

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2004/0490

BETWEEN:

ASOT MICHAEL

Applicant/Claimant

- and -

(1) THE ATTORNEY GENERAL
(2) THE DIRECTOR OF THE ONDCP
(3) THE COMMISSIONER OF POLICE

Respondents/Defendants

Appearances:

Mr. Anthony Astaphan SC and Mr. John Fuller for the Applicant
Mr. Gerald Watt Q.C. and Dr. David Dorsett for the Respondents

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2008: May 22
September 04
.....

RULING

- [1] **Harris J:** The Claimant (Asot Michael), by application dated the 7th day of March, 2008 applied to the Court for an interim injunction preventing the implementation of or alternatively a stay of the Attorney General of Antigua and Barbuda's decision to seek, production or disclosure from the Bermudan authorities of confidential and private banking records which belong to the Claimant and/or Bellwood Services S.A. (see para. 1 of the "Submissions on Behalf of the Claimant filed on May 09 2008)
- [2] The Claimant, by the said application dated the 7th day of March, 2008 has also applied to this court for an interim injunction or alternatively, a stay, restraining the Attorney General of Antigua and Barbuda from disclosing to the relevant authorities in Bermuda the same categories of documents pursuant to a request for assistance made by the Bermudan authorities. (see: para. 2 of the submissions on behalf of the Claimant filed on May 9, 2008). The grounds for the application are set out in the Notice of Application. This

application raises the consideration by the Court of various balance-of-convenience factors.

- [3] The Respondents oppose the application in its entirety, including, upon the ground that the application is frivolous and vexatious .In para. 4 of “Submissions on behalf of the Respondents with respect to applications of 7th March, 2008” filed in opposition to this application on May 20, 2008 ,the defendants produce “... a *chronology of the dates, activity and applications initiated by the Claimant*”. This, presumably, is in support of its contention that the application is frivolous and vexatious and an abuse of process and the respondent points out that the conduct of the claimant in this case, as reflected in the “*chronology,*” suggests that he has little interest in moving his Judicial Review case to trial.
- [4] The Claimant contends that the delay is not entirely or at all the fault of the claimant but that of the Respondent in failing to disclose certain relevant documents¹. All the same, I think it useful and set it out below for ease of reference and convenience:

Chronology

<u>Item</u>	<u>Date</u>	<u>Activity</u>
1	2004.11.29	Claimant files notice without application for leave for judicial review
2	2004.12.02	Court grants leave to file fixed date claim form
3	2004.12.02	Affidavit in support of application for leave and Fixed Date Claim Form filed
4	2005.01.13	Amended Fixed Date Claim Form filed
5	2005.01.14	Case Management Conference at which it is ordered: <ol style="list-style-type: none">1. Defendant to file affidavit2. Claimant to file affidavit in reply3. Standard disclosure4. Written submissions to be filed5. Submissions in reply to be filed6. Parties at liberty to apply for further directions before filing submissions in reply7. PTR set for 15th July 20058. Trial date to be fixed by the Court
6	2005.05.06	Affidavit in reply by 1 st and 2 nd Defendants
7	2005.06.17	Affidavits filed on behalf of Claimant <ol style="list-style-type: none">1. Asot Michael2. Keith Hurst3. Elton Martin

¹ Along with the reason referred to in para. 38 below

8	2005.06.17	Various witness summaries filed on behalf of Claimant: <ol style="list-style-type: none"> 1. Cosbert Cumberbatch 2. Gene Pestaina
9	2006.06.06	Standard Disclosure by Claimant
10	2006.09.19	Notice of acting filed by Watt & Associates
11	2006.09.19	1 st Defendant files application that order of 14 th January 2005 be varied
12	2006.10.04	Claimant files request for further information
13	2006.10.11	Claimant files affidavit in opposition to application of 1 st Defendant filed 19 th September 2006
14	2006.10.18	Claimant files amended statement in support of application for leave to apply for judicial review
15	2006.10.18	Claimant files amended fixed date claim form
16	2006.12.15	Case Management Conference. It is ordered: <ol style="list-style-type: none"> 1. Written submissions by filed and served by the parties 2. Submissions in reply 14 days thereafter 3. PTR set for 16th February 2007 4. Trial date to be set by Court office as a matter of urgency 5. Draft order to be prepared by 1st Defendant's counsel
17	2006.12.28	Notice of Acting filed by AG's Chambers
18	2007.01.29	Claimant files application for standard disclosure, further information and stay of proceedings against the Claimant together with affidavit and draft order
19	2007.02.05	Claimant's submissions filed
20	2007.02.05	2 nd Defendants filed
21	2007.02.07	Additional legal authorities on behalf of the 1 st and 2 nd Defendants filed
22	2007.02.09	Claimant files supplemental affidavit in support of notice of application for standard disclosure, further information and stay
23	2007.07.05	Case Management Conference: Court orders <ol style="list-style-type: none"> 1. Standard disclosure by Defendants 2. Specific disclosure of items 7, 10 and 16 or provide reasons for refusal 3. Disclosure of other items 4. Application adjourned to 4th October 2007
24	2007.09.27	Defendants provide reasons for refusal
25	2007.10.04	Application for specific disclosure and contending that reasons given are not proper reasons
26	2007.12.06	Defendant files submissions in support of reasons resisting request for specific disclosure
27	2008.02.15	Hearing before Blenman J awaiting decision of Harris J
28	2008.03.01	Claimant files application for a stay of proceedings
29	2008.04.18	Hearing on stay of proceeding application

[5] The Claimant's substantive submission on this application is that the Attorney General of Antigua and Barbuda has sought to obtain confidential information of the Claimant in Bermuda pursuant to an "Agreement" concerning the "Investigation Restraint and Confiscation of the proceeds and instruments of Crime" (hereinafter referred to as the "agreement") [exhibited as JLS10 to the "Affidavit in Response" of Justin Simon filed on May 05, 2005 in Response to the Amended Fixed Date Form which commenced the

- substantive Judicial Review matter from which the present application arises] or further, pursuant to the Mutual Assistance in Criminal Matters Act 2 of 1993 (The Act). The Claimant/applicant submits that in any event, the agreement was not in force at the time of the request in relation to the United Kingdom.
- [6] The non-application of the agreement to the instant case was conceded by counsel for the Respondents, Mr. Watt Q.C.
- [7] Further, counsel for the Claimant submitted that the Act does not provide for the Attorney General of Antigua and Barbuda to make a request for information from Barbuda, a Colony, but requires the request to be made to the Secretary of State in the U.K. This procedure submits Counsel for Asot Michael, was not followed and as a result the request was contrary to law and a *“serious abuse of power”*. (see: **Lord Griffiths in R v Horseferry Road Magistrates Court, ex.p. Bennett [1994] 1 AC 42**)
- [8] Senior Counsel for the Respondents eventually conceded that under the Act the Attorney General could not properly pursue the request for information directly from Bermuda, but that the said Act by virtue of S.6 (1) provided for the Attorney General to develop other forms of informal co-operation with Commonwealth Countries such as Bermuda.
- [9] Counsel for the Claimant argued that S.6, upon proper construction, does not permit of that construction and in any event having regard to the Definition of a *“Commonwealth Country”* under the Act, together with the plain meaning of S.29 and S.30 of the said Act, a colony such as Bermuda is not contemplated by S.6 as being a country with which Antigua and Bermuda can develop *“other forms of cooperation”* as alleged by the Respondent.
- [10] However, Counsel for the Respondent submits that there is nothing in the Act or law that precludes the Government of Antigua and Barbuda or any other authority in Antigua from requesting such information from the Government of Bermuda or the appropriate authority in Bermuda, outside of the Act and the Agreement. That Antigua and Barbuda is free to engage with whom it wants and the fact that the Attorney General mistakenly purported to do so pursuant to the agreement may render his actions without lawful basis under the Act, but it does not render his request unlawful at large. It just would not be effective under the regime provided under the Act/Agreement. Built into the Respondent/Defendants contentions in opposition to the application, is the admission that the statutory regime for facilitating mutual assistance of the kind referred to in this action has probably not been complied with by the Respondents. In any event it appears to me

that it has not been complied with. I accept the claimant's contention on this point. This leaves the defendant's defence, made earlier in this paragraph, that the Antiguan authorities are free to deal with the Bermudan authorities outside of the Act and Agreement.

[11] Counsel for the Claimant submits that this is not so and that where Parliament provides a legislative framework and government negotiates an Agreement/Treaty to achieve the same ends, it not intended that any public authority have the authority to circumvent the Act.

[12] I, however, accept the proposition that the Government's right to engage any other country or authority on matters, the subject of this application, is not ousted or fettered by the treaty or Act unless expressly or by clear implication so ousted or fettered. The Acts and treaty referred to are, it appears, intended to facilitate the cooperation between states by providing a preferred statutory framework and procedure to make more efficient and timely that process, rather than circumscribing a limited and definitive procedure available to a country or other defined authority to facilitate cooperation of the type detailed in this action.

[13] The authorities submitted and relied on this matter¹ suggest that the Court does have, in fit and proper circumstances, the power to intervene in a criminal investigation if the behaviour of the "investigation" threatens either basic human rights or the rule of law.

[14] Why does the Claimant seek to prevent the Respondent from obtaining this information as an interim measure in addition to claiming the stay and injunction as the core of its substantive remedy? The Claimant avers that his concern is that the Government has evinced an intention to pursue the investigation or prosecution with political interference and violation of the rule of law. He has cited several statements made by either the Attorney General, the Prime Minister and the Minister responsible for the Police and the investigations, in support of this averment. As a result of this the Claimant submits, he requires the injunction or stay to prevent a further breach of the rule of law so as to protect the status quo until the substantive matter is determined.

[15] The Claimant rests this concern both for the substantive action and this application on (i) the alleged intemperate statements made by members of the executive and (ii) the alleged unlawful application by the Attorney General (or relevant Antiguan authority) to

¹ The parties have submitted a dearth of authorities in this application covering a broad spectrum of the relevant law. For this the court is grateful to counsel.

the Bermudan Government for the confidential information on/of the Claimant and (iii) the alleged unlawful search by the police of his properties in Antigua.

Intemperate Statements

[16] In relation to the statements made by members of the executive I am inclined to the view expressed by Lord Bingham and Walter at para. 14 of the Privy Council Appeal, The Honourable Satnarine Sharma v Carla Browne Antoine et al (*the Sharma case*) that:

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

[17] Regrettably the cultural environment in this sub-region permits of and is replete with, intemperate statements of this kind by persons in authority. I am not condoning it but merely observing its existence. The statements also appear, at a very superficial level, similar in character to what is colloquially referred to as a *“grand charge”* or more forensically as a *“mere puff”*. The true significance of these statements is best left to trial. Generally, those persons in the sub-region and for our purpose here, in Antigua and Barbuda, *“... professionally charged with the investigation of offences and institution of prosecution ...”* are well accustomed and able to carry out their duty without their professional judgment being swayed in circumstances so as to negate a contrary presumption (albeit a rebuttable one). In the balance, I am unable to see the merit in the Claimant’s assertion (taken at its highest) that as a result of these statements, if made, that the circumstances warrant interim injunctive relief or a stay as prayed.

The request from Bermuda for confidential information from Antigua

[18] The Claimant is seeking to restrain the Respondents from providing what the claimant refers to as confidential information, to the Bermudan Authorities on the same grounds that it relies on in restraining the Attorney General of Antigua and Barbuda from obtaining such information from the Bermudan authorities.

[19] There is no sufficient evidence or authority before me that sets out the legal regime and Law governing the rights of the Bermudan Authority in making such a request.¹ I do not

¹ A request both within and outside of the treaty and statutory regime. I believe it is accepted and the court so finds, that certainly under the Agreement and the Antiguan Act referred to above, **if** the British Legal regime is identical to that which governs Antigua and Barbuda it would not permit a British Colony such as

presume that they do not have that right. The Claimant admits to being involved in similar legal proceeding in Bermuda and can, in my view, best address the lawfulness of the Bermudan Authorities request to the Antigua Government, in the Bermudan courts. For that matter, it can also address the Bermudan authority receipt and use of the information obtained from Antigua and Barbuda, in the Bermudan courts.

[20] The Claimant argues that the Attorney General under the aforementioned Agreement and the Act, cannot entertain a direct request from the Bermudan Authorities. To do so would be unlawful and seeks to restrain the Respondent or any of them from facilitating the Bermudan request for confidential information at this time. Presumably, the Defendants can make their request if compliant with the Act and /or Agreement, without the present legal objection from the applicant/Claimant, Asot Michael. The objection then, is to the process by which this request is being made.

[21] I do not necessarily subscribe to the view of the Claimant on this point. There is no statute, law, or chain of reasoning before the court that appear to preclude the authorities in Antigua and Barbuda from providing the subject information to Bermuda at this time. The Respondents it appears, are free to communicate information to the Bermuda Authorities provided the Respondents comply with local law in obtaining the information including local legislation and law as to subsequent user. On the balance, to prevent the continuation of the investigation along these lines - unclear as it is - would not further the interest of justice for all involved. In any event, information obtained unlawfully, intended for use in a subsequent criminal trial may be challenged in the civil courts in Bermuda and also at the civil and/or criminal trial (**see MV Home Office [1994] 1 AC 377, Connelly v DPP [1964] 2 WLR 1145 (1198), R v Horseferry Road Magistrates Court, ex p. Bennett [1994] 1 AC 42 (61, 62)**). This last proposition is relevant to the courts balancing of the convenience of the respective parties.

Stay of Proceedings and Injunction

[22] The applicant, Asot Michael asks that the prior Order of the court dated the 2nd December 2004 granting Asot Michael leave to apply for Judicial Review in this action operate as a stay of proceedings pending the substantive hearing in this action. By a stay of proceedings, Asot Michael means, all steps in furtherance of any and all requests for assistance made by the relevant authority in Antigua and Barbuda to Bermuda and vice

Bermuda to pursue this request under the said Agreement and the Act. In any event evidence of the law of another state will require expert witness testimony.

versa, concerning the said Asot Michael. In effect he is asking for his substantive remedies now. This, in the appropriate circumstances, is a legitimate request.

[23] Counsel for Asot Michael contends that the application for a stay and injunction respectively, is not to stop the decision to investigate, but to prevent the acquisition or the use of documents and information under Act No. 2 of 1993 and the Agreement. Further, contends the applicant, there is a dearth of authority to establish that the Court will intervene in certain circumstances if there is an abuse of the Law by the Executive prior to trial.

[24] This interim application for a stay and injunction is coming some four (4) years after the matter is filed and three (3) years after the Case Management Conference. It concerns what the claimant alleges are efforts on the part of the relevant authorities in both Bermuda and Antigua and Barbuda to obtain by unlawful means, confidential documents and information from each other, of Asot Michael. In fact, this was known to Asot Michael from the beginning and forms the basis of one of his claims in the substantive Judicial Review action.

[25] Asot Michael has not in this application or in the substantive action or any application thereto, alleged or identified any document in existence or event that has transpired in the four(4) years since this matter was filed ,that evidences the effect of a breach or threatened breach complained of. No actual prejudice is disclosed thus far. No evidence of documents or information or laying of criminal charges has been put before the court at this time. Sufficient time I would have thought, has passed for the detrimental effects of the alleged "unlawful" acts of the Antiguan and Bermudan authorities to be self evident.

[26] The applicant, Asot Michael, alleges as a ground of his application that he has an outstanding **application for disclosure** and production of documents. The applicant contends that the defendants refuse to produce the documents. The CPR 2000 makes provisions to remedy this if in fact it is so. In any event, in this case, the grant of a stay or an injunction is not an appropriate coercive remedy for the alleged refusal to disclose the documents.

[27] Further, the applicant alleges that he had an understanding with the Solicitor General of Bermuda that "... *no further steps would be taken pursuant to these requests without giving further notice to the claimant*" and that this understanding persisted up until the 23rd of February 2008. This "*understanding*" it appears to me, taken at its highest, might affect the hand of the Bermudan authorities but not that of the Antiguan authorities in the

context of this action. There is no evidence to suggest that Asot Michael is precluded from seeking a remedy in Bermuda in relation to the actions of the Bermudan authorities. He has admitted to have engaged in legal action in Bermuda, It is inconceivable to me that he would not have there addressed the concerns raised in this application¹.

[28] I do not accept the applicant's contention that prior to the expiration of the understanding between himself and the Bermudan Solicitor General, there was no need for him to obtain an order for interim relief. Asot Michael had no such understanding with any one in Antigua and Barbuda (and in any event has not alleged that he did) and the necessity to obtain the interim relief prayed for in this application, if that is what it is, would have been equally applicable at the commencement of these proceedings as he argues it is today.

[29] Asot Michael alleges in his grounds for the application, that the necessity for interim relief in this action is further buttressed by the Defendants "*...illegal search of the claimant's home...*" in Antigua. That the search was *illegal*, is a conclusion and in the absence of the facts relied on to form the basis of the conclusion, is not sufficient for the court to place reliance on. The Crown, surely, can lawfully search the premises of its citizens, so it is not unlawful on its face. Even if the applicant had provided sufficient evidence to establish the unlawfulness of the said entry, that in itself is not necessarily conclusive as to the propriety of the grant of the interim relief as prayed. The unlawfulness of the search then, is a matter for another action. The applicant alleges further, that the Defendants unlawfully used the process of the courts to obtain yet further documentation. I do not know that the defendant is precluded from obtaining *documentation*. Merely alleging unlawfulness does not make out a case for unlawfulness. Again, even if it did make out such a case (which it does not), that would not necessarily make out the case for the necessity for the grant of interim relief in this action. The question still remains; why should this specific documentary component of the investigation cease?

[30] The applicant is the claimant in this action filed in 2004. It must be of considerable concern to the claimant, I would imagine, that he has not gotten to trial and as a consequence not afforded the opportunity to fully ventilate his concerns. It appears however, that in the four (4) years that this matter has been filed, none of the claimant's expressed fears have been realized. In balancing the factors of convenience in this matter, including the duty of the relevant authorities to continue the investigation and to enforce the law in the the public interest, the strong public interest in upholding and enforcing the law, the balance needed between the wider public interest and maintaining the rule of law, the court has

¹ The claimant/applicant has not exhibited any official court documents evidencing the nature of his action in Bermuda.

included in its consideration in addition to the other factors raised in law and by the parties in the proceedings; (i) the applicants right to bring an action in the Bermudan court to deal with the issues of concern to that jurisdiction and, (ii) the consideration of the protections afforded a party in civil and criminal trial both in Antigua and in Bermuda and, (iii) that the applicant is not contending that the documents and information sought by the defendants are not relevant and are inadmissible per se or otherwise not lawfully available to the defendants, but that it is the present process of obtaining them that he argues is unlawful.

- [31] For the reasons provided above, this is not the clearest of cases for the intervention of the court. The court is unable to support the application of the Claimant/applicant, Asot Michael. The parties must get on with the case.

ORDER

- [32] The application is hereby dismissed in its entirety with costs (pursuant to the CPR 2000) of this application to the Defendants.

**DAVID C. HARRIS
JUDGE
HIGH COURT
ANTIGUA AND BARBUDA**

