

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA**

HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV2012/0045

**IN THE MATTER OF THE SEIZURE OF COMPUTERS CELL PHONES AND OTHER
PERSONAL ITEMS BY POLICE OFFICERS FROM THE PRIVATE RESIDENCE OF SHANKIELL
MYLAND AT WOBURN IN THE PARISH OF SAINT GEORGE**

**AND IN THE MATTER OF A PERSON ALLEGING BREACHES OF HIS CONSTITUTIONAL
RIGHTS AS GUARANTEED BY SECTION 6 OF THE CONSTITUTION OF GRENADA**

**AND IN THE MATTERS OF A PERSON SEEKING REDRESS FOR ALLEGED BREACHES
PURSUANT TO SECTION 16 OF THE CONSTITUTION**

BETWEEN:

SHANKIELL MYLAND

Claimant

And

**[1] COMMISSIONER OF POLICE
[2] SGT. RAYMOND LOCKIBY
[3] ATTORNEY GENERAL OF GRENADA**

Defendants

Appearances:

Mr Ruggles Ferguson and Deborah Mitchell for Claimant
Mr. Darshan Ramdhani Solicitor General and Crown Counsel Mr. A. Olowu for the
Defendants

2014: May 9

JUDGMENT

- [1] **ELLIS, J.:** Following receipt of information from confidential sources, the Second Defendant on 6th February 2012 and in accordance with section 15 (1) (b) of the Criminal Procedure Code sought and obtained a warrant authorizing the search of the Claimant's

home at Woburn St. Georges and the seizure of the following items; a controlled drug, vacuum plastic bags, grams scales, cell phones, computers, documents and any other things that will constitute an offence.

- [2] The warrant was issued by a Justice of the Peace signing on behalf of the Magistrate of the Southern District and was obtained pursuant to a compliant on oath signed by the Second Defendant in which he swore that the Claimant between 1st December 2011 and 2nd February 2012, did conspire to export a controlled drug contrary to section 18 of the Drug Abuse (Prevention and Control) Act.
- [3] The search warrant was executed on the 7th February 2012, and several documents were seized along with computers and cell phones found in the Claimant's home. Subsequent to the search and seizure, the Claimant was detained and kept in police custody but was later released without charge.
- [4] On March 2012, the Claimant was arrested and charged jointly with four other persons with the offence of conspiracy to traffic a controlled drug. At the first hearing of the charge, Counsel for the Claimant requested the return of the computers and cell phones and any other unused materials. On the 7th February 2012, a list of the seized items was provided to the Claimant. However, the Claimant claimed that despite several verbal and written requests, the First and Second Defendants have refused to return to the Claimant the seized items.
- [5] By Fixed Date Claim Form filed on 14th February 2012, the Claimant seeks the following relief as against the Defendants:
- (1) A declaration that the First Defendant acting through his servants and or agents, including the Second Defendant, on February 7th, 2012, unlawfully removed and carried away from the home of the Claimant several personal items (the seized items) of the Claimant and his family including three (3) computers, three (3) cell phones and a flash drive in breach of his fundamental right to privacy and to be protected from having property arbitrarily seized from him.

- (2) A declaration that the Defendants continue to unlawfully hold and retain possession of the seized items without any or any proper basis in law or otherwise in violation of the Claimant's constitutional right guaranteed under the Constitution of Grenada not to be deprived of his property.
- (3) A declaration that in removing, carrying away and retaining the seized items, the First and Second Defendants acted and continue to act in abuse of their authority outside the scope of the law and in utter disregard for the fundamental and other rights of the Claimant.
- (4) An injunction restraining the First and Second Defendants from removing, adding to or altering information on the Claimant's computer or searching through or in any way interfering with seized items.
- (5) An order directing the First and Second Defendants to return the seized items forthwith.
- (6) Damages against the Defendants for breach of the Claimant's constitutional rights.
- (7) Such further or other relief as this Honourable Court deems just.
- (8) Costs.

[6] By Notice of Application filed on 14th February 2012, , the Claimant seeks the following relief as against the Defendants:

- (1) An injunction restraining the First and Second Defendants from removing, adding or altering information on the Claimant's computer or searching through or in any way interfering with seized items by the police officers at the Claimant's residence on 7th February 2012.
- (2) An order directing the First and Second Defendants to return the seized items forthwith to the Claimant.
- (3) Costs.

[7] Prior to this matter coming up for hearing, Counsel for the Parties advised the Court that on 3rd May 2012, all of the seized items, save for two processed cheques and an invoice, had

been returned to the Claimant through his attorneys. Notwithstanding this, Counsel for the Claimant maintained that the Claimant intended to pursue his action for damages in respect of the alleged breach of his constitutional rights. He also advised the Court that he would no longer be pursuing the relief claimed in respect of the injunction or the order for the return of the items seized.

POINT IN LIMINE

Defendants' Case

[8] At the commencement of the hearing, the Solicitor General indicated his intention to advance a *point in limine* which was trenchantly opposed by Counsel for the Defendant. The Solicitor General contended that the constitutional jurisdiction of the Court is a special and exceptional one which should be sparingly utilised. He referred the Court to the judicial authorities of **Harrikissoon v Attorney General of Trinidad and Tobago**¹, **Chookolingo v Attorney General of Trinidad**² and **Tobago** and **Hinds v Attorney General**³ which demonstrate that the Court has a discretion to bar constitutional relief on the basis of an alternative remedy.

[9] He submitted that the facts alleged by the Claimant give rise to claims in the tort of trespass or detinue. He contended that the ordinary civil courts are accustomed to dealing with such claims and have available to them common law remedies which include some of the very declarations which are set out by the Claimant in his Fixed Date Claim Form. In respect of the first item of relief claimed, the Solicitor General submitted that this is essentially a claim in trespass and detinue. In respect of second and third claims of relief, he contended that if the items had not been returned, the Claimant could ground a civil claim in detinue, and in any event, the fourth and fifth claims of relief could easily have been ordered as ordinary civil remedies.

[10] The Solicitor General submitted that the mere allegation of a breach by an organ of the state or public authority or public officer does not without more provide sufficient basis to

¹ [1980] AC 265

² [1981] 1 All ER 106

³ [2001] YKPC 56

invoke the constitutional jurisdiction of the Court. In his view, there must be something over and above the simple common law issues which would arise. Save that the police were involved in a lawful search of the Claimant's home; he submitted that there is no other element involved which would justify a claim for constitutional relief. He referred the Court to the judgment of Blenman J (as she then was) in **Richardson-Hodge and Anor. v Attorney General of Anguilla et al.**⁴ In that case, the claimants filed a constitutional motion challenging the grant or execution of two search warrants on the basis that the search warrants were unlawful and invalid and that the defendants contravened section 8 of the Anguilla Constitution Order.

[11] In considering an application to stay the constitutional motion, the learned Judge observed the following:

"It is the law that entering a person's office without his permission can amount to the common law tort of trespass. The seizure and detaining of goods from that office can form the basis of an action in detinue. The public has an interest in protection from unlawful search and seizure; this must be balanced against the interests of the state to investigate, detect and prosecute alleged offences."

[12] At paragraphs 113 – 115 of her judgment, the learned Judge quoted extensively from the Privy Council judgment of **Thakur Persad Jaroo v The Attorney General of Trinidad and Tobago**⁵ noting in particular Lord Hope's statement at paragraph 39:

"Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be involved. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to

⁴ AXAHCV 0007/2010 Anguilla unreported judgment

⁵ [2002] 1 AC 871

withdraw the motion from the High Court as its continued use in circumstances will also be an abuse”.

[13] Blenman J. noted that there was a parallel remedy available to the Claimants which would enable them to enforce their rights not to have their offices subjected to unlawful search and seizure. Moreover, she noted that there are factual disputes in the case before the Court which were better suited to be resolved by a civil action.

[14] The Solicitor General concurred that a Constitutional Motion is wholly unsuitable for cases which depend on the resolution of disputes of fact. He pointed to the Claimant's earlier intimation of an intention to cross-examine the deponents giving evidence for the defence and submitted that disputes of this nature must be resolved by using the procedures which are available in the ordinary courts under the common law. He argued that the proper procedure by which to launch an attack on the validity or otherwise of the search warrants and the searches would be by way of civil action.

Claimant's case

[15] Counsel for the Claimant commenced his response by challenging the timing of the Solicitor General's objection. He submitted that raising this objection at what he described as “the ninety-nine and three-quarter hour” significantly prejudices the Claimant. He contended that in the event that the Court rules in favour of the Defendants, then it would mean that the Claimant would effectively be shut out of a remedy in circumstances where he alleges that the State has acted oppressively. This is particularly so because in matters against the State, claimants do not have generous limitation periods.⁶ In circumstances where the Defendants have waited three months to raise this objection, he contended that the objection should fail on the basis of the potential prejudice to the Claimant.

[16] Apart from the potential limitation challenges, Counsel also submitted that the Claimant would face additional expense of having to start over by commencing a civil action when the

⁶ Based on Immunity and Privileges law, a person must commence his action within six months.

present proceedings were so advanced. He submitted that the overriding objective requires that the Court deal with cases justly and economically.

[17] He further contended that these are matters which are not suited to a civil court as they raise clear constitutional issues relating to a breach of the Claimant's fundamental rights and freedoms. He submitted that this matter involves the litigant coming up against the "mighty coercive arm of the State." This case has to do with the actions taken by agents of the state and not neighbours so that pursuing this claim in trespass or detinue would belittle the Claimant's case. He further submitted that the principles which will be distilled in this matter will have wider implications.

[18] In conclusion, Counsel submitted that the point in limine has no merit and should be rejected. He submitted that this was a hard core constitutional case involving an arbitrary search and seizure and an interference with the fundamental right of freedom of expression.

Court's Analysis and Conclusion

[19] Like most constitutions in the Eastern Caribbean, the Grenada Constitution Order of 1973 contains a provision precluding the exercise by the court of its power to grant constitutional redress if satisfied that adequate means of legal redress are otherwise available. Section 16 of the Constitution provides as follows

"16.-(1) -

(2) The High Court shall have original jurisdiction-

- (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section ; and
- (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section and may make such declarations or orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 2 to 15 (inclusive) of this Constitution :

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.”
(Emphasis mine)

- [20] So that the Court clearly has a discretion as to whether it should exercise its powers to grant relief in any given case. In **Harrikissoon v Attorney-General of Trinidad and Tobago**, the Judicial Committee gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant. Speaking in the context of judicial review as a parallel remedy, Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action. The Board opined that permitting such use of applications for constitutional redress would diminish the value of the safeguard which such applications are intended to have.
- [21] Lord Diplock further observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is made “*solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right.*”
- [22] This position has been reinforced by the decision of the Judicial Committee in **Jaroo v Attorney-General of Trinidad and Tobago**⁷ and more recently at paragraph 25 of **Attorney General of Trinidad and Tobago v Ramanoop**⁸, where the Committee declared that where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. There must therefore be some feature which on a *prima facie* basis, indicates that the means of legal redress otherwise available would not be suitable. To seek

⁷ And see: Hamel-Smith JA in *George v Attorney-General of Trinidad and Tobago* (8 April 2003, unreported).

⁸ [2006] 1 AC 328; *Subiah v. The Attorney General of Trinidad & Tobago* (Trinidad & Tobago) [2008] UKPC 47

constitutional relief in the absence of such a feature would be a misuse or abuse of the court's process.

[23] A typical, but by no means exclusive example of a special feature would be a case where there has been an arbitrary use of state power. The case of **Attorney General of Trinidad and Tobago v Ramanooop** concerned what the Privy Council described as "some quite appalling misbehavior" by a police officer. After noting that police officers are endowed by the state with coercive powers, the Board concluded that that case involved a shameful misuse of this coercive power and in those circumstances, the Court accepted that the arbitrary use of state power meant that alternative means of legal redress were not adequate.

[24] Another special feature is the preponderance of disputed facts. An originating motion is a summary procedure. Save in the simplest of cases, it is clear that it is ill-suited to decide substantial factual disputes. Satisfactory resolution of such disputes usually requires pleadings, discovery and oral evidence which are more suited to a civil claim procedure. The Court is guided by the dicta in **Jaroo v AG of Trinidad and Tobago** at paragraph 36 of the Judgment:

"Their Lordships wish to emphasise that the originating motion procedure under section 14(1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes as to fact. Disputes of that kind must be resolved by using the procedures which are available in the ordinary courts under the common law. As Lord Mustill indicated in Boodram v Attorney General of Trinidad and Tobago [1996] AC 842, 854, in the context of a complaint that adverse publicity would prejudice the applicant's right to a fair trial, the question whether the applicant's complaint that the police were detaining his vehicle was well founded was a matter for decision and, if necessary, remedy by the use of the ordinary and well-established procedures which exist independently of the Constitution."

- [25] It is also useful to note that the Board in **Ramanoop** observed that had the facts set out by the claimant in his affidavit been disputed it might well have been appropriate for the court to direct that the proceedings should continue as though they had been by way of writ.
- [26] The instant case involves a search of the Claimant's home and the alleged unlawful seizure and retention of personal belongings purported to have been committed by police officers acting in their professional capacity and in execution of a warrant. There can be no doubt that entering a person's home without his permission may amount to the common law tort of trespass and the seizure and detention of goods from that home may form the basis of a claim in detainee. In this case however, the Claimant goes further and alleges an arbitrary misuse of the powers conferred upon the police by the State resulting in the infringement of his constitutional rights. He alleges not only a breach section 6 of Constitution – which affords protection for an unlawful deprivation of property, but he also contends a breach of privacy and a violation of his fundamental right to freedom of expression. He claims not only declaratory relief but also compensatory damages in respect of the alleged breaches.
- [27] Whether this claim is maintainable is a matter which must ultimately be decided by the Court, but on a prima facie basis the Court finds that there is at least an arguable claim for constitutional relief.
- [28] Moreover, unlike the case of **Richardson-Hodge and Anor. v Attorney General of Anguilla**, there are no troublesome disputes of fact at issue here. In this case, the Defendants have filed a substantive response to the Claimant's case which does not substantially dispute the underlying factual chronology or background of the claim. At the commencement of the hearing, the parties in this case clearly conceded following dialogue that any difference in the affidavit evidence filed by both sides were not material to the matters before the court and so there would be no need to cross-examine witnesses. There therefore appears to be a general consensus that a search warrant was executed on the 7th February 2012, on the Claimant's home and that several documents were seized along with computers and cell phones found in the home. It is also now common ground that except for

the named items, all of the seized material have prior to the hearing of this matter been returned to the Claimant.

- [29] Having regard to all of the circumstances of this case, the Court will exercise its discretion to consider the Claimant's claim for constitutional relief notwithstanding the Claimant's failure to strictly comply with the relevant procedures prescribed by Part 56.7 of Civil Procedure Rules.

CHALLENGE TO THE VALIDITY OF SEARCH WARRANT

- [30] The Claimant's Fixed Date Claim Form filed on 14th February 2012 makes no mention and claims no relief in respect of the validity of the search warrant issued and executed at his home on 7th February 2012. The entire scope of the claim hinges on the unlawful removal and retention of items seized under the search warrant. This position is reinforced in the affidavit evidence filed by the Claimant in support of his Claim.

- [31] In fact, it is only in the skeleton submission filed on behalf of the Claimant on 30th April 2012 that Counsel for the Claimant attempted to raise this issue. Counsel submitted that the warrant issued on 6th February 2012 is not a valid search warrant within the meaning of section 15 of the Criminal Procedure Code. He submitted that in order to issue a warrant to search the Claimant's home, a magistrate must first have been satisfied on oath that there was something which there is reasonable ground to believe will afford evidence of the commission of an offence. Once seized, these items must then be carried before the Magistrate issuing the warrant (or some other available magistrate).

- [32] While a Justice of the Peace may issue a search warrant instead of the magistrate, section 98 of the Criminal Procedure Code provides that this can only be done where the magistrate is absent or where it is otherwise not practicable to make immediate application to a magistrate. Counsel contended that in this case, the "necessary information" was not provided to the Justice of the Peace in order to satisfy him that a case was made out for issuing the search warrant. He further contends that it has not been shown that either a

magistrate was absent or that the ends of justice would likely be defeated by any delay required for the making of an application to a magistrate. Moreover, the Claimant contends that no justification has been provided for issuing a warrant at all.

[33] Counsel for the Defendants forcefully opposed the Claimant's eleventh hour attempt to challenge the validity of the search warrant. He noted that nowhere in the evidence filed in support of the Claim, is any complaint made that the issuance of the warrant was improper. For that reason alone, he submitted that this Court should decline to consider any challenge on that basis.

[34] Counsel contended that in the absence of any specific allegation of evidence to the contrary, the Court is left with the warrant which was exhibited to the affidavit of Detective Sergeant Raymond Lockiby and filed on the 8th March 2012, which on its face and form sets out all the relevant and material information necessary to make it a valid warrant. He suggested that while the Claimant can challenge the execution of the warrant, he cannot purport to challenge the validity thereof in the absence of appropriate pleadings. He cited in support the case of this contention, the case of **Margaret Joseph v. [1] The Attorney General [2] Raphael Hamilton**⁹.

[35] Counsel for the Claimant readily conceded that the Claim seeks no relief in respect of the validity of the search warrant. He submitted that at the time that the claim was drafted, he was not in possession of the warrant and that it was only produced during the course of the proceedings. He contended that notwithstanding this, the Court is able to address this issue as part of the catch-all claim for relief which is set out in the Fixed Date Claim Form in which Claimant claims "Such further and other relief as the Court deems just." He also submitted that paragraph 5 of the Claimant's affidavit of 14th February 2012 in which he deposed that "*...the second defendant read from what he purported to be a valid search warrant authorising them to search for scales, drugs, plastic wraps ammunition, cell phone...*": would have signalled that the Claimant did not accept the validity of the search warrant.

⁹ Civil Appeal No.9 of 2003

[36] He contended that as the search warrant has now been put before the Court, the Court is obliged to consider the validity warrant and complaint of oath based on the documentation alone, notwithstanding the absence of any evidential contention on the part of the Claimant.

Court's Analysis and Conclusion

[37] Litigation proceeds on the basis that the court is a court of pleadings. They are critical in that they give fair notice of the case that has to be met, so that the opposing party may direct its evidence to the issues disclosed and they assist the court in adjudicating on the allegations made by the litigants. Not only should they define the issue(s) between litigants with clarity and precision, but they also serve as a record of the issues involved in the action which can (if necessary) be referred to at a later date.

[38] The CPR reinforces this at Part 8.7 which provides that:

- (1) "The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.
- (2) The statement must be as short as practicable.
- (3) The claim form or the statement of claim must identify or have annexed thereto a copy of any document which the claimant considers is necessary to his or her case."¹⁰

[39] Thus, every pleading must contain a concise statement of the material facts on which a party relies for his or her claim. Material facts must be stated clearly and definitely in a summary way. They should not need to be inferred from vague or ambiguous expressions, or from statements of circumstances consistent with different conclusions.

[40] This is particularly so in the case of public law claims where it is now settled law that a Claimant who seeks to claim breach of constitutional provisions must show on the face of the pleadings the nature of the alleged violation or contravention that is being

¹⁰ In the same way, a defendant must plead to any matter on which he or she intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise, or raise an issue that has not been raised in the opposite party's pleading.

asserted.¹¹ Part 56.7 (4) clearly sets out a claimant's responsibility in this regard. It states as follows:

"56.7(4) – The affidavit must state: –

- (a) –
- (b) the nature of the relief sought identifying –
 - i. Any interim sought; and
 - ii. Whether the claimant seeks damages, restitution, recovery of any sum due or alleged to be due or an order for the return of property, setting out the facts on which such claim is based and, where practicable, specifying the amount of money claimed;
- (c) in the case of a claim under the relevant Constitution - the provision of the Constitution which the Claimant alleges has been or is likely to be breached;
- (d) the grounds on which such relief is sought;
- (e) the facts on which the claim is based;"
- (f) –
- (g) –

[41] In order to succeed in his claim for relief, the Claimant must therefore not only allege but provide cogent evidence that these Defendants have through their action or inaction breached or violated his rights under the Constitution. He would have to demonstrate that the Defendants have in some way acted inconsistently with his rights, which obliges them to refrain from or remedy the activities which are otherwise unlawful. The Court cannot accept that in these circumstances it is appropriate for a claimant to ignore the requirements set out under the CPR and to seek to litigate an issue which has not been raised in his pleadings, thus taking the opposite party completely by surprise.

[42] The Defendants were therefore well within their rights to oppose the Claimant's attempts to litigate an issue which is not set out in his case. The Court is not persuaded that the Claimant's failure to seek disclosure of the warrant should in any way assist him in avoiding his obligations under the CPR. This is especially so since the Claimant would have exhibited the warrant and the complaint on oath since 8th March 2012, affording sufficient time for the Claimant to amend his pleadings.

¹¹ Operation Dismantle v The Queen (1985) 1 SCR 441 and Amerally and Bentham v Attorney General (1978) 25 WIR 272

[43] That this is a substantive rather than technical issue was made clear by the Court of Appeal in **Margaret Joseph v. [1] The Attorney General [2] Raphael Hamilton**. In the facts of that case, a police officer obtained a warrant for the arrest of the Appellant and executed that warrant on the same day. The Appellant claimed damages for wrongful arrest, false imprisonment and malicious prosecution. Having failed to obtain relief at first instance, she appealed to the Court of Appeal. Gordon JA in delivering the Court's judgment noted the following:

“...the Grenada Criminal Law, as do most systems of Criminal law, makes provision for the issue of warrants for the arrest of persons. Title III of the Criminal Procedure Code, Cap 2 of the Laws of Grenada deals with the whole issue of powers of arrest and warrants for the arrest of persons. **There has been no allegation either in the Statement of Claim, the evidence or the submissions before the learned trial Judge that the warrant of arrest which was executed by the second respondent was irregularly obtained. Hence, based on the pleadings, the evidence and the maxim *omnia presumuntur rite esse* this Court is bound to find that the warrant was regularly issued.**” (Emphasis mine)

[44] In light of the way that the Claimant has chosen to plead his case, the Court is satisfied that the Claimant cannot in legal submissions purport to advance a claim which he deliberately chose not to advance in his written pleadings and evidence.

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

[46] It is also clear that in displacing that presumption, the Claimant bears the burden of proof, on a balance of probabilities. The Court is not satisfied that the Claimant has in any way discharged this significant burden. Certainly, it is not for the Defendant to prove the validity

of the warrant or the process of obtaining the warrant. This is especially so in circumstances where the Claimant has by his pleadings and evidence filed in support, provided no indication of a nature of the challenge proposed to be raised in that regard.

[47] The Claimant's written submissions rely on section 98 of the Criminal Procedure Code which provides that any justice of the peace may and shall take the necessary information and issue a warrant where, due to the absence of a magistrate or from any other cause, it is not practicable to make an application to a magistrate for a search warrant. He contends that there is no evidence that any of these circumstances existed which would justify resorting to a justice of the peace rather than a magistrate. In so doing, he ignores the Second Defendant's evidence that based on the timing and that urgency of the situation, the application before the Justice of the Peace was the most practicable course.¹² This evidence was not traversed by the Claimant.

[48] Moreover, in advancing this contention, the Claimant has failed to grasp that the burden lies on him to displace the presumption of regularity by proving that there was in fact an available magistrate and that the ends of justice would not have been defeated by a delay in sourcing such magistrate.

[49] In addition, in his written submissions, the Claimant contends that the Justice of the Peace was not given and did not take the information necessary in order for him to form an opinion that a case for issuing a warrant had been made out. He pointed out that section 15 (1) (b) of the Criminal Procedure Code demands that there must be a complaint on oath presented before the magistrate or justice of the peace before a warrant may be issued. He submitted that the complaint on oath which was presented by the Second Defendant in Form 3A prays that the search to be carried out of the Claimant rather than his residence and makes no mention of the items which were later set out in the body of the warrant. He contended that there is therefore no nexus between the legal items seized from the house and the offence which is alleged to have been committed.

¹² Affidavit of DS Raymond Lockiby filed on 4th May 2012 at paragraph 3 (c) and (d)

[50] Having reviewed the text of section 15 (1) of the Criminal Procedure Code, the Court is satisfied that the section does not require that the police officer lay a written compliant on oath before a magistrate. The actual text of that statute reads as follows:

“Any Magistrate who is satisfied upon oath that there is reasonable ground for believing that there is, in any building, ship, carriage, box, receptacle or place —

(a) anything upon or in respect of which any offence has been or is suspected to have been committed, for which, according to any law for the time being in force, the offender may be arrested without warrant;

(b) anything which there is reasonable ground for believing will afford evidence as to the commission of any such offence; or

(c) anything which there is reasonable ground for believing is intended to be used for the purpose of committing any offence against the person, for which according to any law for the time being in force, the offender may be arrested without warrant,

may at any time issue a warrant authorizing some constable named therein to search the building, ship, carriage, box, receptacle, or place for the thing, and to seize and carry it before the Magistrate issuing the warrant or some other Magistrate.”

[51] What the section does require is that the police officer must disclose to the magistrate all that the latter needs to know to establish the grounds for suspicion to his satisfaction. The section requires that this must be stated on oath. The statute does not require that the information be provided in writing neither does it preclude an oral statement given on oath.¹³ It is therefore entirely acceptable for the police officer to provide a sworn affidavit or alternatively to appear before the justice of the peace and present his information orally on oath.¹⁴

[52] It follows that in order to dispute the validity of the warrant, the Claimant would have to not only allege but advance actual evidence to demonstrate that the conditions precedent for the grant of the warrant were absent. Apart from the bare allegation set out in his written

¹³ The Court notes the dicta of Lord Hoffman in *Attorney General of Jamaica v Williams* [1998] AC 351 (PC)

¹⁴ *Attorney General of Grenada v Salisbury Merchant Bank Limited* Civil Appeal No. 20 of 2002; Cause 464 of 2008 R v Carson K .Ebanks ex parte Henderson CILR

submissions, the Claimant has done nothing to not set out the facts in support of his case and has not the requisite proof before the Court. In the present case, the Defendants have simply contended that the warrant was duly obtained and this evidence is not disputed by the Claimant. In the premises, the Court finds that based on the way that the Claimant has chosen to plead his case, that there is no basis upon which the validity of the warrant can properly be maintained.

Did the Defendants' Actions Amount to a Breach of Section 6 of the Constitution?

[53] Subsections 6 (1) and (2) of the Constitution of Grenada protects an individual's right to property in the following terms:

"(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation."

(2) Every person having an interest in or right over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for-

- a. the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he is entitled; and
- b. the purpose of obtaining prompt payment of that compensation. (emphasis mine)

[54] Generally, while the Bill of Rights confers rights on individuals, it also authorises the limitation of those rights in a limitation clause. That axiom - that no right is absolute - applies equally in respect of section 6 of the Constitution and this is reflected in subsection (6) (6) which provides that:

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section-

- a. **to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right-**
 - (i) in satisfaction of any tax, rate or due ;
 - (ii) by way of penalty for breach of the law or forfeiture in consequence of a breach of the law ;

- (iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract ;
- (iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;
- (v) in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or likely to be injurious to the health of human beings, animals or plants ;
- (vi) in consequence of any law with respect to the limitation of actions ; or
- (vii) **for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry** or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to such development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out),

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;”
(emphasis mine)

- [55] Seizure (or the taking possession) of property will therefore be constitutional if it is authorised by a law of general application provided that the limitation is reasonable and justifiable in a democratic society and in Grenada, the relevant legislative provision that prima facie infringes this right is to be found in the Criminal Procedure Code.¹⁵
- [56] In Grenada, the investigation and prosecution of criminal activity entails obtaining evidence through the authorised search and seizure of persons, places and things respectively. Under the Criminal Procedure Code, the right to enter premises, search those premises and remove property therefrom is a significant invasion of the rights of an individual and this is further compounded by the fact that property may be seized and retained for so long only as may be necessary for the purposes of any investigation, trial or appeal. However, there can be no doubt that this is reasonably justifiable in a democratic society given the obvious public interest in the investigation, prosecution and reduction of crime.
- [57] Notwithstanding this, the Constitution and the statute laws of Grenada acknowledge that state authorities should not be permitted untrammelled access to search and seizure. The Constitution therefore mandates that citizens must be protected from unjustified or arbitrary

¹⁵ See also: Section 12 of the Magistrates Act which empowers the Justice of the Peace.

search and seizure of their property by agents of the state. If the latter is not realised, arbitrary state actions could severely hamper and prejudice the individual's personal freedom and associated rights.

[58] A balance must therefore be struck when the rights provision is read together with the legislation authorising search and seizure so as to interfere as little as possible with the rights and liberties of the person concerned.

[59] The un-traversed evidence in the case at bar is that the Claimant's home was searched pursuant to a search warrant and certain items seized as a result of an on-going criminal investigation which has since resulted in the proffering of formal charges against the Claimant as well as several other persons¹⁶. The act of seizing or taking possession of the Claimant's property was carried out pursuant to a purportedly valid search warrant, issued in furtherance of a criminal investigation and prosecution.

[60] As at the date of trial, the Claimant had been arrested, charged and brought before the Magistrate and criminal proceedings were contemplated. It is also apparent that the Claimant has been provided with a comprehensive inventory of the items taken; has had the majority of the items returned by the Defendants within a period of 86 days (save those to be used in evidence in the criminal proceedings) and has been provided with an inventory of the documents returned.

[61] In the premises, the Court can find no basis on which the Claimant could be entitled to the declaratory relief sought at paragraph 2 of his Fixed Date Claim Form.

[62] Counsel for the Claimant has however gone further. He contends that the Claimant's belongings were kept by the Defendants in breach of section 15 (1) and (3) of the Criminal Procedure Code which mandates the procedure which ought to be followed. Subsections 15 (1) and (3) of the Criminal Procedure Code provide as follows:

¹⁶ It is the Defendant's evidence that the Claimant has since been charged along with other persons with conspiracy to export a controlled drug. The remaining items were retained to be used as evidence in the Claimant's criminal trial. The Claimant made appearances before the Magistrate on 2nd March, 2012, 23rd March 2012 and on 29th March 2012.

15 (1) - “Any Magistrate who is satisfied upon oath that there is reasonable ground for believing that there is, in any building, ship, carriage, box, receptacle or place –

- (a) Anything upon or in respect of which any offence has been or is suspected to have been committed, for which, according to any law for the time being in force, the offender may be arrested without warrant; or
- (b) Anything which there is reasonable ground for believing will afford evidence as to the commission of any such offence; or
- (c) Anything which there is reasonable ground for believing is intended to be used for the purpose of committing any offence against the person, for which according to any law for the time being in force, the offender may be arrested without warrant,

may at any time issue a warrant authorizing some constable named therein to search the building, ship, carriage, box, receptacle, or place for the thing, and seize **and carry it before the Magistrate issuing the warrant or some other Magistrate.”**

15 (3) - “When the thing is seized and brought before the Magistrate, he may detain it, taking reasonable care to preserve it till the conclusion of the case; and, if any appeal is made, or any person is committed for trial,, he may order it further to be detained, for the purpose of the appeal or of evidence on the trial. If no appeal is made, or no person is committed, the magistrate shall direct the thing to be restored to the person from whom it was taken, except in the cases herein after mentioned, unless he is authorized or required by law to dispose of it otherwise.”

(Emphasis mine)

[63] In referring to sections 16 and 17 of the Code, he further underscored the strict procedures to be followed in respect of items seized pursuant to a search warrant and he submitted that the clear intent is that the magistrate control and direct the process rather than an executive agent of the state.

[64] In the case at bar, he contended that after obtaining the warrants, the Defendants decided not to carry the seized items before a magistrate but rather retained them despite the fact that the Claimant had not been charged. He further submitted that two months had passed

since the items were seized, and more that 7 weeks after the Claimant was arrested and charged. He submitted that this long delay in returning the items constituted a wrongful detention of the same and an abuse of process by the Defendant.

[65] Even assuming that the warrant was validly issued, the Claimant's case is that the Defendants are not empowered to keep his belongings for an indefinite and arbitrary period of time. He suggests that the law contemplates that in this respect, the rights of the State are subject to judicial supervision such that they must obtain the authorisation of the magistrate for detention. The Criminal Procedure Code therefore prescribes that the Police bring the property seized, before a Magistrate. Counsel submits that this process is an important safe guard for the rights of the citizen.

[66] To ignore this requirement would not only be a violation of the separation of powers doctrine, but it would also violate the Claimant's fundamental rights under section 6 of the Constitution which provides that no property shall be compulsorily taken possession of and no interest in or right in or over property of any description shall be compulsorily acquired except where provision is made by the law applicable to that taking of possession or acquisition for the prompt payment of full compensation. He submitted that the right not to be deprived of property includes the right not to be deprived of the use and enjoyment of that property.

[67] Counsel for the Claimant submitted that rather than being brought before a magistrate, the property was returned to the Claimant on 3rd May 2012, some 2 months and 26 days after they were seized. The Claimant made his first appearance before the Magistrate on 2nd March, 2012. At that time, the seized items were not presented to the Court but the Claimant was provided with an inventory. He made a subsequent appearance on 23rd March 2012, and again on that occasion, the seized items were not presented to the Magistrate. The same position was maintained when he made his next appearance on the 29th March 2012 and at paragraphs 11 – 13 of his affidavit of 14th February 2012, the Claimant details the prejudice which he alleged has been suffered as a result. He noted that the seized items included computers which were not illegal and which were used by his son

to prepare school assignments, and at paragraph 13, he alleges that the absence of the cell phones and computers adversely affected his business and family life.

[68] The Defendants have trenchantly opposed the Claimant's contentions and assert that they have in no way violated the Claimant's constitutional rights. Counsel for the Defendants submitted that section 15 of the Code presupposes a situation where a person is almost immediately charged and brought before a magistrate. Where no charge has yet been brought and the purported criminal activity is still the subject of an investigation, he submitted that the Code does not provide for this.

[69] Counsel pointed the Court to the case of **Ascot Michael et al v Attorney General et al.**¹⁷ where a similar situation arose and where Harris J observed the following:

"The evidence from Insp. Burnette is that the property was not brought before the court and as is the practice in Antigua and Barbuda, the property is brought before the court at the first hearing of the charge laid against the intended Defendant. He said he understood the section to provide, that he is to take the property to court at the appropriate time when the property and person are being brought before the court to answer to the charge. This is in fact the practice, not only in Antigua; but throughout the Commonwealth Caribbean as I know it. The process from entry search and seizure to the 1st hearing may normally be a matter of weeks if not days. However, sometime it is more, much more and, at the time of the hearing of the case before me, it had been over four (4) months since the warrant was executed and the charges, apparently, had not been laid nor the 'property' or person charged in relation to the offence with respect to that property or, taken before a magistrate."

And later: "It appears to me the practice of bringing the property before the Magistrate at the time of the first hearing of the criminal offence evolved at a time when criminal matters were filed and brought before the court in a timely manner - indeed almost immediately after the seizure and charge. The convenience of doing the two acts together was obvious."

¹⁷ CLAIM NO. ANUHCv: 2008/0097

- [70] Counsel for the Defendants submitted that section 15 of the Criminal Procedure Code sets no specific time limit within which the seized items are to be brought before the Magistrate. In these premises, he submitted that the law would imply that the items should be brought before the magistrate within a reasonable time of seizure.
- [71] He referred the Court to the dicta of Harris J in the **Ascot Michael** Case, where he referred to section 44(7) of the Antiguan Interpretation Act, Cap 224 which provides that: “*Where by an enactment no time is described or allowed within which anything shall be done, such thing shall be done with all convenient speed and as often as the prescribed occasion arises.*”¹⁸ The learned Judge concluded that the failure of the Police to bring the property before the court up to the date of the trial of the matter in June of 2008, (over 4 months after the seizure) was, longer than is reasonable in the circumstances. The learned Judge held that the misinterpretation of the section does not circumvent the requirement for the police to deploy ‘all convenient speed’ and therefore, they are in breach of this requirement of the Magistrates Code of Procedure.
- [72] Counsel referred the Court to the affidavit of Detective Sergeant Lockiby, filed on 7th May 2012, in which he deposed that the relevant investigation was still on going and that the items seized were still the subject of that investigation. He deposed that experts had to be dispatched to Grenada to assist with retrieving the information from the computers and the cell phone which was seized and he provides the history of the efforts made to carry out this exercise. Once the items were examined and reports completed in April 2012, they were eventually returned to the Claimant 86 days following their seizure. Although this was entirely clear from his evidence, it appears that the returned items were never brought before the Magistrate following seizure and before they were returned to the Claimant.
- [73] Counsel for the Defendants also submitted that in any event, at common law, the police are empowered to seize and retain items as long as is reasonably necessary for the prosecution of an alleged crime. This power is not circumscribed by section 15 of the Code. He submitted that the enactment of the specific legislation by Parliament would not amount

¹⁸ The equivalent of section xx of the Grenada Interpretation Act

to a revocation of the common law power in the absence of express wording to that effect and he referred the Court to the judicial authorities of **Francis v Martson and Ors. 8 WIR 311; Ghani v Jones [1969] 3 All E.R. 1700 at 1705 and Cowan v Commissioner of Police of the Metropolis [2000] 1 All E.R. 504 at 509-511.**

[74] In the premises, he submitted that there is a common law power which runs parallel with that of section 15 of the Code and which permits the police to retain items seized pursuant to a lawful search as long as there is a reasonable basis for doing so. Counsel for the Defendants submitted that the Defendants had not kept the seized items for any longer as was reasonably necessary. He therefore contended that the Defendants are not in conflict with section 15 or with the terms of the warrant issued by the Justice of the Peace. He argued that there can be no question about the diligence with which this matter was pursued and referred the Court to the evidence filed by Sergeant Lockiby detailing the steps taken to advance the matter.

[75] In a collateral contention, Counsel for the Defendants argued that the Claimant has misapplied the relevant statutory provisions. He submitted that under section 15, the process of a search continues until the officer has fully completed the search and his examination of the data on the computers and cell phones. From a practical standpoint, the physical taking away of the items would not satisfy for search in circumstances where what is practically sought is the information which is contained in the items. The Defendants submitted that section 20 of the Code provides for the return of the property of portion thereof consistent with the interests of justice. They contend that what is believed to be contained in the computers and cell phone and the ease with which the Claimant can discard evidence which may be more difficult to retrieve, may in the interests of the justice, warrant that the items not be returned while they continue to be investigated.

[76] Finally, Counsel submitted that in the absence of any allegation of malice or bad faith on the part of the police, even if some liability could be ascribed, any damages would have to be nominal in the circumstances.

- [77] In the Court's view, the reasons advanced by the Defendants do not justify the decision of the Police not to bring the items before the Magistrate. It seems to the Court that all of the matters which are raised could properly have been ventilated before the appropriate judicial officer and could well have informed the continued detention of the items.
- [78] The Court is satisfied however that if there is any breach that could be advanced by the Claimant, it would be that prior to the property being returned to him, the Police failed within a reasonable time following the seizure of the property, to carry the seized items before a magistrate as required by the statute. In circumstances where the initial seizure of the property would have been lawful and constitutional and where, as at the date of the hearing of this matter the property has been returned to the Claimant, the only remaining question is whether the Claimant is entitled to any relief in respect of the default of the Second Defendant and the Police in promptly bringing the seized property before a magistrate pursuant to section 15 of the Criminal Procedure Code in accordance with the Code and the terms of the warrant.
- [79] In considering, what if any relief would be appropriate, the Court has taken into account the fact that the majority of the items were returned to the Claimant prior to the hearing of this matter and that the items which have been retained (2 cheques) are to be used in the pending criminal proceedings which at the date of this hearing were on going. The Court will therefore order, in the event that the Defendants have not already done so, that they do cause the same to be brought before a magistrate to be dealt with in accordance with section 15 of the Criminal Code of Procedure within 7 days of this Order failing which they are to be immediately returned to the Claimant together with all copies made.
- [80] Having reviewed the relevant authorities¹⁹, the Court is satisfied that the Defendants purported default in failing to bring the items before the Magistrate would not invalidate the search warrant or the search.

¹⁹ In Attorney General of Jamaica v Williams; Ascot Michael v Attorney General

Breach of the Right to Privacy

- [81] Counsel of Claimant contended that while there is no overt right to privacy under the Grenada Constitution, he submitted that this right is implicit in the other rights expressly mentioned in the Constitution. In particular, Counsel advanced that there is an implicit right to privacy in section 10 (1) of the Constitution which provides as follows:

“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.”

- [82] He submitted that recent case law has determined that the freedom of expression encompasses more than mere verbal expression and includes the right to receive ideas without interference. He submitted that persons communicate ideas through correspondence, computers and cell phones, so that any interference with such communication would amount to a breach of privacy.

- [83] He also submitted that the right to privacy would involve the freedom not to have one's correspondence perused or interfered with. He argued that in the instant case, the police officers had a “field day” scrutinizing the personal and business documents of the Claimant, the information in his personal computers and information on the cell phones. He submitted that no judicial authority has been given to them to undertake that exercise. In examining the contents of private email correspondence and phone calls, he submitted that the privacy of the Claimant has been violated.

- [84] In response, Counsel for the Defendants argued that there is no constitutional right to privacy and that the Claimant should not be allowed to integrate such a right through a right to freedom of expression.

[85] Unfortunately, other than the bare assertions, neither Counsel provided that Court with any relevant judicial authority to support their contentions.

[86] The Court acknowledges that like many other jurisdictions, there is no explicit right to privacy in the Grenada Constitution. However, courts have increasingly found a constitutional basis for privacy rights in the broad sense of freedom from interference in certain intimate realms of personal life. In doing so, they have applied general constitutional provisions such as that set out in Chapter 1, section 1 of the Constitution of Grenada which provides that:

“ Whereas every person in Grenada is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, political opinions, 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. —
- b. —
- c. ***protection for the privacy of his home and other property*** and from deprivation of property without compensation ; and
- d. —

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in these provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.”

[87] The right to privacy therefore has been somewhat recognised by the legislators, who have acknowledged that an individual is entitled to protection of privacy of his home and property. In Grenada, the scope of this entitlement is manifested in section 7 of the Constitution which provides as follows:

7.-(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, town and country planning, the development and utilization of mineral resources or the development or utilization of any property for a purpose beneficial to the community ;**
- b. that is reasonably required for the purpose of protecting the rights or freedoms of other persons ;**
- c. that authorises an officer or agent of the Government of Grenada, 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 or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, authority or body corporate, as the case may be; or
- d. that authorises, for the purpose of enforcing the judgment or order of a court in any civil 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.

[88] It is widely accepted that a person's home gives rise to the highest expectation of privacy, which reflects the old adage that a man's home is his castle. Therefore, section 7 of the Grenada Constitution specifically protects the right not to have one's person or home arbitrarily searched and acknowledges that state authorities should not be permitted untrammelled access to search and seizure. Having recognised that arbitrary state action could severely hamper and prejudice the individual's personal freedom and associated

rights, Parliament has therefore mandated that citizens must be protected from unjustified or arbitrary search and seizure of their property by agents of the state.²⁰

[89] However, the truism that no right is absolute perhaps applies in this case more so than any other. There can be no doubt that one's fundamental rights and freedoms may be limited by a law of general application, provided that the limitation is reasonable and justifiable in an open and democratic society and is based on principles of human dignity, equality and freedom.

[90] In regards to the protections afforded by section 7, there can be no doubt that the right to enter premises to search those premises and to remove goods therefrom is a significant invasion of the rights of an individual and must therefore be exercised within certain clearly defined limits so as to interfere as little as possible with the rights and liberties of the person concerned. In Grenada, a balance is struck when sections 1 (c) and 7 of the Constitution are read together with relevant legislative provisions authorising searches found in the **Criminal Procedure Code**²¹. In many respects, this statute is simply a codification of the historical common law position. At common law, the police have the power to search, seize and retain property which may afford evidence of the commission of a crime²². This assumes that at the time of seizure or shortly thereafter, an individual is arrested or charged with an offence in respect of which the seized items would provide material evidence. This common law position has been confirmed with the enactment of the **Code** which provides a statutory legal basis for obtaining warrants to search and seize.

[91] It follows that nothing contained in and done under the authority of these codified provisions could be held to be inconsistent with or in contravention of the provision for the protection of persons and property from arbitrary search and entry except inter alia *“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.”*

²⁰ Entick v Carrington (1765) 2 Wils. 27; AG of Jamaica v Williams

²¹ Cap. 2 of the 1994 Revised Laws of Grenada

²² Francis v Marston and Others (1965) 8 W.I.R. 311 at 313

- [92] In that connection, the Court notes that by its very nature, effective crime investigation entails obtaining evidence through the authorised search of persons and places and the seizure of property. In the case at bar, the Defendants contend that the search of the Claimant's property was reasonably justifiable. Counsel submitted that at the time of the search, the Claimant was the subject of a complex criminal investigation which eventually resulted in his arrest and prosecution. Paragraphs 6 – 8 of the first affidavit of Sgt Lockiby and paragraph 3 of the second affidavit of Sgt Lockiby sets out the basis of the Claimant's arrest and prosecution. Moreover, it is not disputed that the Claimant has been charged along with other persons with the offence of conspiracy to export a controlled drug. The Defendants submit that it is on the basis of this alleged criminality that the Justice of the Peace issued the warrant authorising the search.
- [93] For the reasons already set out herein, the Court finds that no maintainable challenge has been advanced to the validity of that warrant. In regards to the execution of the warrant, the Claimant at paragraph 6 and 19 of his affidavit filed on 14th February 2012, alleges that he was not told what the search related to and what his involvement was in the whole affair. He stated that when the warrant was read to him it did not state the basis for the search of his home or the reasonable and probable cause for removing and carrying away the items seized, the allegations investigated, the particulars of the suspected offence or the authority pursuant to which the warrant was issued.
- [94] These allegations are denied by the Second Defendant who avers that the warrant was shown to the Claimant and read to him before the search executed in accordance with the laws of Grenada. Generally, the court found that the challenge to the execution of the search was not vigorously pursued by the Claimant. The Second Defendant's evidence was not traversed and the Claimant did not seek to pursue or address this in his submissions. Rather, the core concern of the Claimant appeared to be the fact that his private and other documents had been exposed to the Defendants. He reiterated his fear that the Defendants would copy, add to, alter and interfere with the information on his computer or on the hard documents in an attempt to frame him on trumped-up charges.²³

²³ Paragraph 17 of the Claimant's affidavit filed 14th February 2012 and paragraph 4 of his affidavit of 30th April 2012

- [95] The Defendants' response to these allegations is set out in paragraphs 6 to 16 of the Affidavit of Sgt Lockiby filed on 1st May 2012. They aver that the documents were being scrutinised and examined as part of the investigative process to ascertain what evidence would have been in the possession of the Claimant regarding the alleged offences and they deny that there was any intention of attempt made to alter the information in order to implicate the Claimant.
- [96] Counsel for the Claimant argued that the Claimant's right to privacy is impacted because he is entitled to peaceful enjoyment of his property and this would include the freedom from interference with his correspondence.
- [97] The Court is satisfied that section 3 and 7 of the Constitution which vest all individuals with the right to be free from unreasonable search and seizure as well as the relevant legislative provisions of the Code seek to strike an appropriate balance between the right to be free of state interference and the legitimate needs of law enforcement. This balance is generally achieved in two main ways. First, the police must obtain judicial authorization for a search *before* they conduct it, usually in the form of a search warrant. Second, an authorized search must be conducted in a reasonable manner, ensuring that the search is no more intrusive than is reasonably necessary to achieve its objectives.²⁴
- [98] It is clear on the face of the search warrant before this Court that it properly authorized or permitted a search and seizure of documents at the Claimant's residence. It is apparent that the Justice of the Peace who issued the warrant did so pursuant to a complaint of the Second Defendant in which he averred that the Claimant committed the criminal offence of conspiracy to export a controlled drug. It is the Defendants case that based on information provided to him, the Justice of the Peace could and did reasonably draw the inference that there were reasonable grounds to believe that documents would be found in the residence which would afford evidence as to the commission of such offence.

²⁴ R v Vu 2013 SCC 60

- [99] Save for bare allegations, the Claimant has done little to traverse this contention and in light of the all of the circumstances of this case and for the reasons already set out, the Court is not satisfied that the search for such documents was done without lawful authority and for reasons which were not reasonably justifiable in a democratic society. In addition, the Claimant has not satisfied the Court that there is any basis for his fear that the Defendants would add to, alter and interfere with the documents in an attempt to frame him.
- [100] The Claimant also expressed particular disquiet about the fact that his electronic devices had been the subject of the warrant. It is clear from the text of the warrant that it authorized the search and seizure of cell phones and computers. It did not however authorize the search or seizure of flash drives (electronic data storage device) found on the premises. The Claimant's allegation that a flash drive was seized during the search has not been denied by the Defendants. Neither have they contended that it fell within the scope of the warrant because it constituted an offence. To the extent that this storage device fell outside of the scope of the warrant, the Court is satisfied that it would have been seized without the requisite lawful authority.²⁵
- [101] The Claimant also complains that his privacy had been invaded without proper justification.²⁶ His affidavit indicates his concern that all his private and other documents had been exposed to the Defendants who declined his assistance in retrieving particular information from the computer (despite his offer to unlock the same to facilitate the investigation). The Claimant reiterated his fear that the Defendants would copy, add to, remove, alter or interfere with the information on his computer in an attempt to frame him. No doubt this concern would have motivated his Fixed Date Claim Form, in which he sought injunctive relief restraining the Defendants from removing, adding to or altering information on his computer or searching through or in any way interfering with seized items which was followed by a Notice of Application filed on the 14th February 2012 in which he sought the same relief. However at the commencement of the trial, Counsel for the Claimant indicated

²⁵ R v Chief Constable of Warwickshire Exp.F [1999] 1 W.L.R. 564

²⁶ See: Paragraphs 12, 13 and 16 of the Claimant's affidavit of 14th February 2012

that as these items had been returned he would no longer pursue his claim for injunctive relief.

[102] Notwithstanding this concession, the Claimant contended that the Constitution affords him protection from having the information on his computers and his cell phone scrutinized and interfered with without his consent. He argued that the Defendants had no judicial authority to scrutinize the information on his personal computers or his cell phones and that in so doing, they wrongly invaded his privacy.

[103] It is apparent that section 15 of the Criminal Procedure Code authorizes the search of any building, ship, carriage, box, receptacle or place. It is also clear however that while the warrant in question authorized the search of the Claimant's premises, it did not specifically authorize the search of the computers or cell phones and yet, it is clear from the Defendant's evidence that a significant time was spent in examining the cell phones and computers and analyzing the information contained therein. The evidence in this case is that the Defendants resorted to expert assistance in that regard and reports were eventually received on 27th April 2012.

[104] While the Court is satisfied that the search of the Claimant's premises was reasonably justifiable in all the circumstances and was conducted in accordance with the laws of Grenada, given the Claimant's contention, this gives rise to a critical issue in this case - that is - whether the warrant was also required to specifically authorize the search of the Claimant's computers and cellular phone.

[105] Unfortunately, the Court found a significant dearth in regional authorities dealing with this specific issue. There is however international judicial authority which suggests that in so far as the search of computers and cell phones, the police may need to go further. In Canada, the Supreme Court has recently considered this within the context of the Charter of Rights and Freedoms. In the 2013 case of **R v Vu**, the police had obtained a warrant authorizing the search of a residence for evidence of theft of electricity, including documentation identifying the owners and/or occupants of the residence. Even though the Information to

obtain a search warrant indicated that the police intended to search for “computer generated notes”, the warrant did not specifically refer to computers or authorize the search of computers. In the course of their search of the residence, police found marijuana, two computers and a cellular telephone. A search of the devices revealed evidence that the appellant was the occupant. At trial, he claimed that the searches had violated his s. 8 *Charter* rights.²⁷ The trial judge concluded that the Information did not establish reasonable grounds to believe that documents identifying the owners and/or occupants would be found in the residence and so the warrant could not authorize the search for them. Further, the trial judge held that the police were not authorized to search the personal computers and cellular telephone because those devices were not specifically mentioned in the warrant.

[106] On appeal, the Supreme Court of Canada considered the traditional legal framework which held that once police obtain a warrant to search a place for certain things, they do not require specific, prior authorization to search in receptacles such as cupboards and filing cabinets. The question which arose in that case was whether this framework is appropriate for computer searches. The Court took into account the fact that computers differ in important ways from the receptacles governed by the traditional framework. The Supreme Court concluded that the 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.

[107] After considering some of the distinctions between computers and other receptacles²⁸, the court concluded that the numerous and striking differences between computers and traditional receptacles call for distinctive treatment under s. 8 of the *Charter* and it held that specific prior juridical authorization is required to search the contents of those devices when executing a search warrant for a premises.

²⁷ Section 8 of the Charter of Rights provides that “*everyone has the right to be secure against unreasonable search or seizure*”.

²⁸ Paragraph 40 - 45

[108] The Court observed that *“It is difficult to imagine a more intrusive invasion of privacy than the search of a personal or home computer.”* It later opined that:

“In effect, the privacy interests at stake when computers are searched require that those devices be treated, to a certain extent, as a separate place. Prior authorization of searches is a cornerstone of our search and seizure law. The purpose of the prior authorization process is to balance the privacy interest of the individual against the interest of the state in investigating criminal activity before the state intrusion occurs. Only a specific, prior authorization to search a computer found in the place of search ensures that the authorizing 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. This means that if police intend to search any computers found within a place they want to search, they must first satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for. If police come across a computer in the course of a search and their warrant does not provide specific authorization to search computers, they may seize the computer, 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. In this case, the authorizing justice was not required to impose a search protocol in advance with conditions limiting the manner of the search. While such conditions may be appropriate in some cases, they are not, as a general rule, constitutionally required.”

[109] What was particularly notable in that case is the similarity between the legislative provisions governing the search and seizure of property in Canada and Grenada. Section 487 (1) of the Canadian Criminal Code provides as follows:

“(1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place,

- (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,*
- (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,*

- (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
 - (c.1) any offence-related property,
 may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant
- (d) to search the building, receptacle or place for any such thing and to seize it, and
- (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

[110] It is in the context of these provisions that the Supreme Court of Canada considered and came to its conclusion and in so doing; it drew no distinction between computers and cell phones.

[111] As indicated, there is no similar binding judicial authority in this region and the Court was not provided with any similar analysis conducted by an English court. Rather, in the United Kingdom, Parliament has attempted to keep pace with the modern developments with legislative reform. The English approach is now crystallized in the Police and Criminal Evidence Act where at sections 19 and 20, the English Parliament has extended the powers of seizure to computerized information. Section 19 provides that :

“19 (1) the powers conferred by subsections (2), (3) and (4) below are exercisable by a constable who is lawfully on any premises.

19 (2) –

19 (3) –

19 (4) The constable may require any information which is contained in a computer [stored in any electronic form] and is accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible [or

from which it can readily be produced in a visible and legible form] if he has reasonable grounds for believing—

(a) that –

(i) it is evidence in relation to an offence which he is investigating or any other offence; or

(ii) it has been obtained in consequence of the commission of an offence; and

(b) that it is necessary to do so in order to prevent it being concealed, lost, tampered with or destroyed

19 (5) The powers conferred by this section are in addition to any power otherwise conferred.

19 (6) No power of seizure conferred on a constable under any enactment (including an enactment contained in an Act passed after this Act) is to be taken to authorise the seizure of an item which the constable exercising the power has reasonable grounds for believing to be subject to legal privilege.”

[112] This is supported by section 20 which extends the power of seizure to computerized information. It provides that **“Every power of seizure which is conferred by an enactment to which this section applies on a constable who has entered premises in the exercise of a power conferred by an enactment shall be construed as including a power to require any information stored in any electronic form contained in a computer and accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible or from which it can readily be produced in a visible and legible form.”** (emphasis mine)

[113] If the computer or part thereof is encrypted, there are powers to issue a notice to compel decryption under Pt III of the Regulation of Investigatory Powers Act 2000 (RIPA). Section 49 of that Act sets out the circumstances in which a notice to disclose a decryption key or to provide material in unencrypted form can be issued. The grounds include (a) in the interests of national security; (b) for the purpose of preventing or detecting crime; or (c) in the interests of the economic wellbeing of the United Kingdom. Such notice must be in writing, must be signed by an identified senior officer and must pass several tests. In addition, there

is a detailed Code of Practice which regulates how computerized information can be accessed.

[114] It is clear to the Court that the general search warrant regime under the Grenada Criminal Procedure Code was directed at tangible rather than intangible data and was developed before computer searches were widely contemplated. It is also clear that local legislature has not kept pace with modern developments.

[115] Notwithstanding this, the Court is of the view that Title IV of the Code must be interpreted in a purposive way which demands that it be read as extending to the accessing of computerized information or other electronic data. So that the power which is conferred by the Code on a magistrate to authorize the search and seizure pursuant to its provisions must be construed as including a power to authorize the search of computers or other electronic equipment. In that connection, the Court has noted that the warrant in question has specifically authorized the search for and the seizure of “... *cell phones, computers, documents and any other things which will constitute and offence.*”

[116] It is unfortunate however, that unlike the English Act, the local regime does not go further to clarify for the avoidance of doubt that every power of seizure which is conferred by the Code on a constable who has entered premises pursuant to a warrant must be construed as including a power to require any information stored in any electronic form contained in a computer and accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible.

[117] It is perhaps this legislative intervention which precluded a similar successful legal challenge such as was mounted in the Canadian case of **R v Vu**. And unfortunately, there is no basis upon which these provisions can be imported into the Grenada legislative regime. While it would no doubt strike anyone as odd that a warrant to search for a computer would not inevitably imply the power to conduct a search of the computer, that is precisely what the Supreme Court of Canada concluded after considering the argument advanced by the Crown at paragraph 36 of the judgment.

[118] This Court cannot ignore the persuasive reasoning of Supreme Court in **R v Vu**, particularly in the absence of specific legislation and appropriate protocols regulating the extent to which computers and other data storage devices can be operated or accessed by the police. The Court is of the view that searches of personal property such as computers and cell phones require specific prior authorization if they are to be consistent with the Constitution. Like the Canadian Supreme Court, this Court is persuaded that the “...*general rule...based on the assumption that, if the search of a place for certain things is justified, so is the search for those things in receptacles found within that place*” is not justified in the case of computers because burgeoning technology militates against any purported classification as an ordinary receptacle. Given the nature and the storage capacity of computer hard drives, there can be no doubt that there is a significant distinction between a search of a computer and the search of a cabinet found on premises. By their very nature computers contain information that may be generated without the knowledge of the user; they also have the ability to retain information that a user may have tried to delete. It is entirely possible for investigators to access intimate details of a user’s interest and habits by drawing on its history. This is especially so when the device is connected to the internet. After observing that limiting the location of search to a building, receptacle of place would be meaningless in the case of a computer the Court in **R v Vu** noted that:

“Ordinarily, then police will not have access to items that are not physically present in the building receptacle of place for which a search has been authorized. While documents accessible in a filing cabinet are always at the same location as the filing cabinet, the same is not true of the information that can be accessed on a computer....when connected to the Internet, computers serve as portals to the almost infinite amount of information that is shared between different users and is stored almost anywhere in the world...Thus a search of a computer connected to the internet or a network gives access to information and documents that are not in any meaningful sense at the location for which the search is authorized.”

[119] This Court is also persuaded given the constitutional context in which this Claim was brought, that where, as in this case, the relevant legislation does nothing to clarify the law, the matter must be resolved in a manner which would uphold an individual’s constitutional human rights. When read together with the section 7 of the Constitution, it is clear that the

protections afforded against arbitrary search and seizure can only be circumscribed by a lawful prior authorization of a judicial officer.

[120] This will require the relevant judicial officer to conduct a “*specific assessment of ‘whether in a particular situation 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 to advance its goals, notably those of law enforcement.’*”²⁹ There is nothing to indicate here that the relevant officer would have had an opportunity to undertake such assessment or to consider the implications arising from a search of the Claimant’s computers and cell phones.

[121] It follows that notwithstanding that the warrant in question authorized the seizure of the computers and cell phones which would empower the Defendants to preserve their integrity and the integrity of their data, the Court is satisfied that any search of these devices should have been expressly authorized in a warrant secured in accordance with Title IV of the Code. To the extent that the search of the Claimant’s computers and cell phones were conducted in the absence of such authorization, this Court finds that there has been a violation of the Claimants rights under section 7 of the Constitution.

Breach of Fundamental Right to Freedom of Expression

[122] During the course of his submissions, Counsel for the Claimant also argued that Defendants’ actions violated his client’s rights under section 10 of the Constitution which he contended recognizes the right to receive and to communicate ideas and which protects the individual from unlawful interference with his correspondence. He referred the Court to the case of **Cable and Wireless v Marpin Telecoms and Broadcasting Company Limited**³⁰ in which the Judicial Committee observed that the Dominican Constitution treats freedom of expression as including the freedom to receive and communicate ideas and information without interference. So that the grant of refusal of an exclusive licence to provide national and international telecommunication services would have implications for that right.

²⁹ R v Vu at paragraph 47

³⁰ Privy Council Appeal No. 15 of 2000

[123] Counsel contended that individuals now communicate ideas via emails, texting and messaging using computers and cell phones. However, apart from this bare assertion, the Claimant failed to properly articulate his contentions in this regard. The purported implication appears to be that the seizure of the relevant equipment pursuant to the warrant would have hindered the Claimant's ability to receive and communicate ideas or interfered with his correspondence. However, no such allegations were levied in the Claimant's pleadings or in his evidence, neither were the submissions developed or pursued with any enthusiasm during the trial of this matter.

[124] In the premises, the Court cannot properly adjudicate on this matter and will decline to make any observations in that regard save to say that even if a potential breach of section 10 of the Constitution could have been made out, the Court is satisfied that the right would also be subject to limitation prescribed at section 10 (2) which provides that;

10 (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 or public health;*
- b. that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television ; or*
- c. that imposes restrictions upon public officers,*

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

[125] Bearing in mind the conclusions already drawn by the Court herein, the Court is satisfied that seizure of the devices would have been reasonably justifiable pursuant to section 10 (2) (a) as the items were seized pursuant to a lawful warrant and in furtherance of a criminal investigation which resulted in criminal charges being laid against the Claimant. The

Defendants' actions could not therefore be said to be inconsistent with the rights vested under section 10 (1).

Damages

[126] In accordance with Part 56.8 (1), the Claimant has claimed damages against the Defendant for breach of his constitutional rights. It is clear that by virtue of Rule 56.8(2) of CPR 2000 a court may award damages if the-

- i. claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or
- ii. facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief; and
- iii. court is satisfied that, at the time when the application was made the claimant could have issued a claim for such remedy.

[127] What is clear from this rule is that within the context of public law proceedings, this remedy is discretionary one. Damages are not available simply because a claim for an administrative order is successful.³¹ Indeed, there is no general right to damages for a breach of public law.³²

[128] Moreover, in McGregor on Damages at para 8-001 the learning is as follows:

"A claimant claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damages and as to the amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where the right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit the award of nominal damages.

³¹ R v Metropolitan Borough of Knowsley ex parte Maguire [1992] COD 499

³² per Lord Geoff in R v Secretary of State for Transport ex p Factortame Ltd (No.2) [1991] AC 603 a 672 H

[129] Within this context the Court has noted that no submissions have been advanced in respect of this claim for relief neither has there been any substantial representations on the question of quantum.

[130] The Court has found that the seizure of the Claimant's flash or jump drive was done without lawful authority and in breach of the Claimant rights. The Court has however also taken into account that the fact that the item was seized in furtherance of a police investigation which resulted in criminal charges being laid against the Claimant and that it was returned to the Claimant prior to the hearing of this matter.

[131] The Court has also found that the search of the Claimant's computers required judicial authorization. The Court has however taken into account all the circumstances of this case including the fact that the state of the law regarding the search of computers seized was uncertain when the search was conducted so that the Defendants would no doubt have been operating pursuant to established practice and under the mistaken belief that they were acting under lawful authority. This matter clearly gave rise to and clarified areas of law which are of general public importance.

[132] Having regard to all of these factors, the Court will award a nominal sum of damages in the amount of \$2500.00

[133] **The Court therefore orders and declares as follows:**

- 1. That the relevant search and seizure of the flash or jump drive was unlawful.**
- 2. That the relevant searches of the Claimant's computers and cell phones were without prior authorization and were unlawful.**
- 3. The Claimant is entitled to nominal damages in the sum of \$2500.00**
- 4. In respect of all other claims of relief advanced by the Claimant in his Fixed Date Claim Form, these are dismissed.**

5. **Given the several conclusions drawn, the partial success of both sides and the fact that matter has raised and determined some question of general public importance, the Court will exercise its discretion to make no order as to costs.**

[134] Finally, the Court conveys its sincere regrets for the delay in rendering the judgment in this matter and must thank Counsel and the parties for their patience.

Vicki Ann Ellis
High Court Judge