ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: AXAHCV 0007/2010

BETWEEN:

CORA RICHARDSON-HODGE

1st Claimant

NAVINE FLEMING

2nd Claimant

and

ATTORNEY GENERAL OF ANGUILLA

1st Defendant

COMMISSIONER OF POLICE OF ANGUILLA

2nd Defendant

JOSEPH ANDREW ARSENAULT

3rd Defendant

Appearances:

Mr. Mark Brantley for the Claimants

Mr. Wilhelm Bourne, Attorney General with Mr. Ivor Green, Senior Crown Counsel for the Defendants

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2010: November 18
December 15
2011: May 27

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DECISION

[1] BLENMAN, J: These are applications by Mrs. Cora Richardson-Hodge and Ms. Navine Fleming to stay criminal proceedings which are brought against them, together with an application for specific disclosure of certain information or documents. The applications are strenuously resisted by the Attorney General, the Commissioner of Police and Inspector Andrew Arsenault.

[2] The Attorney General, the Commissioner of Police of Anguilla and Mr. Andrew Arsenault have all applied to the court for a stay of the amended Constitutional Motion that is brought by Mrs. Cora Richardson-Hodge and Ms. Navine Fleming against them. Their application is vigorously opposed by Mrs. Richardson-Hodge and Ms. Fleming, respectively.

Issues

[3] The issues that arise for the court to resolve are as follows:

(a) Whether the court should grant a stay of the criminal proceedings (in the Magistrate Court);

(b) Whether the court should grant a stay of the Constitutional Motion;

(c) Whether the court should order the Attorney General, the Commissioner of Police and Mr. Arsenault to disclose the documents/information on which Mr. Arsenault relied in order to obtain the search warrant.

Background

[4] It is important to state the background in some detail.

Mrs. Cora Richardson-Hodge and Ms. Navine Fleming are two solicitors/barristers who practise in Anguilla. Mrs. Richardson-Hodge is the Principal of the law firm CR Hodge & Associates, while Ms. Fleming is the Principal of Libran Chambers. It appears as though sometime in 2009 they were retained by Mr. Joseph Brice to represent himself and Private International Trust Corporation, in which Mr. Brice was a major shareholder. Mrs. Richardson-Hodge represented Mr. Brice and Private International Trust Corporation in a number of claims together with the assistance of a senior lawyer, Mr. Michael Bruney, who practises in Anguilla but whose main practice is in the Commonwealth of Dominica. One of the matters in which Mrs. Richardson-Hodge represented Mr. Brice and the Private International Trust Corporation is in Claim No. AXAHCV2008/0102. Ms. Fleming also represented Mr. Brice and Private International Trust Corporation. Mr. Bruney had oversight of all of Mr. Brice's matters in which Ms. Fleming had general conduct and in

particular Claim No. AXAHCV2009/0017, *Private International Trust Corporation and Joseph Brice v Gigi Osco Bingeman.*

[5] Both Mr. Brice and Private International Trust Corporation appear to have been involved in a number of other litigations as claimants and defendants. Mr. Brice appears to have a judgment entered against him and the corporation in which he had substantial interest while others were made in his favour.

[6] It seems that on 4th March 2009 in Claim No. AXAHCV2009/0026, *YA Ltd v Joseph Brice and Private International and Caribbean Ventures* in which there were allegations that Mr. Brice and the corporation with which he was associated had defrauded YA Limited of US$3,566,335.00, Justice Michel granted YA Limited a freezing order and directed that the defendants shall not in any way dispose of or deal with or diminish the value of any of their assets to the value of US$3,566,335.00.

[7] Based on the order on the court's file, it seems that in Claim No. AXAHCV 2009/0017 it was ordered, on 4th March 2009, that the defendant would pay Mr. Brice and Private International Trust Corporation US$750,000.00 arising out of orders of court and for legal fees. It appears as though as part of the settlement discussions it was agreed that US$600,000.00 would be used to satisfy the outstanding amount owed by Mr. Brice in relation to the claims in court and for the legal fees incurred.

[8] On 11th March 2009, Ms. Fleming filed an application on behalf of Mr. Brice to the court in Claim No. AXAHCV2009/0017, for the payment of US$600,000.00 to be paid to Joseph Brice and Private International Trust Corporation, and Justice Michel ordered the payment of US$600,000.00 out of the monies held in court at the Government Treasury for the benefit of Joseph Brice and Private International Trust Corporation to be used to settle the above debts.

[9] On 13th March 2009, Ms. Fleming filed another application in the above Claim No. AXAHCV2009/0017, *Private International Trust Corporation and Joseph Brice v Gigi Osco-*

Bingeman for the payment of legal fees incurred by Joseph Brice and Private International Trust Corporation. Evidence of the several claims in which Mrs. Richardson-Hodge, Mr. Bruney and Ms. Fleming acted as counsel together with the invoices for the legal services rendered accompanied the application. On 20th March 2009, Justice Michel ordered that they be paid fees totaling US$147,083.19. Indeed, in AXAHCV2009/0017, ***Private International Trust Corporation and Joseph Brice v Gigi Osco-Bingeman*** *(As Personal Representative of the Estate of Martin Crowley)* ***and Vadim Fridman and Pendragon International Limited,*** Justice Michel ordered on 20th March 2009: "That the sum of One Hundred and Forty-Seven Thousand Eighty Three Dollars and Nineteen Cents United States Currency(US$147, 083.19) held in the court for the benefit of Joseph Brice and Private International Trust Corporation to the Order of the court made on 4th March 2009 in the matter of AXAHCV2009/0017, ***Private International Trust and Joseph Brice v Gigi Osco-Bingeman, Vadim Fridman and Pendragon International Limited*** be transferred to Libran Chambers with respect to the satisfaction of legal fees incurred by the Claimants/Applicants in prosecuting and defending the various actions before the court."

[10] Ms. Fleming attended the Registry of the High Court and obtained a copy of the court's order. She was then able to collect a cheque from the Treasury Department, Government of Anguilla, for US$147,083.19 on 28th March 2009, and allegedly disbursed the sums as legal fees to herself, Mrs. Richardson-Hodge and Mr. Bruney.

[11] Prior to this, it seems that since 2008 members of the Financial Investigation Unit of the Royal Anguilla Police Force had been investigating allegations made by numerous persons of criminal wrongdoing allegedly involving Mr. Joseph Brice and Private International Trust Corporation. It appears that as a result of allegations several criminal charges were eventually laid against Mr. Joseph Brice.

[12] Mr. Arsenault says that, subsequent to this, he received certain confidential information which allegedly related to Mrs. Cora Richardson-Hodge and Ms. Fleming. Mr. Arsenault set about investigating the allegations and in pursuance of this he did several things, most of which are of no relevance to the applications at bar.

[13] On the 18th of January 2010, Mr. Arsenault obtained two search warrants from the Rev. Brooks, who is a Justice of Peace, in order to search the offices of CR Hodge and Associates and Libran Chambers, respectively, in order to obtain billing records in relation to Mr. Brice and the relevant companies. The warrant stated that evidence on oath was given by Mr. Joseph Andrew Arsenault, that there was reasonable cause to believe that certain property which may be used as evidence in the prosecution of the suspected offence of false accounting contrary to section 260 (1) of the Criminal Code.

[14] The search warrants were executed on the law offices of Mrs. Richardson-Hodge and that of Ms. Fleming. Certain documents were seized from the law practices of both Mrs. Richardson-Hodge and that of Ms. Fleming.

[15] Mr. Arsenault says that his reasonable suspicions were that Mrs. Richardson-Hodge and Ms. Fleming had inflated their legal fees in their application to the court in which they had obtained the Order from Justice Michel for the payment of the fees in an attempt to assist Mr. Brice who allegedly was now in difficult financial circumstances. On the face of his affidavit, Mr. Arsenault says that he received certain information in relation to alleged overbilling by Mrs. Richardson-Hodge and Ms. Fleming, applied and obtained a warrant to search the business premises of Mrs. Richardson-Hodge and Ms. Fleming. He says that he had suspicions that both of the law firms had information or property which may be used in evidence in the prosecution of offences of false accounting against their respective Principals.

[16] On 12th February 2010, Mrs. Richardson-Hodge and Ms. Fleming filed a Constitutional Motion which was later amended, in which they contend that there was no basis for the granting or execution of the search warrants; that the search warrants were unlawful and invalid; and that the defendants contravened section 8 of the Anguilla Constitution Order 1982. They also sought declarations against the defendants which include:

(a) That the search warrant dated 18th January 2010 were not validly issued;
(b) That the search warrant were not validly executed;
(c) That the defendants violated the constitutional rights provided to them by virtue of section 8 of the Anguilla Constitution Order 1982.

[17] There were a number of intervening events which are not material to the applications before the court. Of significance, however, is the fact that the defendants caused affidavits to be filed in opposition to Mrs. Richardson-Hodge and Ms. Fleming's Motion. During the pendency of the Constitutional Motion, the Royal Anguilla Police Force caused criminal summonses to be filed against Mrs. Richardson-Hodge and Ms. Fleming which ordered them to appear before the Magistrate's Court. The summonses allege, in effect, that they falsified information which was provided to the Registrar of the High Court in order to obtain the sum of US$147,083.19 (which incidentally was the Order made by Justice Michel.) It was several months after Mrs. Richardson-Hodge had commenced their Constitutional Motion seeking the declarations, among other things, in relation to the validity of the search warrants and their due execution, that the Prosecution served both Mrs. Richardson-Hodge and Ms. Fleming with the summonses.

[18] Neither side has provided the court with an official record in relation to what transpired in the Magistrate's Court, but it appears that during the hearing of the matter Mrs. Richardson-Hodge and Ms. Fleming requested the disclosure information from the defendants in relation to the search warrants. The defendants have refused to provide the information. It was against the above background that Mrs. Richardson-Hodge and Ms. Fleming have applied to the High Court for an order of specific disclosure to be made of the documents and/or material in their possession, power, custody or control used by Mr. Arsenault in obtaining the search warrants. (There appears to have been arguments on the application for disclosure in the Magistrate's Court and the decision has been reserved.)

[19] In addition, they have applied to the High Court to stay the criminal proceedings in the Magistrate's Court, pending the hearing and determination of the Constitutional Motion. This application is vigorously opposed by the Attorney General. They contend that the criminal proceedings are an abuse of the court's process in light of the defendant's conduct, and the fact that the evidence which is being used emanates from material obtained as a result of the search warrants which are being challenged by the defendants. This application was opposed.

[20] In his affidavit in answer to the application for specific disclosure, Mr. Arsenault stated that he prepared and swore on oath concerning information for search warrants, whereupon the Justice of

the Peace issued the search warrants that related to the legal bills for Mr. Brice and Private International Trust Corporation that were alleged to be in the possession of the law firms CR Hodge and Associates and Libran Chambers. It seems that the information which was used to buttress the warrants was provided by Mr. Arsenault who stated that there was reasonable cause to believe that certain property in the law offices which may be used as evidence in the prosecution of the suspected offence of false accounting, contrary to section 260 (1) of the Criminal Code.

[21] The Attorney General, the Commissioner of Police and Mr. Arsenault are specifically opposed to the application on the main ground that the Crown has Public Interest Immunity from disclosure in criminal proceedings and that this immunity would be circumvented if the Constitutional Motion is heard before the completion of the criminal matter. In addition, the defendants oppose the application on the ground that the order of discovery of documents or other material in the Constitutional Motion for the purpose of eliciting the factual basis or grounds for the police officer's belief would not accord with the public interest in the proper administration of Justice.

[22] Also, the Attorney General, the Commissioner of Police and Mr. Arsenault have asked the court to stay the Constitutional Motion. In support of their application for a stay of the Constitutional Motion and their request for the court to allow the Magistrate hearing to proceed, they argue that the Constitutional Motion be stayed until the criminal trials are completed. There is great likelihood that a jury hearing the criminal case would be prejudiced, in the event that Mrs. Richardson-Hodge and Ms. Fleming are successful in the Constitutional Motion. Mrs. Cora Richardson-Hodge and Ms. Fleming vigorously opposed the application to stay the Constitutional Motion on the basis that it was first in time to the criminal proceedings and it should take precedence. In any event, the criminal summonses are not genuine and have been brought to derail the Constitutional Motion.

[23] The Attorney General told the court that the learned Senior Magistrate was expected to render her ruling by the end of January 2011. There is no official record provided to the court by either side as to what had transpired in the Magistrate's Court.

[24] The court is aware of the fact that before the hearing of the applications, certain steps were taken by the parties to have the substantive matters resolved amicably but those efforts were unsuccessful.

[25] It was against that background that the issues identified above arise for determination.

Law

[26] Section 31 of the Anguilla Magistrate's Code of Procedure provides:

> "Where the Magistrate is satisfied on evidence on oath that there is reasonable cause to believe that any property whatsoever or with respect to which an offence has been committed is in any place, he may grant a warrant:
>
> (a) To search that place for the property; and
>
> (b) If the property or any part of it is found there, to bring it before the Magistrate."

[27] Section 7 of the Magistrate's Code of Procedure gives authority to a Justice of Peace to issue search warrants. Section 7 (4) of the Magistrate's Code stipulates that the Justice of Peace shall have the same power as the Magistrate to issue a search warrant in any case in which and under the same conditions upon which a Magistrate can issue a search warrant.

[28] Section 8 (1) of the Anguilla Constitution Order 1982 provides:

> "Except with his own consent, no person shall be subjected to the search of his person or his property or entry by others on his premises."

[29] Section 8 (2)(c) of the Constitution states that:

> "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 that is reasonably required for the purpose of preventing or detecting crime."

[30] Section 16 (1) of the Constitution enables any person who alleges that any provision of the Constitution has been or is being contravened in relation to him, without prejudice to any other action with respect to the same matter which is lawfully available, to apply to the High Court for redress.

[31] Section 16 (2) of the Constitution provides that the High Court shall have original jurisdiction to hear and determine any application made by any person under the provisions of the Constitution. There is a proviso which states:

> "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 Constitution."

MR. BRANTLEY'S SUBMISSIONS

Stay of Criminal Proceedings

[32] Learned Counsel Mr. Brantley submitted that the court should stay the criminal trial, in the Magistrate's Court. He said that Section 16 (3) of the Constitution recognizes that once a constitutional issue is raised in the Magistrate's Court the matter must be immediately referred to the High Court for adjudication. There is no doubt that the court has the power to stay the criminal proceedings which are an abuse of process. Mr. Brantley said that in the applications at bar, the High Court has the jurisdiction to stay the Preliminary Enquiry in the Magistrate's Court. Mr. Brantley referred to ***Hunters v Chief Constable*** [1982] 2AC 529 at p 536 where Lord Diplock stated that the power of the court to stay proceedings is one:

> *"Which any Court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would*

nevertheless be manifestly unfair to a party to a litigation before it or would otherwise bring the administration of justice into disrepute among right thinking people."

[33] Learned Counsel Mr. Brantley stated that in any event, the court is clothed with a discretionary power to stay proceedings under Part 28.1 (6) of the CPR 2000, where the court is of the considered view that those proceedings amount to an abuse of power. The power is unfettered and in its exercise the court should maintain a fair and proper balance between the needs of the parties. Part 26.2 (q) of CPR 2000 states:

"Except where these rules provide otherwise, the court may stay the whole or part of any proceedings generally or until a specified date or even"".

[34] Mr. Brantley stated that an abuse of process of the court arises where its process is used not in good faith and not for proper purposes, but as a means of vexation or oppression or for some ulterior purposes, or simply where the process is misused. He argued that when the court examines the circumstance of the issuance and execution of the search warrant it must conclude that they amount to an abuse of the court's process.

[35] Mr. Brantley maintained that the issuance and execution of the search warrant dated 18th January 2010 signed by the Justice of Peace, Rev. Brooks, infringe on Mrs. Richardson-Hodge and Ms. Fleming's constitutional rights against arbitrary search and entry; the warrants are unlawful. Mr. Arsenault had originally sought to use the route of The High Court to obtain the same information and he abandoned the application without explanation.

[36] He reiterated the fact that Mrs. Richardson-Hodge and Ms. Fleming filed the Constitutional Motion challenging the validity of the warrant and its execution. Some seven months after the execution of the search warrants and within days of the Pre-Trial Review hearing of the Constitutional Motion, while mediation options were being explored, the defendants served them with charges based on evidence obtained by virtue of the same search warrants, the legality of which the claimants are challenging.

[37] Learned Counsel Mr. Brantley said that in any event, that the charges that have been laid against Mrs. Richardson-Hodge and Ms. Fleming do not have any realistic prospect of succeeding. The prosecution will have the insurmountable hurdle to surpass to prove that it was the information that they gave to Mrs. Patricia Gumbs or the Registrar that enabled the payment to be made, when in fact it was the Order that was made by Justice Michel on 20th March 2010 that authorized/directed that the payment be made.

[38] Next, Mr. Brantley argued that the court should stay the Magistrate's Court proceedings. He says that the instituting of the criminal charges by the Crown amounts to an abuse of the court's process. It is clear that the Crown is using the criminal process to derail the Constitutional Motion.

[39] The court should exercise its discretion and stay the criminal proceedings. If the criminal trials are not stayed, Mrs. Richardson-Hodge and Ms. Fleming could be convicted and that would render the Constitutional Motion nugatory. See Civil Appeal No. 4, 5, & 6, *Simmonds et al v Randolph Williams.*

Constitutional Motion

[40] Learned Counsel Mr. Brantley said that The Constitutional Motion has advanced to Pre-Trial Review hearing and there is no proper or legal basis for staying it. Part 56 of CPR 2000 contemplates that these matters should be dealt with expeditiously.

[41] In any event, in a criminal trial the defendants are entitled to say to the court that the evidence which was obtained ought to be excluded.

[42] More importantly, the Constitutional Motion seeks to challenge the constitutionality of Mr. Arsenault's conduct and the complaint is that there has been a breach of Mrs. Richardson-Hodge and Ms. Fleming's fundamental right to protection against arbitrary search of their premises.

[43] The High Court is empowered to review the acts of public officials in order to ensure that there is conformity with the dictates of the Constitution. The allegations of breaches of their fundamental rights are sufficiently serious to warrant the High Court proceeding to hear and determine them before the completion of the criminal trials. They go to the heart of the criminal procedure adopted by the defendants in seeking to quite belatedly file criminal charges against Mrs. Richardson-Hodge and Ms. Fleming. It is clear that the criminal charges were filed as a means of reaction.

[44] Finally, Mr. Brantley argued that there is no alternative remedy that is available to Mrs. Richardson-Hodge and Ms. Fleming. A claim based on the common law of detinue will not be adequate to yield the sort of results that are required. The justice of the matter requires that the court allows the Constitutional Motion to proceed.

Specific Disclosure

[45] Learned Counsel, Mr. Brantley, stated that the court has the jurisdiction to order specific disclosure. This is based on Part 28.5 of the Civil Procedure Rules 2000 and the inherent jurisdiction of the court. Mr. Brantley urged the court to order the defendants to disclose the information that was requested. There is no basis for the Crown to refuse to provide the information. If the Crown felt that the information ought not to have been disclosed, CPR 2000 provides the procedure which should have been adopted.

[46] Part 28.14 of the Civil Procedure Rules 2000 stipulates that the party who insists on non-disclosure should apply to the court for an order to that effect. The Attorney General has failed to apply to the court for such an order and he cannot now be heard to say that the documents are privileged and ought not to be disclosed. The onus is on the Attorney General to establish that the document should not be disclosed.

[47] There is clear evidence before the court in the affidavit of Mr. Arsenault in which he makes reference to two separate sets of information which he placed before the Justice of the Peace in order to obtain the search warrants. Once these documents have been referred to, they must be

disclosed. See Part 28.16 (3) of CPR 2000 which mandates that the party must produce the document to which it was referred.

[48] Mr. Brantley took issue with the defendants' assertion of Public Interest Immunity. He said that this was a very belated reason that was advanced out of sheer convenience. Learned Counsel Mr. Brantley referred the court to Halsbury's Laws of England, in support of his contention that the defendants have failed, on the pleading, to properly raise a claim for Public Interest Immunity. In any event, the decision whether or not to accept that the claim of Public Interest Immunity operates as a bar to disclosure falls within the exclusive purview of the court. This is matter for the court to examine and determine whether the person who is seeking to rely on Public Interest Immunity has established the grounds.

[49] Learned Counsel Mr. Brantley advocated that Public Interest Immunity does not arise in the case at bar; it would be wrong for the court to accede to the defendants' request not to order disclosure on the basis of Public Interest Immunity. Counsel reminded the court that the search warrants were executed on Ms. Richardson-Hodge and Ms. Fleming's law firms, thereupon, Mrs. Richardson-Hodge and Ms. Fleming filed the Constitutional Motion challenging their invalidity, among other things. It was several months after they had filed their Constitutional Motion that the defendants instituted the criminal charges against them and are now claiming Public Interest Immunity which cannot properly be claimed; neither does it arise based on the mere say- so of Senior Crown Counsel , Mr. Ivor Greene.

[50] Mr. Brantley said that the evidence which is being sought is not being relied on by the prosecution as evidence in relation to the charges brought and therefore, the prosecution was not prohibited from disclosing the evidence since it did not form part of the case for the prosecution. There is no evidence before the court that the Crown intends to use the information as evidence in the criminal proceedings.

[51] Mr. Brantley therefore argued that *R v Inland Revenue Commissioners ex parte Rossminster Limited* (1980) AC 952 is inapplicable to the application at bar since the information used to obtain the search warrants is not to be used as evidence for future prosecution. The evidence that

is sought is however very relevant to the Constitutional Motion insofar as that motion seeks to challenge the validity of the issuance and execution of the search warrant. The evidence should be disclosed since it would go to the root of the defendants' assertion that there was a proper basis for obtaining the search warrant.

[52] Learned Counsel Mr. Brantley argued in the alternative that even if the court were to find that the Public Interest Immunity has been raised, the court should find that the Public Interest Immunity has not been made out in relation to the information sworn to by Mr. Arsenault before Rev. Brooks in order to obtain the search warrant. Accordingly, Mrs. Richardson-Hodge and Ms. Fleming are entitled to the court's grant of their application for specific disclosure of the said information. Mr. Brantley also referred the court to Privy Council case of ***Brian Gibbs v John Mitchell*** [1998] AC 786. Gault J stated in his Judgment:

> *"Moreover, a person alleging invalidity, indeed malicious procuring of a warrant should be entitled to expect to be informed of the grounds for its issue unless there are good reasons for withholding such information. That the defence did not offer any reason or take any step to explain the grounds relied on to secure the warrant is the more surprising considering that, had there been concern that disclosure might prejudice drug investigations, the court would have ensured all necessary protection by allowing Public Interest Immunity. Any challenges to that could have been dealt with in such a way as to protect the information and its sources."*

[53] Mr. Brantley reiterated that the information which is sought is material to the Constitutional Motion and the court ought to order that it should be disclosed.

THE ATTORNEY GENERAL'S SUBMISSIONS

Stay of Criminal Proceedings

[54] The learned Attorney General reminded the court that Mrs. Richardson-Hodge and Ms. Fleming seek declaratory reliefs in this civil court. Such reliefs by their very nature, even if granted, do not

retrospectively or otherwise affect the validity, viability or continuity of the criminal proceedings; they do not nullify it. A finding, for instance, that the warrant was not validly issued or executed and consequently the search was illegal and constituted a breach of the defendants' constitutional rights, is essentially different from a declaration that the law under which the defendant is charged is unconstitutional. On that basis, the question arises as to why then should there be any need for the criminal proceedings to be delayed pending the outcome of a motion whose result, whichever way, can have no impact on the continuity of the former.

[55] It is accepted that in addition to the declaratory reliefs sought, they have in their motion also asked the court to grant any further and other relief that the High Court deems just. It is also accepted that the Constitution empowers the court hearing the matter to give directions and make orders as it considers appropriate to effect the enforcement of the right of persons which have been breached. However, the only potential orders of any kind which can significantly and adversely affect criminal proceedings is one which directs the exclusion from those proceedings of evidence obtained as a result of the search or an order which stays those proceedings as being an abuse of the process of the court for reasons related to the said search.

[56] The learned Attorney General posited that in any event, for all the reasons articulated hereafter, a request in the civil court to exclude evidence from criminal proceedings or to declare the criminal proceedings to be an abuse of the process of the court is not tenable in law.

[57] The criminal court also has an inherent jurisdiction on an application being made by defendants appearing before them to order a stay of criminal proceedings of which it is seized on the grounds that the proceedings are an abuse of the process of the court. Therefore, despite the observations made above, it is now a matter of law that a court hearing a civil motion will not grant a remedy which will potentially constitute a usurpation of the functions of the criminal court in the related proceedings. *Sharma v Brown Antoine and Ors,* Privy Council Appeal No. 75 of 2006, establishes that civil proceedings which seek to pre-empt or stay a pending criminal prosecution are themselves likely to be stayed on the basis that the criminal court is the appropriate forum in which to raise such a challenge.

[58] The learned Attorney General submitted that the criminal trial court retains the discretion to consider whether evidence should be excluded, even if a breach of a person's constitutional rights has been established as a result of an illegal search. The fact that it is a constitutional right that may have been breached does not remove the issue of admissibility out of the hands of the criminal court. See *Herman King v The Queen* (1969) AC 304.

[59] Consequently, even if Mrs. Richardson-Hodge and Ms. Fleming were to succeed in their motion, an order for the exclusion of the documents found during the search from being used in the criminal proceedings or an order that those proceedings should be stayed on the grounds of abuse of process is not an option by way of redress. These matters remain within the province of the criminal trial court. The Attorney General referred to *Sharma v Brown Antoine and Ors,* Privy Council Appeal No. 75 of 2006.

[60] The learned Attorney General said that given the foregoing, there is therefore no rational or reasonable justification why the criminal process in the Magistrate's Court should be stayed to await the outcome of the civil proceedings which can have no realistic impact on its viability or continuance. In support of his arguments, the learned Attorney General referred the court to the case of *Herman King v The Queen* [1969] A.C. 304. In this case, the court found that an illegal search had been carried out on the appellant and that his constitutional right against search of his person without his consent was violated. At his trial for possession of drugs found on him, the court exercised its discretion to allow the evidence despite the proven contravention of his rights. Before the Privy Council, the appellant contended that the evidence obtained against him should have been automatically excluded as it was obtained in violation of his constitutional rights. Nevertheless, it was held that the discretion was properly exercised.

[61] In *Sharma v Brown Antoine and Ors,* Privy Council Appeal No. 75 of 2006, Judicial Review Proceedings were brought by the then Chief Justice of Trinidad and Tobago, challenging the decision by the Director of Public Prosecutions to institute criminal charges against him. The Board refused to grant the application on the basis that the matter should have been instituted before the criminal court where it could more appropriately be dealt with, as there were sufficient mechanisms within the criminal process for the resolution of the Chief Justice's challenge to the prosecution.

[62] The Attorney General maintained that the court ought not to stay the criminal proceedings. He also referred to *The Attorney General of Jamaica v Williams Anor* (1997 3 WLR. 389, Privy Council Appeal No. 70 of 1995.)

Stay of Constitutional Motion

[63] The learned Attorney General posited that the court ought to stay the Constitutional Motion. He said that the Constitutional Motion seeks to pre-empt the criminal trials in the Magistrate Court and should be stayed.

[64] The Attorney General reminded the court that the grant of Constitutional relief pursuant to Section 16(1) of the Constitution Order is not a guarantee, even in the face of a prima facie contravention of a person's rights. This indeed is the effect of the proviso to section 16(2) which reads as follows:

> *"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."*

[65] The courts, in applying similar provisos, appearing in the constitutions of other Caribbean jurisdictions, have on several occasions stayed constitutional proceedings for the reason that other forms of redress are available under other branches of the law.

[66] Mrs. Cora Richardson-Hodge and Ms. Fleming have applied for a declaration that their right not to be arbitrarily searched has been breached. However, the common law action of damages for trespass for the wrongful seizure of documents resulting from an unlawful search is an alternative to the Constitutional Motion which was available to them. See *Commissioner of Inland Revenue and Another v Rossminster Limited* (1980) AC 966 per Viscount Dilhorne at p. 1007 e-f.
Also open to Mrs. Cora Richardson-Hodge and Ms. Fleming as part of the same suit is the common law action of detinue to force the return of property seized wrongfully. Of course, this would be subject to arguments as to whether the original items or copies should be returned to

them or whether Mr. Arsenault, under the principles of *Ghani v Jones,* is entitled to simply keep them altogether because of the pending criminal proceedings. Be that as it may, the point is that the action is one which was available to be taken as an alternative to the Constitutional Motion. The Attorney General referred the court to *Thakur Persad Jaroo v The Attorney General of Trinidad and Tobago* (2002) UKPC 5 judgment paragraph 32, in support of his argument.

[67] He also emphasized the forms of redress already identified above that are available to Mrs. Cora Richardson-Hodge and Ms. Fleming together with those within the criminal trial process itself.

[68] Accordingly, the Attorney General submitted that there are other options available to Mrs. Cora Richardson-Hodge and Ms. Fleming, which are adequate redress for their complaints outside of the provisions of the Constitution. On this analysis, there exists a serious possibility that the proviso to section 16(2) of the Constitution might be applied with the fatal result that Constitutional Motion might, from its inception, be dismissed on the grounds of being an abuse of the process of the court for the reason that the constitutional route was taken in circumstances where there were other legitimate avenues available.

[69] The Attorney General said that by addressing this matter here is not suggesting that it is necessary for the court to make a determination as to whether the motion would or should be dismissed by this Court. What is being simply said is that its potential vulnerability is additional reason for the court not to subvert the criminal proceedings to await its outcome and determination.

[70] Furthermore, the fact that there are other remedies available is a ground in itself for regarding the Constitutional Motion as being frivolous or vexatious.

[71] In *Sharma v Brown Antoine and Ors,* Privy Council Appeal No. 75 of 2006, The Judicial Review Act of Trinidad and Tobago, contained a proviso similar to that of the Anguilla Constitution Order. The effect of the proviso was to allow judicial review only if no other adequate remedy was available. The Privy Council overturned the High Court decision which had granted the Chief Justice leave to apply for judicial review and which, in addition, had ordered a stay of the criminal prosecution until the hearing and determination of the judicial review proceedings.

[72] Their Lordships indicated that the trial judge, contrary to her duty, had failed to consider whether the Chief Justice's complaints could be adequately resolved within the criminal process itself, either at the trial or possibly by application for a stay of the proceedings as an abuse of process.

> *"Nor did she consider which, if any, of the Chief Justice's complaints could not be adequately resolved within the criminal process itself, either at the trial or, possibly by application for a stay of the proceedings as an abuse of process. It is ordinarily a condition of obtaining relief that a complaint cannot be satisfactorily resolved in this way and a grant of leave to apply for judicial review which ignores this condition must be suspect." Per Lord Bingham of Cornhill and Lord Walker of Gestingthorpe Judgmen*t.

Specific Disclosure

[73] The learned Attorney General stated that the court should not compel Mr. Arsenault to disclose the information which he placed before the Justice of Peace in order to obtain the search warrant. At common law, the disclosure of information obtained or to be used in a criminal trial is protected by the Privilege of Immunity. The Attorney General submitted that Mr. Arsenault's affidavit sworn to before the Justice of the Peace explaining the basis of his suspicion and upon which, in turn, the Justice of the Peace would have acted in issuing the search warrant, is protected by Public Interest Immunity and is therefore not disclosable until the termination of the criminal proceedings. See *Conway v Rimmer* (1986) A.C. 910 per Lord Reid at 935/4, *Commissioner of Inland Revenue and Another v Rossminster Limited; The Attorney General of Jamaica v Williams.*

[74] The learned Attorney General said that when the court is seeking to determine whether or not a document that was used in a criminal case should be disclosed, there is no need for compliance with CPR 2000. The court has an inherent jurisdiction to examine the circumstances and determine whether there is Public Interest Immunity which would serve to prevent the disclosure of the information sought. The learned Attorney General stated that the court has sufficient information on which it could be satisfied that Public Interest Immunity arises to protect the disclosure of the information which is being sought.

[75] The learned Attorney General submitted that the immunity accorded to documents seized as evidence for a future prosecution lapses either at the conclusion of the criminal trial or when it was decided not to bring a prosecution.

[76] The Attorney General said that Mr. Arsenault's affidavit explains adequately what transpired during the search warrant. There is adequate information by Mr. Arsenault which should enable Mrs. Richardson-Hodge and Ms. Fleming to ascertain the basis upon which Mr. Arsenault obtained the search warrant. The court should stop short of pressing Mr. Arsenault to disclose the information that he placed before the Justice of Peace. This information would eventually become available during the criminal trial when it gets on its way.

[77] It follows that Mrs. Cora Richardson-Hodge and Ms. Fleming's application for a stay of the magisterial proceedings on the basis of non-disclosure of this document is misplaced and has no merit.

[78] Also, the learned Attorney General submitted that Mrs. Cora Richardson-Hodge and Ms. Fleming are entitled to the disclosure of documents which the prosecution intends to rely on and produce before the court in the presentation of its case. Mr. Arsenault's affidavit does not however fall in this category. The affidavit was merely part of a procedural step taken during the investigative stage of the matter and has no bearing on proof of the case and the prosecution would not be seeking to tender it as an exhibit.

[79] In *Commissioner of Inland Revenue and Another v Rossminster Limited* (1980) AC 966, Lord Diplock said at page 1010:

> *"If there is to be a criminal prosecution it is, in my view, clearly in the public interest in the proper administration of justice, both criminal and civil, that the civil action should not proceed to trial until the criminal trial is over; so discovery, whether of documents or by interrogatories, directed to eliciting the factual grounds for the officer's belief, can be deferred at least until the Inland Revenue have had a reasonable time to complete their*

investigations into suspected tax frauds and to decide whether to bring criminal proceedings at all and, if so, for what offences. If they decide to bring proceedings the Public Interest Immunity would continue to apply until the conclusion of the criminal trial; if they decide not to bring any criminal proceedings the public interest immunity would come to an end with that decision. The court in the civil action could and should be vigilant to see that the Inland Revenue proceeded with their decision whether to prosecute or not without unreasonable delay. If this were not done the court could properly hold continuation of the immunity to be no longer justified in the public interest, and allow discovery to go ahead.

In cases where those claiming a public interest immunity against premature disclosure of information relating to criminal investigations or pending prosecutions are not (unlike the appellants in the instant case) protected against injunctive relief by Section 21 of the Crown Proceedings Act 1947, the immunity would, in my view, extend to applications for an interlocutory mandatory order for return of the documents seized. Despite the fact that when the action came to be tried the onus would lie upon the defendant to show that there existed reasonable grounds for his belief that they might be required as evidence in criminal proceedings, the court should not require him to disclose the grounds of his belief in opposition to the claim for interlocutory relief, but should be satisfied with his statement on affidavit that he had reasonable grounds for his belief."

[80] Viscount Dilhorne in his judgment, in reference to the appeal of the ***Inland Revenue Commissioners,*** had this to say on the point:

"The effect of the Court of Appeal's order was to prevent evidence which might be required for a criminal prosecution being secured. If this appeal is allowed, it will not prevent the respondents continuing their action for damages for the wrongful seizure of documents, though if there is a prosecution, it may well be desirable that that action should not be tried until after the conclusion of the criminal case…….this appeal should be allowed."

[81] In *Attorney General of Jamaica v Williams and Anor* (1997) 3 WLR 389, their Lordships commented on the subject matter of disclosure in civil proceedings of the investigator's grounds for obtaining a search warrant, while related criminal proceedings are pending, are to the same effect as in the *Rossminster* decision. Speaking of the facts before them, their Lordships made the following significant observations.

> *"It would plainly not be in the public interest for the grounds of the officer's suspicions to be disclosed while the investigation is in progress and one would not expect them to be stated upon a publicly available document. The need for confidentiality in these matters was rightly stressed by Patterson J. in the Supreme Court. But there is no need for the same confidentiality in the privacy of the Justice's room. The application is made ex parte and the officer must disclose to the Justice all that the latter needs to know in order to discharge his duty. There may be some knowledge, for example of the identity of informers, with which the Justice will find it unnecessary to be burdened. But sufficient information to establish the grounds for suspicion to his satisfaction must be stated on oath. The statute does not require the information to be provided in writing. An oral statement on oath is sufficient*."

[82] Lord Hoffman stated at page 397, letter c-f that:

> *"The next question is whether the Justice had before him information upon which he could be satisfied that Mr. McNeish had reasonable cause to suspect. Here one comes to the chief difficulty in the case, which is that their Lordships (like the courts in Jamaica) have no information about what passed between Mr. McNeish and the Justice. This is entirely understandable because, at the state when the Constitutional Motion was launched, the criminal prosecution was still pending. It would have been contrary to the public interest for any information about the grounds for suspicion to be disclosed at the time to the respondents. The position may have been different if the civil proceedings had been commenced after the criminal prosecution was concluded."*

[83] When applied to the issues in the case at bar, the effect of the above pronouncements is two-fold:

i) Mr. Arsenault's affidavit is not disclosable to Mrs. Cora Richardson-Hodge and Ms. Fleming at this stage for the purpose of being used for advancing their civil claim or for the criminal proceeding.

ii) When and wherever the position is reached that as a result of issues relating to disclosure, a choice has to be made between related civil and criminal proceedings, as to which is to take priority, the criminal proceedings should take precedence.

[84] The Attorney General also referred to *Gibbs and Others v John Mitchell Rea.* The then Chief Justice decided that there was not sufficient evidence to support a finding that the elements of the tort of maliciously procuring the issue and execution of a search warrant had been made out. The Court of Appeal and the Privy Council decided that the evidence was sufficient. The case of *Gibbs v John Mitchell Rea*, supra, has to be read and understood on its own peculiar facts and circumstances. That case is highly distinguishable from the case at bar for the reasons given below:

Mr. Arsenault on April 9th, 2010 filed an affidavit in these proceedings stating that he had grounds for his belief. He relies on information obtained from a reliable source, which information he swore to before a Justice of the Peace to obtain the search warrants. The grounds for his belief are subject to protection from disclosure at this time because of the Principle of Immunity that applies in the pending criminal proceedings before the Magistrate's Court. *R v Inland Revenue Commissioners ex parte Rossminster Limited* (1980). In *Gibbs and Others v John Mitchell Rea*, Mr. Justice Gault, delivering the judgment of the majority, said at paragraph 50 (line 9):

> *"Moreover a person alleging invalidity, indeed malicious procuring, of a warrant should be entitled to expect to be informed of the grounds for its issue unless there are good reasons for withholding such information."*

[85] The Attorney General maintained that there are good reasons for not disclosing the grounds in these interlocutory proceedings. See *R v Inland Revenue Commissioners ex parte Rossminster Limited*. The Attorney General accepted that the grounds are disclosable in a civil action or motion at the appropriate time but do not accept that they are disclosable in any interlocutory proceedings where there are criminal charges pending before a court. See *Rossminster* case. Mrs. Cora Richardson-Hodge and Ms. Fleming have already made applications to the learned Senior Magistrate for disclosure of the said grounds. The learned Senior Magistrate's decision is pending and the High Court should not pre-empt the ruling in the Magistrate's Court.

[86] So the premise on which Mr. Justice Gault in *Gibbs and Others v John Mitchell Rea* (Gibbs v Rea) concluded his finding on behalf of the majority decision (3 to 2), that the silence of the defence was maintained when some answer was called for, is far different from the case before this Court. The facts and circumstances are entirely different. There is no issue of silence in the instant case; there is the issue of immunity in a criminal context where criminal proceedings are pending and the criminal proceedings should take precedence in the interest of the proper administration of justice.

[87] In view of the above authorities, the learned Attorney General maintained that the court should refrain from granting the disclosure order.

Court's Analysis and Conclusions

[88] The court has given deliberate consideration to the pleadings in the matter and to the very lucid and comprehensive helpful submissions of both learned Counsel Mr. Brantley and the learned Attorney General.

[89] The court proposes to address the first issue: whether there should be a stay of the criminal proceedings.

Stay of Criminal Proceedings

[90] Having considered both sets of argument, the court finds the arguments of the learned Attorney General very attractive and persuasive in comparison to those of learned Counsel, Mr. Brantley. The court must always be very mindful of the intention of the legislature to promote the investigation of crime while balancing the need for private citizens to be afforded the right of protection over their property.

[91] The fundamental guarantee afforded to every citizen under the Constitution can only be abrogated by the lawful exercise of the powers of an officer of the Crown. The police have extensive powers in relation to the search and seizure of property; the powers must be exercised lawfully. However, even if they were to act in contravention of the law during their investigation, this does not automatically result in the exclusion of the evidence during the criminal trial. In *Herman King v R,* 12 WIR, the Privy Council held that although there was no legal justification for the search, this was not a case in which the evidence had been obtained by conduct of which the Crown ought not to take advantage. The court had a discretion whether or not to admit the evidence and this discretion was not taken away by the protection against search of persons or property without consent enshrined in the Jamaican Constitution.

[92] It therefore follows that even if the evidence was obtained unlawfully, the criminal trial court has a discretion whether to accept it. Equally significant is the fact that a criminal court must ensure that its process is not abused. The criminal court is duty bound to ensure that the summonses that are filed are lawful and must review the totality of the circumstances.

[93] The court is guided by the principles enunciated in *Sharma v Brown Antoine and Ors,* Privy Council Appeal No. 75 of 2006:

> *"The validity or order of criminal prosecutions and processes are better determined during the criminal trial."*

[94] It is the law that as a general rule, once there is a constitutional challenge to the validity of acts of public officers, those challenges should take precedence over any criminal trials. The general position is for the Constitutional Motion to be concluded before the criminal trial to conclude. This was the traditional approach taken by the court.

[95] However, Baroness Hale, Lord Carswell and Lord Mance in the case of ***Sharma v Browne Antoine and Ors*** at paragraph 31 stated that:

> *The possibility of a challenge to the prosecutorial decision, and the apparent inevitably of full investigation in the course of any criminal proceedings into the background to the decision to prosecute, are in our view features central to the resolution of the present appeal. They could properly be raised in the criminal proceedings either in the course of an application to stay those proceedings on the ground of abuse of process or in any substantive trial. It is clear that the criminal courts would have the power to restrain the further pursuit of any criminal proceedings against the Chief Justice if he could on the balance of probabilities show that their pursuit constitutes an abuse of the process of the court."*

[96] At paragraph 32 of ***Sharma v Browne Antoine and Ors***, *Baroness Hale, Lord* Carswell and Lord Mance said that:

> *"The same responsibility extends to oversight of executive action in the form of a police or other prosecutorial decision to present. The power to stay for abuse of process can and should be understood widely enough to embrace an application challenging a decision to prosecute."*

[97] Applying the very helpful principles enunciated in the ***Sharma v Browne Antoine and Ors***, the court is of the considered view that the issues of the validity or otherwise of the search warrants, and the consequential searches are matters that should properly be dealt with in one set of proceedings – the criminal proceedings.

[98] Accordingly, the court is not of the considered view that it should accede to the request to stay the criminal proceedings. The court is fortified in its view that the matters that are raised by Mrs. Richardson-Hodge and Ms. Fleming should properly be dealt with during the course of the criminal trial. The criminal court has the jurisdiction to stay the proceedings if Mrs. Richardson-Hodge and Ms. Fleming can show, on a balance of probabilities, that their prosecution amount to an abuse of process. This view applies with equal force to the validity or otherwise of the search warrants and the admissibility of the evidence that was obtained through the use of the search warrants.

[99] The above view does not in any way detract from the fact that each citizen is afforded protection at law from arbitrary, unwarranted and unlawful executive action. These protections are part of the wider concept of the rule of law. The criminal court has an inherent jurisdiction to ensure that there is no abuse of process.

[100] The court is reinforced in its view by the help of pronouncements made by Lord Bingham n *Sharma v Browne Antoine and Ors.*

> *"It is the duty of police officers and prosecutors engaged in the investigation of alleged offences and the initiation of prosecutions to exercise an independent, objective and professional judgment of the facts of each case."*

[101] The court is mindful of the fact that the institution of the Constitutional Motion was first in time. However, once Mrs. Richardson-Hodge and Ms. Fleming became aware that the criminal trial had commenced against them, even though they had already commenced their Constitutional Motion, they ought to have taken the necessary steps to not proceed with the Constitutional Motion but rather raise the issues of the abuse of process; the validity of the search warrants before the learned Senior Magistrate who has conduct of the criminal proceedings. The issue of whether the summonses are valid in view of the Order of Justice Michel can be properly dealt with in the criminal proceedings. The criminal court will have to satisfy itself that the complaints in the Magistrate's Court have a proper basis.

[102] See paragraph 34 of the judgment of the Board where Baroness Hale, Lord Carswell and Lord Mance said as follows:

> *"Viewing the matter generally the present is clearly a case where all issues should if possible be resolved in one set of proceedings. There are political disadvantages for all concerned, including the public, in a scenario of which one outcome might be long and quite probably public judicial review proceedings followed by criminal proceedings. We add that, in our view, it will in a single set of criminal proceedings be easier to identify and address in the appropriate way the different issues likely to arise. A criminal judge would we think be better placed to resolve the different potential issues, such as whether the decision to charge was politically influenced, whether there is evidence fit to be left to the jury (both matters for him at separate stages of any trial and the case gets that far, how the evidence should be left to the jury. The court is entitled to weigh all such disadvantages in the balance along with any possible advantage that the Chief Justice might hope to gain by judicial review proceedings".*

[103] The criminal court can properly determine whether the search warrants were validly obtained and in this regard, must pay regard to all of the evidence including the fact that Justice Michel had directed the payment to be made to Libran Chambers. This will have to be weighed against Mr. Arsenault's views of the circumstances which led to Mrs. Cora Richardson-Hodge and Ms. Fleming being paid the legal fees.

[104] In view of the totality of circumstances, the court has no doubt that the criminal court is a better placed to determine the issues raised by Mrs. Richardson-Hodge and Ms. Fleming in the Constitutional Motion.

[105] Accordingly, the application to stay the criminal trial is refused.

[106] Having decided the above issue, it therefore is unnecessary for the court to determine whether the Constitutional Motion should be stayed. However, for the sake of completeness, and even if it was wrong, the court is of the view that it should nevertheless provide its views on the other issues.

Stay of Constitutional Motion

[107] The fundamental rights jurisdiction of the court is special and exceptional and should only be utilized in circumstances in which the common law does not provide adequate means of redress. It is a jurisdiction that should be utilized very sparingly. See *Harriksson v Attorney General of Trinidad and Tobago (*1980) AC 265, 268. *Chokolingo v Attorney General of Trinidad and Tobago* (1981) 1 WLR 106, 111-112 and *Hinds v The Attorney General* (2001) UKPC 56.

[108] Based on the pleadings, the court has no doubt that the alleged facts of the case could give rise to an action at common law for the torts of trespass and detinue. It may well be likely that if such an action were to be launched and if Mrs. Richardson-Hodge and Ms. Fleming were successful, the civil court would be able to provide remedies to them, including the declarations and the damages that are sought.

[109] 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 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. Here again there is a public interest element. The court is however mindful of the fact that even though both sides have put forward arguments as to the adequacy of the alternative remedies, those arguments are not as detailed as they could have been.

[110] Be that as it may, the court found the judgment of *Thakur Persad Jaroo v The Attorney General of Trinidad and Tobago* very helpful. At paragraph 36 it was held that the Originating Motion procedure under section 14 (1) of the Constitution is appropriate for use in cases where the facts are not in dispute and questions of law are in issue.

[111] In paragraph 29 of *Jaroo,* it was stated that it has been made clear more than once by their Lordships' Board that the right to apply to the High Court , which section 14 (1) of the Constitution provides, should be exercised only in exceptional circumstances where there is a parallel remedy.

See *Harrikson v Attorney General of Trinidad and Tobago* (1980) AC 265 at page 268 per Lord Diplock.

[112] The court is of the considered view that in the case at bar there are factual disputes which are better suited to be resolved by a civil action (had there been no pending criminal trial). There is no doubt a parallel remedy that is available to Mrs. Richardson-Hodge and Ms. Fleming to enable them to enforce their rights not to have their offices subjected to unlawful searches and seizures. In the court's respectful view, the Constitutional Motion is not suitable for a case such as the present. This is not a proper procedure by which to launch an attack on the validity or otherwise of the search warrants and the searches. Instead, the claimants ought to move the court by way of civil action. See *Thakur Persad Jaroo v The Attorney General of Trinidad and Tobago,* Privy Council Appeal No. 54 of 2000.

[113] At paragraph 36 of *Jaroo*, Lord Hope stated that the Constitutional Motion is wholly unsuitable for cases which depend for their decision on the resolution of disputes of fact. Disputes of this nature must be resolved by using the procedures which are available in the ordinary courts under the common law.

[114] In *Jaroo* at paragraph 38 Lord Hope said that:

> *"The appropriateness or otherwise of the use of the procedure afforded by Section 14 (1) must be capable of being tested at the onset when the person applies by way of originating motion to the High Court. All the court has before it at that stage is the allegation. The answer to the question whether or not the allegation can be established lies in the future. The point to which Lord Diplock drew attention was that the value of the important and valuable safeguard that is provided by Section 14 (1) would be diminished if it were to be allowed to be used as a general substitute for the normal procedure in cases where those procedures are available. His warning of the need for vigilance would be deprived of much of its value if a decision as to whether resort to an originating motion was appropriate could not be made until the application had been afforded an opportunity to establish whether or not his human rights of fundamental freedom had been breached".*

[115] Paragraph 39 of *Jaroo* it was stated:

> *"Their Lordships respectfully agree with the court of Appeal that, before he resorts to his 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 withdraw the motion from the High Court as its continued use in circumstances will also be an abuse".*

[116] In the case of *Jaroo*, the Privy Council held that the appellant is not entitled to a declaration sought.

[117] Accordingly, and in view of the totality of the circumstances, even if the court were incorrect to allow the criminal trial to proceed, the court would accede to the request of the learned Attorney General to stay the Constitutional Motion for the reasons indicated above and based on the very helpful pronouncements of the Board in *Jaroo.*

Specific Disclosure

[118] The court is of the respectful view that it is right that the court gives its considered views on the application for Specific Disclosure even though, in view of the above ruling, this has become otiose.

[119] The court accepts that there is Public Interest Immunity from disclosure in criminal proceedings on the grounds of information and belief for obtaining the search warrants. See *Inland Revenue Commissioners and Another v Rossminster Limited and Others*.

[120] The court recognizes that Public Interest Immunity arises in criminal cases and continues until its conclusion. See Lord Reid pronouncements in ***Rossminster*** namely:

> *"If there is to be a criminal prosecution it is in my view, clearly in the public interest in the proper administration of justice both criminal and civil, that the civil action should not proceed to trial until the criminal trial is over; so discovery, whether of documents or interrogatories, directed to eliciting the factual grounds for the officer's belief, can be differed until the Inland Revenue have had a reasonable time to complete their investigations and decide whether to bring criminal charges".*

[121] In the application at bar, the court has to reconcile two competing and conflicting public interests: the alleged offences should be detected and punished; and, that the right to the individual to the protection of the law from unjustified interference with his private property should be upheld.

[122] In the ***Attorney General v William's*** case, there was presented to the court the affidavit which the officer had sworn to in support of the application for the warrant. Lord Hoffman in reviewing the case before the Board had this to say:

> *"In the absence of any direct evidence of the information actually provided to the justice, the courts have to do the best they can with such inferences as can be drawn from the terms of the warrant itself and such other evidence as is available. In this case, each warrant recited upon its face that the justice was satisfied that there is good reason to believe that in a certain place (the premises to be searched is kept or concealed customed goods or books, documents or instruments relating thereto."*

[123] In ***Attorney General v Williams*** (1997) 51 WIR 264, Lord Hoffman said that the chief difficulty in the case is that the court had no information about what passed between the officer who obtained the warrant and the Justice of the Peace. At page 273, Lord Hoffman said:

> *"This is entirely understandable because, at the stage when the Constitutional Motion was launched, the criminal prosecution was still pending. It would have been contrary to the*

public interest for any information about the grounds for suspicion to be disclosed at that time to the respondent. The position may have been different if the civil proceedings had been commenced after the criminal prosecution was concluded." See ***R v Inland Revenue Commissioner ex parte Rossminster Limited.*** at pages 1000 -1001.

[124] The court is of the view that the content of the formal affidavit, sometimes described as the information, which is prepared in a form can be disclosed to the occupier of the premises to be searched. It would plainly not be in the public interest for the grounds of the officer's suspicions to be disclosed while the investigation is in progress and one would not expect them to be stated in a publicly available document. The need for confidentiality in these matters was rightly stressed. See ***Attorney General v Williams Danhai and Another*** in the judgment of Lord Hoffman.

[125] If they decide to bring proceedings, the Public Interest Immunity would continue to apply until the conclusion of the trial; if they decide not to bring any criminal proceedings, the Public Interest Immunity would come to an end with that decision. The Public Interest Immunity in the case at bar takes priority to the alleged fundamental rights of Mrs. Richardson-Hodge and Ms. Fleming at this stage of the matter.

[126] The court is not of the view that the Public Interest Immunity is only applicable to documents that are intended for use in the criminal trial. ***Rossminster's*** case is not restricted to documents seized and to be used as evidence; in fact, the principle is of wider application and is relevant to information and documents that are in the possession of the official which are relevant to the criminal trial. In the case at bar, the application is for an order that Mr. Arsenault discloses the information to which he swore in order to obtain the search warrants that were granted.

[127] Public Interest Immunity extends to all information obtained by the police officer upon which he formed the reasonable suspicion that a crime was committed and the effect of which caused him to obtain the search warrant. It would not be in the public interest for the court to order him to disclose his sources of information or method of investigation while criminal proceedings are pending.

[128] In view of the totality of the circumstances, the court declines to accede to the request of specific disclosure.

Conclusion

[129] In view of the totality of the circumstances, the court makes the following orders:

(a) Mrs. Cora Richardson-Hodge and Ms. Navine Fleming's application to stay the criminal proceedings before the Senior Magistrate is declined.

(b) The Attorney General's application to stay the Constitutional Motion is hereby granted.

(c) Mrs. Cora Richardson-Hodge and Ms. Navine Fleming's application for specific disclosure is refused.

[130] As agreed, the court makes no order as to costs.

[131] The court greatly appreciate the tremendous assistance received from learned Counsel.

Louise Esther Blenman
Resident High Court Judge
Anguilla