

BRITISH VIRGIN ISLANDS

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Claim No: BVIHCV 2024/

Fees Paid:139.79

IN THE MATTER OF SECTIONS 12, 16, 18,19, 23, 24, 25, 26 and 31 OF THE VIRGIN ISLANDS CONSTITUTION.

AND

IN THE MATTER OF THE POLICE ACT, 2013

AND

IN THE MATTER OF SECTION 14L, of the COMPUTER MISUSE AND CYBERCRIME ACT, 2014

BETWEEN:

SEAN McCALL

CLAIMANT

AND

THE MAGISTRATE

1ST DEFENDANT

COMMISSIONER OF POLICE

2ND DEFENDANT

ATTORNEY GENERAL

3RD DEFENDANT

ORIGINATING MOTION

The Claimant, Sean McCall of Hodges Creek, Tortola, British Virgin Islands whose address for the purpose of this motion is Chase Law & Co. Simm’s Mini Mall, De Castro Street, P.O. Box 1548, Road Town, Tortola, claims against the 1st Defendant, Her Honour Ms. Benjamin, a Magistrate of the Virgin Islands, of Sakal Building, Road Town, Tortola, British Virgin Islands, the 2nd Defendant, the Commissioner of Police of the Royal Virgin Islands Police Force , Station Road, Road Town, Tortola and the 3rd Defendant, the Attorney General of the Virgin Islands of TTT Building, Road Town, Tortola, British Virgin Islands who is joined as the notional defendant in constitutional motions against the territory, and seeks the following orders:

- 1) A Declaration that s. 14L of the *Computer Misuse and Cybercrimes Act* is unconstitutional, null and void, and to no effect as it has contravened or is likely to contravene s. 12, 15 (3),16 and 19 of the Constitution:
 - a) by requiring an individual to provide information to a state agent, on pain of prosecution, that may be used against him at any subsequent trial contravenes sections 16 of the Constitution;
 - b) in that it lacks sufficient safeguards to prevent disproportionate interference with an individual's fundamental rights and freedoms, such as failing to provide for:
 - i. circumstances proscribing an inter partes hearing;
 - ii. disclosure, after an ex parte hearing, of the information that led to the order of the warrant;
 - iii. circumstances where the less intrusive production order procedures must first be attempted; and/or
 - iv. orders the court may make to prevent access to irrelevant personal and confidential data, and the misuse of data.

- 2) A Declaration that the search warrants under s. 14 L of the Computer Misuse and Cybercrimes Act ordered on 3 March 2023 by the First Defendant has contravened or is likely to contravene s. 12, 16, 18,19, 23, 24, 25, 26 and are null and void, and to no effect in that:
 - a) the warrants were ordered in pursuit of an investigation by the Second Defendant that was an abuse of power, in bad faith, and in pursuit of an improper purpose;
 - b) the warrants were not ordered in accordance with law as s. 14 L of the *Computer Misuse and Cybercrimes Act* as:
 - i. the 1st Defendant had no authority to issue the warrant;
 - ii. s. 14L is restricted to offences under the said Act; and
 - iii. the Act does not permit the issue of warrants where the computer is already, at the time of the application, in the possession of the Second Defendant.
 - c) the order of the warrants was disproportionate in that there was no reason why the Second Defendant did not proceed under 14K of the Computer Misuse and Cybercrimes Act;
 - d) the warrants were unspecific;

- e) no order was made by the 1st Defendant to prevent access to irrelevant personal and confidential data, and the misuse of data;
 - f) no order was made by the 1st Defendant for an inter partes hearing; and
 - g) no order was made by the 1st Defendant for the disclosure, after the ex parte hearing, of the information that led to the order of the warrant.
 - h) the notes of the proceedings and the reasons for the order of the warrant have not been disclosed to the Claimant.
- 3) A Declaration that the 2nd Defendant's seizure and retention of data from the Claimant's phones, has contravened or is likely to contravene the Claimant's rights under sections 12, 16, 19 and 25 of the *Constitution*.
- 4) An order of Certiorari, or quashing order, quashing the 1st Defendant's order of search warrants dated 3 March 2023 for the search of the Claimant's phones upon an application by the 2nd Defendant's servants or agents.
- 5) An order of Mandamus or mandatory order that the Second Defendant forthwith account for and delete, or return, all data seized or accessed by the Second Defendant's servants and agents.
- 6) Damages for breach of the Claimant's constitutional rights, including general or compensatory damages, vindicatory damages, and aggravated damages.
- 7) Costs.
- 8) Such further and other relief and/or direction as this Honourable Court deems appropriate or necessary.

The nature and reasons for this Motion are as follows:

- 1) The Claimant was at all material times a Sergeant of the Royal Virgin Islands Police Force (RVIPF) and an executive member of the Police Welfare Association, a body formed under s. 81 of the Police Act, holding the positions of Chairman between February 2022 to the end of March 2023 and thereafter Secretary.
- 2) The Claimant has made numerous complaints against the Second Defendant of instances of the latter's improper, unfair, and unlawful conduct.

- 3) On the 3 March 2023 at about 10 a.m., the Claimant was required to attend at the 2nd Defendant's offices where the 2nd Defendant caused or directed that the Claimant be arrested on suspicion for the criminal offence of Breach of Trust. The Claimant was thereafter questioned, released, and placed on interdiction. The Claimant has remained on continuous interdiction ever since.
- 4) On arrival Chief Inspector Vernon Larocque of the RVIPF directed the Claimant to hand over his cellular telephones. The Claimant duly handed over his personal cellular telephone and the RVIPF issued cellular phone assigned to him as Chairman of the PWA.
- 5) Chief Inspector Vernon Larocque and Sergeant Gemma Williams thereafter escorted the Claimant into the interview room, where he was interrogated by Chief Inspector Vernon Larocque, from about 10:30 am on the said 3rd March 2023.
- 6) On 3 March 3 2023 at about 11:45 am, whilst the Claimant was still in police custody, Chief Inspector Larocque read a warrant which was issued by the Magistrates Court on 3 March 2023. The warrant directed seizure of, and access to, the Claimant's phone. The phone was already seized before the warrant was issued.
- 7) The warrant ordered the Claimant to reveal the phone's passcode to permit access by Chief Inspector Vernon Larocque.
- 8) The Defendants have not adequately furnished the Claimant with the factual basis and reasons for the ordering of the search warrant.
- 9) In the Claimant's presence, Chief Inspector Laroque used the passcode to unlock the Claimant's cellular telephone, and thereafter directed that interrogation of the phone's contents be pursued.
- 10) The Claimant never gave anyone any permission to search his phone and was given no opportunity to be heard on the grant of the warrant.
- 11) Data on the phone included private and personal matters.
- 12) The 2nd Defendant and his servants or agents have failed to enumerate the data accessed pursuant to the search warrant.
- 13) The search warrant was vague and general, failing to properly identify the investigation and items to which it related.
- 14) In case No. 4 of 2023, between Mickiel Robin and the Director of Public Prosecutions dated 31 March 2023 a High Court Judge ruled, inter alia, that Magistrates had no jurisdiction to order search warrants under the Computer Misuse and Cybercrimes Act.
- 15) On Friday 25 August 2023 at 09:30 am, Inspector Laroque visited the Supreme Court seeking production orders for the data that had been the object of the Magistrate's

warrant for the Claimant's devices on 3 March 2023. The Hon Mrs Justice Angelica Teelucksingh denied the request as having not met the standard and being more of "gossip and not a criminal offence".

16) The investigations of the Claimant by the 2nd Defendant's servants and agents were actuated by improper purpose, bad faith and were an abuse of power.

The grounds on which the Claimant is seeking the orders are as follows:

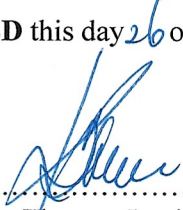
- 1) Sections 12 and 19 of the Constitution is contravened or is likely to be contravened where agents of the state conduct searches of private property and information without sufficient safeguards to prevent disproportionate interference with an individual's rights under s. 19 of the Constitution, to include:
 - a) ordering warrants at *ex parte* hearings where it is just and expedient to have an inter partes hearing;
 - b) not requiring, after an ex parte hearing, the disclosure of the information that led to the order of the warrant;
 - c) preferring less intrusive production order procedures; and/or
 - d) orders to prevent access to irrelevant personal and confidential data, and the misuse of data.
- 2) The failure of the First and Second Defendants to:
 - a) disclose the factual and legal basis and reasons for the issue of the search warrant; and
 - b) properly outline the nature of the investigation and items subject to the search warrant;contravenes the Claimant's rights under sections 12, 16, 19, and 25 of the Constitution.
- 3) The failure of the Second Defendant to enumerate the items seized pursuant to the warrant contravenes the Claimant's rights under sections 12, 16, 19, and 25 of the Constitution.
- 4) The retention by the Second Defendant of the Claimant's data seized by the Second Defendant's servants or agents contravenes the Claimant's rights under sections 12, 16, 19 and 25 of the Constitution.
- 5) The Defendant's investigations of the Claimant are:

- a) in breach of the proper functioning of the PWA, a body established under s 81 of the Police Act; and
 - b) malicious and in bad faith in that the investigations against the Claimant were a reaction to the Claimant's criticisms of the Defendant,
- and in contravention of sections 12, 18, 19, 23, 24, and 26 of the Constitution.
- 6) There is no sufficient alternative form of redress.
 - 7) It is within the power of the Honourable Court to grant the relief sought.
 - 8) It is just and equitable to grant the orders as prayed.

The Claimant estimates the length of hearing to be four (4) hours.

The Claimant relies on the evidence.

DATED this day 26 of March, 2024


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Karlene Thomas-Lucien
Chase Law & Co.
Legal Practitioners for the Claimants

CERTIFICATE OF TRUTH

I, **SEAN MCCALL**, of Hodges Creek, Tortola, British Virgin Islands, herein certify that the facts contained in this Originating Motion are true to the best of my information, knowledge and belief.


.....
SEAN MCCALL

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

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