges are brought tend to remain with the police until the charges are disposed of, which is often at the conclusion of a trial. This is specifically permitted by section 5(4) of the CPC.

[35] The items here were seized and charges commenced before the Court. These items were returned prior to the commencement of trial. The Accused had full disclosure of the contents of the seized items. There was no evidence of any inappropriate conduct on behalf of the police or Prosecution in holding these items in the manner they did and no evidence of any related prejudice to the Accused.

[36] Another argument advanced was that the Warrant terms required a return before the court with a report on its execution. This is the Accused's Application. The Accused have not presented a transcript, an affidavit or any other evidence to establish that this did not occur.

[37] The reason a warrant is required to be returned with a report on execution is so that it is available for the subject of the warrant, here Mr. Buffonge, to have the opportunity to challenge the warrant and related search. I have no evidence from Mr. Buffonge that he was denied that opportunity or that he or any of the Accused suffered any prejudice related to this requirement.

[38] In addition to the above, it is worth noting that the Accused were arrested and brought before the Magistrate on December 7, 2022. The Accused were represented that day and throughout by very experienced counsel. No issue was raised then or following with respect to the Warrant being returned or the related report on execution. Stating the obvious, the Accused are challenging the Warrant now, which is their right to do.

However, there is no suggestion and certainly no evidence of any prejudice in the Accused doing so at this stage of the proceeding.

[39] The final point of challenge by the Accused relates to those parts of the Warrants directing either independent counsel or the Director of Public Prosecutions to be the one responsible for reviewing any seized material believed to be protected by legal privilege.

[40] Distilled, the Accused argument is that the review process stipulated in the Initial and Secondary Warrants is flawed. Facially, the Warrants leave it to the police to whom the Warrants were issued to make a determination whether any of the seized information may potentially be privileged. Flowing from this, a third party review is engaged only where that preliminary screening suggests privilege may exist.

[41] The Prosecution response was limited on this issue but appears to be that the challenge is moot. Their position is that none of the items seized were covered by legal privilege and, therefore by inference, it was unnecessary to engage the review process stipulated in the Warrants.

[42] The first and obvious query is the competence of the police to make a determination whether any of the seized information may potentially be privileged. This is a question of fact and law that requires legal training and experience to properly assess. Does the police force have such qualified resources internally? No argument was made in this regard or evidence presented but the concern warrants mention.

[43] I do agree with the Accused that Director of Public Prosecution should not be named in a warrant as the presumably objective third-party arbiter of privilege. Prosecutors have a specific role in the criminal justice system, as do counsel for an accused. As such, the Director of Public Prosecution cannot in fact or in appearance be considered neutral. Naming the Prosecution in the Secondary Warrant should not be an ongoing practice but was not fatal here.

[44] The Secondary Warrant was redundant and could be set aside entirely without impacting the analysis or decision on this Application. The Initial Warrant provided the authorization to search Mr. Buffonge's office, to take possession of items and to examine those items for evidence relevant to the named offence(s). That said, the Court does

agree that the process where any third-party acts as the arbiter of privilege is inherently problematic.

- [45] If a third-party review resulted in a determination that the materials were not covered by privilege then the Accused would surely challenge that determination before the Court, which they have here done. Similarly, if that third-party review determined that privilege applied, then the Prosecution would bring a challenge before the Court.
- [46] The inescapable reality is that it is the Court who should review any disputed materials and decide whether privilege applies. If it does, then the evidence is inadmissible for all purposes. If privilege does not apply, then the materials are admissible presuming relevancy.
- [47] Going forward, issued warrants should direct that any seized materials believed to be privileged should be sealed and deposited with the Court for a hearing and determination of that issue.
- [48] In summary, the wording used in both the Initial Warrant and the Secondary Warrant directing a third-party review of any potentially privileged materials seized is ineffective. The primary reason is that any such review does not resolve that issue given it is the Court who must determine any privilege and admissibility issue.
- [49] Respecting the Secondary Warrant, the Prosecution should not be named as the third party arbiter of privilege.
- [50] However, the ineffective language and related process in both the Initial Warrant and the Secondary Warrant does not invalidate issuance fundamentally because the Court at all times remained the ultimate decision maker here. Any flaw in the language or process was cured by this Court determining the privilege issue in this case.
- [51] In addition, there was no suggestion or evidence of any prejudice to the Accused flowing from this wording in the Warrants. The materials seized were disclosed with both sides having opposing views on whether any privilege applied, leaving it to the Court to decide, which is the issue next reviewed.

Does Legal Privilege Apply?

- [52] As noted above, the materials in dispute are emails extracted from Mr. Buffonge's computer. These emails are communications between the Accused and two other individuals, Kato Kimbugwe and Lei Meng, from February, 2016 to November, 2019. Kato Kimbugwe and Lei Meng were both named in the Indictment for this matter but were not accused persons before the Court in this trial.
- [53] The law with respect to legal or solicitor client privilege is well settled. All communications between a lawyer and his client(s) made in confidence by the client for the dominant purpose of obtaining legal advice are privileged and protected from disclosure except where such protection is expressly waived by the client.
- [54] The reason for extending legal privilege is obvious. A client must have the security of knowing what he shares with his lawyer in the course of obtaining advice will remain confidential. Only with this security can any client feel and be free to share the fullness of detail necessary to obtain effective legal assistance.
- [55] Not all communications with a lawyer are covered by privilege. If it were otherwise then every criminal organization would imbed a lawyer in their activity and communications to ensure that law enforcement could never rely on any such communications to support charges or prosecution.
- [56] Communications with a lawyer relating mainly to business or investment (i.e. they are corresponding as a "man of business") lacking a relevant legal context will not engage privilege (see: *O'Rourke v Darbishire* [1920] A.C. 581; *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 at para 38; *Z v Z and other* [2017] 4 WLR 84 at para. 13).
- [57] Communications with a lawyer for a dishonest purpose, whether the lawyer is aware of that purpose or not, will not be protected by privilege. This is sometimes referred to as the "fraud" exception. However, this is a misnomer for two reasons.
- [58] First, the exception is not confined to cases of criminal fraud instead a broader spectrum of dishonest acts (see: *Barclays Bank PLC and other v Eustice and others* [1995] 1 WLR 1238 at 1249; *Z v Z and other* [2017] 4 WLR 84 at para. 14). The court must be satisfied that the evidence establishes prima facie dishonesty (see: *Barclays Bank PLC and other*

v Eustice and others [1995] 1 WLR 1238 at 1249; *O'Rourke v Darbishire* [1920] A.C. 581; *Gibbins* [2004] EWCA Crim 311).

[59] Second, this is not an exception to the protection of privilege. Such dishonesty when found means that the communications did not satisfy the requirements for privilege to apply in the first place (see: *Follett v Jefferyes* 1 SIM.(N.S.) 3; *O'Rourke v Darbishire* [1920] A.C. 581; *R v Cox and Railton* (1884) 14 QBD 153).

[60] The question of whether particular emails are solicitor-client privileged is one that must be assessed contextually and objectively. What is the nature and apparent purpose of the communications? What is the role of the participants and reason for participating in the communications? Did the participants intend their communications to be confidential?

[61] The following provide a representative sample of the emails at issue:

- a) February 29, 2016 – Kato Kimbugwe sent an email to a financial portfolio manager in China about the “Woodlands” real estate investment opportunity in Montserrat, including a detailed description of the proposed project along with photographs. This email is copied to Lei Meng and Fitzroy Buffonge;
- b) March 6, 2016 – Kato Kimbugwe forwarded an email from Lei Meng, who advised that the Chinese portfolio manager was interested in the Woodlands project, but prefers to “sign an agreement with a company instead of 6 individuals”. The email from Kato Kimbugwe is sent to John Ryan, Alford Dyett, Dion Weekes and Fitzroy Buffonge who are addressed as “Team” and continues “see the email below on progress made with regard to consultations with chinese investors”;
- c) March 18, 2016 - Fitzroy Buffonge sent an email to John Ryan, Alford Dyett, Dion Weekes, Kato Kimbugwe and Lei Meng about registering a company. In the email he explained to the group why he must “remain silent”, including due to declarations that would need to be signed for the property deals, and states: “I am not prepared to allow another lawyer to sign that declaration and discover

what we are doing here...Hence I remain silent and join after all land transfers are complete. I am committed to the unified decisions of the group”;

- d) April 16, 2016 - Fitzroy Buffonge sent an email to Kato Kimbugwe warning, “You are discussing what we are doing with too many persons on Montserrat. If you are not careful it’s going to fuck us up later on. You guys don’t seem to understand the value of secrecy when we are seeking to circumvent the system”;
- e) May 30, 2016 - Kato Kimbugwe sent an email to Fitzroy Buffonge where he writes, “As a group we will make US \$300,000 off the land sale alone. If he completes in 4 months that is another US\$58,000 to the pot which means between the 6 of us we each walk away with \$59666 or EC\$158398...Bros please trust that I have your and my friends best interest at heart. I love my friends in Montserrat hence the effort made to push this venture”; and,
- f) May 31, 2016 - Fitzroy Buffonge sent an email to Lei Meng, John Ryan, Alford Dyett, Dion Weekes and Kato Kimbugwe who are addressed as “Team” and continues: “It is for the company to decide as a group all these issues...It is up to the group how we wish to approach that element. Whatever we do ought to be in the best interest of the company. If the team takes the view that it is in the best interest of the company then we go that way”.

[62] During this hearing, counsel for the Accused confirmed their position that Fitzroy Buffonge was the lawyer for John Ryan, Alford Dyett and Dion Weekes. The relationship between these four was the foundation for the Accused Application claim of legal privilege.

[63] As is abundantly clear from the sample emails above, the subject emails were ongoing communications between six not four persons, namely Kato Kimbugwe, Lei Meng, John Ryan, Alford Dyett, Dion Weekes and Fitzroy Buffonge.

[64] There was no suggestion by the Accused that Mr. Buffonge was the lawyer for Kato Kimbugwe and/or Lei Meng. Quite the opposite. The Court was told who Mr. Buffonge represented and that list did not include Mr. Kimbugwe or Mr. Meng

- [65] There was no submissions on behalf of the Accused respecting what role Kato Kimbugwe and Lei Meng played in the narrative for the Accused Application or how their participation impacts the claim of the Accused to legal privilege.
- [66] How does this context support a claim that this was confidential advice between a lawyer and clients? Legal privilege cannot be claimed where the communications consistently involved third parties who were not clients, without any other explanation that would bring these third parties within the privilege and confidentiality framework.
- [67] There is no doubt that the Mr. Buffonge was keen to keep their communications confidential. As referenced above, Fitzroy Buffonge sent a scathing message to Kato Kimbugwe in that very regard on April 16, 2016. However, the desire for confidence expressed by Mr. Buffonge is immediately followed by reasoning, namely “to circumvent the system”. On its face, this can only have one credible interpretation and that is that Mr. Buffonge and his five partners had an iniquitous, dishonest agenda around the Woodlands real estate opportunity. Legal privilege does not and cannot apply to communications with such an agenda.
- [68] These email communications are mostly about a real estate investment opportunity and how it will be achieved. The context of the relationship and communications, objectively viewed, are not a legal one but a business one among six equal partners. As Mr. Buffonge noted in his May 31, 2016 email, it was a group decision how to proceed on all investment related issues. These emails are the group exchanging ideas and deciding together how best to proceed.
- [69] In short, this is not a business group retaining a lawyer and communicating around legal advice but rather a group of equal partners that includes a member who is a lawyer by profession, communicating predominantly about the business aspects of a shared investment opportunity. Legal privilege does not apply where the lawyer is a “man of business”, which is exactly the role of Fitzroy Buffonge and the other members in this group with related communications.

[70] The only emails that could possibly be privileged are the two where Fitzroy Buffonge circulates a draft Agreement for the intended sale of the Parcel 207 property to a Chinese corporation, Shanghai Development Corporation ("SDC").

[71] However, any privilege for these two emails was lost when the draft was circulated to Kato Kimbugwe and Lei Meng who were included in all related communications. These two individuals are not alleged clients of Mr. Buffonge and there was no submission made by the Accused that would bring them under the privilege umbrella. Further, the same draft was sent to the purported buyer, SDC, inferring there was no expectation of confidentiality with respect to the Agreement or related communications.

[72] In summary, the subject emails are not protected by legal professional privilege.

Conclusion

[73] In conclusion, the Accused have failed to demonstrate on a balance of probabilities that the various email communications extracted from Fitzroy Buffonge's computer is evidence that should be excluded on the basis of the flawed issuance or execution of the Initial Warrant issued by Justice of the Peace Ryan or the Secondary Warrant issued by Chief Magistrate Benjamin. Further, the Accused have failed to demonstrate on a balance of probabilities that the various email communications extracted from Fitzroy Buffonge's are inadmissible on the basis that these communications are covered by legal privilege.

IT IS HEREBY ORDERED THAT:

1. The Application of John Ryan, Alford S. Dyett, Dion Weekes and Fitzroy Buffonge to exclude evidence, namely various email communications extracted from Fitzroy Buffonge's computer covering a period from February, 2016 to November, 2019, pursuant to a Search Warrant issued by Justice of the Peace Ryan and/or the Search Warrant issued by Chief Magistrate Benjamin, is dismissed.

The Hon. Dale Fitzpatrick
(Ag) High Court Judge

By the Court

REGISTRAR