

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCv: 2008/0097

IN THE MATTER of Section 18 of the Constitution of Antigua & Barbuda 1981 AND IN THE MATTER of an application by the Claimants alleging that their rights under section 3 (a) and (c), and 10 of the Constitution of Antigua & Barbuda have been contravened and for redress under section 18 of the Constitution of Antigua and Barbuda.

BETWEEN:

- (1) ASOT MICHAEL
- (2) JOSETTE MICHAEL
- (3) TERESA-ANN MICHAEL

Claimants

v

- (1) THE ATTORNEY GENERAL
- (2) THE COMMISSIONER OF POLICE
- (3) THE MAGISTRATE FOR DISTRICT A (IVAN WALTERS)

Defendants

Appearances:

Mr. John Guthrie Q.C.

Mr. A. Astaphan S.C.

with Mr. John Fuller for:

Claimant

The Attorney General, Mr. Justin Simon Q.C.

with Mr. Kendrickson Kentish for:

Defendant

.....
2008: June 31¹

2009: June 30
.....

JUDGMENT

1. **Harris J:** The 1st Claimant was being investigated by the Special Task Force of the Royal Police Force of Antigua and Barbuda in connection with certain financial transactions between

¹ The claimant's closing submissions delivered on July 29, 2008; the Defendant's closing submissions delivered on July 7th 2008.

the Government of Antigua and Barbuda (GAB), Ishikawajima-Harima Heavy Industries Co. Ltd., Tokyo, Japan (IHI – Japan), IHI Debt Settlement Company (IHI – Bermuda), Debt Settlement Administrators LLC (DSA), Bellwood Services S.A a Panamanian Company, located at the Bank of Bermuda, Bermuda,¹ Patrick A. Michael Ltd and Giddie Ltd. It is alleged that the criminal offences under investigation include but are not limited to Misbehavior in Public Office, contrary to common law and Conspiracy to Defraud the Government of Antigua and Barbuda.²

2. The police were desirous of entering and searching two properties belonging to Asot Michael and to that end applied for and obtained two (2) warrants to search the respective properties.³ At least three (3) police officers were involved in preparing the Information for the Search Warrants and one officer obtained the two (2) search warrants pursuant to S.38 of the Magistrate's Code of Procedure Act Cap. 255 (also referred to as the 'Act' or the 'Code'). The warrants were executed on the 10th of January 2008. The said warrants; (i) did not make any reference on their face to the statutory power under which it had been issued (ii) did not state that the property sought is in relation to a larceny or other felony that has been committed or indeed, did not state on its face, its relation to any criminal offence at all.
3. The warrants stated that evidence on oath had been given by the officer and that there was reasonable cause to believe the property – documents – listed on the attached appendix "A" *"alleged to have been concealed"* is on the respective specified premises of the 1st Claimant . The warrant purported to give the officers power to enter a specified premise by *"force and breaking doors if necessary and to search the property"*. The warrant provided also that *"... of such property as aforesaid or any said [sic] thereof be found therein, to bring the same, and the person or persons in whose possession the part [sic] premises are, before this court, to be dealt with as the law directs."*

¹ Whose directors are Asot Michael (1st Claimant) and Josette Michael (2nd Claimant).

² See Appendix "A" of the Information for Search Warrant, pp 88 of Trial Bundle.

³ The "Dry Hill" property and the "St. Johns" property respectively.

4. The Officers entered the Dry Hill premises through the perimeter fence and then the open kitchen door.¹ Although the three (3) officers that conducted the search inside of the building at Dry Hill were in plain clothes and not visibly armed, there were several other officers outside armed with rifles. At the Dry Hill premises the Claimant's mother and domestic help were prevented from reentering the premises while the search was being conducted. Further, certain associates of the claimant's were also prevented from entering the building while the search was being conducted. At the St Johns premises,² during the search, the 2nd claimant was questioned on matters concerning the 1st claimant and there too, armed police were on the scene and the occupants were not informed by the police officers of the criminal offences to which the search related. The 1st and 3rd claimants were presented with the warrants by the police, on their entry.
5. During the search and under protest by the 1st Claimant, documents were removed from the 1st claimant's premises at Dry Hill, some of which, not being covered by the warrant, were 3 months later returned to the Claimant (see pp 136-145 of the trial Bundle). The Claimant's Attorney was present at the Dry Hill premises for most of the search and was also present at the Police station where the documents were taken to carry out an inventory, under protest from the 1st claimant, from the said 1st Claimant's premises and were later itemized and listed.

Claimant's Submissions³

6. The Claimants contend that the warrants were unlawfully **issued**; (i) no evidence having been produced to show that the Magistrate himself was satisfied as to the statutory requirements. The warrant therefore, argue the claimants, does not disclose jurisdiction on its face and is therefore unlawful (ii) that it was an example of the government's politically motivated harassment of him and; that it was an attempt to procure through the 'back door', certain documents for use in civil litigation against him.

¹ The Dry Hill premises were the home of the Claimants. The St. Johns premises were a commercial building owned by the 1st claimant, but housed, as , businesses owned and operated by the 2nd and 3rd named claimants.

² See footnote to para 3 above.

³ The claimant's submissions below are substantially a wholesale reproduction of their counsels' written and oral closing address.

7. Further, the Claimants contend that the **form** of the search warrants were unlawful in that; **(i)** it did not state the statutory authority under which they were issued **(ii)** did not state the pre-conditions for their issue under the Magistrate's Code of Procedure or at all; **(iii)** did not state or identify any larceny or felony or criminal conduct allegedly committed; **(iv)** did not state that the Third Defendant – the Magistrate - was himself satisfied of reasonable grounds for believing that property was at the Claimants premises; **(v)** did not even refer to "evidence" or the reason why "evidence" was required; **(vi)** simply referred to the listed documents on the warrant – Appendix 'A' - as "concealed" **(vii)** simply refer to the documents listed in appendix "A" by the introductory words, not amounting to a sufficient reason under the Act, that "In order to complete my investigations, I request a search warrant be issued for the following."(emphasis mine)
8. The Claimant contends further still, that the **execution** of the warrants were unlawful on the basis that they **(i)** were unlawfully issued **(ii)** having been initially executed, the officer did not bring the Claimants and the seized documents before the Magistrate to be dealt with according to law as prescribed under the Act; **(iii)** carried out the search in a manner not *reasonably justified in a democratic society* i.e. including 'interrogating' the 2nd and 3rd Claimants at Dry Hill and St. Johns respectively, acted oppressively by use of heavily armed policemen, the refusal of the police to delay the search until the arrival of the Claimants lawyer, refusal to allow the 2nd Claimant immediate access to a doctor when she complained of illness;(iv) the Act did not provide a general authority to search for evidence and the provisions of S.38 of the Magistrates Code of Procedure Act did not apply to the property sought to be seized – as described in appendix "A"..
9. The claimants, pursuant to S.18 of the Constitution, seek a declaration(s) that the warrants had been invalid and the search there under, illegal and contrary to; **(i)** S.3 (a) and 3 (b) of the Constitution; **(ii)** S.10 of the Constitution and **(iii)** the provisions of the Magistrates Code of Procedure Act Cap. 255 of the Laws of Antigua and Barbuda.

10. The Claimant contends also that this was a part of the Defendant's systematic politically motivated harassment against him.

The relevant statutory provisions

11. The Claimants submit that under sections 3 and 10 of the Constitution of Antigua and Barbuda; all persons in Antigua are entitled to the enjoyment of their property, to the protection of the law, to their privacy, to the privacy of their property and protection of their property from arbitrary search or entry. The enforcement of these rights is provided for by section 10, which states in terms, that; 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. If such interference is in breach of this Constitutional right, so also will be the removal of any property. Such interference contends the Claimants, can only be justified to the extent authorized under section 10(2) of the Constitution.
12. Section 10(2), says the Claimant, only justifies search or entry by others on a persons' premises *"to the extent the law in question makes provision"* that, includes law *" c. that is reasonably required for the purpose of preventing or detecting crime"*
13. Further, the Claimants submit that even if a search or entry of a persons property by the police is prima facie justified by such a law, it will still be in breach of section 10 if anything done under its authority is shown not to be *"reasonably justifiable in a democratic society"*.¹
14. The Claimants submit that although the warrant did not state on its face under which statutory authority the warrant was issued, the Defendants, by way of Inspector Nuffield Burnette, did say at trial that the warrant was issued under the authority of S. 38 of the Magistrates Code of Procedure which provides as follows:
- "where a Magistrate is satisfied on evidence upon oath that there is reasonable cause to believe that any property whatsoever on or with respect to which any larceny or other felony has been committed is in any place or places he may grant a warrant to search*

¹ See section 10 of the Constitution of Antigua and Barbuda.

such a place or places for such property. And if the same or any part thereof be there found to bring the same before the magistrate granting the warrant or some other magistrate of Antigua and Barbuda”.

15. The Claimant contends that the Magistrates Code does not permit one to go on a “fishing exercise” but is limited in scope to search only in respect of *“property on or with regard to which any larceny or felony has been committed”*. Unlike wider legislation in some other jurisdictions which provide for the issue of search warrants in pursuit of *evidence*; the Magistrate Code does not authorize in the instant case, a broad search for documents required by the Police to *“complete an investigation”*.¹
16. Further, the Claimant says that it is a further condition to the issue of a search warrant in Antigua and Barbuda that the Magistrate is satisfied on evidence upon oath, that there is reasonable cause to believe that property as referred to in the Code is in the place or places alleged. In the instant case, the Claimant submits that the magistrate’s satisfaction is not disclosed on the face of the warrant.
17. The Claimant submits that the magistrate’s duty to satisfy himself that the prescribed circumstances exist, is a duty on him of high constitutional importance.
18. In support of this proposition, the Claimant cites; The A – G of Jamaica v Williams PC [1998] AC 351, per Lord Hoffman at pp 358:

“The purpose of the requirement that a warrant be issued by a justice is to interpose the protection of a judicial decision between the citizen and the power of the state. If the legislature has decided in the public interest that in particular circumstances it is right to authorize a Policeman or other executive officer of the state to enter upon a persons premises, search his belongings and seize his goods, the function of the justice is to satisfy himself that the prescribed circumstances exist. This is a duty of high Constitutional importance. The law relies upon the independent scrutiny of the judiciary to protect the citizen against the excesses which would inevitably flow from allowing an

¹ See the Appendix to the warrant.

executive officer to decide for himself whether the conditions under which he is permitted to enter upon private property have been met¹".(emphasis mine)

19. The Claimant contends that given the duty of high constitutional importance imposed on the magistrate to judicially consider the application for the issue of the search warrants, the magistrate failed to so conduct the enquiry thereby rendering its issuance unlawful. The contention is that the five (5) minutes that Insp. Nuffield Burnette said that the magistrate took to consider both applications for the issuance of the warrants, clearly shows that the Magistrate performed no more than a perfunctory rubber stamping exercise and could not have satisfied himself that the conditions required by section 38(1) of the Magistrates Code of Procedure and the Law were satisfied.

20. The Claimant contends that the magistrate could hardly have read the two informations in that time, let alone have understood and clarified the complex financial transaction referred to in them. ²

21. The Claimant submitted that it is not possible to go behind the terms of the search warrant or the Informations for the basis upon which they were issued³. They cited, inter alia, the case of RedKnapp v City of London Magistrates Court [2008] EWHC 1177 (Admin) 13 & 16 per Latham LJ:

"The obtaining of a search warrant is never to be treated as a formality. It authorizes the invasion of a person's home. All the material necessary to justify the grant of a warrant should be set out in the information provided on the form. If the Magistrate or Judge does require any information in order to satisfy himself that the warrant is

¹ See also *R v Inland Revenue Commissioners, Ex parte Rossminster Ltd* H.L. [1980] AC 998 (1004;1022); *Seven Seas Publishing Ltd v Sullivan* [1968] N2LR 63; *Re Herrero* [2004] Bda L.R. 9, *RedKnapp v City of London Magistrates Court* [2008] EWHC 1177 (Admin).

² The Claimant relied on several other deficiencies in the process as evidence of the magistrate's failure to carry out his "*duty of high constitutional importance*". See para 22 – 24 of the Closing Submission of the Claimants filed on July 29, 2008 for other deficiencies including the non disclosure of the details of the Civil Action by the Government against the 1st Claimant.

³ *Re Herrero* supra; *Sevens Seas Publishing Ltd*, Supra; *RedKnapp* Supra, at para 13 and 16.

justified a note should be made of the additional information so that there is a proper record of the full basis upon which the warrant is granted".

22. *"As I have already said, it is totally unsatisfactory where the validity of such a warrant is in issue, to be asked to rely on anything other than the application itself and if necessary, a proper note or record of further information given orally to the magistrate".*

23. The next question arising on the Informations is; whether evidence contained in the Information was capable of satisfying the magistrate that there *"was reasonable cause to believe that any property whatsoever on or with respect to which any larceny or other felony had been committed is in any place or places?"*

24. This, the Claimant says, is an objective test and that the Informations were not capable of meeting that test.

25. Firstly, submits the Claimant, that the descriptions of both of the properties in the Defendants Informations before the magistrate¹ as *"documents and records ..."* which may provide evidence of criminal activity and being sought *"In order to complete my investigation"* do not fall within the terms of the Magistrates Code of Procedure. The said Code provides for searching for *"property..... on or with respect to which any larceny or other felony had been committed"* and as a result does not provide the authority for the issue of the warrants in the instant case.

The form of the warrant

26. The Claimant submits that the warrants were bad in form in that; they did not state the statutory authority under which they were issued, i.e. under the Magistrates Code of Procedure Act; they did not state the preconditions for their issue under the Magistrate Codes of Procedure Act; they did not state or identify any larceny or felony or criminal conduct allegedly committed; they did not state that the 3rd Defendant himself – the magistrate – was satisfied of

¹ See Trial Bundle pp 87 and 93, 91 and 97.

reasonable grounds for believing that property was at the Claimants premises; they did not refer to the evidence or the reason why the evidence was required; they simply referred to the documents listed in appendix "A" as concealed on the premises.

27. The Claimants submit that a search warrant is required to state the authority under which it is issued and relied on in support of this proposition; R v Inland Revenue Commissioners, Ex parte Rossminster Ltd. H.L [1980] A C 952 per Lord Wilberforce at pp 1000:

"The person affected, of course, has the right to be satisfied that the power to issue it exists: therefore the warrant should contain a reference to that power".

28. Further, Lord Diplock said at pp 1002 of the same case that:

"Even though the statute may not strictly so require the warrant ought to state upon its face the statutory authority under which it has been issued".

29. The Claimant points out that the warrant Form, headed "form 6" was used in this case and that it contains certain standard form printed material. It is the form of warrant used by the Police when proceeding under the Magistrates Code.

30. The Blank form reads:

*"Evidence has been given this day of 20..... by.....
that there is reasonable cause to believe that certain property, to
wit..... alleged to have been
..... is on certain premises, to
wit..... you are therefore hereby
commanded....."*

31. A transcription of the actual filled out warrant for the search of the Dry Hill premises is exhibited to the Affidavit of the first Claimant and found at pp 21 of the Trial Bundle; this warrant reads as follows:

*"Evidence on oath has been given this 10th Day of January 2008 by Nuffield Burnette (Insp.) that there is reasonable cause to believe that certain property to wit. **DOCUMENT AS INDICATED IN APPENDIX "A"**.*

32. *Alleged to have been **CONCEALED***

is on certain premises to wit; **THE PREMISES OF ASOT MICHEAL OF DRY HILL.**

You are therefore commanded, with proper.....etc..... (The emphasis mine – identifies the information entered on the standard form).

33. The Claimants contends that the Form is intended to follow the words of S. 38 of the Magistrates Code, so that after "*certain property; to wit...*" there should be there set out, such property "*on or with regard to which...*" the crime concerned is alleged to have been committed and not just a reference to the Schedule/Appendix "A". Further, the Claimant says that after the words "*alleged to have been*" there should be set out the detail of an alleged crime.

Execution of the search warrant

34. The Claimants say that even if the search warrants were lawfully **issued**, the **execution** of the search warrants were unlawful and in breach of the Claimants rights.
35. In support of this contention the Claimants say that the Police failed properly to explain to Asot Michael and the 3rd Claimant, the reasons for the search at Dry Hill and St. Johns respectively. The Claimant says that Nuffield Burnette's evidence in Court, that he did so properly explain to the 1st Claimant the reason for the search, is at variance with his affidavit filed in this matter and is not to be believed over the evidence of the 1st Claimant and indeed also the affidavit of the very same Nuffield Burnette where he makes no reference to informing the Claimant of suspected criminal offences. This failure to inform the Claimants of the proper purpose of the search was even more important given the fact that the warrant itself did not do so. As a result, the execution of the warrants were unlawful.

36. The Claimant contends also that (i). the refusal to allow Gaston Browne, an associate of the 1st claimant, to enter the premises during the search, along with (ii). the police statement to the 2nd Claimant and her staff that they were no longer to be in the house but must wait outside and (iii). the alleged refusal to allow the 2nd Claimant immediate access to a Doctor; amounts to an unlawful execution of the search warrant at Dry Hill and in breach of the Claimant's rights.

37. The Claimant's continue; that the Police told the 2nd Claimant at Dry Hill that the search was being conducted with a view to bringing criminal proceeding against the 1st Claimant and herself (Jossette Michael's affidavit para 4, 12 Trial Bundle('TB') p 34); that the Police refused to delay the start of the search to await the arrival of a lawyer; that documents that had nothing to do with those authorized by the warrant were removed from the premises; that the police were heavily armed with rifles and machine guns and generally acted oppressively and that these actions all amounted to the execution of unlawful searches in breach of the Claimant's rights.

Abuse of process

38. The first Claimant submits that he is the subject of harassment by the Government and referred to several statements made in parliament and media by members of the executive branch of the Government to this effect. He contends that the issue and execution of the search warrants against the Claimants is an example of the harassment and is an abuse of process. The Claimant cites the authorities of Jones v Swansea City Council [1990] 1 WLR 54, 85f, and Three Rivers DC v Bank of England (No. 3) [2003] 2 AC 1.

39. In the **Three Rivers** DC v Bank of England case, lord Millet at pp 235 had this to say:

"Every power granted to a public official is granted for a public purpose. For him to exercise it for his own private purposes, whether out of spite, malice, revenge or merely self advancement, is an abuse of the power. It is immaterial his powers or acts within the

letter of the Power: see Jones his deliberate use of the powers of his office to injure the plaintiff takes his conduct outside the power, constitutes an abuse of the power....."

The Defendant's Submission

40. The submissions of the Defendant are set out in their written closing submissions filed in July, 07 2008. Put shortly, they are as follows:¹

The defendant contends that the warrants were lawfully issued under the statutory authority of the Magistrates Code of Procedure Act, Cap 255 and lawfully executed by the Police Officer in respect of both the High Street and Dry Hill premises on the 10th January 2008².

41. They contend that the said statute did not impose formal requirement for the validity of such general warrants. In that context, they argue that an express statement of the statutory authority under which the warrants were issued, though highly desirable, was not a prerequisite.

42. Further, the absence of a recital on the face of the warrant that the magistrate was satisfied that there was "*reasonable cause to believe*" in the existence of certain state of affairs, was not fatal; for, applying the objective test, there was in fact sufficient information before the Magistrate (and now before this court) to establish grounds for the Police Officers reasonable cause to believe that; property "*on or with respect to which any larceny or other felony has been committed is in any place*"

43. The Defendants submit that the document referred to in the warrant and those subsequently seized were "*property*" contemplated by the Act. Further still, the Defendants argue that any defects in the wording of the warrants as alleged by the Claimants – presumably, the preamble to Appendix "A" and the use of the word "Concealed" as opposed to there setting out the alleged criminal offence(s), on the face of the warrant – were errors of drafting and in any event caused no prejudice to the Claimants.

¹ The following is substantially a wholesale reproduction of counsels' arguments.

² See para 12 – 19 and para 20 – 25 of the Defendants closing submission filed 7/7/08.

44. The Contention of the Defendants conclude, in the circumstances of the search; that the respective Claimants were duly informed of the purpose of the search being in pursuance of a criminal investigation of the 1st Claimant; that the search was conducted with the unqualified consent of the Claimants and their Attorney; that the search was executed peacefully; there was no oppressive or intimidatory conduct on the part of the Police¹; that the defendants that were questioned by the police during the search were under no compulsion to provide any answers to the police; that the removal of documents not covered by the description in the warrant does not invalidate the search.
45. The Defendants ask that the court accept the evidence of the Defendant's witness that; the Police did inform the 1st & 2nd Claimants at Dry Hill and the 3rd Claimant at St. John's, of their proper purpose; the Claimant's lawyer Mr. V. Bird Jr. was present through out the search and took no objection at that time to the issue, form or execution of the warrant.
46. The Defendant submits that the common law is not static and continually adapts itself to meet the changing needs of society and the competing interest of repressing crime and giving meaning to the constitutional protections afforded citizens².
47. Further, the defendant's submit in support of the proposition that the Magistrates *satisfaction* need not be recited on the face of the warrant, the authority of Inland Revenue Commissioners v Ex Parte Rossminster (1980) 1 ALL ER 80 and the A.G of Jamaica v Williams (1998) A.C 351 PC.
48. In the ***A-G of Jamaica*** case, counsel for the Defendants drew the court's attention to Lord Hoffman's statement that "*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 support of the contention that the court can look at the Information before the court and draw such inferences as can be drawn.

¹ Insp. Burnette said for instance, that the firearms carried by the police were standard issue for operations like this. I accept this evidence.

² The Defendants rely on Chic Fashions (West Wales) Ltd v Jones (1968) 2 QB 299.

COURT'S FINDINGS AND ANALYSIS

49. I accept the evidence of Nuffield Burnette that he did tell the 1st Claimant the purpose of the search. Notwithstanding the affidavit of Nuffield Burnette not specifically stating that he informed the 1st Claimant of the criminal offence underlying the warrant and search thereto. The evidence in chief of Insp. Burnette was that on entering the premises at Dry Hill he *"presented the warrant to MP. Asot Michael"*. It appears even from his affidavit (pp 82 of the trial bundle) that what he said to the 1st claimant did set out the criminal activity alleged against the 1st claimant. Further, it is clear from the Information that he presented to the Magistrate, that there was a clearly articulated criminal offence(s) set out there that he would have been aware of. Further, Josette Michael said that the police on the scene at Dry Hill told her that both herself and Asot Michael were under investigation for criminal offences, which suggests to me that the 2nd claimant herself is alleging that that police officer at least, knew the search related to a criminal offence.¹ I observed him in the box giving testimony of having informed the 1st claimant of the criminal offence, at the end of which I simply did not disbelieve the witness. Unless motivated by malice or through sheer inadvertence (neither of which I find), I cannot find that the officer, with full knowledge of the criminal offences underlying the warrant, would not or did not tell the claimant his proper purpose. Further, I agree with counsel for the claimant that this was not a general warrant to search for any evidence related to the alleged criminal offences. The argument for the necessity of informing the house holder of the criminal offence is strengthened where the property being searched for cannot be gleaned from the warrant and is not recited on the face of the warrant. In the instant case, the claimants were fully apprised of exactly what the defendant's were searching for by the appendix to the warrant and indeed, were even able to ascertain, on the scene, that certain documents which in their estimation were not covered by the warrant, were being seized. The appearance of the police at the 1st claimant's premises must have been a somewhat traumatic experience for the 1st claimant - as indeed it would be for most persons – thereby jading his recollection of all of the events as they unfolded.

¹ The officer she referred to was the most Junior officer in the house. The defendants deny that these words were ever spoken to Josette Michael. But see the evidence in relation to the search at the St. Johns premises.

50. I do not accept that in the circumstances of the search at Dry Hill as described by both the Claimants and Defendants that the Defendants did (or did intend) to deprive the 2nd Defendant of immediate medical attention by keeping her Doctor out of the Dry Hill premises during that part of the search. I accept the version of the defendants including; that the police did not at that time control the electronic entrance gate to the property having themselves entered through a hole in the fence, as more plausible in the circumstances. I note that it is not contended by either party that the second defendant was prevented from leaving the Dry Hill premises to seek medical attention off the premises. I note also that on the claimant's own version of the facts, the 2nd claimant did ultimately receive access to her treatment.

51. I accept also, that the use of armed Police – three of them inside of the house – not unreasonable in these times and in those circumstances as pertained to the execution of the said warrants. The need for strong security on the perimeter of the premises, to keep out the growing throngs of persons outside of the premises is apparent and I do not presume that the police did not anticipate this occurrence. Reading the affidavits and listening to the evidence it was clear to me that armed police on the execution of a search warrant is, in this part of the world, more to keep out unwanted intermeddlers than it is to keep in the occupants of the premises to be searched. A cultural peculiarity perhaps. On the evidence, it appears that at worst, the guns held by the police outside on the perimeter of the property were intended to keep *at bay*, those 3rd parties on the outside of the premises, who might be desirous of gaining improper entry to the premises whilst the search was ongoing.¹ This must have been so in this case for when you consider the conduct of the claimant during the search, if I were to accept; the evidence of the defendants in whole, or that part of their evidence that remains uncontradicted, or even the conduct of the claimant on his own evidence, the police, if they had any improper intent would have more than likely have expressed it upon the claimant at that time. There is no dispute either, that large numbers of persons congregated on the perimeter of the premises at Dry Hill. The police are generally best placed to make the determinations as to their operational requirements.

¹ I make a similar finding with respect to the premises at St Johns.

The Magistrate's Code of Procedure, Cap 255

52. The Magistrate's Code of Procedure is an Act passed on the 10th February 1892. It has been subject to several amendments none of which affect S. 38. It is a statutory enactment that is as close to the mere codification of the Common Law as one may find in modern times. Unlike several other provisions in other more modern and special enactments, S.38 of the said Magistrates Code is a "bare bones" provision.
53. *I note the said Magistrate's Code at S.34 provides that: "Every warrant issued by a Magistrate to apprehend any person...shall state shortly the act charged and shall name or otherwise describe the person to be apprehended and shall order...etc...". This section, unlike S.38, specifically stipulates what shall be recited on the face of a warrant to apprehend any person.*
54. I accept the Defendants position that the Common law is not static and continually adapts itself to meet the changing needs of society. The validity of the issue, form and execution of the search warrant in the instant case is affected substantially by the extent of any change (if any) in the prism through which one interprets the S. 38. However, If nothing else, the requirements of a lawful issue, form and execution of a search warrant as set out by the claimant in support of its case herein, is a chronicle of "best practices" in this area of law enforcement.

THE PROTECTION AGAINST ARBITRARY SEARCH AND ENTRY

55. For our purposes here there can be no better commencement to this area of the law than the judgment delivered by lord Hoffman in the Privy Council Appeal of A – G of Jamaica v Williams (Supra) more particularly at pp 354 H:

"The fundamental human right to protection against unlawful searches and seizures is part of the English Common law. In Entick v Carrington (1765) 2 Wils. 27 the Kings Messengers entered the plaintiffs' house and seized his papers under a warrant issued by the Secretary of State a Government Minister. Lord Camden C.J. said at p. 291: 'our law holds the property of every man so sacred that no man can set his foot upon his neighbor's close without his leave; if he does he is a trespasser though he does no

damage at all; if he would tread upon his neighbor's ground, he must justify it by law..... we can safely say there is no law in this country to justify the defendants in what – they have done; if there was, it would destroy all comforts of society; for papers are often the dearest property a man can have' ”

56. Lord Hoffman continues: *“From the common law this right has passed into the Fourth Amendment to the Constitution of the United States¹ and into the Constitutions of countries throughout the world”.*

57. The section 10 of the constitution – PROTECTION OF PERSON OR PROPERTY FROM ARBITRARY SEARCH OR ENTRY – provides a regime for the protection of individuals along with allowances for lawful entry and seizure.

58. Further at section 10 (2) it is there in essence provided; that nothing contained in or done under the authority of any law – which in my view includes the Magistrates Code – shall be held to be inconsistent with or in contravention of the provision for the protection of persons and property from arbitrary search or entry except; - among other things – *“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”.*(emphasis mine)

59. To my mind, section 10 (2) imports into the equation, consideration of internationally accepted human rights norms when interpreting the said S. 10(2) and S. 3 of the Constitution and , S. 38 of the Magistrates Code (including the form and execution of the search warrant) and the interplay between the two². These norms, for the most part appear to inform both the binding and the merely authoritative judgments, several of which are cited in argument in the instant case.

¹ See Justice Paul Stephens in US Supreme Court of Appeal in, Groh v Ramirez, 540 U.S. 551 (2004); Listen to the audio of the oral arguments of counsel and the opinion delivered by Justice Stephens at; http://oyez.org/cases/2000-2009/2003/2003_02_811

² See Hon. Mr. Justice Michael Kirby, AC, CMG in the Commonwealth Law Bulletin, Vol. 18, No.4,Oct. 1992,pp1306; also, Justice Lallah of the Supreme Court of Mauritius Comm. Law Bulletin,Vol 17, No 2, April 1991.

THE ISSUE OF THE WARRANT

60. A warrant is defined by Lord Wilberforce in R v IRC, ex parte Rossminster at pp 1000 thus:
"There is no mystery about the word 'warrant': it simply means a document issued by a person in authority under power conferred in that behalf authorizing the doing of an act which would otherwise be unlawful. The person affected, of course, has the right to be satisfied that the power to issue it exists: therefore the warrant should (and did) contain a reference to that power. It would be wise to add to it a statement of satisfaction on the part of the judicial authority as to the matters on which he must be satisfied but this is not a requirement and its absence does not go to validity. To complain of it in the present case when, as is admitted, no challenge can be made as to that satisfaction, in fact, of the judge, would be technical and indeed irrational".
61. The authorities in support of the duty of the magistrate to properly consider the application for the issue of a search warrant, being a duty of "*high constitutional importance*" is not in dispute in this matter. Dicta from a wide cross section of Commonwealth cases to this end, is cited and set out extensively in the Judgment of Kawaley J. of the Supreme Court of Bermuda in Re Herero and others [2004] Bda L.R.1 (pp 8 – 10).
62. These authorities include Bridgeman v Macallister (1898) 8 Q1 per Gryffills CJ. 152; Norse and Thompson v Harlock and others [1977] WAR 65 at p 73, AG of Jamaica v Williams Supra at pp 358 per Lord Hoffman; George v Rocket (1990) 170 CLR 104, IRC v Rossminster Supra: per Lord Salmon at 1019B. Each of the cases cited in argument concern different provisions, some far detailed than others.¹
63. The evidence in the present case is that two applications were made to the Magistrate at the same time for the two search warrants for the respective properties. The Informations that were put before the Magistrate are now before this court and in my view disclose sufficient facts to satisfy a Magistrate *"that there is reasonable cause to believe what it alleges with*

¹ The Australian and New Zealand statutes tend to be more comprehensive and can even expressly state what is required to be recited on the face of the warrant.

respect to the felonies it refers to". More particularly, to be satisfied that the (i) the property (ii) on or with respect to any larceny¹ or other felony... (iii) is any place... It appears to me that for the warrant to be valid it is for the Magistrate to be satisfied, that the police have reasonable cause to believe that the 'property' relates to the 'felony', and not the house owner to be so satisfied.

64. The Claimant contends that even if the information is sufficient, the Magistrate, in the circumstances; did not properly consider the information before him so as to amount to a judicial act as contemplated by the Law. He contends that the evidence of Inspector Nuffield Burnette is that the Magistrate received and dealt with the two applications in 'about' five (5) minutes. Further, that the nature of the allegations contained in the Informations and the stature of the person against whom the allegations were being made (an ex Minister of Government and a sitting parliamentarian), would of necessity required further questions by the Magistrate.²

65. Further, state the Claimants, the Information was deficient in that it failed to disclose the prior civil actions by the state against the Claimant concerning similar matters and the injunctions applied for against the State in those matters. That this information is information that the Court needed to have been aware of and consider for the Magistrate's deliberation to have discharged his duty of high constitutional importance is not clear. That any injunctions or relevant orders had been obtained at that time, by the claimant, in relation to this point has not been alleged or proved in this matter before me. In any event we must consider this case in the context of Antigua and Barbuda. The claimant himself contends and the defendants have not contested it, that the executive have expressed publicly, their designs for his prosecution. Given the alleged publicity, It would be difficult for the magistrate not to know of or suspect the existence of the civil litigation against the 1st claimant, investigations pursuant to that and perhaps the orders obtained (if any) by the claimant thereto. If he did know of this fact, on the

¹ I do not limit the interpretation of this part of the section to the narrower meaning that the 'property' has to be 'stolen goods'

² Insp. Burnette in cross examination did say that he had a conversation with the Magistrate who required additional information, which was given.

evidence before this court, he did not seek and presumably did not require any further information in that regard.

66. In the end the question is, applying an objective test; in the circumstances – including the alleged non disclosure – could and did, the Magistrate discharge his duty of high constitutional importance? The section 38 of the magistrate's Code sets out what the magistrate has to be *satisfied* of to issue the warrant. All the information required by the magistrate to be *satisfied* and to issue the warrant, was before him. The requirement under the Act to be *satisfied* of the existence of certain things, does not prescribe, or in my view, does not necessarily import, the existence of civil proceedings and orders thereto, between the parties. Thereafter, if the magistrate is so "*satisfied*", as required under the Act, his decision to issue or not issue the warrant will involve the consideration of a myriad of factors not necessarily known to us. But, in my view, the existence of prior civil proceedings and orders emanating from those civil proceedings, unless in conflict with the powers the magistrate is now being called upon to exercise and in conflict with the order applied for at the hearing of the application for the issue of the search warrant, are at best, peripheral to that final deliberation in this case.¹ That in the circumstances of this case where no relevant civil court orders and their content are proved before me, the omission to refer to the civil action in the Information does not amount to an act of non disclosure that results in the invalidity of the warrant. I wish to make the point however, that the authorities cited in this matter support the proposition; that if information material to the deliberations underlying the issue of a warrant under consideration by a magistrate was not disclosed, this can render the issue of a warrant unlawful.

67. As to the time spent by the magistrate in considering the Informations before him; sad to say, in the cultural context of this case, Insp. Burnette's evidence that "*..... I was with him for about 5 mins*" could easily amount to very much more than 5 minutes. There simply, at this level, can be no presumption that a man (including a police officer) in this jurisdiction will accurately assess the passage of time to the last minute. That notion of "*west Indian time*" or "*Island time*" as suggesting that all to many persons do not have a keen sense of keeping time, is,

¹ The Orders referred to by senior counsel for the claimant have not been put before the court. The relevance of those orders to the application for the search warrant and to the issue (of non-disclosure) are not known.

regrettably very real.¹ My experience in the trial courts in Antigua and Barbuda and in the region supports this notion.

68. That the comprehensive Informations were presented to the Magistrate for his consideration is not in dispute. That the magistrate took time to consider it, is also not in dispute.² To now impose Insp. Burnette's estimate of the amount of time that the Magistrate took to consider the applications, to satisfy himself of their sufficiency and sign it, I find, in the circumstances of this case not to be a safe, fair and productive exercise. To invalidate the warrant on the basis that the length of time the Magistrate allegedly took to consider the application just may have been too short is also in these circumstances not productive of a fair assessment of the magistrate's deliberations.

69. In the absence of a clear and established deficiency in the time the Magistrate took for his deliberation, I find that the magistrate did judicially consider the applications before him. Further, It appears on the evidence that the magistrate did receive the Informations, also called on the officer to give him additional information to satisfy him of certain things, which the officer in his evidence said he did.³ Following this, at some time, he issued the warrants. I need state here, what may well be obvious; that I do envisage circumstances, if proved, that would show that a judicial officer did not properly consider such an application, including circumstances that suggest that the judicial officer could not have had the time to sufficiently consider the application. The circumstances in the instant case, in my view, are not one of those circumstances. Further, I too think it highly desirable that the magistrate make a note of any further evidence led by the police on the application for the warrant.

THE FORM OF THE WARRANT

70. The Magistrate Code of Procedure Act S.38 (1) is very bare. It provides for the Magistrate's satisfaction of the existence of certain facts, for the grant of a warrant to search for properly in

¹ Insp. Burnette in his evidence says that they arrived on the scene at about 10.30am and Officer Piers said they arrived on the scene at 12.05 pm.

² The claimants suggest, '*about 5 minutes*', as the time given by the defendant's witness.

³ The substance of that communication was not given in court so the testimony remains largely unhelpful

relation to certain offences. With respect to the use of prescribed forms such as the warrant "form 6"; section 27 of the Interpretation Act, Cap 224, provides: "*Where a form is prescribed or specified by an enactment, deviations there from not materially affecting the substance nor calculated to mislead do not invalidate the form.*" It is contended by the claimants that the warrant did deviate from its prescribed format.

71. At the onset let me refer to section 230 of the Magistrate's Code of Procedure which reads as follows: "*No objection shall be allowed to any information, complaint, summons, or warrant for any alleged defect therein in substance or in form...*" The section does not distinguish between types of warrants i.e.; S.38 - search warrant; S.32 - warrants in the first instance; and S. 31 – "bench" warrants. Warrants properly defined include all these warrants (see definition of warrants per Lord Wilberforce In the **Rossminster** case at pp1000 or as set out below ¹
72. That the Police had reasonable cause to believe that the *property*, was in relation to certain criminal offences disclosed in the information and located at the premises of the 1st Claimant, I accept. That the magistrate was satisfied of this "*belief*", I also accept. I accept this on the ground that he has signed the warrant pursuant to the Act which first requires him to be so satisfied. Further, there is clearly sufficient grounds upon which he could have been so satisfied, and this is disclosed in the Informations which were placed before him for his consideration. The Informations contained the grounds including the statement of the offences – felonies. These Informations are before the court now.
73. Further, neither the Privy Council decision in the **AG of Jamaica v Williams**, Supra, nor the House of Lords in **Rossminster**, Supra, require the Magistrate's satisfaction to be recited on the face of the document. I do understand both authorities as suggesting that in the absence of other evidence, such as the *Informations*, or the magistrate's notes of evidence, the court may not be prepared to infer merely from the signature on the warrant, that the Magistrate was so "*satisfied*" or that the evidence presented to him was capable of supporting such '*satisfaction*' of the existence of the '*property*', the '*... larceny or other felony*', and the '*... place or places*'.

¹ See also Black's Law Dictionary 8th edit., pp1616.

74. Indeed, none of the authorities cited in this matter are quite on all fours with the instant case, although they do present applicable guidance on key issues of law in this area. I do note that the Magistrate's Code of Procedure Act in a section that does not concern us in this matter, that is S. 34, does specifically provide for certain information – including the act charged - to be recited on the face of a warrant to apprehend a person. This express requirement does not appear in our section 38 however.

75. Whereas both the Divisional Court and the Court of Appeal in England, in the *Rossminster* case saw the requirement for the recital on the face of the warrant – for both the 'judicial' satisfaction and the specific criminal offence for which the householder is suspected of – as being necessary to enable the police officers, the citizen and the court to be able to ascertain what the police were authorized to take from the premises, the House of Lords in the same case felt that this requirement was not made necessary by the section, but merely desirable. As I said earlier in relation to the instant case, the detailed list of documents contained in the appendix to the warrant, in any event, would in my view militate against the necessity for reciting the criminal offence on the face of the warrant for the purpose of assisting the householder in determining the nature and extent of the documents authorized to be seized by the warrant or against the police needing to be guided as to the nature and extent of the property authorized to be seized.

76. In the lower, Divisional Court, Eveleigh L.J at pp 961E-F differed from the majority there, in his findings on what is required to be recited on the face of the warrant. He said that: *"It seems to me that what they have to disclose will depend on the case that is made against them. Consequently, each case will depend upon its own facts and upon its particular presentation...In so far as the warrant is concerned, we do not know what evidence was given on oath to the judge...What we do know is that it was sufficient to satisfy him that a warrant should issue"* In the instant case, I do know what evidence was before the issuing magistrate. The Information is exhibited in this matter.

77. Viscount Dilhorne at the House of Lord in the said **Rossminister** case case: went further and put it thus: "Does *the fact that the warrants did not state that the Common Serjeant had satisfied himself of these matters lead to the conclusion that the warrants were in law invalid? That in my opinion would be so if the omission meant that he had not done so...*" In the instant case, the content of the Informations that were put before the Magistrate are consistent with a judicial satisfaction, as it were. There is no sufficient evidence to suggest that the magistrate who signed the warrants was not so satisfied as required by the Act.
78. The Claimant had submitted that in addition to the Magistrate's '*satisfaction*' being required to be recited on the face of the warrant, the warrant ought to state upon its face, the statutory authority under which it has been issued. There is no dispute in this matter over the fact that such statutory authority under which it has been issued is not recited on the face of the warrant save for the identification of the form; 'Form 6'. There is now no dispute in this matter over the fact that the statutory authority is that of the Magistrate's Code of Procedure. The issue is whether such authority is required to be recited on the face of the warrant.
79. In the A-G of Jamaica, Lord Hoffman at 364 H, said of this: "*Their lordships agree that it is highly desirable for the warrant to contain an express statement of the statutory authority under which it was issued. If it does not, the householder might reasonably think that it is not based upon any authority and resist entry. But this does not mean that in a case in which the warrant was in fact issued under proper authority and there was no resistance to entry; the warrant should be treated as invalid particularly when.....*"
80. It is clear from the terms of the warrants in this matter (and the form of the warrant – 'form 6' in this case), that it was issued under S. 38(1) of the Magistrates Code of Procedure Act; both parties having accepted as much. The Act does not appear in any event, to create this formal requirement to support the validity of the warrants.¹ In the instant case also, there was no resistance to the entry, neither did the claimants at the time question the basis of the authority under which the warrant was issued. Following the thread of reasoning in the line of cases

¹ See Lord Hoffman, in A.G of Jamaica Supra, at 365 F – G.

flowing from the cases of *Rossminster* and the *A-G of Jamaica*, had the claimant for instance, resisted entry on the basis of the absence (or doubt) of authority in the police to enter and search his premises, the absence of a statement of their authority recited on the face of the warrant may have left the police without a remedy against the claimant/householder.

81. The validity of the warrants, notwithstanding the absence of a recital of (i) the Magistrates satisfaction, where there is a proper basis for his 'satisfaction' (ii) the statutory authority under which it had been issued where it has been issued under a proper statutory basis; is not inconsistent with what is "*reasonably justifiable in a democratic society*" or with the internationally accepted norms of fundamental rights and freedoms of individuals. In my view, the international authorities cited in this case support this conclusion. Lord Wilberforce at the House of Lords in the *Rossminster* case¹ noted that: "*The warrant followed the wording of the statute...I am unable, therefore, to escape the conclusion, that adherence to the statutory formula is sufficient*". The defendants in the instant case argue that the warrants for the Dry Hill and the St. Johns premises, substantially followed the wording of the Statute; and, indeed it does, save for the insertion of the word "*concealed*", which in my view is an error in drafting by the police and entered in the wrong field, on the standard form.²

82. Viscount Dilhorne at pp1004 A, in the very same *Rossminster* case, H.L, noted also, that: "*The Act does not prescribe that such a warrant must be in any particular form.*" It appears to me that upon proper construction of section 38(1) of the Magistrates Code of Procedure Cap 255, that it too, does not expressly prescribe that warrants issued under it be in any particular form notwithstanding the availability of form 6 in the subsidiary legislation. As I said above (see para 53 and para 74) other sections of the Magistrates code do expressly provide in the substantive Act (as opposed to, by implication, in the warrant Form in the schedule), information that should be recited on the face of other types of warrants. Had parliament intended that the search warrant under S. 38 also recite certain facts or the existence of certain circumstances, it would have done so in one of the, over forty(40), amendments to the Act since the first amendment in 1891. I note also that in 'Form 4' of the same legislation – the

¹ Supra, pp 999E-H

² I doubt it need be entered at all on the warrant.

form of **Information** for a search warrant - it recites a different standard for the court's satisfaction than that of S. 38. Form 4 requires that the police have "*probable cause to suspect...*" as opposed to that in S. 38, which requires the police to have "*reasonable cause to believe...*". I do not believe that the two standards sit happily with each other ¹. One needs to look closely to determine whether the forms prescribed by the subsidiary legislation to the Magistrates Code in their present form are adequate for their purpose, having regard also, to S. 27 of the Interpretation Act (for the text of S. 27, see para. 70 above).

83. Again, in the instant case it is worth noting that the Claimant did not resist entry or question the validity of the warrant.² Whether the warrant contains sufficient information on it to satisfy a house owner of the authority of the Police to enter and search his home, can ultimately be determined without this information recited on the face of the warrant. Clearly the greater the amount of information contained on the face of the warrant, the greater the level of transparency in the process. As to whether the absence of the highest level of transparency necessarily invalidates a search warrant, Justice Paul Stephens of the U.S. Supreme Court, in *Groh v Ramirez*, *Supra*, a case dealing with the 4th Amendment to the U.S Constitution – *protection against arbitrary search and seizure* – and more specifically, whether a significant misdescription of the property to be searched for, on the face of the warrant, would invalidate it, posed the question, in relation to what information needed be on the face of a search warrant; what if the house owner was illiterate, would the warrant be invalid as a result of such a misdescription or the absence of formal information on the face of the warrant? Would the Police be precluded from searching the premises until the house owner could get someone to read the warrant for him - such as his lawyer for instance?__The Justice was suggesting that even if all information was recited on the face of the document, the requirement that a house owner needs to have all information to satisfy himself of the validity of the warrant would, in the case of an illiterate, be meaningless and tantamount to being absent. However, this absence of certain information does not necessarily invalidate a warrant. Is the purpose of the detail on

¹ See also para. 3 above for other errors in form 6

² The 1st claimant did resist the taking away of uncatalogued documents at the end of the search.

the face of the warrant to inform the house owner of the basis of the authority of the Police or is it to inform the police as to the limits of their authority in conducting the search? Ultimately the matter before the US Supreme Court was determined in favor of the complainant on the basis of the plain words of their constitutional provision – fourth amendment – expressly required that the description of the items to be seized, to be recited on the face of the warrant and in that case the items were not so recited.

84. Counsel for the Claimant in the instant case, submitted that not all of the text contained in the Information before the Magistrate was carried over to the Appendix to the warrants. This is correct and was further confirmed by Insp. Nuffield Burnette. I do not know that there is any significance to this. The Appendix to the warrant is intended to list/describe the documents/property that the warrant authorizes the Police to search for. The alleged criminal activity and offences set out in the Information could have been transferred to the warrant, albeit in a location/field other than the appendix¹.

85. The said list of documents (Appendix 'A') were clearly taken from the information and transferred to the warrant. The convenience of this, if nothing else, is patent. In my view, it creates no deficiency in either the Informations or the warrant. (See Lord Hoffman at pp 360 B – C in the A.G of Jamaica v Williams, supra).

86. The Claimant submits that the warrant, in its appendix, uses words not known to the Magistrates Code of Procedure, such as, *"in order to complete my investigation....."*. Again, the appendix "A" is intended to provide the list/description of documents authorized to be searched for on the strength of the warrant and is not intended to provide the reason for the search. Whatever the intention, the law is clear on what the reason of the search must be.² The cross examination of Nuffield Burnette, however, showed that he did not entirely understand the limits set under a warrant and to what extent the warrant, statute and the law were to guide him in relation to the seizure of the documents/'property'. This, in my view, in the circumstances of this case, did not affect the execution of the warrant as contended by the claimants.

¹ The claimants have taken this point already; that the criminal offences for which the *property* was allegedly concerned with were not recited on the warrant. See above.

² The reason for the search is disclosed on the face of the warrant along with the *Information*.

87. In any event, those words are not inconsistent with the Police having “*reasonable cause to believe.....*” and not inconsistent with the fact that it is desirable, although not always attained, that investigations are entirely complete before bringing any charges against an individual.¹ No sufficient prejudice, if any, is suffered by the claimants as a result of this superfluous preamble.

88. The Claimant submits further, that the absence of a recital of specific, or in this case, any criminal offence, on the face of the warrant renders it invalid. I see it as clear, from the wording of S. 38(1), that the documents seized must relate to the criminal offence but whether or not they so relate, is a matter for the determination of the magistrate issuing the warrant and ultimately, the trial judge/magistrate.

89. Lord Denning M.R in the ***Rossminster*** case at pp 975 – 976, deals with this issue from the point of view of the mischief created by the absence of this recital. The concern expressed in that case at the court of Appeal, is that in the absence of the Revenue Officer in the case not knowing the offence for which the subject party is suspected of having committed, the customs officers cannot properly know what documents they are authorized to search for, neither can the court subsequently exercise any control over the operations of the officers of the Inland Revenue who were making the search and seizure. In relation to the subject matter of the search and seizure in that case, Lord Denning posed the question “*I would ask, on what grounds did these officers decide whether or not there was reasonable cause for believing that they would be required in evidence?*”²

90. However, In the ***Rossminster*** case; the court did not have the benefit of (i) the list of documents in the Appendix as in the instant matter and, (ii) the Information that was before the issuing judicial officer as I do in this case; and that was their dilemma ³. In the instant case the information that was prepared by the police and presented to the magistrate is before me and

¹ See pp 362 E – F in *A.G of Jamaica v Williams*, Supra.

²Supra, pp 975 G – H and pp 973H-974A; *ibid*, Browne LJ at 976A-B, 978G-H. The ambit of the search authorized by the relevant statute was even wider in the ***Rossminster*** case than in the instant case.

³ Particularly that of the Divisional Court and the Court of Appeal.

expressly sets out the criminal offences alleged and particulars thereof. There were three (3) Police Officers conducting the search at Dry Hill, one of which, Nuffield Burnette, had assisted in preparing and applied for the warrants. There is no evidence that the executing officers at either premises, which includes officer Howard Williams, did not know what the alleged criminal offences were¹; the particulars of those alleged offences (as much as was known to the police at that time and contained in the Informations) or; what was the nature of the listed documents being searched for (The list in the Appendix was comprehensive and would offer a better guide to the police than merely reciting the criminal offence on the face of the warrant). Each warrant had attached, this comprehensive list of documents that they were authorized to search for, which, in my view, would provide a better guide to the police and the claimant as to what had been authorized for search and seizure. In my opinion, the circumstances of the instant case are distinguishable from that of the *Rossmminster* in this regard and indeed to, all the other cases cited in argument.

91. Viscount Dilhorne disagreed with the opinion of the Court of Appeal that the warrant state on its face what criminal offence or offences are suspected. He reasoned that the officers executing the search do not rely on the terms of the warrant for guidance but rely on the statutory provisions underpinning the warrant. The warrant, he said, does not authorize or say what may be seized. So, in the instant case, the police and indeed the claimants must, in addition to the warrant, look to the Magistrates Code, more specifically S38 (1) to ascertain whether the search under the warrant complied with the terms of the section and is valid.²

92. Lord Salmon supported Viscount Dilhorne in the House of Lords, in holding the warrant valid notwithstanding the absence of a reference to the criminal offence(s) on its face: *"I entirely agree with your Lordships for the reasons which you have given that the warrants cannot be successfully attacked on the ground that they do not sufficiently particularize the offences to which they refer."*³ Lord Scarman, at pp1023 D said: *"The Judges warrant is not the authority for seizing and removing things found on the premises. That power is conferred by the statute*

¹ Officer Ronald Piers testified that Howard Williams was one of the officers involved in the preparation of the Informations and warrants. The 3rd claimant testified that he was part of the search party of the St. Johns premises.

² See the *Rossmminster* case at pp 1005 D-H.

³ Ibid, pp1020 G.

...as the Divisional court well said, the warrant is only the key of the door, it does not confer the power to seize and remove..." Further, Lord Scarman observed that with respect to the contention that particulars of the offence suspected to have been committed be recited on the face of the warrant, that : "*The statute contains no express provision spelling out such a requirement. Is the requirement to be implied? I know of no common law rule which compels the implication. Indeed, the common law supports the converse...*"¹ Lord Scarman made the point that in any event, it is for the court at trial to ultimately determine the relevance of a document. The importance then, of the recitals on the face of the warrant in guiding the police and house owner in determining, inter alia, the nature and relevance of the property seized is somewhat diminished . Section 38 of the Magistrates Code provides for the Magistrate being the one to be satisfied of the nexus between the property and the prescribed criminal offence(s).² Once the magistrates satisfaction is shown - in this case by his signature on the warrant - it is not for the house owner to determine whether the criminal offence(s) alleged, can be substantiated or not and then proceed to stop or permit as the case may be, the police entry.³

EXECUTION OF WARRANT

93. The Claimant alleges that the Police failed to explain to the 1st Claimant the reason for the search. I find that the Claimants did inform the Claimant the proper reason for the search (see above). I do not find that Nuffield Burnette reference to the "*Civil Suit filed by the Honorable Attorney – General...*" replaced reference to the criminal offence or, prejudiced the 1st claimant, but merely provided what must have been a helpful guide to the Claimant in understanding the context of the search and even, the criminal offence(s) underpinning the issue of the warrant.
94. I accept the evidence of Jossette Michael that a police officer did tell her that both herself and the 1st Claimant could be the subject of criminal proceedings.

¹ Ibid, 1026 C-D.

² See para. 62, 68 and 69 above.

³ I have determined above that there need be no express recital of the magistrate's satisfaction on the face of the warrant to show his 'satisfaction'.

95. But, to go even further, what was the 'reason' for the search that counsel for the claimants contend that the law insists on? Notwithstanding the 1st claimant being told of the criminal offence to which the search related, it appears to me that the narrower and an adequate reason for the search disclosed on the face of the warrant was; to locate and seize the documents listed on the warrant. The warrant presented at both premises, in this regard, was self explanatory.
96. I accept that the Police did initially delay the start of the search to await the Claimants lawyer. It is unclear whether the search did ultimately commence in the absence of the lawyer, Mr. V. Bird Jr. Mr. V. Bird testified that when he arrived the search had already commenced. There is no sufficient evidence from the Defendants as to what they did whilst waiting for the lawyer.¹ On the balance of probabilities I accept the evidence of the Claimants that the search did commence before the Claimant's lawyer arrived. I do not know how much earlier the search started, but Mr. Bird indicated that as soon as he was called he left his office to come to the premises. It appears to me having regard to the size of Antigua, traffic conditions and the like; that minutes separated his arrival and the commencement of the search. I do not know that the Police are required at all to await the arrival of the Claimant's Attorney, but in any event, on the evidence before me, no prejudice is disclosed resulting from the Attorney's absence at the commencement of the search.
97. The refusal to allow Gaston Browne to enter the premises is, I believe, entirely within the right of the Police. In any event, again, no actionable prejudice to the Claimants is disclosed on the evidence from this refusal.
98. Keeping the 2nd Claimant and her staff out of the 1st claimant's house during the search is not inconsistent with the authority of the Police in the circumstances. Again, in any event I see no actionable prejudice suffered by the 1st, 2nd or 3rd Claimants respectively by this.

¹ Insp. Burnette did say that they remained idle waiting for the Lawyer.

99. The questioning of the 2nd and 3rd Claimants at the Dry Hill and St. John's premises respectively did not place the Claimants under any compulsion to respond. This is the right of citizens. This action by the Police is not sufficient to render the entry and execution under the warrant invalid in the circumstances of this case.
100. Counsel for the Claimant submitted that the Police carried documents from the premises without first cataloguing the documents and providing the Claimants with an inventory. More importantly, counsel submitted that at both premises, documents that did not fall within the list – Appendix A - attached to the warrant, were carried away.
101. The facts are that the Police spent several hours at the Claimant premises conducting the search.¹ That when the Police left with the documents they expressed an intention to complete an inventory at the Police Station. Counsel for the Claimant – the evidence is that by this time several lawyers for the Claimant were on the scene – went to the Police Station on the invitation of the police and remained there to observe the preparation and presentation of the inventory. The claimant's lawyers, in rotation, remained there until the completion of the inventory.
102. Subsequently – some three (3) months after the search – documents along with a list were returned to the Claimant as not falling within the ambit of the warrant.
103. The Police are not entitled to remove documents not caught by the warrant especially as they did have a detailed list of the documents and the types of documents they were authorized to search for. However, the ultimate arbiter as to the relevance of the documents is the court. The Police only make their best preliminary determination as to the relevance of the documents to their authority before seizing them. Mistakes will be made in ascertaining relevant documents especially where large quantities of complex documents are involved. Except in clear cases of abuse, the prejudicial effect of this is likely to be minimal or non-existent; and will not necessarily vitiate the issuance or execution of the warrant. (See

¹ Officer Piers testified that they arrived at 12.05pm and left at 5.30pm. June Iestrade the claimant's domestic help, testified that they searched the 1st claimant's room for 3hrs.

Rossminster case). There was apparent to me, that the Police expended much effort in preparing their application for the warrant, the search itself (at least 5 hrs), and the preparation of the inventory. I do not find on the evidence that they exhibited any improper motive in carrying away the documents without preparing the inventory at the premises or in advertently carrying away documents that turned out to be outside the scope of the warrant¹. The Claimants Attorney was present through out most of the search. If the search had not been so long and extensive and the preparation of the inventory at the station had not been attended by the claimant's lawyers, the police actions may have had another outcome.

104. The Claimant further submitted that the Magistrates Code provides for the Police bringing the property seized, before the Magistrate. The Claimant submits that this process is an important safe guard for the house owner. 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 through out 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. The Form 6 is unclear here.² It appears to contemplate the arrest of the person in whose possession the property is found. In fact the printed form also has what appears to be an error, in providing; "...to bring the same, and the person or persons in whose possession the part [sic] premises are, before this court..." (emphasis mine). Also, no provision is made for the situation where the owner of the place(s) and/or 'property' is not charged. In fact, there appears to be no requirement in the Act, S.38, that the owner of the place/premises have any connection to the property at all. Neither does it appear that there is

¹ The distinction between documents authorized and those not, would not have been as obvious as carrying away an original Land Certificate of Title for instance, as opposed to a music sheet.

² See also para. 3 above.

any requirement that the owner of the property be substantively connected to the alleged crime. All that is required is that property be so connected. So what is required of the police by the Magistrates Code?

105. The Magistrates Code lays down no specific time limit. It is not unreasonable to interpret the section to require the property to be brought before the Magistrate Court at trial if that be a reasonable time from the seizure. At the trial the claimant will be present as provided by the warrant if he is charged with a related offence.¹ 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. However, the Interpretation Act, Cap 224 at section 44(7), provides as follows: *"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."* The Laws of Antigua and Barbuda do provide the Claimants with alternative measures to seek the protection of the court in relation to property seized especially if they are not charged with an offence. However, the failure of the Police to bring the property before the court up to the time of this trial in June of 2008, over 4 months after the seizure, is, longer than is reasonable in the circumstances. 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.

106. In balancing the competing interest between the claimant's rights and that of law enforcement and the suppression of crime and when one considers also that the claimants; have been provided with a comprehensive inventory of the documents taken; have had several documents returned by the defendants; have been provided with an inventory of the documents returned, had alternative remedies and has not alleged actual prejudice by not having the seized documents in his possession², I do not believe that the interest of justice is

¹ The Information alleged that the claimant committed certain felonies.

² The 1st claimant in para 7 of his 2nd affidavit, merely said that he and the 2nd defendant require the return of the material for business purposes.

served by vitiating the entire process – that being the issue, and execution of the warrant – and rendering the warrant invalid from issue and execution.

ABUSE OF PROCESS

107. The improper acts of the executive in pursuance of their political agenda do not necessarily or at all prejudice the rights of its citizens to have the administration of justice upheld. The fact that an individual holds public office does not necessarily mean that every act committed by the individual is done in pursuance of his office.

108. The claimant maintains that he is the subject of harassment by the current government of Antigua and Barbuda. He alleges that the issue and execution of the warrant is an example of this. He submits that prior evidence of the *animus* is found in the record in Hansard where the Prime Minister used these words to him; *"We are going to hound you"* and the then Minister of Justice, Senator Colin Derrick; *"When I'm finished with you you're going to be crazy, and go off your head. We're going to lock you up"*.

109. Further, the claimants submit that the defendants are attempting to obtain information for a civil action against the claimant, through the back door. Support for this contention say the claimants, is in the affidavit of Insp. Burnette at para 8, where he refers to the 1st claimant being aware of the civil suit and the applications for injunctions seeking to prevent the governments from obtaining financial information.

110. Further still, say the claimants, the defendants have attempted to prejudice the claimant by reference in the affidavit of Nuffield Burnette, to a fire bomb incident in St. Johns, compelling the inference that the claimant was involved with the incident.¹ This part of the affidavit was leaked to the press with its attendant publication. The reference to the fire bombing was entirely irrelevant and unnecessary and in my view without justification.

¹ The claimant's allege that the Attorney General provided the draft affidavit of Insp. Burnette's affidavit.

111. Counsel for the claimant submits that the defendants have not responded to these allegations – contained in para 103 to 105 of the claimants affidavit – and in the absence of any answer to the 1st Claimant's evidence that he is being harassed or harassed in the manner set out above, his allegation should be accepted as fact. The claimant cited several authorities for this proposition including the Privy Council appeal from the Cayman Islands, Gibbs v Rea [1988] A.C. 786. where it was held –applying it to our case - that where defendants elected to give no evidence and to contend that the claimants case was not proved , their silence in circumstances in which they would be expected to answer might convert evidence tending to establish the claimant's claim into proof and where there was a circumstantial case that supported the grounds for the claimants allegation of harassment of which the defendants could reasonably be suspected, the claimant's case called for an answer and the 1st defendant's silence, supported the inference that the government had been carrying out the acts of harassing the claimant.¹

112. That the government was harassing the claimant is a conclusion. It is a finding the court is asked to make. It has at its base, among other things, the inescapable inference that the police and the Magistrate took these improperly motivated instructions to procure and issue respectively, the subject warrants. The claimant's are alleging the contravention of S. 3 and S. 10 of the constitution. Presumably, the acts of harassment claimed, contravene these or any of these sections directly or, indirectly by their influence on the issuance, form and/or execution of the search warrant. The claimant has not proved that the police and magistrate were so influenced. I have to look at the acts that the claimants allege amount to the harassment and, I believe, determine whether a magistrate could reasonably be satisfied that the police had reasonable cause to believe the existence of the matters prescribed in the Magistrate's Code of Procedure Act. If the validity of the warrant is established, then, in my view, in the circumstances of this case it cannot be argued here that the procurement of the issue of the warrants were without reasonable cause. If the court is to accept as a fact, the claimant's allegations of the acts he contends amount to harassment, in the absence of any answer or sufficient answer from the defendant, I do accept that evidence. However, I do find the issue of the warrant to be lawful. I do also find that the various statements were made to the

¹ Taken and adapted from the head note at pp788H.

claimant and it would clearly be unlawful if they formed the motivation for the procurement of the search warrant and/or its execution.¹ In my view, whether or not the warrants were valid, the 'statements' did not form the motivation for the procurement of the search warrants. I have no evidence that either the magistrate or the police were improperly motivated or directed, or directed to act for improper reasons. In relation to the statements made by members of the executive, I am inclined to the view expressed by Lord Bingham at para. 14 of the Privy Council Appeal, The Honorable Satnarine Sharma v Carla Browne Antoine et al (*the Sharma case*) that:

113. *"It not infrequently happens that there is strong political and public feeling that a particular suspect or class of suspect should be prosecuted and convicted. Those suspected of terrorism, hijacking or child abuse are obvious examples. This is inevitable, and not in itself harmful so long as those professionally charged with the investigation of offences and the institution of prosecution do not allow their awareness of political or public opinion to sway their professional judgment."*

114. That the 1st claimant and the members of the executive are political opponents is not in dispute. That given the imperatives of the parliamentary system we inherited and subsequently tailored, the adversarial relationship between the parties as evidenced by the proved words spoken by the Honourable Prime Minister and the Hon. Minister for Justice, in the cut and thrust of parliamentary and other public debate is not unexpected.² The question is, as I understand the case for the claimant on this point, is whether as a result of this relationship, the members of the government have used their position to further an agenda falling outside of the scope of their authority of their Office. The legal authorities recognize however, the existence of circumstances where the state cannot be held responsible for the errant acts of a holder of political office.³

¹ Ibid, pp 800 D-G

² That is, the adversarial relationship is not unexpected.

³ See Lennox Phillip (a.k.a. Yasin Abu Bakr) v The Attorney General Of Trinidad and Tobago, PC Appeal No. 30 of 2008 in addition to the *Sharma* case.

115. In the **A-G of Jamaica case**, Lord Hoffman closes with this note: *"Although the courts may some times feel frustrated by their inability to go behind the curtain of the recital reasonable grounds for suspicion existed... their Lordships think that it would be wrong to try to compensate by creating formal requirements for the validity of a warrant which the statute itself does not impose. In doing so, there is a risk of having the worst of both worlds; the intention of the legislature to promote the investigation of crime may be frustrated on technical and arbitrary grounds, while the courts, in cases in which the outward formalities have been observed, remain incapable of protecting the substance of the individual right conferred by the Constitution. The alleged defects in the warrants are all errors of drafting, no doubt on the part of the officers of the revenue protection division by whom it was prepared for submission to the justice. So far as they may have led to substantive abuses, it is of course right that the applicants should have a remedy. But in a case like this in which they have caused little or no prejudice to the applicants, their lordships think it would be wrong to treat them by invalidity of the entire search. Section 19(1) of the constitution was intended to serve a higher purpose than to promote accuracy in drafting in the revenue division."*

116. Section 19 of the Constitution of Jamaica – search or entry of person or property – equates in essence to S. 10 of the Antigua and Barbuda's Constitution. I too believe that S. 10 is intended for a higher purpose.

117. Put shortly, the Magistrate was satisfied on sufficient evidence on oath that the police had reasonable cause to believe that these documents listed on the appendix accompanying the Information and subsequently accompanying the warrant, was property prescribed under the Act in relation to a felony and located on the premises of Asot Michael at Dry Hill and St. John's the magistrate issued the warrant. The warrant was executed. The warrant was presented to the 1st and the 3rd defendants at the respective premises. The warrants on their face were signed by the magistrate and prescribed the authority of the police commanding them to do certain things (see the bottom of the warrant) and delineated the extent of the search by setting out the description of the documents. The police further informed the 1st defendant (owner of both premises) of the criminal offences to which the search related. The

claimant's at all material times could not in the circumstances be in doubt as to the authority of the police under the warrant nor could they in doubt as to what the police were authorized to search for and where they were to search for it. The search was conducted peacefully, save for the 1st claimants remonstrations as described by Officers Pier and Burnette.

118. The police erred in leaving the premises before creating the inventory, erred in carrying away any document the description of which falls outside the ambit of the authority under the warrant and/or Law and erred in not either bringing the claimant or the person to be charged, before the court within a reasonable time or returning the property to the claimant.

119. The alleged defects in the execution of the warrants (and indeed, the form of the warrants) have in this case caused little or no prejudice to the claimants and it would be wrong to deal with the defaults by invalidating the entire search. As was observed by lord Hoffman in the A-G of Jamaica v Williams case, the Constitution, - S. 10 in our case – was intended to serve a higher purpose than to promote accuracy in drafting or to create formal requirements for the validity of a warrant which the statute itself does not impose or to frustrate the promotion of investigation of crime on technical and arbitrary grounds.

120. On the default of the police in bringing the documents seized, before the court, pursuant to S. 38(1) of the Magistrates Code, it is right that the 1st claimant should have a remedy, albeit not the vitiation of the search and warrant. I am satisfied that sufficient grounds exist for the issue of a warrant so that even if the warrant was for other reasons issued or executed unlawfully, the defendants could apply again properly and obtain a warrant for the same search. No prejudice is therefore suffered by the claimants. The claimant has asked for the return of his documents and he shall forthwith have them under the terms set out in para. 7 and para. 8 of the Claim Form (Originating Motion) filed on February 15, 2008, unless, the police bring the documents before a Magistrate to be there dealt with, if not already done (see Order below).

DAMAGES

121. The evidence of the police witnesses by way of cross examination by counsel for the claimants disclosed a lack of full understanding of the limits of their authority under S. 38 of the Magistrate's Code of Procedure Act and the warrant issued there under. The police are taken to know that they are required; **(i)** to seize only documents that are permitted under the Act, the wider Law and the warrant; **(ii)** to prepare at the premises named in the warrant and to leave with the claimants, an inventory of the property seized at the premises.¹; **(iii)** to bring the property seized - along with the person charged (if any) - with all convenient speed before a Magistrate.² They have not done so. These are the breaches for which the Defendants are liable in this action. No or little prejudice has been suffered by the claimants as a result of these breaches however. For these breaches the court also awards damages, appropriate in all the circumstances.

122. I have considered the fact that the 1st Claimant has not succeeded on his claim completely and that the 2nd and 3rd Claimants have not succeeded at all. The Claim against the Defendants was not a frivolous or vexatious claim. In fact, it was a matter of considerable constitutional importance. Given the special character of constitutional protection and redress and mindful of the risk of suppressing citizens in pursuit of their legitimate claims for protection and redress under the Constitution, the court shall grant the 1st Claimant his costs and, make no order as to costs against the 2nd and 3rd Claimant. This claim disclosed, among other things; that although the 2nd and 3rd Defendants in my view acted within the parameters of the law³; they did not deploy the best practices in the area of the issue, form and execution of a search warrant.

123. For the reasons provided above **it is hereby ordered** as follows:

¹ See para. 100 – 103 above

² See para. 105 – 106 above.

³ Save for the breaches referred to in para. 121 and supported in the body of the judgment above.

ORDER

- (i) Judgment for the 1st Claimant;
- (ii) The Claim for the 2nd and 3rd Claimants is dismissed;
- (iii) That the two(2) warrants are not invalid;
- (iv) That the 1st Claimant is awarded Damages for the breaches referred to in paragraph 121 above, in the sum of EC\$ 8000.00;
- (v) That; if the 1st and 2nd Defendants have not already done so; that they do cause to be brought or do bring all the documents seized and in the possession of the Defendants, before a Magistrate to be there dealt with as provided in section 38 of the Magistrates Code of Procedure, within seven (7) days of this Order, failing which **(a)** the 1st and 2nd Defendants are directed to immediately after the expiration of the said seven (7) days, to identify all materials seized from the said premises and immediately return the same to the Claimants together with all copies made of such material; **(b)** the 1st and 2nd Defendants immediately identify to the claimants those persons who have seen or had access to such material and state what use has been made of such material since 10th January 2008; **(c)** that the Defendants be restrained from using the said documents and material in any way, including but not limited in their use in any legal proceedings whether in Antigua or abroad;
- (vi) That Costs be the 1st Claimant's costs pursuant to the CPR 2000 or as otherwise agreed between the parties.
- (vii) That there be no order as to costs as against the 2nd and 3rd Defendants.

David C. Harris

High Court Judge
Antigua and Barbuda