

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

Antigua and Barbuda

Claim No: ANUHCV 2021/0143

BETWEEN

SCOTT KELSICK

Claimant

and

(1) THE COMMISSIONER OF POLICE

(2) THE ATTORNEY GENERAL

Defendants

Appearances:

Dr. David Dorsett of counsel for the Claimant

Alicia Aska and Zachary Phillips of counsel for the Defendants

2021: August 20th

2023: February 14th

JUDGEMENT

- [1] **Drysdale, J:** The Claimant filed these proceedings seeking constitutional relief as provided for by section 18 of the Constitution of Antigua and Barbuda for the contravention or likely contravention of his fundamental rights guaranteed by sections 3 and 10 of the Constitution.

THE FACTS

- [2] The Claimant is a businessman who was registered to operate as an insurance agent for Caribbean Alliance Insurance Company Ltd (hereinafter CAIC). On the 30th of January 2020 the Claimant attempted to re-register as an insurance agent of CAIC however, his application was deemed unsatisfactory by the Superintendent of Insurance at the Financial Services Regulatory Commission (hereinafter FSRC).

- [3] In the subsequent months, formal complaints were received from CAIC and the Claimant was officially terminated as an agent of CAIC on 7th July 2020. On the 10th of July 2020 the Claimant was issued with a cease and desist order from the FSRC.
- [4] On the 1st of April 2021, the police executed a search warrant on the Claimant's premises and seized documents, cell phones and computers belonging to the Claimant. The search of the premises was based on an allegation of fraud.
- [5] On 7th April 2021 the Claimant received a telephone call from a police officer advising that he should attend the office for the purpose of initialing the computers in order for them to be taken to a cyber lab for the purposes of doing a search on them relating to an offence of operating without a licence. The Claimant never obliged that request.
- [6] Immediately on 7th April 2021 the Claimant filed a claim alleging that the intended searches are not authorized in law and constitute a contravention or likely contravention of his constitutional right to privacy and protection against arbitrary search.
- [7] Subsequently the First Defendant obtained two search warrants to retrieve stored data. The first of these warrants (pursuant to the Electronic Crimes Act) authorized the search of the computers and was dated 28th April 2021. The second authorized the search of the cell phone and was dated 13th May 2021.

The Legal Submissions

- [8] The Claimant claims his constitutional right to privacy and against arbitrary search pursuant to sections 3 and 10 of the Antigua Constitution Order (hereinafter the Constitution) has been or is likely to be contravened by the Defendants. The Claimant referenced the authority of **Myland (Shankiell) v Commissioner of Police**¹ where the court found that the search of the Claimant's computers required judicial authorization and that the search of a computer without a warrant was unlawful and unconstitutional in that it contravened a person's right to privacy.

¹ GDCHCV 2012/0045

- [9] The Claimant posits that a search of a cell phone or computer that does not contravene the Claimant's right to privacy and against arbitrary search as guaranteed by sections 3 and 10 of the Constitution is one which is done under the authority of the law. The search warrant executed by the police was issued under section 38(1) of the Magistrate's Code of Procedure Act (hereinafter The Act). This Act however does not extend to the search of any seized property. Thus, in order for a lawful search to be done, the Defendants were obligated to simultaneously obtain a warrant pursuant to section 19 of the Electronic Crimes Act².
- [10] Moreover, the Claimant argues that the search warrant was issued by the Magistrate on sworn evidence relating to an offence of fraud. However, the motivation for that search warrant was not the suspicion of fraud but some other matter. The action of the State in subsequently obtaining a warrant to search the electronic devices after the filing of these proceedings provides insight as to the true and dominant purpose for obtaining a search warrant being to obtain possession of the electronic devices with the intention of taking them to a cyber lab to be searched. This is ultra vires section 38 of The Act.
- [11] The Claimant further argues that the law mandates that to achieve the purpose of seizing an electronic device with the intent of searching it, a section 19-warrant is to be used. This was not done in the instant case on 1st April 2021. That it could not have been the intention of Parliament that the proper use of a section 19-warrant was to be circumvented by using a section 38-warrant first and then a section 19-warrant later.
- [12] The power to seize (and with it the intention to search) an electronic system or device pursuant to section 19 of the Electronic Crimes Act 2013 would be defeated if a section 38-warrant would be used for that same purpose. The true and dominant purpose for obtaining the search warrant executed on 1st April 2021 was inextricably mixed up with what may have been a permissible purpose which renders the section 38-warrant liable to an appropriate administrative order.
- [13] Accordingly, the police have acted unreasonably, fundamentally unfair in the manner they have sought to obtain a search warrant and arbitrarily depriving the Claimant of his property.

² No 14 of 2013

The Defendants Submissions

- [14] The Defendants counter the Claimant's argument and underscore that the constitutional rights which the Claimant has invoked are limited and permissible once legally justifiable. They contend further that a search warrant was obtained prior to the seizure of the electronic devices and another warrant to search those devices through subsequently obtained were done prior to the actual search of those devices.
- [15] The Defendants suggest that the Claimant has not challenged the validity of the search warrant and as such they submit that the execution of a search warrant once lawfully granted by the judicial authority is considered lawful.
- [16] The Defendants also rely on the authorities of **R v Vu**³ and **Myland v Commissioner of Police et al**⁴ and argue that an officer executing a warrant is within his authority to seize a computer at the stage of a search of the premises but cannot search the computer without a warrant that grants specific authorization to search that computer. The Defendants submit this is what was done on the 1st of April 2021 when the officers executed the warrant. Consequently, the seizure of the computers and phones on the premises were lawful.
- [17] The Defendants suggest that the Claimant has conflated the issues of the seizure and search of the electronic items. They reference the above authorities of **Vu** and **Myland v Commissioner of Police** and state that the express authorization in the form of a search warrant specifically for the search of computer is a prerequisite so that search of those items does not violate a citizen's constitutional rights. Both judgements explain clearly that there must be a specific assessment of whether "the public's interest in being left alone by the government must give way to the government's interest in intruding on the individual's privacy in order its goals, notably those of law enforcement." The Defendants submit that this assessment occurred prior to the search in question.
- [18] The Defendants submit that in Antigua there is a specific search warrant to retrieve stored data under section 19 of the Electronic Crimes Act⁵. Thus, the assessment referenced by the authorities above would

³ (2013) 38 BHRC 551

⁴ GDCHCV 2012/0045

⁵ No. 14 of 2013

occur at the point in time when an officer seeks a search warrant to retrieve stored data under this section. The Defendants therefore submit that the only way such a search could violate a citizen's constitutional rights, is if that search occurred without a warrant being granted prior to the conduct of the search, as that vital balancing act of the public's interest and the individual's privacy would not have occurred.

- [19] The Defendants argue that the Claimant's suggestion that a warrant to retrieve stored data should be obtained prior to the seizure of the electronic devices, is not supported by either the jurisprudence or the laws of Antigua and Barbuda. Further that the duty to investigate criminal allegations is an ongoing duty and the Defendants submit that the officers in question were acting in furtherance of that duty when they (1) lawfully seized the items in question on 1st April 2021 and (2) sought and obtained subsequent approval to search the items that had been lawfully seized. The Defendants submit that there was no search of the Claimant's items prior to the officers obtaining search warrants to retrieve stored data dated 28th of April 2021 and 13th May 2021, and as such, the search of the computer and cell phones were specifically authorized at the time that the searches occurred.

The Issues

- [20] The issues for consideration is as follows:
- i. Whether the search warrant was valid
 - ii. Whether there has been a breach of the Claimant's right to privacy and protection of the law pursuant to sections 3 and 10 of the Constitution
 - iii. Whether there was an anticipated breach of the Claimant's right to protection against arbitrary search of his computers on 7th April 2021.

ANALYSIS AND THE LAW

- [21] The legislative framework for which this matter is concerned is found at sections 3, 10 and 18 the Antigua and Barbuda Constitution Order and are as follows:

'Fundamental Rights

3. Whereas every person in Antigua and Barbuda is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, regardless of race, place of origin, political opinions or affiliations, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely- (a) life, liberty, security of the person, the enjoyment of property and the

protection of the law; (b) freedom of conscience, of expression (including freedom of the press) and of peaceful assembly and association; and (c) protection for his family life, his personal privacy, the privacy of his home and other property and from deprivation of property without fair compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Protection of person or property from arbitrary search or entry

10. (1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

(a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, public revenue, town and country planning or the development and utilization of property in such a manner as to promote the public benefit;

(b) that authorises an officer or agent of the Government, 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 thereon for the purpose of any tax, rate or due in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government, or to that authority or body corporate, as the case may be;

(c) that is reasonably required for the purpose of preventing or detecting crime;

(d) that is reasonably required for the purpose of protecting the rights or freedoms of other persons; or

(e) that authorises, 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 entry upon any premises by such order,

and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Enforcement of Protective Provisions

18. (1) If any person alleges that any of the provisions of sections 3 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.'

Whether the search warrant was valid

- [22] The search warrant which triggered these proceedings was obtained on 31st March 2021 but executed on 1st April 2021. The search warrant allowed for search and seizure of inter alia electronic devices and computers. The face of this warrant reveals that it was based on the offence of fraud.
- [23] The warrant was obtained under the authority of section 38(1) of The Act which provides that a Magistrate upon being satisfied that there is reasonable cause that property in relation to a criminal offence is in any place may issue a warrant for the search that place. The Privy Council in the case of the **Attorney General of Jamaica v Danahi Williams and others**⁶ highlighted that the purpose of this is to protect 'the citizen from excesses which would inevitably flow from allowing an executive officer to decide for himself the conditions under which he is permitted to enter upon private property have been met.' The Board after examining the issue of the validity of the warrant expressed that the Judicial Officer must carefully consider the grounds put forward and the evidence and satisfy himself that there are reasonable grounds for the issuance of the search warrant.
- [24] The evidence of the Defendants is that they were seized with information from the FSRC that the Claimant despite being issued with a cease and desist order continued to operate in contravention of the Insurance Act. That particularly he was receiving monies under false pretence by holding out to be a licenced agent and thus may be committing the offence of fraud. Accordingly I find that the Magistrate had sufficient information to consider and determine whether circumstances existed for the grant of a warrant on the

⁶ [1997] UKPC 22

ground of fraud. Even if there were other considerations at the material time, there being a basis to ground the warrant for fraud, the warrant issued pursuant to section 38 is deemed to be valid.

Whether there has been a breach of the Claimant's right to privacy and protection of the law pursuant to sections 3 and 10 of the Constitution

- [25] Electronic devices change way we communicate, work, access information and store data. For the most part these devices form an essential appendage to our daily use and functioning. With a few strokes of the finger and a click of a button access is gained to a walking library of infinite information. Further the constant upgrades and security measures available and imposed by companies gives rise to a reasonable expectation of privacy concerning the contents of those devices. For those reasons, as it relates to electronic devices the rules for their search differ to physical devices. This is buttressed by both the common law and statute.
- [26] The case of **R v Vu**⁷ a judgement from Canada, has evolved as a locus classicus in the constitutionality of searches of electronic devices. The Court ruminated on whether the traditional legal framework was appropriate to protect the privacy interests related to computer searches and found that there were unique privacy concerns which arose with the search of computers which differed vastly from the search of the cupboards and other physical repositories. The Court further found that it could not be assumed that a justice who had authorised the search of a place had considered the privacy interests that might be compromised by the search of any computers found within that place and that this could only be assured if the computer search required specific pre-authorisation. The dicta which is of significance and bears repeating is found at paragraphs 45 to 49 and is as follows:

'45. These numerous and striking differences between computers and traditional 'receptacles' call for distinctive treatment under s 8 of the charter. The animating assumption of the traditional rule—that if the search of a place is justified, so is the search of receptacles found within it—simply cannot apply with respect to computer searches.

(ii) Prior authorisation is required

46. Prior authorisation of searches is a cornerstone of our search and seizure law. As the court affirmed in *Hunter v Southam Inc* [1984] 2 SCR 145 at 160, the purpose of s 8 is—

'to protect individuals from unjustified state intrusion upon their privacy. That purpose requires a means of *preventing* unjustified searches before they

⁷ (2013) 38 BHRC 551

happen ... This, in my view, can only be accomplished by a system of *prior authorisation*.' (Dickson J's emphasis.)

Dickson J went on in *Hunter v Southam Inc* to say that the requirement of prior authorisation 'puts the onus on the state to demonstrate the superiority of its interest to that of the individual'. The purpose of the prior authorisation process is thus to balance the privacy interest of the individual against the interest of the state in investigating criminal activity *before* the state intrusion occurs.

47. I have found that privacy interests in computers are different—markedly so—from privacy interests in other receptacles that are typically found in a place for which a search may be authorised. For this reason, I do not accept that a justice who has considered the privacy interests arising from the search of a place should be assumed to have properly considered the particular interests that could be compromised by a computer search. The distinctive privacy concerns that are at stake when a computer is searched must be considered in light of the purposes of s 8 of the charter. This calls for a specific assessment of—

'whether in a particular situation 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 its goals, notably those of law enforcement.' (See *Hunter v Southam Inc* [1984] 2 SCR 145 at 159–160.)

That is the threshold demanded by s 8 of the charter. Only a specific authorisation to search a computer found in the place of search ensures that the authorising justice has considered the full range of the distinctive privacy concerns raised by computer searches and, having done so, has decided that this threshold has been reached in the circumstances of a particular proposed search.

48. Specific, prior authorisation means, in practical terms, that if police intend to search any computers found within a place they want to search, they must first satisfy the

authorising justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for. They need not, however, establish that they have reasonable grounds to believe that computers will be found in the place, although they clearly should disclose this if it is the case. I would add here that once a warrant to search computers is obtained, police have the benefit of s 487(2.1) and (2.2) of the code, which allows them to search, reproduce and print data that they find.

49. If police come across a computer in the course of a search and their warrant does not provide specific authorisation to search computers, they may seize the computer (assuming it may reasonably be thought to contain the sort of things that the warrant authorises to be seized) and do what is necessary to ensure the integrity of the data. If they wish to search the data, however, they must obtain a separate warrant.'

[27] Regionally the case of **R v Vu**⁸ was applied in the case of **Myland v Commissioner of Police et al.**⁹ In that case the warrant similar to a section 38 warrant to search premises and seize items was obtained. The issue therefore was whether this was sufficient to authorize the search of electronic devices. Ellis J as she then was found that a warrant to search for a computer which would empower the Defendants to preserve its integrity did not crystallize into a warrant to conduct a search of the computer. Thus, the Learned Judge stipulated that 'searches of personal property such as computers and cell phones require specific prior authorization if they are to be consistent with the Constitution.'

[28] Also underpinning the need for a separate warrant to authorize the search of electronic items is found in the in the Electronic Crimes Act. Section 19(1) provides that:

'Where a police officer has reason to believe that stored data would be relevant for the purposes of an investigation or the prosecution of an offence, the police officer may apply to a Magistrate/Judge in chambers for the issue of a warrant to enter any premises to access, search and seize that data.'

⁸ (2013) 38 BHRC 551

⁹ GDAHCV2012/0045

- [29] It is therefore without question that for the Defendants to retrieve any stored data, a separate warrant pursuant to section 19 of the Electronics Act must be obtained. At the time of the trial of this matter such warrants had been obtained. Further the uncontroverted evidence is that the electronic items only searched after the requisite search warrants had been obtained. In so far as the electronic items were not searched without the appropriate warrant there is no breach of the Claimant's fundamental rights to privacy.
- [30] However the Claimant suggests that notwithstanding this, there has been a breach of his fundamental right to privacy as the obligation to obtain a section 19 warrant occurred at the time of the execution of the search warrant of the premises. The Claimant suggests the dominant purpose was clearly to search the electronic devices. That being the case, it was insufficient for the Defendants to subsequently obtain a section 19 warrant. The Claimant relies on the case of **R v Crown Court at Southwark, ex parte Bowles**¹⁰ to justify this posture.
- [31] Whilst the case of **ex parte Bowles** explored the dominant purpose for obtaining a warrant the circumstances of that case justified this approach. In that case an application had been made for a production order under section 93H of the Criminal Justice Act 1988 which was concerned with the recovery of the proceeds of criminal conduct. The issue was whether an order obtained for the purpose of assisting in the recovery of the proceeds of criminal conduct could be used also in relation to the investigation of prior criminal offences. The court found that the Police were unable to use section 93(H) to further the investigation of a possible offence that a person benefited from a criminal conduct as the section was intended only to further the recovery of awards after a conviction. Unlike the case of **ex parte Bowles** there is no conflating of the purpose of the various warrants obtained. The first warrant obtained on 31st March 2021 was the purpose of searching premises and seizing certain items. This was done. A subsequent search warrant was obtained specifically to search the electronic items. There is no evidence that the Defendants or their agents relied on the first warrant to effect the search of the electronic items. Further the cases of **Vu** and **Myland v Commissioner of Police** quoted above both recognize that the physical devices can be seized pursuant to a search warrant akin to that obtain under section 38. The distinguishing feature is that once seized it cannot be searched without pre authorization in the form of a specific warrant.
- [32] Further where a clear and unambiguous interpretation of statute would not lead to some absurdity it should be applied in accordance with its express terms. This is the case of section 19 of the Electronic Crime Act.

¹⁰ [1998] 2 All ER 193

Whilst it mandates that a warrant must be obtained prior to the search of any electronic device it does not impose an obligation on the Defendants to obtain the same at the same time the section 38 warrant was obtained or prior to its execution. There being no statutory or other obligation to extend the meaning and efficacy of the statute it would be wrong to mandate that a section 19 warrant should have been obtained at the same time. Thus I find that there was no obligation to obtain a warrant to search the electronic items seized simultaneous to obtaining the search warrant of 31st March or prior to the execution of the same.

- [33] The Claimant's claim for breach of his right to protection of the law was hinged on his perceived violation of his right to privacy. The Court having found that there was no breach of the law in the obtaining of the warrant, its execution and subsequent search of the electronic devices this claim automatically fails.

Whether there was an anticipatory breach of the Claimant's right to protection against arbitrary search of his computers on 7th April 2021.

- [34] Article 18 of the Antigua and Barbuda Constitution order allows a person aggrieved to bring a claim for a likely or anticipated breach of a fundamental right. The Claimant contends this was the case on 7th April when he was asked to initial the computers for the purpose of conducting a search. Whilst the Defendants deny in general the allegations of the Claimant contained at paragraph 5 of his affidavit there is no specific denial of the allegation that the Claimant was requested to initial computers for the purpose of sending them to a cyber lab to be search. In light of the bare denial of the Defendants this dispute must be resolved in favour of the Claimant. However, this does not translate in there being an anticipatory breach as nowhere in the evidence of the Claimant is there any suggestion that those devices were destined at some specific point in time or imminently to be sent to the cyber lab to be searched without the benefit of a section 19 search warrant. Further there is no evidence that there is an established practice or policy that mandates that upon initialing the items that the same would immediately be sent to the cyber lab for inspection without first obtaining an appropriate search warrant. Whilst in some Caribbean jurisdictions such as Grenada from where the Myland case emanated, there is no statutory authority guiding the process and need for the obtaining of a warrant to search the data on these devices this is not the case in Antigua. To simply assume that such clear legislative authority would not be complied with is presumptuous. Moreover, there is no foundation for the same. There being no cogent or any evidence that the request to initial the computers would ipso facto lead to an automatic search of these devices I find that the request to initial the computers without more is simply a request to ensure proper identification. Whilst the Claimant may have been concerned that there existed the possibility that due process in accordance with the Electronic Crimes Act

might not be observed, this simpliciter is insufficient to establish a likely breach of the fundamental rights as contained in sections 3 and 10 of the Constitution.

- [35] Whilst the Claimant has not succeeded in this Constitutional motion, the same was neither frivolous nor vexatious. Further it was not unreasonable for the Claimant to approach the constitutional court to determine whether there was a breach or likely breach of his fundamental rights. Ergo pursuant to the CPR 56.13 I find it inappropriate to make a costs order against the Claimant and will decline to do so.

IT IS THEREFORE ORDERED

- a. The Claimant's Originating Motion is dismissed.
- b. No order as to costs

Jan Drysdale

High Court Judge

By The Court

Registrar