

CARIBBEAN COURT OF JUSTICE

Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No. BZCV2017/003

BZ Civil Appeal No. 6 of 2016

BETWEEN

TITAN INTERNATIONAL SECURITIES INC

APPELLANT

AND

**THE ATTORNEY GENERAL OF BELIZE
& THE FINANCIAL INTELLIGENCE UNIT**

RESPONDENTS

Before the Honourables:

**The Hon. Mr. Justice A. Saunders, PCCJ
The Hon. Mr. Justice J. Wit, JCCJ
The Hon. Mr. Justice D. Hayton, JCCJ
The Hon. Mr. Justice W. Anderson, JCCJ
The Hon. Mme. Justice Rajnauth-Lee, JCCJ**

Appearances

Mr. Eamon H. Courtenay, SC, Ms. Iliana N. Swift and Ms Leslie Mendez for the Appellant

Mr. Nigel Hawke, Mrs. Samantha Matue-Tucker and Mr. Ravell Gonzalez for the Respondents

JUDGMENT

of

**The Honourable Justice Saunders, President
and the Honourable Justices Wit, Hayton, Anderson,
and Rajnauth-Lee, Judges**

Delivered by

**The Honourable Mme. Justice Rajnauth-Lee, Judge
on the 17th day of October 2018**

Introduction and Factual Background

- [1] The Appellant, Titan International Securities Inc. ('Titan') was at all material times an international business company licensed in Belize as a securities broker/dealer. Titan was incorporated on 28 February 2011. The Respondents are the Attorney General of Belize ('Attorney General/AG') representing the Government of Belize ('GOB'); and the Financial Intelligence Unit ('FIU'). The FIU was established by section 3 of the Financial Intelligence Unit Act¹ to carry out statutory responsibilities which include the fight against international crime.
- [2] On 8 September 2014, a 22-page indictment was unsealed in the United States of America charging Titan, the President of Titan, Mr. Kelvin Leach, Mr Robert Banfield and nine others with securities fraud, evasion of taxes, money laundering and conspiracy to commit those offences. On 9 September 2014, the US Department of Justice in Washington, Criminal Division, Office of International Affairs, urgently requested the assistance of the GOB pursuant to the Treaty on Mutual Legal Assistance in Criminal Matters ('the Treaty') in relation to an investigation by the US Attorney for the Eastern District of New York of several targets which included Titan as well as Leach and Banfield. The United States requested to have the targeted offices searched as quickly as possible to prevent the destruction of evidence. The Request detailed the documents which needed to be seized. The AG reviewed the Request and concluded that it was proper to provide the assistance requested. The AG informed the Belize Police Department to apply to a Magistrate for the warrant to execute the search and seizure pursuant to section 18 of the Mutual Legal Assistance and International Co-operation Act ('the Act'). The AG also requested assistance from the FIU in order to carry out the search and seizure.
- [3] The application to obtain a search and seizure warrant was granted to Superintendent Hilberto Romero and to all Police Constables and Peace Officers of Belize and to the Officers of the Financial Intelligence Unit of Belize. The warrant entitled them to enter several premises, including the offices of Titan and to search for and seize documents which might be used as evidence in a prosecution for the offences listed. The search and

¹ Cap 138:02 Revised Edition Laws of Belize.

seizure were conducted on the evening of 9 September. Though a copy of the search warrant was read to Mr. Leach, who was on the premises at the time, it was not given to or left with him; the authorities did not leave an inventory of items seized with Mr. Leach and, moreover, Titan's attorney was denied entry into Titan's office during the search. While the search was being conducted, Titan was informed via email by the International Financial Services Commission ('the Commission') that its licence had been suspended.

- [4] On 15 September 2014, the Commission issued a warning notice to the public that the licence granted to Titan was suspended until further notice. Investors were advised to take note and exercise caution. On 17 September, the Commission confirmed Titan's suspension by letter. The suspension was never lifted, and the licence has since expired. On 20 January 2015, and 3 February 2015, approximately five months after the search was executed, almost all the items taken during the search and seizure were returned to Titan.

Constitutional and Statutory Framework

The Belize Constitution² ('The Constitution')

- [5] Section 9 of the Constitution provides:

“(1) Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises.
(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes reasonable provision-
(a) that is required in the interests of defence, public safety, public order, public morality....”

- [6] Section 14 of the Constitution guarantees a person protection of his privacy in relation to himself and his correspondence. Section 14 expressly states:

“(1) A person shall not be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation (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 of the kind specified in subsection (2) of section 9 of this Constitution.”

² Chapter 4 of the Laws of Belize.

[7] Section 20 provides that the Supreme Court has the right to hear claims, such as the present one, under the Constitution:

- (1) If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.
- (2) The Supreme Court shall have original jurisdiction-
 - (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and
 - (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 19 inclusive of this Constitution:

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

The Mutual Legal Assistance and International Co-Operation Act³

[8] The purpose of the Act is “to provide for measures to ensure compliance with international standards and obligations, including the Vienna Convention, in relation to mutual legal assistance and international cooperation...”.

[9] Section 18 provides:

- “(1) If, on an application made by a police officer, a Magistrate is satisfied –
 - (a) That criminal proceedings for an offence have been instituted against a person in a foreign State or that a person has been arrested in the course of a criminal investigation carried on in that State into such an offence; and
 - (b) That there are reasonable grounds for suspecting that there is on premises in Belize occupied or controlled by that person evidence relating to that offence; he may issue a warrant authorizing a police officer to enter and search those premises and to seize any such evidence found there.
- (2) The power to search conferred by subsection (1) is only a power to search to the extent that is reasonably required for the purpose of discovering such evidence as is there mentioned.

³ Act No 8 of 2014 of the Laws of Belize.

(3) No application for a warrant or order shall be made by virtue of subsection (1) except in pursuance of a direction given by the central authority⁴ in response to a request received –

(a) from a court or tribunal exercising criminal jurisdiction in the overseas State in question or a prosecuting authority in that State; or

(b) from any other authority in that State which appears to him to have the function of making request for the purposes of this section; and any evidence seized by a police officer by virtue of this section shall be furnished by him to the central authority for transmission to that court, tribunal or authority

(4)

(5) ...”

[10] Section 26 states:

“(1) Where, on receipt of a request, the central authority is satisfied that

(a) the request relates to a criminal matter in the requesting State; and

(b) there are reasonable grounds for believing that the item to which the request relates is relevant to the criminal matter and is located in Belize, the central authority, or an authorised officer directed by him, may apply to the Supreme Court for an order under subsection (3) or a warrant under subsection (4) in respect of specified premises.

(2) An application for a warrant referred to in subsection (4) in respect of any item in the possession of a financial institution shall not be made unless that item can be particularised.

(3) ...

(4) On an application referred to in subsection (1), the court may issue a warrant in writing authorising the central authority, or an authorised officer directed by him, to enter the premises... and search the premises if the court is satisfied that the conditions in subsection (7) are fulfilled...

(5) The central authority, or an authorised officer directed by him, entering premises by virtue of a warrant under this section—

(a) may take such other persons and equipment with him as he thinks necessary;

(b) may seize and remove any item whatsoever found there which he has reasonable cause to believe may contain information relevant to a request; and

(c) shall prepare a list of the items seized, where anything has been seized, and, if so requested by a person showing himself either—

(i) to be the occupier of the premises; or

⁴ The central authority is the Attorney General of Belize.

(ii) to have had possession or custody of those items immediately before the seizure, provide that person with a copy of that list; and

(d) ...

(6) The central authority may transfer any item seized to the requesting State in accordance with the terms of this Act and the applicable treaty and may, in writing, state any conditions that apply to such transfer.

(7) The conditions to be fulfilled under subsections (3) and (4) are that—

(a) there are reasonable grounds for suspecting that a specified person in Belize has carried on or has benefited from an offence relating to the item in respect of which the request is made;

(b) there are reasonable grounds for believing that the item to which the application relates —

(i) is likely to be of substantial value (whether by itself or together with another item) to the criminal matter in respect of which the request is made; and

(ii) does not consist of or include items subject to legal professional privilege; and

(c) the court is satisfied that it is not contrary to the public interest for the order or warrant to be issued.”

Supreme Court Proceedings

[11] On 22 December 2014, Titan commenced a claim in the Supreme Court seeking several declarations in relation to the constitutionality of the search of its office and seizure of its documents, computers and other electronically stored devices:

- i. A declaration that section 18 of the Act is inconsistent with Titan’s fundamental rights guaranteed by sections 9 and 14 of the Constitution;
- ii. A declaration that the search of Titan’s offices conducted on September 9th was in breach of section 9 of the Constitution;
- iii. A declaration that the search, seizure, retention and use of correspondence between Titan and its clients contained in records and computers was in breach of section 14 of the Constitution.

[12] Abel J, delivered the judgment of the Supreme Court on 20 January 2016 and framed the issues at paragraphs [7] and [8]:

- (i) Whether the search and seizure of Titan's property³ is unlawful (as being disproportionate and in excess of statutory authority) and/or was unconstitutional?
- Is the Act constitutional?
 - Was the warrant a valid and lawful warrant of a magistrate of Belize?
 - Who carried out the search and seizure, was it the police alone or did it include officers of the FIU?
 - What was the role of the FIU (were they agents of the GOB) and were its actions in any way unlawful?
 - Whether the items seized constituted evidence of offences as required by the Act?
 - Was the search carried out in excess of legal authority?
 - Whose property was searched?
- (ii) Whether Titan is entitled to the reliefs claimed including the injunction and any damages?

The constitutionality of the Act and section 18 specifically

- [13] Titan argued that section 18 of the Act breached sections 9 and 14 of the Constitution. Section 9 protects against unreasonable search of a person or his property or the entry of others on his premises, while section 14 deals with the prohibition against arbitrary or unlawful interference with privacy.
- [14] Abel J found that the provisions of section 18 subsections (1) and (2) were relevant and important in that they introduced key limitations and safeguards. He observed that these limitations and safeguards required that the power to search was only to be used when it was reasonably required for the purpose of discovering certain evidence if and only where there were existing proceedings such as a filed Indictment, or an arrest, in the Foreign State. He noted that there must be an actual and specific criminal offence relating to a person in the requesting state and not merely an investigation. There must also be reasonable grounds for suspecting that there was, on premises in Belize occupied or controlled by a person the subject of such investigation, evidence relating to such an offence. In his view, as a result of these limitations and safeguards, any search and seizure carried out under a warrant issued pursuant to section 18, would be both

reasonable and proportionate in a democratic society and provided adequate legal safeguards to protect the public interest from the risk of a breach of sections 9 and 14 of the Constitution.

[15] Drawing upon the provisions of sections 18 and 26 of the Act, he concluded that a reasonable interpretation of section 18 would require the imposition of eleven crucial matters and considerations which he set out at [79] of his judgment.

[16] The trial judge concluded his analysis by stating that the provisions of section 18(1) and (2) were proportionate as they satisfied the three-tiered test set out by the Privy Council in *de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and Others*⁵. We will return to this test later in this judgment.

Was the search and seizure carried out in excess of legal authority?

[17] Titan had argued that the search was executed in an unreasonable and oppressive manner which abused the authorization granted to search the premises. After careful consideration of all the facts and circumstances, the trial judge found that the search was executed, not to an insignificant extent, in an unreasonable and excessive, but not necessarily in an oppressive, manner. He went on to find that the manner in which the search and seizure were executed, abused the authorization granted by the Magistrate and amounted to a breach of Titan's constitutional right against arbitrary or unlawful interference with its privacy. It was on this basis that he held that the defendants ought to have been more careful about the manner in which the search was conducted. He held that⁶:

- A copy of the search warrant should have been provided to Mr. Leach and the director of Titan who was present should have been allowed to witness the search and seizure. This would have eliminated the appearance of high-handedness and given an air of legality and respectfulness to the whole operation and possibly put Titan at ease.

⁵ (1998) 53 WIR 131.

⁶ See [122] – [123] of the Supreme Court judgment.

- The officers ought not to have denied Titan's lawyer entry into the premises to witness the search and seizure unless there was good reason to deny his entry, and none was provided to the court. In his view, this would have done much to clothe the operations with propriety, transparency and demonstrate a desire not to exceed legal authority.
- The officers took pictures which were not disclosed. The court expressed the view that there was no excuse for Titan not to have been provided with copies of photographs as part of the disclosure process in the proceedings before the court.
- Police and other officers of the AG and FIU ought to have taken measures or at least taken some steps not to remove Titan's files, records, computers, computer servers and electronically stored information, unrelated to the warrant, rather than the indiscriminate removal of such items.
- It was also inexcusable that no inventory was prepared of the items seized and no attempt made to obtain from a representative of Titan some form of confirmation of what items were removed. In the absence of such inventory and of any detailed inventory being produced, the result was that the defendants had to take full responsibility of the risk, of being accused of not returning all items.
- The defendants ought to have taken every possible step to minimize the disruption of Titan's business, and even if a shutdown were inevitable, to minimize the period of shutdown by reason of the search and seizure and make a concerted and ostensible effort to ensure that any disruption was not caused to persons other than those named on the warrant.

[18] As a result of the above determination, the court granted the declaration sought by Titan that the indiscriminate removal of all files, records and computers of Titan and the effective shutdown of its office was disproportionate and in excess of any statutory authority to search and seize evidence in possession of Titan in aid of foreign court proceedings in the U.S.⁷

Whether Titan was entitled to reliefs claimed including the injunction and any damages?

[19] Applying sections 20(1) and (2) of the Constitution, *Maharaj v. Attorney General of Trinidad and Tobago (No. 2)*⁸ and *Maya Leaders Alliance et al v. Attorney General of*

⁷ See [124] of the Supreme Court judgment.

⁸(1978) 2 All ER 670.

*Belize*⁹, Abel J accepted that a discretionary award of damages might be appropriate in circumstances where there had been an infringement or violation of the Constitution, including the fundamental rights guaranteed under the Constitution.

[20] Titan argued for compensatory damages reminding the court that the object of damages was to put the company in the position it would have been in if the constitutional right had not been infringed. Titan also argued that any assessment of damages should be conducted as at the date the cause of action accrued¹⁰. Titan utilised the expert evidence of Mr. Renaldo Magana to contend that the fair market value of the business on September 9th, 2014 was US\$22,273,700.00. Titan also submitted that vindictory damages should be awarded in the amount of BZ\$100,000 to mark the gravity of the wrong and the importance of the rights infringed. The Respondents questioned the reliability of Titan's expert evidence and relied on the expert report of Mr. Jose Bautista which criticised the methods utilised in Mr. Magana's report and highlighted the inaccuracy of data and the impact of the suspension of Titan's licence.

[21] Abel J concluded that Titan was entitled to redress for breach of its constitutional rights but struggled to ascertain the actual amount. The judge held that he was not satisfied with the extent of proof of damages by Titan and questioned the reliability of the evidence. He was also critical of Mr. Bautista's evidence and pointed out that there was no independent calculation of the possible damages. In the absence of an independent report, he found that the value of the business was overestimated by 80% and ordered damages in the amount of US\$4,460,000.00, representing 20% of the original value claimed. The trial judge grounded his finding of 20% on the fact that the profitability and viability of the company was greatly compromised because of the indictment and other bad publicity. In the trial judge's view, this would have eroded the company's credibility and affected its future marketability and profitability. Finally, the judge considered the suspension of the trade licence (against which there was no claim in the proceedings) and how it affected Titan's status to trade. In his view, this was an important factor which had to be separated from any constitutional breaches. He made no order for vindictory damages.

⁹ [2015] CCJ 15 (AJ).

¹⁰ Following *Vancouver v Ward* [2010] 5 LRC 309.

Orders and Declarations

[22] Accordingly, the trial judge made the following declarations and orders¹¹:

- (a) A declaration that the warrant of search and seizure granted by a magistrate on 8 September 2014 to enter into Titan's premises to search and seize documents and information relating to Titan insofar as it authorised officers of the FIU to be present and to take part in the search and seizure rendered the warrant bad and in excess of the powers of the magistrate to grant, but that the bad part of the warrant could be severed from and did not invalidate the rest of the warrant, and did not render any action taken pursuant to the good part of the warrant unlawful.
- (b) A declaration that some of the records, including correspondence and the contents of computers of Titan concerning clients who were not US persons, nor who were not in any way related to Robert Banfield or IPC Corporate Services LLC (and which records were kept at Titan's offices), were incapable of constituting evidence of the offences alleged in the Request and the subject of the search and seizure warrant lawfully issued by a magistrate; but were entirely unrelated to matters alleged in the US Indictment.
- (c) A declaration that the search was executed, not to an insignificant extent, in an unreasonable and excessive, but not necessarily in an oppressive, manner. Nevertheless, the actual search and subsequent events abused the authorization granted to search the premises and seize items in Titan's premises in the manner and way in which it was executed and was thereby in breach of Titan's constitutional rights against arbitrary or unlawful interference with its privacy.
- (d) A declaration that the indiscriminate removal of all files, records and computers of Titan and the effective shut down of Titan's offices in Belize was disproportionate and in excess of any statutory authority to search and seize evidence in possession of Titan in aid of foreign court proceedings in the USA.
- (e) An Order that the defendants disclose the location of any and all records, correspondence and computers, and copies thereof, or any information which they may

¹¹ See [158] of the Supreme Court judgment.

have taken, and deliver the same up to Titan on or before the close of business on 20 February 2016.

- (f) Upon an undertaking from the defendants by their counsel that they will not at any time in the future, whether by themselves or by their agents or employees or any of them or in any other way use or permit the use of any property not related to any client of Titan who are not citizens of the United States of America taken in the search and seizure operations carried out in the premises of the claimant on 9 September 2014 and that they agree to issue a limitation to the United States of America Authorities not in any way to use such items taken; this court will not grant an injunction to Titan.
- (g) An Order for damages for breach of the constitutional rights of Titan, bearing in mind, in assessing such damages, that Titan has not had a licence to carry on business of securities broker/dealer since 9 September 2014, and that there has been no claim in the present proceedings in relation to the suspension of such licence. Taking all the relevant facts and circumstances into consideration, compensatory damages were assessed at US\$4,460,000.00.
- (h) The defendants shall pay Titan's costs, certified fit for two senior counsel and one junior counsel, which costs were assessed, taking into account all the facts and circumstances of the case, to be 80% of the prescribed costs with the value of the claim being the said sum of US\$4,460,000.00.

Judgment of the Court of Appeal

- [23] The Respondents appealed against both the finding of the breach of constitutional rights and the award of damages. In a cross appeal, Titan sought additional declarations and an increase in the award to US\$22.3 million. At the hearing, the Respondents made no submissions on the constitutional breach and focused mainly on the award of damages. Thus, the main issue on appeal was whether Titan was entitled to damages for the breach of its constitutional rights.

Was there a breach of section 14 (unlawful interference with privacy) of the Constitution?

[24] The Court of Appeal briefly considered the constitutional breach. The court agreed with the Respondent's submissions that the suspension of the licence, not the search and seizure, ultimately led to the shutting down of the business. However, the court held that regardless of the cause, the search was conducted in an unreasonable and excessive manner since there was no sifting of the records to comply with the specific request by the United States. As such, the declaration of the trial judge that there was a breach of Titan's constitutional rights against arbitrary or unlawful interference with its privacy was upheld.

Was Titan entitled to compensatory damages for breach of its constitutional rights?

[25] The Court of Appeal considered whether the trial judge was correct to order the Respondents to pay Titan US\$4,460,000.00 in compensatory damages. The Court of Appeal held that the trial judge adopted the wrong approach in awarding 20% of the damages claimed. In its view, pecuniary loss had to be specifically proven and not arbitrarily awarded. As the evidence of financial loss was rejected by the trial judge, there was no evidence to support the award of US\$4,460,000.00.

[26] The Court of Appeal also considered whether Titan had established the causal link between the harm for which it sought damages and the breach of its constitutional rights. The court held that the taking of the property was not the cause of the shutting down of Titan's business. There was an independent intervening factor – the suspension of the trade licence. The court held that Titan could not prove that its business would have been up and running if the breach of its constitutional rights had not occurred. Additionally, the licence was not renewed, and the suspension was never challenged. The court ultimately concluded that the trial judge erred in awarding "pecuniary damages" for the value of the business since the business could no longer lawfully continue its operation.

Cross Appeal

[27] Titan sought to vary the trial judge's decision and contended that section 18 of the Act was inconsistent with the fundamental rights guaranteed by sections 9 and 14 of the Constitution. The Court of Appeal agreed with the trial judge's interpretation of section 18 and held that he correctly sought guidance from section 26 of the Act to aid his

interpretation in the absence of statutorily required rules. The court held that there was no basis to vary the judge's decision that section 18 ought to be read as consistent with sections 9 and 14 of the Constitution.

Costs

[28] The court held that each party should bear its own costs in the appeal and the court below as the Respondents succeeded in relation to damages and Titan succeeded on the basis that the search of its premises was carried out in an indiscriminate, unreasonable and excessive manner.

Appeal to the CCJ

[29] The Court of Appeal granted conditional leave to appeal to the CCJ on 19 September 2017. Titan was ordered to pay security of costs in the amount of \$15,000.00 within 60 days. The Certificate of Compliance was subsequently issued on 27 October 2017.

[30] Titan filed a Notice of Appeal against the whole of the Court of Appeal judgment on 17 November 2017 with the following grounds of appeal:

- i. That the Court of Appeal erred in law and/or fact in setting aside the trial judge's award of US\$4,460,000.00 in compensatory damages;
- ii. The Court of Appeal erred in law in finding that section 18 of the Mutual Legal Assistance and International Cooperation Act is consistent with the fundamental rights guaranteed by sections 9 and 14 of the Belize Constitution;
- iii. The Court of Appeal erred in law by finding that Titan should not have been awarded vindicatory damages; and
- iv. The Court of Appeal erred in law in ordering that each party bear its own costs.

[31] Titan is seeking the following relief:

- i. An order that the decision of the Court of Appeal be set aside;
- ii. An order for damages for breach of its constitutional rights in sum of US\$4,460,000.00 as compensatory damages;
- iii. An order for vindicatory damages;
- iv. A declaration that section 18 of the Mutual Legal Assistance and International Cooperation Act is inconsistent with the fundamental rights guaranteed by sections 9 and 14 of the Belize Constitution; and

- v. A declaration that the search and seizure was unlawful, unreasonable, excessive and contrary to Titan's fundamental rights guaranteed by sections 9 and 14 of the Constitution.
- vi. An order for costs.

Issues

[32] The main issues in this appeal are:

- i. Whether section 18 of the Act is unconstitutional;
- ii. Whether Titan is entitled to monetary compensation for pecuniary damage;
- iii. Whether Titan is entitled to vindicatory damages; and
- iv. Costs.

First Issue: Is Section 18 of the Act constitutional?

[33] Titan is seeking a declaration that section 18 of the Act is inconsistent with sections 9 and 14 of the Constitution. At trial, Titan argued that section 18 was unconstitutional because it disproportionately interfered with the right to protection from arbitrary search and seizure and the right to privacy guaranteed under sections 9 and 14 of the Constitution. In its view, there were no reasonable safeguards and limitations against arbitrariness included in section 18. On the other hand, the Respondents argued that section 18 was not unconstitutional, and that it was necessary in order for Belize to meet its international obligations and fight modern criminal trends. Section 18(1) provided that criminal proceedings for an offence must have been instituted against a person in a foreign State or a person must have been arrested in the course of a criminal investigation carried out in that foreign State. In addition, by virtue of section 18(1) there must have been reasonable grounds for suspecting that there was on premises in Belize occupied or controlled by that person evidence relating to that offence. In those circumstances, the Magistrate had the power to issue a warrant authorizing a police officer to enter and search those premises and to seize any such evidence found there. In addition, section 18(2) provided that the power to search conferred by section 18(1) was only a power to search to the extent that it was reasonably required for the purpose of discovering such evidence.

[34] Hafiz Bertram JA summarized the view of the Court of Appeal on this issue at paragraph [70] of its judgment:

“The trial judge (from paragraphs 69 to 78) considered several authorities before embarking on an interpretation of section 18 of the Act. At paragraph 79, he said, “A **reasonable interpretation** of section 18 would therefore, in my view, require the **imposition** of the following crucial matters and considerations ..” He then listed eleven considerations. Thereafter, at paragraph 80, he found that the presence of section 18(1) and (2) of the Act is proportionate as it satisfies the three-tiered test set out in *de Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing and Others* (1999) 1 A.C page 69 at page 80. The word “imposition” used by the trial judge was wrongly interpreted by the respondent to mean that he was implying limitations and safeguards into the legislation and usurping the functions of Parliament. In my view, the judge was in fact interpreting section 18 and sought guidance from section 26 of the Act to do so. I am fortified in my view because there was no finding by the trial judge of unconstitutionality of section 18, which would firstly have to be done before reading words into the section. See **AG of Belize v Zuniga** [2014] CCJ 2 (AJ) at paragraphs 86 to 91.”

[35] This passage is a useful starting point to begin our analysis on this point as it frames the issues for our consideration. Section 2 of the Constitution states that “this Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void”. An Act passed by the National Assembly of Belize is presumed constitutional until a court of competent jurisdiction declares that it is inconsistent with the Constitution. Thus, the party alleging the breach has to prove that the law is unconstitutional, and the burden of proof is a significant one.¹²

[36] Titan’s argument on appeal to this Court was that when section 18 was subjected to the *de Freitas* test, it would be found to be unconstitutional. That test was constructed in the Privy Council decision from Antigua and Barbuda of *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries Lands and Housing et al.* In that case, the applicant, who was a civil servant, participated in peaceful demonstrations against government corruption. The permanent secretary of the ministry in which the applicant worked claimed that the applicant had acted in breach of section 10(2)(a) of the Civil Service Act, which prohibited the communication by civil servants to any other person of any information or expressions of opinion on matters of national or international political controversy, and interdicted him from exercising the powers and functions of his office

¹² This principle was reiterated by this Court in *Bar Association of Belize v the Attorney General* [2017] CCJ 4 (AJ). At paragraph 22, it was held that: “At the outset when considering the constitutionality of a law, courts presume that the impugned law is valid and place the burden of establishing at least prima facie transgression on the party alleging breach.”

pending disciplinary proceedings against him. The applicant applied to the High Court of Antigua and Barbuda for redress under section 18(1) of the Constitution for alleged infringement of his constitutional rights under sections 12 and 13, which guaranteed freedom of expression and peaceful assembly and association, while permitting restrictions on public officers that were reasonably required for the proper performance, of their function except to the extent that the restrictions were shown not to be reasonably justifiable in a democratic society. The judge declared that section 10(2)(a) of the Civil Service Act was unconstitutional and granted the relief sought. The Court of Appeal reversed that decision and affirmed the validity of section 10(2)(a), implying into it a provision limiting the scope of the prohibition to situations where the forbearance by the particular civil servant from such publication was reasonably required for the proper performance of his official functions. On appeal, the Privy Council considered the scope of the restrictions on the rights to freedom of expression and the freedom of assembly:

“The restrictions which may consistently with the Constitution be imposed upon the freedom of expression in section 12 and the freedom of assembly in section 13 of the Constitution in the case of civil servants must be restrictions which are reasonably required for the proper performance of their functions. Furthermore, they must be reasonably justifiable in a democratic society.”¹³

[37] The Privy Council adopted the three-tiered test set out in the Zimbabwean case of *Nyambirai v. National Social Security Authority*¹⁴ to determine whether a limitation/restriction on a fundamental right was arbitrary or excessive. In *Nyambirai*, it was observed that the court would ask itself the following questions:

“whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”¹⁵

[38] The Privy Council concluded that:

“Their lordships would be prepared to accept in principle that the first two of these criteria could be met in the case of civil servants once it is noticed that their special status, with its advantages and restraints, is recognised as proper in the administration of a free society. But the third criterion raises a question of proportionality...Without some such refinement their lordships are not persuaded that the validity of the provision can be affirmed. The distinction

¹³ *supra* (n5) at p. 139.

¹⁴ [1996] 1 LRC 64.

¹⁵ *supra* (n5) at p. 144.

between the different grades of civil servant and the application of the provision in particular circumstances to particular individuals cannot in their lordships' view sufficiently be made by the implied condition proposed by the Court of Appeal for the reasons which have already been set out. It was for the appellant to show that the restraint, with its qualification, was not reasonably justifiable in a democratic society and their lordships are persuaded that that has been shown to be the case.”¹⁶

[39] The question remains: whether the power to search in section 18 is a reasonable limitation/restriction on the rights enshrined in sections 9 and 14 of the Constitution. The legislative objective of the section is clear; its purpose is to address issues relating to searches for material relevant to overseas investigations. Section 18 plays a key role in facilitating mutual legal assistance between the GOB and a foreign State as it relates to transnational crimes. The Magistrate has to be satisfied that the statutory requirements have been met before a warrant is issued to authorize any search or seizure. This, in our view, is a justifiable and proportionate limitation on the rights enshrined in sections 9 and 14 of the Constitution. We are of the view that the three-tiered test set out in *de Freitas* is an appropriate test. We agree with the trial judge that the test has been met and that within section 18 itself, there are important limitations and safeguards.¹⁷ In our view, therefore, section 18(1) and (2) makes reasonable provision required in the interests of public safety and order pursuant to section 9 of the Constitution and is therefore not unconstitutional.

Did Abel J err in his interpretation of the Act?

[40] The court's role in statutory interpretation has been settled. Parliament makes the law; judges interpret it. Judges have a duty to interpret an Act according to the intent of those who made it. The primary indication of legislative intention is the legislative text, read in context using internal aids, like other provisions in the act or external aids, such as the legislative history¹⁸. In *Smith v Selby*¹⁹, this court discussed the particulars of such an exercise:

“The principles which the judges must apply include respect for the language of Parliament, the context of the legislation, the primacy of the obligation to give

¹⁶ *ibid.*

¹⁷ See the limitations and safeguards set out by the trial judge at [67] of his judgment and referred to by this Court at [14] above. See also [33] above.

¹⁸ See: Lord Nicholls in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001]2 AC 349 at pp. 397-398.

¹⁹ [2017] CCJ 13.

effect to the intention of Parliament, coupled with the restraint to avoid imposing changes to conform with the judge's view of what is just and expedient. The courts must give effect to the intention of Parliament...

...In *Rambarran v The Queen*, we noted that when a court is called on to interpret legislation it is not engaged in an academic exercise. Interpretation involves applying the legislation in an effective manner for the well-being of the community...Parliament's intention is discerned by understanding the objective of the legislation; what is the change that it is aimed to produce; what is its purpose. This often requires consideration of the social and historical context and a review of the legislation as a whole. But its intentions are also discerned from the words it uses. The underlying principle is that the court has a different function from Parliament. The court is ensuring that the legislative intent is properly and effectively applied. It is not correcting the legislative intent nor substituting its own views on what is a just and expedient application of the legislation."²⁰

[41] As mentioned earlier, Abel J drew upon the provisions of sections 18 and 26 and concluded that a reasonable interpretation of section 18 would require the imposition of the following eleven crucial matters and considerations²¹:

- (i) "The police must obtain judicial authorization for the search before they conduct it, usually in the form of a search warrant. And the judicial officer has to be satisfied that the individual's interest in being left alone by the state must give way to the government's interest in intruding on the individual's privacy in order to advance the legitimate goals of law enforcement generally to prevent unjustified intrusion.
- (ii) The application for the issue of the warrant, and the warrant itself, ought to specify what items and documents were expected to be found in the place to be searched, and how they would be relevant to the investigation. The warrant needs therefore to be drafted with sufficient precision to enable both those who execute it and those whose property is affected by it to know whether any individual document or class of documents falls within it. The search ought not to be wholly a fishing exercise and if an element of fishing is involved it ought not to be the major part of the exercise but be palpably, and demonstrably, part of a live and active criminal investigation for which criminal proceedings have been instituted or a person arrested; and in relation to which there are reasonable

²⁰ *ibid* at [9] and [12].

²¹ See [79] of the Supreme Court judgment.

grounds for suspecting that there is on premises in Belize occupied or controlled by that person evidence relating to that offence.

- (iii) An authorized search must be conducted in a reasonable manner. This is to ensure that the search is no more intrusive than is reasonably necessary to achieve its objectives. The requirement that the search be conducted reasonably would limit potential abuse of the authorization to search.
- (iv) An itemised inventory of what is seized by the police officers ought to be taken by them.
- (v) The persons conducting the search and seizure, i.e. the police officers, ought to account to the person responsible for the premises of any individual searched regarding what has occurred with any property seized.
- (vi) Such police officers ought to therefore provide to the individual of premises searched with a list of any object and documents removed from the individual's office.
- (vii) Seized property ought not to be kept any longer than is reasonably necessary and the central authority must account to the affected person for any significant delay of its return.
- (viii) The police officers ought to leave a copy of their search warrant with the individual affected by the search unless there are special circumstances for not doing so.
- (ix) Any individual affected by a search and seizure ought to be able to make representations to the central authority regarding any of its property seized and to have such representations treated seriously and responded to with due dispatch.
- (x) Even without specifically providing measures to ensure that there is no abuse by the state; this is necessarily to be implied.
- (xi) Even without specifically providing any provision for compensating the individual for damaged or lost property the police would be responsible for any loss and damage or for any unreasonable delay in the return of property seized (which is necessarily to be implied even if not expressly stated)."

[42] Titan complained that the trial judge did not merely interpret section 18 but that he read words into the section for it to pass constitutional muster. We do not agree. We do not think the court was wrong in setting out what it considered to be reasonable requirements

for the lawful and reasonable operation of section 18. We note that Mr. Hawke in addressing the Court acknowledged that the considerations laid out by the trial judge have been accepted by the Respondents.

Second Issue: Is Titan entitled to Monetary Compensation for Pecuniary Damage?

[43] In *Maya Leaders Alliance*²², this Court at [7] of its judgment, listed the three requirements a litigant needed to meet in order to obtain a constitutional pecuniary award under section 20 of the Constitution: (1) the existence of a constitutional right for his or her benefit; (2) a contravention of that right; and (3) that a monetary award is an appropriate remedy or redress for the contravention. The Court did note, however at [61] that the entitlement to monetary compensation was not automatic:

“An award of monetary compensation is not the invariable relief for a breach of constitutional rights. Section 20 empowers the court to fashion an appropriate remedy for the infraction which, to repeat the words of Lord Diplock in *Maharaj*, may be, “reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this.” An order for payment of compensation is only one of the forms of redress to which the court may consider that an applicant is entitled, and he or she must convince the court that the award is appropriate in the particular circumstances of the case. In the case of *James v Attorney General of Trinidad and Tobago* the Privy Council underscored that to treat entitlement to monetary compensation as automatic where violation of a constitutional right had occurred would be to undermine the discretion that was invested in the court by section 14 of the Trinidad and Tobago Constitution (the equivalent of section 20) and would run directly counter to jurisprudence in the area...”

[44] To grant Titan a monetary award, this Court must be satisfied therefore that a constitutional right existed, that there was a contravention of that right and that the appropriate redress should be, at least in part, monetary in nature. Both the Supreme Court and the Court of Appeal were satisfied that Titan’s constitutional right against arbitrary or unlawful interference with its privacy was breached because of the way the search and seizure were conducted. In his judgment, Abel J held that the Respondents should have been more careful about the manner in which they conducted the search and seizure and taken extra steps which would have “eliminated the appearance of high-handedness and lent an air of legality to the whole operation and possibly put Titan at

²² *supra* (n9) at [7].

ease”.²³ Similar sentiments were echoed by Hafiz Bertram JA in the Court of Appeal.²⁴ She agreed with Abel J that the search and seizure were conducted in an unreasonable and excessive manner since there was no sifting of the records to comply with the specific request of the US Government. She also described the operation as high handed and acknowledged that the officers went beyond the scope of the warrant. She commended counsel for the Respondents for not pursuing his argument that the judge was wrong to find a breach of Titan’s constitutional right to privacy in oral arguments before the Court of Appeal. The Court of Appeal found that the declaration of the trial judge that there was a breach of Titan’s constitutional rights against arbitrary or unlawful interference with its privacy should be upheld. Before us, Mr. Hawke conceded that the search was excessive but not oppressive and submitted that the appropriate relief was a declaration.

[45] In arguments before us, Titan maintained that a monetary award was appropriate because it had suffered financial loss as a result of the violation of its constitutional right. Titan argued that the Court of Appeal erred in its application of the principle of causation and submitted that this Court should relax its application of that principle as it was a tool of the common law and was not strictly applied to constitutional claims.²⁵ Titan cited the South African case of *Lee v Minister for Correctional Services*²⁶ in support of that argument. Primarily, that case concerned whether the applicant’s detention and the systemic failure to take preventative and precautionary measures by the Correctional Services authorities caused the applicant to be infected with tuberculosis while in detention. The complaint was that the unlawful detention and specific omissions by the authorities violated the applicant’s right to freedom and security of the person and the right to be detained under conditions consistent with human dignity, and to be provided with adequate accommodation, nutrition and medical treatment at state expense. The Constitutional Court of South Africa had to consider whether the conduct of the authorities caused the applicant to be infected with tuberculosis. As to causation, the court remarked:

“There are cases in which the strict application of the rule would result in an injustice, hence a requirement for flexibility...Indeed, there is no magic formula

²³ See [123] of the Supreme Court judgment.

²⁴ See [40] and [60] of the Court of Appeal judgment.

²⁵ Relying on Hammond J in *Attorney General v Taunoa* [2006] 2 NZLR 457.

²⁶ [2012] ZACC 30.

by which one can generally establish a causal nexus. The existence of the nexus will be dependent on the facts of a particular case.”²⁷

And at [47], the court cited the case of *Minister of Finance and Others v Gore*²⁸ which referred to the useful observations of Nugent JA in *Minister of Safety and Security v Van Duivenboden*²⁹:

“A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than metaphysics.”

[46] Counsel for Titan also argued that the trial judge made a finding that the search and seizure caused the effective shutting down of the business and pointed out that that finding was never challenged by the Respondents. Mr. Hawke on the other hand argued that Titan was unable to prove its loss as the company had no value at the time the constitutional claim was filed. Its licence was suspended and Titan was unable to generate profits or income so as to forcefully assert its claim in relation to damages. Interestingly, when questioned about the effect of the suspension, Mr. Courtenay submitted that it was a mere factor in deciding the value of the company and maintained that the search and seizure caused the company’s losses. He argued that following the operation, Titan lost the ability to contact clients as important items such as computers and hard drives were removed during the operation. In essence, the business virtually evaporated overnight.

[47] The Court of Appeal agreed with the Respondents on the award of pecuniary (compensatory) damages. The court questioned the trial judge’s approach to his award of US\$4,460,000.00. At [50] of the Court of Appeal judgment, Hafiz Bertram JA opined that:

“In my view, the judge erred when he awarded pecuniary damages to Titan for breach of its constitutional right. Titan claimed that the search and seizure caused a shutting down of its business and claimed damages in the sum of US\$22.3 million based on the expert report prepared by their witness Reynaldo Magana. The trial judge rejected that evidence in relation to quantum of damages. However, he reduced the claim for damages by 80% and awarded Titan US\$4,460,000.00 million dollars in compensatory damages. The reduction of the claim from 100% to 20% by the trial judge was done on the

²⁷ *ibid* at [41].

²⁸ NO 2007 (1) SA 111 (SCA).

²⁹ Cited in *Gore* (n27) at para 33; 2002 (6) SA 431.

basis that Titan did not have a licence to carry on business of securities brokers/dealer since 9 September 2014. This was a wrong approach as there was no evidence before the trial judge of the 20% financial loss. The trial judge had rejected Titan's evidence of financial loss suffered. It is trite law that pecuniary loss has to be specifically proven and not arbitrarily awarded."

[48] We agree. There was no basis for an award of US\$4,460,000.00. Normally, damages must be specifically pleaded and proven and there was no evidence on record to support the particular amount arrived at by the trial judge, or indeed, any amount. In his judgment, Abel J rejected Titan's evidence on damages. He specifically stated that he was "not satisfied with the extent of proof of damages by Titan; and in particular, whether it is indeed the independent, objective and unbiased product of Titan's expert witness; and whether the assumptions on which it was based were ones on which this court can rely"³⁰. Having made this finding, it is difficult to understand how the judge then relied on the same evidence to conclude that it was "significantly overestimated by as much as 80%". In our view, the Court of Appeal was correct to hold that there was no satisfactory basis to support the judge's assessment of the size of Titan's alleged loss and that he erred in awarding compensatory damages in the sum of US\$4,460,000.00.

[49] There is also the issue of causation. A fundamental characteristic of the law of damages is that a) a defendant must have caused harm in a relevant sense to be held liable for the payment of damages for such harm and b) the damages awarded must bear a reasonable relationship to the nature and extent of the harm caused. Titan claims here for damages based on the market value of the business and the projected income and profits of the company for the period 2015 to 2024. Although this is a constitutional and not a normal tort action, given the nature of and basis for Titan's monetary claim, there must be some causal link between the contravention of the constitutional right and the millions in losses claimed. Thus, even if the principle of causation was applied in a relaxed manner as argued by Titan, the company still had the burden of proving the nature and extent of its loss or damage and that the unreasonable and excessive search and seizure caused the loss or damage claimed.

³⁰ See [150] of the Supreme Court judgment.

[50] The indictment in the US was unsealed on 8 September. The search and seizure were carried out on the evening of 9 September. Titan was informed by email that same day that its licence was suspended by the Commission. A corresponding warning notice advising that Titan's licence had been suspended was published on the Commission's website on 15 September. The suspension was formally communicated to Titan by letter of the 17 September. That letter stated that Titan was prevented from carrying on "*trading in financial and commodity-based derivative instruments and other securities*".

[51] The Commission is a regulatory body created by the *International Financial Services Commission Act*³¹ and is the body responsible for regulating all financial market participants, exchanges and the setting and enforcing of financial regulations. Section 7(7), (8) and (9) of the *International Financial Services Commission Act* provide that:

(7) Subject to subsection (8) below, every licence granted under this Act shall be valid for one year and shall be subject to renewal.

(8) The Commission may for good and proper cause and after giving the licensee an opportunity to make representations, cancel or suspend a licence granted under this Act.

(9) Any person who is aggrieved by the decision of the Commission to grant, refuse, cancel or suspend a licence, may within twenty-one days, apply to the Minister for a review, and the decision of the Minister thereon shall be final.

[52] The *International Financial Services Commission (Licensing) Regulations, 2007*³², is the instrument which governs licensing. Regulation 8 states:

8. The duration of licences granted under these Regulations and the cancellation or suspension of the same, or the refusal to grant licences, and the procedure for review of any decision concerning any licence and the penalties for failure to obtain a licence as required under these Regulations, shall be in accordance with the provisions of section 7 of the Act.

[53] Licences are subject to annual renewal and the Commission has the authority to refuse, cancel or suspend a licence. If a person is aggrieved by the decision to refuse, cancel or suspend, there is 21-day period in which an application can be made to the Minister to review. Titan did not, within 21 days or any other time, make an application for its suspension to be reviewed. In addition, Titan never sought to renew its licence after it had expired.

³¹ Cap. 272.

³² Statutory Instrument No. 67 of 2007.

[54] Though the *Lee* case posits that causation does not need to be proved with certainty, there was still the requirement to establish that the wrongful conduct was probably a cause of the loss. This, according to the Constitutional Court of South Africa, required a common-sense approach. At [46] of that judgment, the court observed that:

“In *Kakamas*, it was stated that “[c]ausality often raises difficult legal questions which cannot always be answered by strict adherence to logic. Recourse may sometimes be had to what [the House of Lords] called the law’s ‘empirical or common-sense view of causation’”. In *Siman* the minority judgment noted that “[f]inally, as in other problems relating to causation in delict, in applying the ‘but-for’ test the Court should not overlook the importance of applying common sense standards to the facts of the case”.

Then at [55]:

“There was thus nothing in our law that prevented the High Court from approaching the question of causation simply by asking whether the factual conditions of Mr Lee’s incarceration were a more probable cause of his tuberculosis, than that which would have been the case had he not been incarcerated in those conditions. That is what the High Court did and there was no reason, based on our law, to interfere with that finding.”

[55] The *Lee* case does not assist Titan. Whether the principle of causation is relaxed as argued by Titan or strictly applied, the outcome remains the same. Thus, even if the seizure had not been excessive and the critical items necessary for the survival of Titan’s business had not been taken, Titan would still not have been able to conduct business because the licence remained suspended. Using the common-sense approach – which at its lowest requires the satisfaction of the test that the loss was probably caused by the wrongful conduct – we still arrive at the conclusion that the excessive search and seizure were not the cause of the financial losses allegedly suffered by Titan. The loss complained of, was essentially caused, in our view, by the suspension and non-renewal of the licence. That the search preceded the public notification and formal confirmation of the suspension by a few days can hardly, if at all, detract from this conclusion. We therefore agree with the Court of Appeal on the issue of a monetary compensation for pecuniary damage. Titan has failed to prove its loss and accordingly, are not entitled to such damages.

Third issue: Is Titan entitled to Vindictory Damages?

[56] Vindictory damages are largely discretionary and dependant on the particular circumstances of a case. In *Attorney General of Trinidad and Tobago v Ramanoop*³³, the

³³ (2005) 66 WIR 334.

Privy Council laid out what it considered the correct approach to the grant of damages for the breach of a constitutional right:³⁴

“18 When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases, more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law.

19 An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. “Redress” in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances...”

[57] Shortly after, in the appeal from the Bahamas of *Merson v Cartwright and Another*³⁵, the Privy Council considered whether making an award of \$100,000 for the infringement of the appellant’s constitutional rights was a duplication of the awards made under the tortious heads. Ms. Merson had successfully obtained damages for assault and battery, false imprisonment, malicious prosecution and contravention of her constitutional rights. The Privy Council held that a substantial award to vindicate Ms Merson's rights was clearly justified and looked specifically at the purpose of a vindictory award. At [18], it was said:

“...The purpose of a vindictory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other

³⁴ *ibid* at [18] – [19].

³⁵ (2005) 67 WIR 17.

cases an award of damages, including substantial damages, may seem to be necessary.”

[58] These principles were echoed in *James v Attorney General of Trinidad and Tobago*.³⁶ At [24] and [35], the Privy Council usefully observed that:

“24. ...The constitutional dimension adds an extra ingredient. The violated right requires emphatic vindication. For that reason, careful consideration is required of the nature of the breach, of the circumstances in which it occurred and of the need to send a clear message that it should not be repeated. Frequently, this will lead to the conclusion that something beyond a mere declaration that there has been a violation will be necessary. This is not inevitably so, however. Nor is it even the case that it will be required in all but exceptional circumstances. Close attention to the facts of each individual case is required in order to decide on what is required to meet the need for vindication of the constitutional right which is at stake.

35. ...What, as it seems to me, he was at pains to point out was that a violation of someone's constitutional rights will commonly call for something more than a mere statement to that effect. This is required in order to reflect the importance of the constitutional right and the need for it to be respected by the state authorities. A risk of the devaluation of such rights would obviously arise if the state could expect that the most significant sanction for their being flouted was a declaration that they had been breached...”

[59] The approach is therefore to assess the nature of the breach in terms of the particular facts of the case and to decide whether an additional award was required which would not only vindicate the rights of the party but would also deter the authorities from engaging in such conduct. Awich JA, in his concurring judgment in the Court of Appeal, agreed that vindictory damages of a small sum should be awarded, though he thought that it was not raised in the court below and was not included in the respondent’s notice to vary judgment. A review of the record dispels this. Titan did in fact claim vindictory damages at trial.³⁷

[60] We take into account the following matters in deciding whether an award of vindictory damages ought to be made: (i) Abel J found that a copy of the search warrant was not left with Titan’s officials, (ii) he also found that items were taken which were not relevant to the Request from the US Government, (iii) the Court of Appeal agreed that the search

³⁶ (2010) 78 WIR 443.

³⁷ See [142] and [156] of the Supreme Court judgment.

was conducted in an unreasonable and excessive manner since there was no sifting of the records to comply with the specific Request from the US; (iv) no inventory of the items taken was left with Titan, (v) Titan's attorney was denied entry into the premises during the search and (vi) the Court of Appeal found that the police officers acted in a very high handed manner during the operation. In these circumstances, we think that this is an appropriate case to make an award of vindictory damages. We therefore make an award of BZD\$100,000.

Costs

[61] It is not appropriate for this Court to interfere with the exercise of a judge's discretion as it relates to costs, unless we are satisfied that the exercise of the discretion was plainly wrong. We are not of this view as it relates to the order for costs made in the Court of Appeal. As to costs of the appeal before us, since Titan has been partly successful in its appeal, we will award Titan one half of basic costs.

Disposition

[62] The appeal is partly allowed. The order of the Court of Appeal is affirmed save that this Court awards to Titan vindictory damages for breach of its constitutional right to privacy in the sum of BZD\$100,000.00.

[63] The Respondents shall pay to Titan one half of basic costs of this appeal.

/s/ A Saunders

The Hon Mr Justice A Saunders, (President)

/s/ J Wit

The Hon Mr Justice J Wit

/s/ D Hayton

The Hon Mr Justice D Hayton

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

