

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA
CLAIM NO. ANUHCv2019/0632/ ANUHCv2020/199**

IN THE MATTER OF applications by the Claimants for administrative orders

AND IN THE MATTER OF applications by the Claimants for leave to apply for a judicial review and (1) an order of certiorari quashing (a) the First Defendant's acceptance of a request for mutual legal assistance from Her Majesty's Government of the United Kingdom, (b) the Warrant for the search of safety deposit box 128 at The Bank of Nova Scotia, Market and High Street, St. John's Antigua, issued on 30th October 2019 by the Third Defendant; and (2) an order of prohibition, prohibiting the First and Second Defendants from transmitting information to Her Majesty's Government and the National Crime Agency of the United Kingdom in relation to the Claimants.

AND IN THE MATTER OF Section 18 of Antigua and Barbuda Constitution Order Cap. 23

AND IN THE MATTER OF an application for relief and redress under Section 18 of Antigua and Barbuda Constitution Order Cap. 23 in relation to the infringement of the rights of the Claimants under section 3(a) and (c), 10 and 15 of the Antigua and Barbuda Constitution Order Cap.23

BETWEEN:

**ASOT MICHAEL
JOSETTE MICHAEL
TERESA-ANNE MICHAEL**

Claimants

**and
THE ATTORNEY GENERAL
THE COMMISSIONER OF POLICE
THE MAGISTRATE FOR DISTRICT A**

Defendants

APPEARANCES:

Claire Montgomery Q.C. appearing with Hugh Marshall Jr. for the Claimants
Gilbert Peterson S.C. appearing with Carla Brookes-Harris for the Defendants

2020: December 18TH
2021: May 21st

[1] **Robertson J. Introduction.** Applications for the determination of this court have been filed by the claimant and the defendant. The claimant has, by application filed on 11th March 2020, sought the inspection/copying of specific documents disclosed by the defendant in the defendant's list of

documents filed on 10th February 2020. The claimant has also sought that unless the defendants make available the documents sought that the defence in the matter or alternatively any defence filed by the defendants stand struck out.

[2] Specifically, the claimants have applied to the court seeking, among other things, an order that:

- a. Unless the defendants make available for inspection and copying within seven (7) days, the documents listed in Schedule 1 Part 1 of the defendants' list of documents filed on 10th February 2020 and identified as items 1, 2, 3, 4, 5, 6, 7, 9, 10, 13 and 17, the defendants be prohibited from filing any defence in the matter or alternatively any defence filed by the defendants should be struck out. The items identified are more particularly detailed hereunder:
 - i. Letter dated 28th August 2018 from Crown Prosecution Service to the Honourable Attorney General;
 - ii. Two letters dated 27th October, 2018 from the Home Office, Glodi Malundama to the Attorney General;
 - iii. Letter dated 10th September, 2019 from Crown Prosecution Service to the Honourable Attorney General;
 - iv. Letter dated 24th October, 2019 to Lt Col Edward Croft, Director of Office of National Drug and Money Laundering Control Policy [hereinafter called ONDCP] from the Honourable Attorney General;
 - v. Search Warrant dated 30th October, 2019;
 - vi. Letter dated 8th November 2019 from Commissioner of Police to Attorney General;
 - vii. Claim No. ANUHCv2019/0729 Director of ONDCP v Caribbean Union Bank and affidavit in support filed on 14th November, 2019;
 - viii. Claim No. ANUCv2019/0629 Director of ONDCP v Global Bank of Commerce and Affidavit in Support filed on 14th November, 2019;
 - ix. Letter dated 5th December, 2019 from the Director of ONDCP to the Honourable Attorney General;
 - x. Letter dated 11th December, 2019 from the Director of ONDCP to the Honourable Attorney General.
- b. The claimants also sought that the defendants make available for inspection and copying the items identified in the letter of the first defendant to Mr. Richard Thomas dated 10th

December 2019 and listed as item 15 in the defendants' list of documents Schedule 1 Part 1. Namely,

- i. The witness statement of Debra M. Williams,
 - ii. Certificate of Authenticity of business records,
 - iii. Records from ECAB,
 - iv. Items DMW1 through to DMW 15.
- c. The defendants make available for inspection the items identified in the witness statement of Erita Griffith dated 3rd December 2019 and identified as item 11 in the defendants' list of documents in Schedule 1 Part 1, namely:
 - i. Certificate of Authenticity of Business Records;
 - ii. Records produced by Global Bank of Commerce and exhibited to the Witness Statement of Erita Griffith including exhibits A and B.
- d. Insofar as those not included under paragraph 3, the items identified in the letter of the first defendant to Mr. Richard Thomas, dated 5th December 2019 and listed as item 12 in the defendants list of documents filed on 10th February 2020 in Schedule 1 Part 1, namely:
 - i. The witness statement of Erita Griffith;
 - ii. Records produced by Global Bank of Commerce and exhibited to the Witness Statement of Erita Griffith
 - iii. Certificate of Authenticity of Business Records;
 - iv. Letter from Global Bank of Commerce with the Schedule of Documents provided.
- e. The defendants make available for inspection and copying the items identified in the witness statement of Debra M. Williams items DMW1 through to DMW15 in the said witness statement identified in the defendants' list of documents filed on 10th February 2020 as item 14 in Schedule 1 Part 1;
- f. The Defendants make available for inspection and copying the additional items identified in the defendants' list of documents filed on 10th February 2020 in Schedule 1 Part 1. Namely,
 - i. Item 16; The letter of 11th December 2019 by the First Defendant to Richard Thomas, the enclosures referred to therein;
 - ii. Item 18: The letter of the first defendant of 11th December 2019 addressed to Claire Tripcony, the enclosure referred to therein;

iii. Item 19: The Letter of 12th December 2019 from the first defendant to Claire Tripcony, the enclosure referred to therein.

- g. The defendants make available for inspection and copying the items identified in the witness statement of Vinema Jarvis, items VMJ1 through to VMJ8, in the said witness statement identified in the defendants' list of documents filed on 10th February 2020 as items 10 in Schedule 1 Part 1.

[2] The application of the claimants is grounded in:

- a. The operation of CPR 26.4, 28.5(1), 28.5(4), 28.11 and 28.13.
- b. The defendants having refused, neglected or otherwise failed to make available for inspection documents disclosed.
- c. The defendants having failed to comply with a filed Notice to Inspect documents disclosed.
- d. The fact that through the disclosure of 10th February 2020 the claimants were made aware of documents which are relevant and potentially important to the claim.

[3] Subsequent to the claimant filing its application, the defendant filed on 2nd June 2020, an application seeking that the defendants, pursuant to CPR 28.14, be permitted to not disclose documents listed in the list of documents filed on 10th February 2020. The grounds for this application are that:

- a. The disclosure would damage public interest; and
- b. The Attorney-General has a right or duty to withhold disclosure of the documents.

[4] In supporting its application the defendants noted that:

- a. The ordinary rules of disclosure which include the inspection and copying do not readily apply to judicial review proceedings as the rules would in civil proceedings.
- b. The claimants have not shown that the disclosure is necessary for the just disposal of the proceedings.
- c. Given the stage of proceedings the identification and/or information regarding the nature of the documents is sufficient.
- d. The documents were part of a Letter of Request under the provisions of the Mutual Legal Assistance in Criminal Matters Act 1993, as amended. Thus, the communication between the requesting foreign State and the Receiving Agent ought to be confidential.
- e. The documents sought under the Act are with respect to an ongoing investigation by the requesting foreign State and ought to be kept confidential.
- f. Permitting the inspection of the document will not be in public interest:

- i. The State of Antigua and Barbuda has an obligation under the Act to guard the contents of the documents and to treat matters confidentially.
- ii. The individuals who seek inspection, that is the claimants, are subjects of the investigation.
- iii. The public has an interest in the unimpeded investigation of criminal offences.

Background

[5] The claimants sought and obtained permission to file these Judicial Review proceedings seeking certain administrative orders, by virtue of the first defendant having acted on a Letter of Request issued under the provisions of the Mutual Legal Assistance in Criminal Matters Act, 1993, as amended, [hereinafter called “the Act”]. The claimants claim can be summarized thus, that: (i) the defendants’ acceptance of, and assistance provided in respect of the request or requests for mutual legal assistance from the British authorities in respect of the claimants, was unlawful; that (ii) the search warrant was unlawfully issued by the third defendant; (iii) that the search warrant was not lawfully executed by the second defendant; and (iv) any transmission of information by the first defendant to the British authorities (including agencies) and the retention and transmission of the items seized were unlawful.

[6] Specifically,

- a. The first defendant’s decision, as Central Authority to comply with a request by the Crown Prosecution Service [hereinafter “CPS”] of the United Kingdom was unlawful and violated the constitutional rights of the claimants.
- b. The third defendant acted unlawfully in the issuance of a search warrant under the Magistrate’s Code of Procedure Act Cap 255 in respect of a safety deposit box at Nova Scotia Bank in respect of a Cartier gold watch. The search warrant was issued under section 38 of the Magistrate’s Code of Procedure Act but was not in the correct form and without there being any larceny or felony identified within the meaning of the said Code. Additionally, that the information upon which the search warrant was issued was inadequate since there is no evidence that the third defendant considered evidence upon oath that there was reasonable cause that (i) a larceny or felony occurred and (ii) the property with respect to the larceny or felony was on the premises searched.
- c. The search warrant(s) issued in response to a request or requests for mutual legal assistance was/were illegal.

- d. The release of confidential banking information including the existence of a safety deposit box was illegal.

[7] The claimants seek the following relief:

- a. Writ of Certiorari against the decision of the first defendant to comply with a request under the Act having to do with a Cartier gold watch, a car and bank accounts of the claimants.
- b. Writ of Prohibition against the second defendant in respect of the searches carried out as a result of the Letter of Request.
- c. Writ of Prohibition against the first defendant and the second defendant prohibiting them and their servants and/or agents from transmitting any further information to requesting foreign State relating to the claimants.
- d. Declarations that the decision of the Attorney General in his capacity as the Receiving Agent to comply with a request from the foreign requesting State under the Act to do with a Cartier watch, a car and bank accounts of the claimants were in breach of the claimants' Constitutional rights.
- e. Declarations that the protective rights of the claimants under sections 3 and 10 of the Constitution of Antigua and Barbuda [the Constitution] were contravened by the search of the safety deposit box.
- f. Declarations that the constitutional rights of the claimants as guaranteed by sections 3(a) and (c) of the Constitution were contravened by the defendants.
- g. Declarations that the transmission of information was contrary to the claimants' constitutional rights.
- h. Declarations that any transmission by the first or second defendants, their servants or agents, to third parties such as the foreign requesting state or any agency therefore, of information concerning the execution of the search warrant dated 30th October 2019 and retention and transmission of any items seized constitutes a breach of the claimants' rights under sections 3 and 10 of the Constitution.
- i. Interim injunction restraining the first defendant and the second defendant, their servants and/or agents and requiring them to cease the transmission or from taking any further action to assist the foreign requesting state in response to the request or requests for mutual legal

assistance in relation to the claimants and/or from disclosing any information that is the personal property of the claimants until the determination of the proceedings.

[8] Subsequent to the disclosure of the list of documents by the defendant, the claimants filed an application seeking to amend the claim. This application seeks the following amendments:

- a. A Writ of Certiorari against the decision of the first defendant to transmit information and evidence to the requesting state or its agency pursuant to the letters from the first defendant to Richard Thomas of the United Kingdom Central Authority dated 5th, 10th, 11th and 12th December 2019 and letters to Claire Tripcony of the Crown Prosecution Service dated 11th and 12th December 2019 were contrary to sections 3, 15 and 18 of the Constitution.
- b. A declaration that the transmissions stated above were contrary to sections 3, 15 and 18 of the Constitution.
- c. A Writ of Mandamus requiring the first defendant to use his best endeavours to secure the return of any information or material transmitted unlawfully in response to the request for legal assistance.
- d. A declaration that the first defendant must communicate to the requesting state that any material unlawfully transmitted may not be used for purposes for which they were requested in the Letter or Letters of request from the requesting state and may not be transmitted to third parties including any court or other law enforcement or judicial authority.

[9] The judicial review proceedings came up for hearing on 31st January 2020, and this Court made an order that there be disclosure to the claimants of whether any information was transmitted by the defendants in compliance with the Letter of Request under the provisions of the Act in respect of the claimants in relation to Cartier watch and in respect of any vehicle and bank accounts held in the name of the claimants. The disclosure was required within 10 days and the defendants were required to indicate to whom and when the transmission occurred.

[10] The defendants pursuant to this order filed their list of documents on 10th February 2020. The defendants' documents were listed under schedule 1 part 1 of the list of documents and comprised twenty (20) named documents. The defendants permitted inspection of eight (8) and withheld inspection of the remaining documents.

[11] The foregoing is the context within which the claimants and the defendants have filed applications regarding the withheld documents.

The Law and Analysis

[12] In judicial review proceedings the disclosure process, although relevant is not always applicable since judicial review proceedings seek to challenge the legality of the decision of the decision-maker. The Privy Council in the case of **Save Guana Cay Reef Association Ltd and others v The Queen and others**¹ noted that *orders for discovery and cross-examination are still exceptional in judicial review proceedings. Such proceedings are essentially a review of official decision-making, and need to be determined without any avoidable delay*². It is however, accepted that resting upon the public authority in judicial review proceedings is a duty of candour to applicant and to the court. This duty arises from an understanding that the respondent to judicial review applications, is not only a participant in the litigation proceedings but that *a particular obligation falls upon both solicitors and barristers acting for the public authorities to assist the court in ensuring that the high duties of public authorities are fulfilled*³.

[13] Although orders for discovery may not always be made in judicial review proceedings there are circumstance where the court accedes to an application that such order was necessary. It may be permitted, for example, when the court in reviewing the actions of the decision-maker, determines that the facts may be relevant and require careful assessment.

[14] In relation to specific disclosure the court determines whether the material sought is necessary to fairly dispose of the claim or to save costs⁴. In this case at the time of disclosure the defendants did not assert any privilege with respect to the withheld documents. The primary issue before the court is whether the court ought to permit the inspection of the items disclosed but withheld by the defendants.

[15] Senior counsel for the defendant contends that the circumstances of this case do not give rise to there being an ‘exception’ as referenced by the Privy Council’s decision of **Save Guana Cay Reef**

¹ [2009] UKPC 44.

² Ibid. para. 47.

³ Hoareau and another v Secretary of State for Foreign and Commonwealth Affairs [2018] EWHC 1508 at para 19.

⁴ See: CPR 28.6(1).

Association Ltd and others v The Queen and others thus, there is no necessity for the court to permit inspection of the documents withheld.

[16] CPR 28.11 proves that “*where a party has served a list of documents on any other party, that party has a right to inspect any document on the list, except documents- (a) for which a right to withhold from disclosure has been claimed: or (b) which are no longer in the physical possession of the party who served the list.*” The defendant having, albeit belatedly, asserted the right to withhold the documents the court is obliged or required to consider whether inspection is required in order for the court to fairly dispose of these proceedings. In this regard the court considers the purpose of judicial review proceedings and underlying issues for which the court is required to make a finding.

[17] It is accepted that judicial review is concerned with the legality of the decision rather than the merits of the decision. It is also concerned with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct⁵.

[18] On the matter of underlying issues in these proceedings, this court notes that the underlying issues can generally be stated as: whether the decision of the first defendant to comply with the request and/or supplemental requests made by the Crown Prosecution Service violated the constitutional rights of the claimants or was otherwise unlawful; whether the issuance by third defendant of a search warrant in respect of a Cartier gold watch was unlawful; whether the search of the safety box numbered 128 belonging to the second and third claimants and the search and disclosure of banking information was unconstitutional (contravening sections 3, 10 or some other provisions of the Constitution) or otherwise unlawful; whether the first and second defendants ought to be prohibited in respect of searches and the transmission of information. There is also likely to be the matter of whether the first defendant ought to be required to retrieve any transmitted information.

[19] It is noted that each of the matters arise from the central question as to the legality of the decision of the first named defendant to comply with the Letter of Request and/or the Supplemental Letter of Request. The court will now address its mind to whether the withheld documents are necessary to fairly dispose of these proceedings.

⁵ **Kemper Reinsurance Co v. Minister of Finance** (1998) 53 WIR 109 at 119 per Lord Hoffman.

The Documents and The Finding of the Court

[20] **The Correspondence dated 28th August 2018 from Crown Prosecution Services to the Attorney General and Correspondence dated 27th October 2018 from the Crown Prosecution Services to the Attorney General.** The correspondence dated 28th August 2018 from Crown Prosecution Services to the Attorney General and 27th October 2018 from Home Office to the Attorney General are likely to be the Letters and/or Supplemental of Request. In the case of **Asot Michael v The Attorney General of Antigua and Barbuda**⁶ a question of similar nature was placed before the Court of Appeal. In that matter the request originated from the Attorney General of Antigua and Barbuda seeking the assistance from the authorities in Bermuda. The Court of Appeal in affirming the decision of the trial judge indicated that the documents, including the letter of request, were not required for the fair disposal of the proceedings. In this case as in the matter that was before the Court of Appeal, there is no dispute between the parties that a request was made and it was made under the provisions of the Act. The disclosure by the defendants on the list of documents would have alerted the claimants that there was a letter of request and a supplemental letter of request, when the letters were issues and to and from whom. In this court's view this is sufficient and no further information is required for the fair disposal of this matter.

[21] **The correspondence dated 24th October 2019 from the Attorney General to the Director of the ONDCP and the correspondence dated 8th November 2019 from the Commissioner of Police to the Attorney General.** The claimants contend that the letters are relevant since they are likely to contain instructions from the first defendant to the second defendant and to the Director of ONDCP to take action including obtaining and executing the search warrant issued on 30th October 2019. These actions would have been in direct response to the Letter of Request and/or Supplemental Letter of Request. The correspondence, according to the counsel for the claimants, would also indicate the response of the Commissioner of Police to those instructions. These matters, the counsel for the claimants, contend are directly material to the question of lawfulness of the conduct of the first defendant and the second defendant and are necessary in the determination of reliefs sought in items 2, 3, 10-14. As it relates to the second relief sought this court notes that it relates to the issuance of a search warrant under the Magistrate's Code of Procedure Act⁷ in respect of a Cartier watch. The challenge to this warrant is that it was issued by the learned

⁶ HCVAP 2008/0008.

⁷Cap 255.

magistrate contrary to her powers under Magistrate's Code of Procedure. This court does not accept that the itemized correspondence are relevant in this regard. Reliefs sought in items 10-14 include a review of the constitutionality of the decision of the first defendant to comply with the Letter of Request in causing there to be search and entry. On this matter a similar position is adopted

[22] The third relief seeks a writ of prohibition against the second defendant in respect of searches arising as a consequence of the Letter of Request. At the root of the prohibition against the second defendant is the legality of compliance with the letter of request. This court is not of the view that the communication between the first named defendant and the second named defendant is necessary to fairly dispose of these proceedings.

[23] Queen's Counsel for the claimants also raised as a reason for the inspection of the correspondence that the first respondent may not have fulfilled its duty of candour towards the Director of ONDCP. In this court's view this is not relevant for the fair disposal of the proceedings before this court. In the opinion of this court the disclosure to ascertain whether the first defendant was candid with the Director of ONDCP is likely to trespass into a sphere akin to a fishing expedition.

[24] **Search Warrant dated 30th October 2019.** This is likely to be the search warrant executed in relation to the safety deposit box for which the claimants would have had sight whether or not it was served. The issue of the warrant having been seen by the claimant or claimants has not been denied by the defendants. This document is relevant.

[25] **ANUHCV2019/0628 Director of ONDCP v Eastern Caribbean Amalgamated Bank and Affidavit in Support filed on 14th November 2019; ANUHCV2019/0627 Director of ONDCP v Caribbean Union Bank and affidavit in support filed on 14th November 2019 and ANUHCV2019/0629 Director of ONDCP v Global Bank of Commerce and affidavit in support filed on 14th November 2019.** The contents of these documents are unknown. The defendants' disclosure of these proceedings suggests that, at least from the defendants' perspective, those proceedings have some relevance to the proceedings in this case. On the question whether the inspection of the proceedings is necessary for the fair disposal of these proceedings this court notes that the matter in issue is the decision of the first defendant to comply with the Letter of

Request. The actions taken by subsequent authorities, having been directed by the first defendant or any of the defendants, are not needed for the fair disposal of the proceedings.

[26] **Items identified in the letter of the first defendant to Mr. Richard Thomas dated 10th December 2019 namely, the witness statement of Debra M. Williams, certificate of Authenticity of business records, records from ECAB and items DMW1 through to DMW 15.** On this matter the court notes that there is no dispute that there has been a transmission. Again, the contents of the transmission are not necessary to fairly dispose of these proceedings which seek to challenge the legality of compliance with the Letter of Request and to restrain the transmission and the use of any illegally transmitted material. The copy provided by the defendants to the claimants of the letter dated 10th December 2019 provides sufficient information to the claimants.

[27] This court adopts a similar position with respect to the items identified in the witness statement of Erita Griffith dated 3rd December 2019 namely, Certificate of Authenticity of Business Records, Records produced by Global Bank of Commerce and exhibited to the Witness Statement of Erita Griffith including exhibits A and B; the items identified in the letter of the first defendant to Mr. Richard Thomas, dated 5th December 2019 namely the witness statement of Erita Griffith, the Records produced by Global Bank of Commerce and exhibited to the witness statement of Erita Griffith, Certificate of Authenticity of Business Records; letter from Global Bank of Commerce with the schedule of documents; the items identified in the witness statement of Debra M. Williams namely the letter of 10th December 2019 by the first defendant to Richard Thomas, the enclosures referred in the letter of the first defendant of 11th December 2019 addressed to Claire Tripcony; the letter of 12th December 2019 from the first defendant to the Clair Tripcony, the enclosure referred to therein; the items identified in the witness statement of Vinema Jarvis items VMJ1 through to VMJ8 in the said witness statement identified in the defendants' list of documents filed on 10th February 2020.

Public Interest Immunity

i. The Assertion of Public Interest Immunity

[28] In accordance with the provisions of CPR 28.11 (a) a party may withhold inspection of documents for which the right to withhold has been raised. The provisions which treat with the withholding of documents can be found in CPR 28.14 and provide that:

28.14 (1) A person who claims a right to withhold disclosure or inspection of a document or part of a document must-

- (a) make such claim for the document; and
- (b) state the grounds on which such a right is claimed;

in the list or otherwise in writing to the person wishing to inspect the document.

(2) a person may however apply to the court, without notice, for an order permitting that person not to disclose the existence of a document on the ground that disclosure of the existence of the document would damage the public interest.

(3) A person who applies under paragraph (2) must –

- (a) identify the documents, or parts thereof for which a right to withhold disclosure is claimed: and
- (b) give evidence on affidavit showing-
 - (i) that the applicant has a right or duty to withhold disclosure; and
 - (ii) the grounds on which the right on duty is claimed.

(4) Unless the court orders otherwise, an order of the court under paragraph (2) is not to be –

- (a) open for inspection by; nor
- (b) served on;

any person.

(5) person who does not agree with a claim of right to withhold inspection or disclosure of a document may apply to the court for an order that the document be disclosed or made available for inspection.

(6) On hearing such an application the court must make an order that the document be disclosed unless it is satisfied that there is a right to withhold disclosure.

(7) If a person-

- (a) applies for an order permitting that person not to disclose the existence of a document or part of a document; or
- (b) claims a right to withhold inspection;

The court may require the person to produce that document to the court to enable it to decide whether the claim is justified.

[29] The defendants, when filing their list on 10th February 2020, did not assert a right to withhold any of the documents therein contained from inspection. In fact, counsel for the claimants was invited to inspect the documents on any normal working day between the hours of 8:00 am and 4:30 p.m.. The counsel for the claimants noted that by the invitation to inspect the list of documents and the letter from counsel for the defendant dated 18th February, 2020 which indicated that the documents disclosed were sent to the office of counsel for the claimants, raised concerns about whether the defendants were acting in good faith on the matter of disclosure.

[30] The defendants' application is grounded on the contention that "the disclosure of the existence of the documents will damage the public interest" and "that the Attorney General has a right or duty to withhold disclosure of the said documents". It is noted that despite the words used by the defendants in its application, the documents have been disclosed and the defendants' desire at this juncture is to withhold inspection of the disclosed documents.

[31] The first named defendant in its affidavit in support of the application indicated that:

"6. ...I am of the firm view that there is a duty to withhold inspection of all the documents listed in the List of Documents on the grounds of public interest and confidentiality. The right is invoked pursuant to CPR 28.14. Further the Defendants have not demonstrated a plausible ground on which it can be said that the disclosure is necessary for the just disposal of the proceedings.

7. I am also advised by counsel and verily believe that the ordinary rules of disclosure which include (inspection and copying) do not readily apply to judicial review proceedings as they do to ordinary civil proceedings.

8. In addition, the documents disclosed to the Defendants by letter dated 18th February 2020 are only to be referred to for identity purposes and not their contents. I hereby state that the disclosure of the identity and or nature of the documents ought to suffice at this stage since the foreign requesting State is merely at the state of an investigation.

9. I further state that the documents are confidential at this stage and as such (*sic.*) would be clearly inimical to the public interest to disclose the contents of the documents to the parties who themselves are subjects of an investigation. The public interest element is

grounded in the fact that the State of Antigua and Barbuda has an obligation under the Mutual Assistance in Criminal Matters Act 1993 as amended to guard the contents of these documents.

10. I am advised by counselthat the duty of the first named applicant is the duty to keep the Request confidential from the targets that is (Respondents/Claimants) of the criminal investigation. The public has an interest in the unimpeded investigation of criminal offences.”

[32] Thus, the defendants assert a duty to withhold the documents based upon public interest and the obligation of the State of Antigua and Barbuda to guard the contents and to keep confidential the documents in question. Public interest and confidentiality assertions are also based upon the contention that inspection ought not to be open to persons who are the subjects of criminal investigations.

ii. Public Interest Immunity-The Law and Application of the Law

[33] The law in relation to public interest immunity was stated in the often quoted case of **R v Chief Constable, W. Midlands, Ex p. Wiley**. In **Wiley**, Lord Templeman noted that “*Public interest immunity is a ground for refusing to disclose a document which is relevant and material to the determination of issues involved in civil or criminal proceedings. A claim to public interest immunity can only be justified if the public interest in preserving the confidentiality of the document outweighs the public interest in securing justice*⁸”.

The three-stage process in assessing the applicability of public interest immunity is:

- (1) Whether the material in relation to which public interest immunity is asserted is relevant to an issue in the proceedings;
- (2) Whether there is a real risk that disclosure of that material would cause substantial harm to the public interest;
- (3) If so, whether, balancing the public interest in the administration of justice against the harm to the public interest that would be occasioned by disclosure, an order for disclosure should be made.

[34] The assertion of the principle is often accompanied by a certificate by the office holder indicating that public interest immunity has been raised. The first defendant has not filed a certificate but has deposed that inspection of the document is contrary to public interest. Counsel for the defendants asserts that the affidavit filed by the first defendant is sufficient to hold the claim. This court agrees with counsel for the defendant that

⁸ [1994] 3 LRC 162 at 165.

the first defendant's evidence on affidavit is sufficient to raise a public interest immunity. This is particularly the case since the provisions of CPR 28.14 (3) indicate the manner in which the assertions to withhold disclosure or inspection ought to be made.

[35] On the matter of public interest immunity, the counsel for the defendant, referred to the case of **Asot Michael v The Attorney General of Antigua and Barbuda**⁹. In this case the Court of Appeal referring to the matter before that court noted that:

"[18] The appellant's challenge to the judge's decision addresses itself not to merits but to the legal basis of his decision, by contending that the defendants failed to adduce any evidence capable of establishing that disclosure and the provision of further information would damage the public interest. Counsel contends that because there was no such evidence, the judge erred in upholding the respondents' claim. "Further and/or alternatively," counsel submitted, "if which is denied, there was evidence, it is clear from the Judge's judgement that he did not perform the judicial exercise of a balancing act required whenever immunity is claimed to ensure that the immunity claim is made out and/ or that a fair hearing and the Appellant's rights were protected. See the authorities referred to extensively in **Bennett v Commissioner of Police** [1995] 1 WLR 488 at pages 495(f) to 499(f)".

[36] After making reference to the cases of **Belize Printers Association Limited v Minister of Finance and Home Affairs**¹⁰ the Court of Appeal noted that "In the instant appeal the challenge to the judge's decision is that there was no evidence presented to prove there would be damage to public interest if disclosure was ordered. The short answer to that contention, as the extracts from the **Belize Printers** case show, is that it has *not been the practice for the court to require evidence*.¹¹" The Court of Appeal went on to state that:

"22. It is my understanding that the rules contained in the CPR 2000 that now regulate the making of the claim for public interest immunity have not substantially altered the common law practice. ... To the contrary, the treatment, for instance, in **Blackstone's Civil Practice 2006** indicates that the practice continues to be that the court will rely on the minister's certificate and that it is for the party seeking inspection to show that the claim to immunity should be rejected."

⁹ HCVAP 2008/008.

¹⁰ (2004) 4 Bz.L.R. 23.

¹¹ Supra. paragraph 21.

[37] In the circumstances of this case the first defendant has raised the matter of public interest immunity. The fact that the matter has been raised is not necessarily conclusive¹². However, the matter of public interest immunity having been raised the burden shifts to the claimants to show why the claim to immunity should be rejected in respect of any document(s) required for the fair disposal of the proceedings, in this case the search warrant.

[38] In the submissions to the court on why the application which asserted public interest immunity ought not to be granted, the counsel for the claimants, among other things, submitted that:

- a. There are procedural grounds upon which the assertion of public interest immunity ought to be rejected.
- b. The overall conduct of the defendants was in breach of duty of candour.
- c. Public interest immunity does not generally attach to classes of documents so as to mandate them being withheld from inspection and each document must be considered on its own merits.
- d. There is no blanket rule of withholding documents from the subjects of criminal investigations.
- e. Confidentiality is not, per se, a basis for concluding it is in the public interest to withhold documents.
- f. There is a requirement of the court to consider to the relevant factors in the balance as articulated in the case of **R v Chief Constable, W. Midlands, Ex p. Wiley**¹³.

[39] The procedural concerns raised by counsel for the claimants have been addressed hereinbefore and this court has determined that it is appropriate to proceed with the hearing of the assertion on public interest immunity. On the matter of the attachment of public interest immunity to a class of documents this court notes that 'claims to public interest immunity are of two types: (a) claims that all documents of certain classes must be protected; (b) claims that individual documents need to be protected because of their particular 'contents'¹⁴.

¹² Conway v Rimmer [1968] AC 910.

¹³ [1994] 3 All ER 420.

¹⁴ Blackstone's Civil Practice 2017 at 50.80.

[40] In treating with the relevant factors, the court notes that it is not disputed that the claim raises allegations that the defendants acted in breach the claimant's fundamental rights. These are important matters. Counsel for the claimants, in her submissions, goes on to contend that the first defendant "has attempted to interfere with the administration of justice by transmitting material to the United Kingdom when on notice of-and seemingly to frustrate- the claimants' application for administrative orders and for relief and redress under section 18 of the Constitution and in further breach of the claimants' rights to protection of the law and effective access to the court contrary to sections 3, 15 and 18 of the Constitution". This, counsel submits, supports the view that the substance of the claim is very serious in nature.

[41] Counsel for the claimants submits that on the matter of whether the Government is alleged to have acted unconscionably, the first defendant is a "senior member of Government of Antigua and Barbuda and he is alleged to have acted unconscionably in the following three ways. First, the First Defendant (and consequently the Second Defendant) provided assistance to the United Kingdom that (a) the UK investigation had violated the state of immunity of Antigua and Barbuda, (b) the UK prosecution was liable to be stayed as an abuse of process even if the First Claimant's conduct was not immune, and (c) a central plank of the evidence underpinning the UK investigation was obtained from a third state in breach of the First Claimant's fundamental human rights, and its content could not lawfully be transmitted to Antigua and Barbuda or officers representing Antigua and Barbuda. Second, there is currently no evidence that this information was communicated to the Third Defendant, which is a serious breach of the First and Second Defendants' duty of candour. Third, it now appears that the First Defendant has attempted to interfere with the administration of justice and frustrate- the Claimants' application for administrative orders and for relief and redress under Section 18 of the Constitution and in further breach of the Claimants' right to protection of law and effective access to the court contrary to sections 3, 15 and 8 of the Constitution...". Counsel also invited the court to look at the significance and relevance of the evidence to the case.

[42] On the matter of the search warrant dated 30th October 2019 this court notes that the claimants have previously had sight of the search warrant and it appears as an attachment to the claimants' document. It is difficult to see how the inspection of the search warrant would cause substantial harm to the public interest. On the matter of the claimants being the subjects of criminal proceedings, generally, this court accepts the

submission of the counsel for the claimants that being subjects of an ongoing investigation does not, on its own, preclude the disclosure of item. Accordingly, the inspection of this document is permitted.

[43] It is ordered that:

- a. The inspection of the search warrant issued on 30th October 2019 is permitted. Such inspection to be held within 21 days.
- b. The defendants permitted to withhold from inspection the documents listed as items 1, 2, 3, 4, 5, 7, 8, 9, 10, 13 and 17 in the list of documents filed on 10th February 2020
- c. The defendants permitted to withhold from inspection the documents and/or documents identified in items 10, 11, 12, 14, 15, 16, 18 and 19 in the list of documents filed on 10th February 2020.
- d. Costs to be heard by this court at the next hearing.

Marissa Robertson
High Court Judge

Registrar

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