

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. HCV207/03

BETWEEN THE JAMAICAN BAR ASSOCIATION CLAIMANT
AND THE ATTORNEY GENERAL OF JAMAICA 1ST RESPONDENT
AND THE DIRECTOR OF PUBLIC PROSECUTIONS
2ND RESPONDENT

CLAIM NO. HCV 238/03

BETWEEN ERNEST SMITH AND COMPANY (a firm) 1ST CLAIMANT
AND ERNEST A. SMITH 2ND CLAIMANT
AND NESTA-CLAIRE SMITH 3RD CLAIMANT
AND PEARLINE BAILEY 4TH CLAIMANT
AND MARSHA SMITH 5TH CLAIMANT
AND THE ATTORNEY GENERAL OF JAMAICA 1ST RESPONDENT
AND THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT
AND DEPUTY SUPERINTENDENT OF POLICE
KARL PLUMMER 3RD RESPONDENT

CLAIM NO. HCV 213/03

BETWEEN HUGH THOMPSON 1ST CLAIMANT
AND GIFFORD THOMPSON AND BRIGHT 2ND CLAIMANT
AND THE ATTORNEY GENERAL OF JAMAICA 1ST RESPONDENT
AND THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

R. Henriques Q.C., Dennis Morrison Q.C. David Batts, Ransford Braham, Ian Wilkinson instructed by Livingston Alexander and Levy for the Jamaican Bar Association

Frank Phipps Q.C., Earle Witter, Mrs. Jacqueline Samuels Brown Miss Caroline Reid and Miss Debra Martin instructed by Crafton Miller and Company for Ernest Smith & Company Ernest Smith, Nesta Claire Smith, Pearline Bailey and Marsha Smith

Mrs. Pamela Benka-Coker, Q.C. Bert Samules and Walter Scott for Hugh Thompson and Gifford Thompson and Bright instructed by Bert Samuels and Company

Oswest Smith instructed by McNeil and McFarlane for Robert Bidwell an interested party

Michael Hylton, Q.C. Solicitor General, Mrs. Nicole Foster-Pusey and Garfied Haisley for the Attorney General

Kent Pantry, Q.C., Director of Public Prosecutions, David Fraser, Miss Lisa Palmer and Mrs. Caroline Shurland for the Director of Public Prosecutions and Karl Plummer

HEARD: June 9, 10, 11, 12, 17, 18 and October 30, 2003

WOLFE, C.J.

Pursuant to section 23 (1) of the Mutual Assistance (Criminal Matters) Act the second Respondent authorized Deputy Superintendent of Police Karl Plummer to apply to the Resident Magistrate for the Corporate Area Criminal Court for a search warrant to be issued in keeping with the request of a foreign state.

Acting upon the authorization of the second respondent, Deputy Superintendent Karl Plummer applied for and obtained warrants to search the law offices of Gifford Thompson and Bright, Ernest A. Smith and Marsha Smith.

In keeping with the authority of the warrants, the police duly searched the offices mentioned above and removed therefrom several files.

The claimants contend that –

- (i) the conduct and actions of the second respondent, the Resident Magistrate and the Police were in breach of the Constitution of Jamaica;
- (ii) the conduct and actions of the second respondent, the Resident Magistrate and the Police were in breach of the principles of Legal Professional Privilege as enshrined under the Constitution of Jamaica and at Common Law;
- (iii) warrants issued by the Resident Magistrate for the Corporate Area were illegal, void and of no effect and/or issued without jurisdiction.
- (iv) The Mutual Assistance (Criminal Matters) Act properly construed protects Legal Professional Privilege, or in the alternative if the said Act does not protect or fails to provide sufficient protection for the said Legal Professional Privilege, the Act, or such parts thereof, is contrary to the Constitution of Jamaica and/or wrong in law.

Against this background the claimants seek the following Remedies, Directions and/or Orders:

- (1) A declaration that the warrants issued by the Resident Magistrate for the Corporate Area, His Honour Martin Gayle contravene the provision of the Constitution of Jamaica, in particular sections 19 and 20 thereof;
- (2) A declaration that the issue of the said warrants prejudiced the right of citizens to Legal Professional Privilege a matter of public interest and essential to the administration of justice, contrary to Common Law and

sections 19 and 21 of the Mutual Assistance (Criminal Matters) Act and was therefore null and void;

- (3) A declaration that the issue of the said warrants was premature and/or wrong in the law in that the persons adversely affected by the warrants were not given an opportunity to be heard or to claim Legal Professional Privilege;
- (4) A declaration that the procedure by which the said warrants were issued contravened section 19 of the Mutual Assistance (Criminal Matters) Act in that it failed to comply with the relevant laws in force in Jamaica, including but not limited to the procedure specified by the Drug Offences (Forfeiture of Proceeds) Act for the production of documents.
- (5) A declaration that the actions of the police officers in purporting to execute the said warrant prejudiced an essential public right and interest of citizens of Jamaica namely the right to Legal Professional Privilege contrary to Common Law, the Jamaica Constitution and Sections 19 and 21 of the Mutual Assistance (Criminal Matters) Act.
- (6) A declaration that the said warrants were wrong in law in that they failed to disclose on their faces the names of the respondents and lacked specificity as to the documents and/or articles required.
- (7) A declaration that the relevant provisions of the Mutual Assistance (Criminal Matters) Act in so far as they purport to authorize the ex parte or other issue of warrants for the search of offices of Attorneys-at-Law are in breach of the Constitution of Jamaica and/or wrong in law.

- (8) A declaration that the procedure utilized to procure the issue of the warrants and the warrants themselves in so far as they fail to provide safeguards for protecting privileged documents from disclosure to third parties are wrong in law and/or in breach of the Constitution of Jamaica.
- (9) A declaration that section 23 of The Mutual Assistance (Criminal Matters) Act is wholly inapplicable to documents and articles in the possession of Attorneys-at-Law which are protected by Legal Professional Privilege.
- (10) A declaration that the designation of the Director of Public Prosecutions as the Central Authority pursuant to the Mutual Assistance (Criminal Matters) Act is in breach of the Constitution of Jamaica, in that the role of the Central Authority is in conflict with duties and functions of the Director of Public Prosecutions as prescribed under the Constitution of Jamaica.
- (11) A declaration that the Minister of Justice in purporting to designate the Director of Public Prosecutions as the Central Authority for the purposes of The Mutual Assistance (Criminal Matters) Act, acted contrary to the provision of the Constitution of Jamaica in that the Minister purported to confer on the Director of Public Prosecutions roles, functions and powers and/or duties which are not contemplated and/or permitted by the Constitution of Jamaica.
- (12) A declaration that the designation of the Director of Public Prosecutions as the Central Authority for the purpose of the Mutual Assistance

(Criminal Matters) Act is contrary to the Constitution of Jamaica in that the said designation purports to confer roles, functions, powers and duties on the Director of Public Prosecutions which are not contemplated and/or permitted under the Constitution of Jamaica.

- (13) An Order of Certiorari to remove into the Full Court of the Supreme Court and quash the warrants issued under the hand of His Honour Mr. Martin Gayle, Resident Magistrate for the Corporate Area on the 24th January 2003.
- (14) Any further Relief, Directions and/or Orders as this Honourable Court may deem just.

ISSUES TO BE DETERMINED

1. The Constitutionality of section 23 of the Mutual Assistance (Criminal Matters) Act.
2. The Constitutionality of the warrants issued pursuant to section 23 of the Mutual Assistance (Criminal Matters) Act and the searches and seizure of the said warrants.
3. Whether the searches and seizures of documents from the Attorneys-at-Law offices infringed the principle of legal professional privilege and were therefore unlawful or unconstitutional.
4. Whether the designation of the Director of Public Prosecutions as the Central Authority under section 2 of the Mutual Assistance (Criminal Matters) Act is constitutional

Issue 1

Constitutionality of the section of the Mutual Assistance (Criminal Matters) Act pursuant to which the search warrants were issued and the documents seized.

The Claimants rely on section 19(1) of the Jamaica Constitution which prohibits the search of a person or his property, or entry by others on his premises, except with the consent of the person subject to subsection (2)(a)(b)(c) and (d).

The issue therefore is whether the provisions of the Mutual Assistance (Criminal Matters) Act, in particular section 23, are in keeping with sections 19(1) and 19(2) of the Constitution.

The claimants submitted that section 23, is unconstitutional, prima facie, since it offends section 19(1) of the Constitution. The Court must therefore examine whether the provisions of section 23 come within the exceptions provided for in section 19(2).

In this regard it was argued that the provisions of section 23 do not come within the ambit of section 19(2) because they were promulgated for purposes outside of the jurisdiction of Jamaica. They were promulgated to assist foreign jurisdictions.

Section 16(1) of the Mutual Assistance (Criminal Matters) Act, the claimants argue, reinforces this contention in that it authorizes the Central Authority to refuse the request if in the opinion of the Central Authority “compliance with the request would contravene the provisions of the Constitution, or prejudice the security, international relations or other essential public interest of Jamaica” or if “the steps required to be taken in order to comply with the request cannot be legally taken in Jamaica in respect of criminal matters arising in Jamaica.

The aforementioned submissions raise the question as to the approach which the Court must use in the determination of whether or not a statute is constitutional.

Decisions of the Judicial Committee of the Privy Council have clearly established that in the interpretation of statutes there is a presumption of constitutionality and further that the burden of proof to the contrary is on the party alleging unconstitutionality.

See *Attorney General of Antigua and Minister of Home Affairs v Antigua Times* [1976] A.C. 16 pp. 573-574.

Lord Fraser delivering the opinion of the Board stated that in considering whether a particular statutory provision was reasonably required –

“the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required”.

In Hinds et al v R (1975) 24 W.I.R. 326 at p. 340

Lord Diplock said –

“In considering the constitutionality of the provisions of s.13(1) of the Act, a court should start with the presumption that the circumstances existing in Jamaica are such that hearing in camera are reasonably required in the interest of “public safety, public order or the protection of the private lives of persons concerned in the proceedings”. The presumption is rebuttable. Parliament cannot evade a constitutional restriction by a colourable device: *Ladore v Bennett* (4) ([1939] AC at p482. But in order to rebut the presumption their Lordships would have to be satisfied that no reasonable member of Parliament who understood correctly the meaning of the relevant provisions of the Constitution could have supposed that hearing in camera were reasonably required for the protection of any of the interest referred; or, in other words, that Parliament in so declaring was either acting in bad faith or had misinterpreted the provision of section 20 (4) of the Constitution under which it purported to act”.

Similar views were expressed in *Ramesh Dipraj Kumar Mootoo v Attorney General of Trinidad and Tobago* (1978) 30 W.I.R. 411 at p.415 per Sir William Douglas.

“It is not in dispute between the parties that in a case involving an Act of Parliament the presumption of constitutionality applies, and that the burden cast on the appellant to prove invalidity is a heavy one”

and in *Attorney General v Mohamed Alli* (1987) 41 W.I.R. 176 at p.189 the Guyana Court of Appeal per Massiah C. held -

“In the instant matter there was a heavy burden on the respondents to rebut the presumption of constitutionality and to show a manifest violation of constitutional provisions rendering the impugned legislation invalid”.

Has the presumption of constitutionality been rebutted by the claimants? Have the complainants satisfied this Court that section 23 of the Mutual Assistance (Criminal Matters) Act is in breach of section 19 (1) and section 19(2) of the Constitution?

Mr. Henriques Q.C. suggested approach to determine the constitutionality of the statute is indeed attractive but in my view untenable. It is my considered opinion that the provisions of section 19 of the Constitution must be read together, that is the provisions of section 19(2) must be read into section 19(1). Section 13 of the Constitution in my view supports this approach. Section 19(1) is not an absolute right but a right subject to the provisions of section 19(2).

Is section 23 within the provisions of section 19(2)? The answer is decisively yes. The submission that the provision of section 19(2) in reference to a law that is a qualification to the fundamental rights and freedom, is referring to a law promulgated for purposes in Jamaica and not in foreign jurisdictions is in my view not sustainable in the

light of the plethora of dicta which establish that domestic legislation should so far as possible be interpreted to conform to the state's obligation under such treaties to which the state is a signatory. See *Lewis and others v Attorney General and Another* (200) 57 W.I.R. 274 P.C. and *Matadeen v Pointu* [1998] 3 W.L.R. 18 p.31.

Jamaica, as a signatory to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1998 and the scheme relating to Mutual Assistance in Criminal Matters (The Harare Scheme) enacted the Mutual Assistance (Criminal Matters) Act and is well within its rights to make laws which ensure its obligations to foreign states which are signatories to the said convention and scheme.

In this context I hold that sections 19(2)(a)(c)(d) embrace the provisions of section 23 of the Mutual Assistance (Criminal Matters) Act.

It was further submitted that even if it is held that the Mutual Assistance (Criminal Matters) Act falls within the provisions of section 19(2) the provisions thereof are not reasonably required for the purposes for which the statute was promulgated.

To determine this issue, the claimants argue, a proportionality test must be applied and in this regard it was pointed out that other methods not as extreme as the search and seizure exist to obtain oral or documentary evidence for use in a foreign jurisdiction. See of section 20 of the Mutual Assistance (Criminal Matters) Act.

Common sense would dictate that the method employed in obtaining the evidence must certainly depend on the circumstances of the case. The fact that other methods exist does not exclude the use of another method. Mr. Henriques Q.C., having conceded that there is nothing in law which precludes the search of a lawyer's office, how then can

he successfully argue that a provision which enables a search of the lawyer's office would fail the proportionality test.

In the light of the foregoing this ground fails.

Issue II

The validity of the warrants and the searches and seizures carried out pursuant to the said warrants.

The complainants have sought to impeach the validity of the warrants issued by the Learned Resident Magistrate as well as the searches and seizures arising from the execution of the warrants.

They have submitted that the warrants are illegal for the following reasons:

- (a) The warrants were general in form and therefore offended both the common law and sections 23(5) (c) and 28 (3) of the Mutual Assistance (Criminal Matters) Act;
- (b) The Learned Resident Magistrate failed to satisfy himself that all conditions set out in the statute had been satisfied.
- (c) The Learned Resident Magistrate issued the warrants in circumstances in which there were reasonable grounds for believing that the material sought consisted of or included legally privileged items.

(d) The warrants were not issued in accordance with sections 23(4)(b) and 23(5) of the Mutual Assistance (Criminal Matters) Act.

(e) The affidavit of Superintendent Karl Plummer was false in material particulars thus invalidating the warrants.

General Warrant

Section 23 (5) of the Mutual Assistance (Criminal Matters) Act enacts as follows:

“There shall be stated in a warrant issued under this section

- (a) the purpose for which the warrant is issued, including a reference to the nature of the criminal matter in relation to which the search is authorized;
- (b) whether the search is authorized at any time of day or night or during specified hours of day or night;
- (c) a description of the kind of articles authorized to be seized; and
- (d) the date, not being later than twenty eight days after the issue of the warrant, on which it ceases to have effect.”

Careful examination of the warrants reveal that each of the three (3) warrants issued complies with the provisions of section 23(5) of the Act. Whilst the warrants do not specifically set out the date on which the warrants expire, they stipulate that the warrants shall expire twenty-eight days from the date of issue which is given in each warrant.

Reliance upon the decisions in *Auckland Medical Aid Trust v Taylor [1975] 1 NZLR 728* is wholly misplaced. The warrant in Auckland’s case was adjudged invalid because it “misled all concerned into the belief that the police could remove as many of

the records as they thought fit instead of making it clear that they were required to search for and seize only such records (if any) as indicated unlawful terminations of pregnancies". Per Richmond J at p. 742 at 45-50 similar dicta were expressed by McCarthy and McMullin JJ.

In the instant case the offences were precisely stated and the documents to be seized related to the respondents and to transaction in respect of Bay Vista Villages and Lot 45 Breadnut Drive. No one could have been misled as to what documents the police were authorized to seize.

Further, the claimants contend that the Learned Resident Magistrate failed to satisfy himself that the provisions of the statute were complied with prior to issuing the warrants.

Section 23(4)(a) and (b) of the Mutual Assistance (Criminal Matters) Act states –
A Resident Magistrate shall not issue a warrant under this section unless –

- (a) the informant or some other person has given to the Resident Magistrate either "orally under oath or by affidavit, such further information (if any) as the Resident Magistrate requires concerning the grounds on which the issue of the warrant is sought; and
- (b) The Resident Magistrate is satisfied that there are reasonable grounds for issuing the warrant."

Exhibit KP2, the information and application, the basis on which the Learned Magistrate ordered the warrants to be issued, sets out in great detail the reasons for which the warrants were required.

It cannot be denied that the warrant is badly constructed and needs to be revised. The Learned Resident Magistrate says "whereas it appears to me". The statute requires him to be satisfied. The question is: "did he apply the right standard of proof?"

The Oxford Dictionary defines the phrase "it appears that" to mean "be manifest".

Virtues' English Dictionary defines the word "appear" as meaning "obvious" and Websters Third New International Dictionary defines it the word appear as meaning "clear to the mind".

By using the words "whereas it appears" instead of "I am satisfied" it cannot be said that the Learned Resident Magistrate used a lesser standard of proof than that required.

Another ground of complaint, as to the validity of the warrants, is that the circumstances were such that the Learned Resident Magistrate ought to have been alerted that the seizure of documents from the lawyers offices might have offended the doctrine of lawyer client privilege.

This submission is made against the earlier concession by at least two (2) counsel for the claimants that a lawyer's office is not exempt from search. The submission assumes that every item received by a lawyer from a client is protected by lawyer client privilege. Whether an item is so privileged is a matter to be determined by the court. A remedy is therefore available to a party who contends that an item to which privilege is attached has been seized.

In *Shun Tak Holdings Ltd. v Commissioner of Police [1995] LRC p.606 at p.614* Kaplan J held that the common law question of legal professional privilege is relevant at both the issue and execution stages of the search warrant.

However at p.615, in addressing the question whether the warrant was invalid because on its face it failed to exclude documents and records protected by legal professional privilege the learned judge said :

“No such restriction applies here. Further it would be impossible for the magistrate to know in advance whether legal professional privilege was correctly claimed or whether, in the circumstances of any particular case, it had been overridden. A third party may be perfectly prepared to waive the privilege. In my judgment, there is nothing in this point and the warrant is not bad simply because it fails to exclude documents which may be covered by legal professional privilege.”

See also *Commissioner of Police v Julian Ernest Sinclair Hall*, a decision of the Bermuda Court of Appeal (unreported).

The manner in which the searches were conducted has given rise to a serious joinder of issue between the parties. Without the parties having been cross-examined, and no such application was made to the court, it is difficult to conclude which version of the affidavit evidence is to be believed.

In what must be considered a desperate attempt, it was submitted that the warrant did not authorize the police to take documents, but only, articles despite the fact that the first section of the warrant refers to any document or article.

Issue III Legal Professional Privilege

In brief, the claimants contend that the issue of the warrants is a breach of the well established Legal Professional Privilege which is a substantive rule of law; a fundamental right, a basic civil or human right.

The submission is that once documents are handed over by a client to a lawyer they become untouchables and are therefore protected from seizure.

As I understand the principle such documents are not immune from seizure but from disclosure. If such documents are seized, before disclosure, a party may apply to the court to determine the question of privilege. If the documents are adjudged privileged then disclosure will not be permitted.

The contention that the mere seizure offends the principle of the Legal Professional Privilege is untenable. Seizure by itself is not an abrogation of the privilege.

Issue IV Director of Public Prosecutions As Central Authority

Section 2 of the Mutual Assistance (Criminal Matters) Act defines the "Central Authority" as "the Minister responsible for justice or any person designated by him for the purpose of performing such functions or duties of the Central Authority as may be specified in the instrument of designation".

There is no issue joined that the Director of Public Prosecutions was in fact designated "the Central Authority" by the Minister of Justice.

However, the objection is that section 94 of the Jamaica Constitution which sets out the role and function of the Director of Public Prosecutions does not permit the Director of Public Prosecutions to perform the function of Central Authority.

The claimants say that such designation is clearly in conflict with section 94 of the Constitution.

Interestingly the claimants have not attempted to specify in what way this designation conflicts with section 94 of the Constitution. The argument is that section 94 stipulates what are the duties and functions of the Director of Public Prosecutions. Such duties and functions do not include the Central Authority, consequently the Director of Public Prosecutions is unable to perform the role of the Central Authority.

In the absence of the Constitution stipulating that the functions mentioned therein are the only ones the Director may perform, I hold his designation as Central Authority to be unimpeachable. There is absolutely no conflict between such designation and the functions prescribed by section 94 of the Constitution.

In respect of the claimant Mr. Hugh Thompson it was argued that the Letters Rogatoire did not request that his office be searched and as a result the search of Mr. Thompson's office was unconstitutional.

It is a fact that the Letters Rogatoire did not specifically request that the office of Mr. Hugh Thompson be searched. However, Deputy Superintendent Karl Plummer in his affidavit in support of the application for the warrants averred that the basis of his application was information contained in the Letters Rogatoire and from his own investigations. On this basis he applied for a warrant to search the offices of Gifford Thompson and Bright.

Associates of the law firm Gifford, Thompson and Bright who purported to act on behalf of the law firm, while acting on behalf of Robert Bidwell in transactions dealing with the acquisition of real estate, were located in the said Chambers.

The firm having acted on behalf of Robert Bidwell the documents could have been stored in any of the rooms occupied by the firm.

Section 15(4) of the Mutual Assistance (Criminal Matters) act states –

“Requests made by a foreign state shall be made in writing to the Central Authority and shall contain such of the particulars set out in the Schedule as the Central Authority may require, but without prejudice to the requirement for such additional information as may be considered necessary for the purpose of giving effect to the request”. (emphasis mine)

In addition to the above provision section 23 (2) states –

“Where a police officer authorized under subsection (1) has reason to believe that the articles to which the request relates is or will at a specified time be.....
the police officer may lay before a Resident Magistrate an information on oath setting out the grounds for that belief and apply for the issue of a warrant under this section to search the person, land or premises for that article.”

I am satisfied on the authority of the provision cited above that the grounds for belief grounding the application are not restricted to those contained in the Letters Rogatoire but may also include information gleaned by the police officer from his investigations.

For the reasons aforesaid I hold that the submission that there was no legal basis for the search of Mr. Hugh Thompson’s office fails.

In respect of Robert Bidwell, an interested party herein, his remedy it seems to me is to ascertain from a court of competent jurisdiction as to whether or not the documents seized are privileged.

Finally let me emphasize that in judicial review cases, the court's essential function was not to act as an appellate court but to look at the material available to the decision makers and ask whether they had acted unfairly to the applicant.

For the reasons mentioned herein I would dismiss the claims.

HARRISON J

I have read the draft judgments of The Honourable Chief Justice and my brother Hibbert, and I am in total agreement with what they had to say and the conclusions they have arrived at. I wish to use this opportunity however, in saying a few words about the search warrants.

THE CONSTITUTIONALITY OF THE SEARCH WARRANTS

It is a well established principle of law that the integrity and privacy of a man's home, and of his place of business is an important human right hence the Courts have a duty to supervise the legality of any purported exercise of powers that may infringe this right. The constitutionality of any search warrant will therefore depend upon the statute governing its issue and any relevant law that protects the citizen's fundamental rights and freedoms.

The searches that took place in this matter touch and concern Attorneys at Law offices and although a rare occurrence it could never be said that they are immune from search.

A request for assistance had originated from the Central Authority for Canada so it will be necessary to examine the relevant provisions under the Mutual Assistance (Criminal Matters) Act of Jamaica ("The Act") and the Constitution of Jamaica ("The Constitution").

The Act came into operation on the 14th day of July 1995 and it provides inter alia, in section 15 that assistance may be provided to a foreign state on request in respect of investigations and proceedings in relation to a criminal matter. Section 15(4) provides that such Requests shall be made in writing to the Central Authority and shall contain such of the particulars set out in the Schedule as the Central Authority may require, but without prejudice to the requirement for such additional information as may be considered necessary for the purpose of giving effect to the request.

Section 16 of the Act provides the circumstances in which the Central Authority in Jamaica may refuse the request and these include where compliance with the request would contravene the provisions of the Constitution.

Section 19 of the Constitution states as follows:.....

“19 (1) – Except with his own consent, no person shall be subject to the search of his person or his property or the entry by others on his premises”.

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

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

(b) to enable any body corporate established by any law for public purposes or any department of the Government of Jamaica or any local government authority to enter on the premises of any person in order to carry out work connected with any property or installation which is lawfully on such premises and which belongs to that body corporate or that Government or that authority, as the case may be; or

(c) for the purpose of preventing or detecting crime; or

(d) for the purpose of protecting the rights or freedoms of other persons.

Section 23 of the Act that deals with the issuing of search warrants states inter alia:

23. (1) Where-

(a) a proceeding or investigation relating to a criminal matter has commenced in a relevant foreign state;

(b) there are reasonable grounds for believing that an article (not being tainted property) relevant to the proceeding or investigation is located in Jamaica; and

(c) the relevant foreign state requests the Central Authority to arrange for the issue of a search warrant under this section in relation to that article,

the Central Authority may authorize a police officer to apply to a Resident Magistrate for the search warrant requested by the relevant foreign state.

(2) Where a police officer authorized under subsection (1) has reason to believe that the articles to which the request relates is, or will, at a specified time be-

(a) on a person or in his possession or under his control; or

(b) upon any land or upon or in any premises,

the police officer may lay before a Resident Magistrate an information on oath setting out the grounds for that belief and apply for the issue of a warrant under this section to search the person, land or premises for that article.

(3) A Resident Magistrate may, on an application under subsection (2), issue a warrant authorizing a police officer named in the warrant with such assistance as may be necessary-

(a) to search the person;

(b) to enter upon the land or upon or into the premises;

(c) to search the land and premises for the article; and

(d) to seize any article found in the course of the search that the police officer believes, on reasonable grounds, to be relevant to the proceeding or investigation.

Now, it was submitted on behalf of the Claimants that section 23 of the Act clearly infringes section 19(1) of the Constitution and unless it fell within any of the purposes set out in section 19(2) of the Constitution it was unconstitutional.

After examining the exceptions under section 19(2) Mr. Henriques Q.C, Counsel for the Jamaica Bar Association submitted that section 23 of the Act does not fall within any of the purposes set out. In particular, he argued that the “purpose of preventing or detecting crime” must relate to crimes committed in Jamaica. He submitted therefore, that since section 23 was enacted for the purpose of rendering assistance at the request of a foreign state by providing evidence and obtaining same in relation to criminal proceedings or investigation in the foreign state this was not covered by section 19(2) of the Constitution. He further argued that any search would clearly be an infringement of section 19(1) and would therefore be unconstitutional. It was further his view that the provisions regarding search under the Act were unconstitutional not only insofar as they permitted the issuing of warrants, but also where they provided for the seizure and taking of documents.

Having considered the submissions, I do agree with the learned Solicitor General when he submitted that the right set out in section 19(1) is not an absolute one. The question one has to determine therefore is whether or not the searches fell within any of the exceptions in section 19(2) of the Constitution. I do agree with the learned Solicitor

General that the respective searches fall under section 19(2)© and that the purpose of the searches under the Act was to prevent and detect crime wherever committed. I also agree with him when he submitted that it was manifestly in the interests of the Jamaican public that crimes of a transnational nature such as money laundering and drug trafficking be prevented and detected.

It is a fact also that Jamaica is a signatory to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and to the Scheme Relating To Mutual Assistance In Criminal Matters (The Harare Scheme) hence one should bear in mind that the purpose of these Conventions is to increase the level and scope of assistance rendered between Commonwealth Governments in criminal matters.

I turn now to the question of proportionality that was raised on behalf of the Claimants. Are the provisions under section 23 of the Act out of proportion to what is reasonably required? It was argued that this Court has to balance the interest of the society with those of individuals and groups and to ensure that the objectives to be achieved are not arbitrary, unfair or based on irrational considerations.

The Claimants submitted that if the purpose of the entry and search was to obtain evidence for use in a foreign jurisdiction then there were other procedures that could be used to achieve this. Firstly, there were provisions for Letters Rogatoire so documents could be delivered up at the request of the foreign state. Secondly, it was submitted that section 20 of the Act provides for the production of documents and other articles so the use of search warrants being draconian in approach had breached the fundamental right and freedom of the citizen.

The Claimants relied heavily upon the authorities of **M'Membe & Anor. v The People** (1996) 2 LRC 280; **Retrofit (Pvt) Ltd v Post and Telecommunication Ltd** (1996) 4 LRC and (1996) 4 LRC 512; **Nyambirai v National Social Security Authority and Another** (1996) 1 LRC 64; **deFreitas v Permanent Secretary of Agriculture Fisheries, Lands and Housings and Others** (1998) 3 LRC 62; **The Queen v Oakes** (1987) LRC

477 and Lucas and Another v R (1998) 3 LRC 236. The Solicitor General submitted however, that these cases did not support the proportionality test put forward.

Having read and considered the cases relied upon, I cannot agree with the Claimants on this aspect of their submissions as well. The Act under which the warrant was issued provides that the warrant may be applied for on an ex-parte basis and I can see very good reasons for this.

It is my considered view that the Court ought to look critically at legislation that impairs the rights of citizens but it is no part of its duty or power to restrict or impede the working of legislation. The use of a search warrant always has an element of surprise inherent in it and I do agree with the Solicitor General that it may be the best means of acquiring evidence especially where there is a real risk that articles or documents might be destroyed, altered or hidden.

It is further my considered view, that the use of the search warrant would in all the circumstances fall properly within the purpose set out in section 19(2)©, that is to say, that it was reasonably required “for the purpose of preventing or detecting crime”.

I do not agree therefore, that the provisions under the Act are out of proportion to what is reasonably required for the prevention or detection of crime. Neither am I persuaded by the submissions that the sections under the Act pursuant to which the search warrants were issued are unconstitutional.

THE VALIDITY OF THE SEARCH WARRANTS

I propose now to deal with the validity of the search warrants. Were they lawfully issued and did they comply with the statutory provisions?

The Search of the Law Offices of Ernest Smith & Co.

I will deal firstly with the warrants authorizing the search of the Law Offices of Ernest Smith & Co. Each warrant is set out in the following terms:

“TO: Deputy Superintendent KARL PLUMMER

WHEREAS it appears to me Martin Gayle Resident Magistrate for the Corporate Area, upon the hearing of an information on oath laid by Deputy Superintendent Karl Plummer of the Financial Crimes Division of the Jamaica Constabulary Force, that there is reasonable cause to suspect that:

1. Any document or article pertaining directly or indirectly to any or all of the Respondents herein or to Bay Vista Villages and Lot 45 Breadnut Drive, Bengal, St. Ann.
2. Any document or article otherwise relevant to criminal proceedings and/or investigations being pursued against the respondents herein by the Canadian Government are located at the following premises:

The Law Offices of Ernest A. Smith located at 85 East Street, Kingston, Jamaica

AND WHEREAS it appears to me that the seizure of the abovementioned articles will assist in the investigation of the following offences currently under investigation in Canada in respect of the Respondents herein:

- i) Conspiracy to import cannabis resin and/or cannabis marijuana;
- ii) Conspiracy to traffic cannabis resin and/or cannabis marijuana;
- iii) Conspiracy to possess cannabis resin and/or cannabis marijuana
- iv) Possession of the proceeds of crime
- v) Laundering the proceeds of crime.

THESE are therefore to authorize and command you in Her Majesty's name, forthwith and with proper assistance and with such force as may be necessary to enter the said premises at any time of the day or night and there diligently to

search for the said articles as aforesaid and if any such articles shall be found to seize and take such articles with you.

GIVEN under my hand this 24th day of January 2003.

Sgd. Martin Gayle

RESIDENT MAGISTRATE FOR THE CORPORATE AREA.

N.B THIS WARRANT SHALL CEASE TO HAVE EFFECT TWENTY-EIGHT DAYS FROM THE DATE OF ISSUE AND SHALL EXPIRE ON THE
DAY OF 2003".

The Claimants submitted that it is the duty of the Magistrate authorizing the issue of the warrant to satisfy himself that all the conditions set out in the statute have been strictly complied with otherwise the warrant will be invalid. A number of cases were cited and relied upon by the Claimants and they include:

R v Maidstone Crown Court ex parte Waitt [1988] CLR 384; R (on the application of Rottman) v Commissioner of Police for Metropolis and Another [2002] CLR 501; R (on the application of R Cruikshank Ltd) v Chief Constable of Kent Constabulary and Another [2001] CLR 990; Lewis Crown Court and Chief Constable of Sussex Police ex parte Nigel Weller [1997]; George v Rockett [1990] 170 CLR 104; and R v Southwark Crown Court and H.M Customs & Excise ex parte Sorsky Defries [1996] CLR 195; Tranz Rail Limited v The District Court at Wellington (2002) NZCA 259; Auckland Medical Aid Trust v Taylor [1975] 1 NZLR 728; R v Central Criminal Court ex parte AJD Holdings Ltd et al (1992) CLR 669 and R v Reading JJ (1992).

I have also read these cases and have considered them carefully.

It seems clear to me after a perusal of the authorities that what must be disclosed on the face of the search warrant must depend on the true construction of the statute. I also believe that when it comes to the drafting of the warrant it is most desirable for the draftsman to closely follow the language of the statute.

Now, section 23(4) of the Act states:

“23(4) A Resident Magistrate shall not issue a warrant under this section unless-

(a) the informant or some other person has given to the Resident Magistrate either orally under oath or by affidavit, such further information (if any) as the Resident Magistrate requires concerning the grounds on which the issue of the warrant is sought; and

(b) the Resident Magistrate is satisfied that there are reasonable grounds for issuing the warrant.

Subsection 5 sets out what shall be contained in the warrant and it states:

(5) There shall be stated in a warrant issued under this section-

(a) the purpose for which the warrant is issued, including a reference to the nature of the criminal matter in relation to which the search is authorized;

(b) whether the search is authorized at any time of the day or night or during specified hours of the day or night;

(c) a description of the kind of articles authorized to be seized; and the date, not being later than twenty-eight days after the issue of the warrant, on which it ceases to have effect.

On my reading of the above provisions it is clear that the Act does not prescribe that the warrant must be in any particular form and neither does it say that it must state that the requirements for its issue have been complied with.

Section 23(5) of the Act sets out however, what information the warrant should contain.

It was submitted on behalf of the Claimants that the warrants were defective in a number of respects. First, it was said that there was a clear distinction between articles and documents and that the warrants did not authorize the police to take documents, only articles; secondly, that the articles or documents authorized to be seized were not described in the warrants; thirdly, that there was no statement as to who were the Respondents or the persons under investigation; fourthly, that there was no statement in the warrant as to what were the criminal proceedings or for what offences the articles were required; fifthly, that the warrants did not have on their faces the expiration date; sixthly, that the warrants stated that it appears to the Resident Magistrate that there was reasonable cause to suspect that the articles were on the premises when the Act required that he should be satisfied; seventhly, that the affidavit to ground the application for the warrants was defective as not complying with the Letter of Request; and eighthly, that the warrants were defective as not complying with either (a) the Affidavit of Superintendent Karl Plummer or (b) the Letter of Request.

Does the fact that the warrants do not name the respondents or persons under investigation, or the offences lead to the conclusion that the warrants were invalid? I do not find myself able to agree with the submissions of the Claimants since section 23 of the Act does not require the setting out of criminal offences nor does it require respondents to be named.

Insofar as the description of articles or documents authorized to be seized are concerned, it is my view that the subsection has been complied with. The warrants did refer to any documents or articles pertaining to Bay Vista Villages and Lot 45 Breadnut Drive,

Bengal St. Ann. I do not believe that a detailed description of all articles or documents was contemplated.

The warrants did not state that the Resident Magistrate was satisfied as to the reasonable grounds for the search so, could this also lead to the conclusion that the warrants are invalid? That in my opinion would be so if the omission meant that he had not done so. I do believe that the Magistrate would have had to advise himself of the relevant law before issuing the warrants. If he had, he must have realized that he had to be satisfied and that he was not empowered to act on another person being satisfied. He did use the word "appears" twice in the warrants but I am of the firm view that if he were not satisfied that there were reasonable grounds for issuing them he would not have signed the warrants authorizing the searches.

I am not persuaded at all by the submission that the Magistrate was using a lower standard of proof than is required when he stated that "it appears" to him that there was reasonable cause to suspect.

With regards to the submission that the warrant did not have the expiry dates on its face I would say that I totally disagree with Counsel. Albeit that an expiry date is not mentioned, it is obvious when the warrants would expire. The note on each warrant states that the warrant shall cease to have effect 28 days from the date of issue. It was given under the Magistrate's hand on the 24th January 2003 so 28 days would commence from that date.

Were the warrants general warrants? Is it a fact that when they referred to "any" document or article the word "any" was inconsistent with the requirement for specificity? I agree with the Director of Public Prosecutions that the directive as to any document or article in the warrant could only mean any document or article not subject to legal professional privilege that is connected to the properties mentioned in the warrants. I reject the submissions raised on behalf of the Claimants and hold that these warrants are not general warrants.

I also reject the submissions with respect to the complaint that the Affidavit of Superintendent Plummer did not comply with the Letter of Request and that the warrants failed to comply with either the aforesaid affidavit or the Letter of Request.

The Search of the Law Offices of Gifford Thompson and Bright

I now turn to the search warrant that was executed at the Law Offices of Gifford Thompson and Bright. It was similarly worded to those issued in respect of Ernest Smith & Co and submissions were also made on behalf of the Claimant Thompson with respect to its validity and its failure to comply with the Act.

Upon being served with a copy of the Letters Rogatoire prepared by the Central Authority of Canada, Mrs. Benka-Coker Q.C “added one more arrow to her bow” and submitted that there was no legal basis for the issuance of the warrant to search the law offices of Gifford Thompson and Bright since there was no request in the Letters Rogatoire for a search to be conducted at these Law Offices. Furthermore, she submitted that the absence of such a request was fatal to the issuance of the warrant.

The Request referred to above, is exhibited to the document headed “Third Affidavit of Kent S. Pantry” sworn to on the 5th day of June 2003. The Request speaks inter alia, of a search being made of the Law Offices of Ernest A. Smith & Co and Marsha Smith located at Main Street, Browns Town, and at 85 East Street Kingston respectively, and the Law Offices of Maureen Smith located at Fairy Hill and Long Hill respectively. The Request also refers to a real estate transaction where the purchaser’s attorney is identified as Maureen Smith of 122-126 Tower Street, Kingston Jamaica.

How did the Canadian Central Authority come to identify Maureen Smith as having her Law Offices at Fairy Hill and Long Hill? It was stated in the Letters Rogatoire that the Royal Canadian Mounted Police investigators had consulted the “2000/2001 Kingston, Jamaica Telephone Directory” on the 14th May 2002 and saw the aforesaid listings. This was also done in respect of Ernest A. Smith & Co.

There was no specific connection between Maureen Smith and Gifford Thompson and Bright in the Letters Rogatoire so on what basis was Deputy Superintendent Plummer authorized to search the law offices of Gifford Thompson and Bright?

In his Application to the Magistrate Deputy Superintendent Plummer stated inter alia, that the grounds for his belief that relevant articles may be found at the respective premises were based on information contained in the Letters Rogatoire from the Department of Justice in Canada that was passed on to him for investigation and also from his own investigations.(emphasis supplied) Was he permitted under the Act to carry out his own investigations in addition to acting on the facts set out in the Request? I do believe that the answer to this question is provided in section 23(2) of the Act where it states as follows:

“(2) Where a police officer authorized under subsection (1) has reason to believe that the articles to which the request relates is, or will, at a specified time be-

(a) on a person or in his possession or under his control; or

(b) upon any land or upon or in any premises,

the police officer may lay before a Resident Magistrate an information on oath setting out the grounds for that belief and apply for the issue of a warrant under this section to search the person, land or premises for that article”. (emphasis supplied)

Subsection 2 (supra) in my view, gives him the authority to carry out his own investigations once he has reason to believe that articles to which the request relates are at a particular premises. The Letters Rogatoire have revealed inter alia, that Maureen Smith, an Attorney at Law had acted on behalf of a purchaser in one of the land transactions under investigation and her address was stated as 122-126 Tower Street, Kingston. Maureen Smith has also stated in a statement connected with these proceedings

that she was once Mr. Hugh Thompson's Associate, the latter being a partner of Gifford Thompson and Bright. Furthermore, there is undisputed evidence that the offices of Gifford Thompson and Bright are located at 122-126 Tower Street, Kingston. It would seem to me therefore, that Deputy Superintendent Plummer's investigations no doubt led him to the offices of Gifford Thompson and Bright and to this extent the Central Authority of Jamaica had authorized him to lay the Application before the Magistrate in order to obtain the necessary search warrant.

I conclude therefore, that the search warrants in respect of the searches carried out at the Law Offices of Ernest A. Smith & Co and Gifford Thompson and Bright have complied with the statutory requirements. I further hold that they were lawfully issued and they are indeed valid.

I would therefore dismiss the claims.

HIBBERT, J.

The movement of criminals and criminal activities across national borders have necessitated the cooperation of states for the purpose of preventing and detecting crimes and punishing offenders. The legislature in Jamaica, in order to honour treaty and other obligations enacted the Mutual Assistance (Criminal Matters) Act which took effect on the 14th July, 1995.

On the 16th January, 2003 the Director of Public Prosecutions who has been designated as the Central Authority of Jamaica, acting on a Letter of Request from the Central Authority of Canada, a designated Commonwealth state, authorised Superintendent of Police, Karl Plummer, to apply to a Resident Magistrate for search warrants to search the law offices of Ernest Smith and Hugh Thompson, attorneys-at-Law. Consequently search warrants were issued by His Honour Mr. Martin Gayle, a Resident Magistrate for the Corporate Area on the 24th January, 2003 to search (i) the law offices of Ernest A. Smith and Marsha Smith located at Main Street, Browns Town, St. Ann, (ii) the law offices of Ernest A, Smith located at 85 East Street, Kingston and (iii) the law offices of Gifford, Thompson and Bright located at 122-126 Tower Street, Kingston.

On the 27th January, 2003 the office of Ernest A. Smith at Browns Town were searched and articles and documents seized, placed in boxes and sealed in the presence of Mr. Smith and Miss Pearline Bailey, attorneys-at-law. On the 28th January, 2003 a similar search was carried out at the Kingston office of Mr. Smith and articles and documents were seized and placed in boxes in the presence of Miss Marsha Smith and Miss Nesta Claire Smith, attorneys-at-law. These boxes were, however not sealed. Also

on the 28th January, 2003, documents and articles were seized from the office of Mr. Hugh Thompson. These were placed in boxes and sealed in his presence. These searches and seizures caused quite a stir in the legal profession and resulted in the filing of the three claims which were heard together.

On behalf of the Jamaica Bar Association, the Claimant in the first of the three claims four (4) issues were identified as arising for consideration by the Court in order to deal with the remedies, directions and/or orders sought. They were stated as follows:

- Issue 1** - Whether the relevant sections of the Mutual Assistance (Criminal Matters) Act pursuant to which search warrants were issued and documents taken possession of are unconstitutional;
- Issue 11** - Whether the warrants as issued were illegal and/or unconstitutional and whether the searches and seizures carried out in respect thereof were unlawful and unconstitutional;
- Issue 111** - Whether or not the searches and the seizures of documents from Attorneys' offices infringed the principle of legal professional privilege and were therefore unlawful and unconstitutional;
- Issue 1V** - Whether or not it is unconstitutional for the Second Respondent to act as the Central Authority.

These four issues identified, substantially represent the issues raised by all the Claimants so I propose to deal with them accordingly, making adjustments where necessary. As Issues 1 and 1V are the ones which directly challenge the constitutionality of provisions of the Act. I propose to deal with these first.

Relative to Issue 1 it is argued on behalf of the Claimant that the provisions of Section 23 (1) to 23 (3) of the Act contravenes section 19 of the Constitution. Section 19 of the Constitution provides protection from arbitrary search and seizure.. Subsection (1) states:

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

This protection, however, is not absolute as sub-section (2) states:

- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required-
 - (a) in the interests of defence, public safety, public order, public morality, public health, public revenue, town and country planning or the development and utilisation of any property in such a manner as to promote the public benefit; or
 - (b) to enable any body corporate established by any law for public purposes or any department of the Government of Jamaica or any local government authority to enter on the premises of any person in order to carry out work connected with any property or installation which is lawfully on such premises and which belongs to that body corporate or that Government or that authority, as the case may be; or
 - (c) for the purpose of preventing or detecting crime; or
 - (d) for the purpose of protecting the rights or freedoms of other persons.

Section 23 the Act states:

23. – (1) Where –
- (a) a proceeding or investigation relating to a criminal matter has commenced in a relevant foreign state;
 - (b) there are reasonable grounds for believing that an

article (not being tainted property) relevant to the proceedings or investigation is located in Jamaica; and

- (c) the relevant foreign state requests the Central Authority to arrange for the issue of a search warrant under this section in relation to that article, the Central Authority may authorize a police officer to apply to a Resident Magistrate for the search warrant requested by the relevant foreign state.
- (2) Where a police officer authorized under subsection (1) has reason to believe that the articles to which the request relates is, or will at a specified time be-
- (a) on a person or in his possession or under his control; or
 - (b) upon any land or upon or in any premises, the police officer may lay before a Resident Magistrate an information on oath setting out the grounds for that belief and apply for the issue of a warrant under this section to search the person, land or premises for that article.
- (3) A Resident Magistrate may, on an application under subsection (2), issue a warrant authorizing a police officer named in the warrant with such assistance as may be necessary –
- (a) to search the person;
 - (b) to enter upon the land or upon or into the premises;
 - (c) to search the land and premises for the article; and
 - (d) to seize any article found in the course of the search that the police officer believes, on reasonable grounds, to be relevant to the proceeding or investigation.

Mr. Henriques for the Claimant argues that since section 23 of the Act derogates from the right protected by section 19 (1) of the Constitution, unless it falls within the purposes set out in section 19 (2) of the Constitution, it must be held to be unconstitutional. He submits that section 23 of the Act does not fall within any of the purposes set out in section 19 (2) of the Constitution and, in the alternative, submits that if section 23 of the Act falls within the purposes stated in section 19 (2) of the Constitution it was not

“reasonably required”. He specifically stated that section 23 of the Act does not fall within **“the purpose of preventing or detecting crime”**. He argues that **“crime”** as used here relates to crimes committed in Jamaica and seeks to so justify his assertion that since section 23 of the Act relates to offences committed abroad it is not covered by section 19 (2) (c) of the constitution. This assertion was not supported by any authorities or any clear reasoning and so I can find no basis for imposing this restriction, as criminal activities had for a long time ceased to be confined by national boundaries. I therefore agree with Mr. Hylton and Mr. Pantry for the Respondents that **“crime”** used in section 19 (2) (c) of the Constitution refers to crime wherever committed. Consequently, in my view section 23 of the Act falls within one of the purposes stated in section 19 (2) of the Constitution. Additionally there is merit in Mr. Pantry’s submission that section 23 of the Act also falls within at least one of the purposes set out in section 19 (2) (a) of the Constitution.

Having concluded that the challenged section of the Act falls within the purpose of preventing or detecting crime. I now look at whether or not it was “reasonably required.” Mr. Henriques in his submission relies on several authorities in order to show that the provisions of section 23 of the Act were not “reasonably required”. He cited:

- i) M’membe v. The People [1996] 2 LRC 280 [from Zambia],
- ii) Retrofit (Pvt.) Limited v. Posts and Telecommunications Corporation, Attorney General intervening [1996] 4 LRC 489 [from Zimbabwe]
- iii) Nyambirai v. National Social Security Authority and Another [1996] 1LRC, 64 [from Zimbabwe]
- iv) de Freitas v. Permanent Secretary of Agriculture, Fisheries, Land and Housing and others [1998] 3 LRC, 6 [from Antigua and Barbuda].
- v) The Queen v. Oakes [1987] LRC (Const.) 486 [from Canada]
- vi) Lucas and Another v. R [1898] 3LRC 236 [from Canada]

It is to be noted that in each of these cases examination were done of constitutional provisions which are different from the one under review. In these constitutional provisions the legislative enactments which seek to limit fundamental rights, apart from being “reasonably justified” must also be “reasonably justifiable in a

democratic society.” The first four cases cited dealt primarily with whether or not the enacted provisions were “reasonably justifiable in a democratic society.” They do not, therefore, provide much help. In **M’membe and another v. The People**, however, it was held that a law met the test of being reasonably required if it had as its aim at least one of the interests or purposes listed in the constitutional provision and, on the principle of proportionality, when the limitation imposed by such a law was not more than necessary to achieve the legitimate object. The other two cases relied on, on behalf of the Claimant concerned alleged breaches of the Canadian Charter of Rights, which are quite different from the Jamaican provisions and are also found to be unhelpful.

Citing **M’membe** it is urged on behalf of the Claimant that there is a burden on the State to show that the law is within the constitutional provisions. In **Attorney General and Minister of Home Affairs v. Antigua Times Limited** [1975] 21WIR at page 574, Lord Frazer delivering the opinion of the Board, however, stated:

“Their Lordships think that the proper approach to the question is to presume until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required”

Similarly in **Hinds and Others v. R** [1975] 24 WIR. 326 Lord Diplock at page 340 said:

“In considering the constitutionality of the provisions of S. 13 (1) of the Act, a court should start with the presumption that the circumstances existing in Jamaica are such that hearings in camera are reasonably required in the interests of public safety, public order or the protection of the private lives of persons concerned in the proceedings”.

After stating that the presumption is rebuttable he continued:

“But in order to rebut the presumption their Lordships would have to be satisfied that no reasonable member of the Parliament who understood correctly the meaning of the relevant provisions of the Constitution could have supposed that hearings in camera were reasonably required for the protection of any of the

interest referred to, or, in other words, that Parliament in so declaring was either acting in bad faith or had misinterpreted the provisions of section 20 (4) of the Constitution under which it purported to act”.

These authorities clearly show that the burden is cast upon the Claimant, and is a heavy one. In my opinion nothing advanced on behalf of the Claimant has come close to rebutting the presumption. Consequently this attack upon the validity of section 23 of the Act must fail.

Issue 1V concerns the validity of the designation of the Director of Public Prosecutions (DPP) to perform duties of the Central Authority. If this designation is invalid it follows that all acts done by the Director of Public Prosecutions in the performance of his role as the Central Authority would be null and void. Section 2 of the Act states:

2. In this Act-

“Central Authority means the Minister responsible for justice or any person designated by him for the purpose of performing such functions or duties of the Central Authority as may be specified in the instrument of designation;

By the Instrument of Designation dated 30th April, 19967 and gazetted on 2nd May, 1997 certain functions and duties were assigned to the Director of Public Prosecutions as the Central Authorities under the Act.

It is contended that this designation is ultra vires section 94 of the Constitution. Section 94. – (3) states:

- (4) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do-
- (a) to institute and undertake criminal proceedings against any person before any court other than a court martial in respect of any offence against the law of Jamaica.
 - (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and
 - (c) to discontinue at any stage before judgment

is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

Section 94.- (6) states:

(6) In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.

It was argued that the functions and duties conferred upon the Director of Public Prosecutions as the Central Authority were inconsistent and in conflict with the specific duties and functions of the Director of Public Prosecutions as set out in section 94 (3) of the Constitution. It is quite obvious that section 94 (3) of the Constitution did not set out to list all the functions of the Director of Public Prosecutions but merely to confer certain powers in relation to criminal proceedings. For example it could never be said that the Director of Public Prosecution had no administrative function in the management of his department. Additionally the protection given to the Director of Public Prosecution under section 94 (6) which is limited to powers conferred on him by section 94 also recognizes that the Director of Public Prosecution may exercise additional powers.

Further, on behalf of the Smiths, Mr. Phipps submitted that as the Director of Public Prosecution as the Central Authority can exercise no functions under section 16 of the Act pertaining to the refusal of foreign requests, such power being reserved to the Minister of Justice, then the Director of Public Prosecution is subject to the direction or control of another person. This he states further renders the designation unconstitutional. Section 94 (6) of the Constitution provides the short answer to this as the protection refers only to the exercise of powers conferred by section 94 (3). This ground in my opinion must also fail.

Issue 11 concerns the issue of the search warrants. Relative to this the combined effect of the various Claimants' arguments is to firstly challenge the lawfulness of the issue of the warrants and in the alternative to challenge the validity of the warrants themselves. Whereas subsection (1) to (3) of section 23 of the Act provides the legal

basis for the issue of search warrants, subsections (4) and (5) deal with the restrictions on the issuing of the warrants and state what they should contain. These subsections state:

- (4) A Resident Magistrate shall not issue a warrant under this section unless –
 - (a) the informant or some other person has given to the Resident Magistrate either orally under oath or by affidavit, such further information (if any) as the Resident Magistrate requires concerning the grounds on which the issue of the warrant is sought; and
 - (b) the Resident Magistrate is satisfied that there are reasonable grounds for issuing the warrant.
- (5) There shall be stated in a warrant issued under this section -
 - (a) the purpose for which the warrant is issued, including a reference to the nature of the criminal matter in relation to which the search is authorized;
 - (b) whether the search is authorized at any time of the day of night or during specified hours of the day or night;
 - (c) a description of the kind of articles authorized to be seized, and
 - (d) the date, not being later than twenty-eight days after the issue of the warrant, on which it ceases to have effect.

It is firstly contended that the warrants were improperly issued as the statutory preconditions were not met. This contention is based on the assertions that the application by Superintendent Karl Plummer was defective and that the Resident Magistrate applied the wrong standards in his decision to issue the warrants.

Where a police officer is authorized by the Central Authority to apply for a search warrant he is required by section 23 (2) of the Act to lay before the Resident Magistrate an information on oath setting out his ground for believing that the articles to which the request relates are to be found at a particular location. Mr. Phipps submits that the information laid before the Resident Magistrate failed to show that Superintendent Plummer had reasons to believe that the articles were located in the places specified in the information. An examination, however, of the information which was exhibited to the affidavit of Mr. Pantry dated 31st March, 2003, shows that it contains the following:

“The grounds for my belief that relevant Articles may be found at the respective premises are based on information contained in Letters Rogatoire from the Department of Justice Canada to the Central Authority of Jamaica for Mutual Assistance in Criminal Matters, which were passed on to me for investigations, and also on my own investigation and are as follows.....”

This to my mind clearly sets out his “reason to believe and the grounds for that belief.”

It was further submitted that the information contained so many inaccuracies and false allegations as to render it useless. An examination of this information with affidavits and attachments which form a part of the records in these proceedings, do not, however, impel me to the conclusion that this contention can be sustained.

Turning to the standard applied by the Resident Magistrate, section 23 (4) (b) of the Act states that the Resident Magistrate should not issue his warrant unless he is satisfied that there are reasonable grounds for issuing it. Each of the warrants contain the following:

“Whereas it appears to me.....upon hearing an information on oath laid by Deputy Superintendent Karl Plummer..... that there is reasonable cause to suspect that-

and later:

“And whereas it appears to me that the seizure of the abovementioned articles will assist in the investigation

The use of the word “appear” instead of “satisfied”, it is submitted, indicates that the Resident Magistrate applied a standard lower than that required by the statute. Mr. Pantry counters by arguing that in the context of the section, the words “appears” and “satisfied” may be used interchangeably and the use of the word “appears” does not denote a lower standard. As one of the meanings given for the word “appear” in the Concise Oxford Dictionary is “be evident”. I am inclined to the view expressed by Mr. Pantry.” This view is also supported by Privy Council decision in **Attorney General v. Williams (Danhai) and Another** [1997] 5 WIR 264 at page 270 Lord Hoffman who delivered the decision of the Board while examining section 203 of the Customs Act dealing with the issuing of search warrants said at page 270

“Section 203 is clear as to the matters upon which the justice must be satisfied. It must appear to him from information on oath that the officer has reasonable cause to suspect one or more of the matters there specified.”

Here it is quite clear that Their Lordships were using the words “appear” as was used in the section and “satisfied” interchangeably. Consequently I find that the Resident Magistrate applied the requisite standard.

Issue was also taken with the form of the warrants. It was submitted that these warrants were too general in nature and ought to be declared invalid. A general warrant was described in **Tranz Rail Limited v. The District Court at Wellington and Anor.** [2002] NZCA 259 as follows:

“A general warrant in this context is a warrant which does not describe the parameters of the warrant, either as to subject matter or location with enough specificity.”

In **Aukland Medical Aid Trust v. Taylor and Ors.** [1975] NZLR 728. McCarthy, P having examined the judgment of Lord Denning M.R. in **Chic Fashions (West Wales) Ltd. v. Jones** [1968] 2 WLR 201 remarked:

“.....Lord Denning gives a short but striking summary of the history of the common-law in this area. The law in England has changed more recently as a result of the enactment of statutory provisions for the issue of search warrants in certain other instances. However, general warrants have never gained acceptance there, or as far as I am aware, in any other country where the common law has been the foundation of the legal system.”

The validity of the warrant, is to be determined, therefore, not on the basis of the common law, but on an examination of the statutory provisions authorizing the issue.

In carrying out this examination regard should be had to a statement made by **Lord Welberforce** in his judgment in **Inland Revenue Commissioners and Anor. V. Rossminster Limited and Ors.** 1980 A.C. 952. In looking at the validity of a search warrant which was authorized by statute, at page 997 to 998 he stated:-

“The courts have the duty to supervise, I would say critically, even jealously, the legality of any purported exercise of these powers. They are the guardian of the citizens’ right to privacy, they must do this in the context of the times, i.e. of increasing Parliamentary intervention,

and of the modern power of judicial review. In my respectful opinion appeals to 18th century precedents of arbitrary action by Secretaries of State and references to general warrants do nothing to throw light on the issue. Furthermore, while the courts may look critically at legislation which impairs the rights of citizens and should resolve any doubt in interpretation in their favour, it is no part of their duty, or power, to restrict or impede the working of legislation, even of unpopular legislation; to do so would be to weaken rather advance the democratic process.”.

As was noted before, section 23 (5) of the Act sets out what a warrant issued under Section 23 should contain. In this case the area of concern relates to paragraphs (a), which speaks to the purpose for which the warrant was issued and (c), which addresses the description of the kind of articles authorized to be seized. Did the warrants comply with these requirements?

Each warrant had as its heading:

“Search Warrant issued under section 23 (3) of the Mutual Assistance (Criminal Matters) Act.”

Later in the body of each warrant the following appears:

“AND WHEREAS it appears to me that the seizure of the abovementioned articles will assist in the investigation of the following offences currently under investigation in Canada in respect of the Respondent herein;

- i. Conspiracy to import cannabis resin and/or cannabis Marijuana
- ii. Conspiracy to traffic cannabis resin and/or cannabis marijuana
- iii. Conspiracy to possess cannabis resin and/or cannabis marijuana
- iv. Possession of the proceeds of crime
- v. Laundering the proceeds of crime

Issue was taken with the fact that although Respondents were mentioned they were never named. Mr. Pantry on the other hand submitted that the statute does not require this, and further submitted that a warrant in a similar form was, in the case of **Attorney General v. Williams** held to be valid.

Each warrant authorized the search for and the seizure of:

- “ 1. Any document or article pertaining directly or indirectly to any or all of the Respondents herein or to Bay Vista Villages and Lot 45, Breadnut Drive, Bengal, St. Ann.
2. Any document or article otherwise relevant to criminal proceedings and for investigations being pursued against the Respondents herein by the Canadian Government.”

I am of the view that as the Act makes no requirement for the naming of persons under investigation then there is no need to name them and that the warrants complied with the requirements of Section 23 (5) of the Act and are therefore valid. It is my opinion that any justifiable criticism of the warrants could only be in relation to the drafting. Adopting the words of Lord Hoffman in **Attorney General v. Williams** at page 279 I would also say:

“Section 19 (1) of the Constitution was intended to serve a higher purpose than to promote accuracy in drafting...
.....”

On behalf of the Claimants Hugh Thompson and Gifford Thompson and Bright it was submitted that the Central Authority exceeded his powers when he authorized Superintendent Karl Plummer to apply for a search warrant in respect of the offices of Gifford, Thompson and Bright.

The Central Authority derives his powers to act on behalf of a foreign state from section 15 of the Act, Subsection (4) states:-

“Requests made by a foreign state shall be made in writing to the Central Authority and shall contain such of the particulars set out in the Schedule as the Central Authority may require, but without prejudice to the requirement for such additional information as may be considered necessary for the purpose of giving effect to the request.”

The request relative to the matter under review was attached to the affidavit of Kent Pantry, sworn to on the 5th June, 2003. It contained a request to search the law offices of, among others, Maureen Smith located at Fairy Hill and Long Hill. This request also disclosed the findings relating to transfer of properties in Jamaica and identified Ernest Smith and Company, Marsha Smith and Maureen Smith as acting behalf of the persons under investigation. In one transaction the address of Maureen Smith was stated as 122-126 Tower Street, Kingston, the same address as Gifford, Thompson and Bright. It is no doubt obvious that these offices were targeted because of the involvement of the attorneys-at-law in the transactions under investigation. Why then was a warrant sought in respect of the offices of Gifford, Thompson and Bright? It is important to note that as stated in the request, the address given for Maureen Smith were obtained from the Jamaica Telephone Directory for the period 2000/2001. Superintendent Karl Plummer, however, in his information on oath to the Resident Magistrate, while stating his grounds for believing that the articles sought might be found on certain premises, stated that he acted on information passed on to him and also from his own investigations. He identifies Maureen Smith who was involved in four (4) of the transactions under investigation as an associate of Gifford, Thompson and Bright. No doubt this would have been passed on to the Central Authority in Jamaica, resulting in his giving his authorization for the application for the warrants. I can see nothing wrong with this as the Central Authority was merely supplying the correct address for the offices which were required to be searched. Interestingly, Maureen Smith was present at the offices of Gifford, Thompson and Bright during the search. I therefore, find that the Central Authority acted within his powers and properly issued his authorization. Hence, all that flowed therefrom was valid.

The third issue concerning legal professional privilege had before the hearing began, become the subject of great debate within the legal fraternity in Jamaica. This great debate was expected to have reached it climax during the course of these proceedings. The Jamaica Bar Association however resiled from what appears to have been its original position that a warrant which authorized the search of an attorney's

office was inherently bad. This position was not supported by the many authorities cited and relied on an behalf of the Association. In many jurisdiction the Courts have held that lawyers' offices are not immune from search. In the United States of America in **Nathan v. Lawton**, Chief Judge Alaimo of the U.S. District Court, Southern District of Georgia observed:

“Although there is considerable resistance within the the legal community to searches of attorney’s offices, it is well established that a search of law offices is not per se unreasonable and, therefore unconstitutional

In **Descateaux v. Mierzwinski**, [1982] 141 DLR 590 the Supreme Court of Canada considered a search warrant in respect of the premises of the legal aid bureau. Lamer J., who delivered the judgment of the Court noted at page 611

“.....the legislation does not make any distinction with respect to the nature of the premises sought to be searched. One may therefore search anywhere for what is provided under [the section] including in a lawyer’s offices.

He further noted:

“It then becomes necessary to reconcile the authority to search, a right that society has assumed as being essential to the suppression of crime, with the right to confidentiality, a right that society recognizes as as essential for the better administration of justice.”

An order made by a judge of the Crown Court in London, requiring solicitors to produce records of conveyancing transactions caused similar concerns within the legal profession in England. This gave rise to the decision in **R v. Crown Court at Inner London Sessions, ex parte Baines (a firm) and another** [1987] 3 All ER 105, Watkins L. J. observed at page 1030

“The third ground of appeal is not only of concern to the solicitors here but also, counsel for the solicitors told us, to the Law Society which is, not surprisingly, taking a major interest in this application. There are clearly two opposing forces to have regard

to here. There is the hallowed privilege existing between solicitor and client and the public interest in the police being enabled thoroughly to investigate crime and criminals.”

Later he stated:-

“It is of course perfectly clear that, usually anyway, conveyancing matters are wholly unconnected with litigation. What is really to the point, however, is whether it is encompassed by the words “communication between a professional legal adviser made in connection with the giving of legal advice to the client.”

He concluded at page 1031:

“That still leaves the main issue to be resolved, namely is conveyancing matter of itself privileged as coming within the meaning of the giving of advice? We were referred to no authority. I doubt that any is needed for the proposition that the document known as the conveyance is clothed with privilege and I do not see why conveyancing matter, as I have called it, can validly be said to be, seeing that in my opinion in common sense it cannot be called advice, consisting as it does of records of the financing of the purchase of, in this case a house.”

These authorities clearly show that searches and the seizures of documents from attorneys' offices do not per se infringe the principle of legal professional privilege. The mere claim of privilege does not render the document privileged. It is my opinion that it is for the courts to then decide whether or not legal professional privilege attaches to any of these documents. It is to be noted that the Respondents were not claiming that documents which are the subject of legal professional principle could be retained. In fact the second Respondent did apply to the court for determination as to whether or not the privilege attaches to any of the documents seized.

The last two cases referred to show clearly the need for the balancing of two important societal rights. This was attempted by legislative action in Canada but in Lavalee, Rackel and Heintz v. Canada (Attorney General) (2002) 216 DLR (4th) 257 this statutory provision was held to be unconstitutional. Perhaps, in Jamaica the Courts could play a role in formulating guidelines to govern the search of the offices of the attorneys-at-law.

In light of the foregoing, I would therefore dismiss the several claims.

WOLFE, C.J.

Order: It is hereby ordered that the claims be dismissed.