

IN THE COURT OF APPEAL OF BELIZE AD 2017
CIVIL APPEAL NO 6 OF 2016

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

Appellants

v

TITAN INTERNATIONAL SECURITIES INC.

Respondent

BEFORE

The Hon Mr Justice Sir Manuel Sosa
The Hon Mr Justice Samuel Awich
The Hon Madam Justice Minnet Hafiz-Bertram

President
Justice of Appeal
Justice of Appeal

D Barrow SC along with J Ysaguirre for the appellants/respondents.
E Courtenay SC along with I Swift and L Mendez for the respondent/appellant.

20 and 23 March and 16 June 2017.

SIR MANUEL SOSA P

[1] Having read the judgment of my learned Sister, Hafiz Bertram JA, in draft, I have no hesitation in saying that I concur in the reasons for judgment given, and the orders proposed, in it.

SIR MANUEL SOSA P

AWICH JA

[2] I agree to the decisions of Hafiz JA in her judgement that: the appeal of the Attorney General and the FIU succeeds in part; the award by the trial judge, of damages, \$4,460,000.00, to Titan International Securities INC, the respondent, be set aside; the declaratory order made by the trial judge that, the search of the premises of the respondent on 9 September, 2014 was carried out in an unreasonable and excessive manner, and was in breach of the constitutional right of the respondent not to be subjected to arbitrary search of his person or his property be confirmed. Further, I agree that, the respondent's notice to vary judgment be dismissed entirely; and parties bear their own costs of the appeal. There has been no appeal against the order for costs in the court below. Since this Court accepts the determination that, the unreasonable and excessive search was a breach of a constitutional right, the relevant section of the Constitution is, in my view, s. 9, not s. 14.

[3] I accepted the declaratory order of the trial judge that, the search was unreasonable and excessive to the extent that it was unconstitutional simply because it was for the appellants to show the contrary to this Court, and the appellants did not. Not every search and seizure that is in excess of the terms of the search warrant or otherwise unreasonable will be a contravention of the Constitution.

[4] Ironically, the failure by the appellants to demonstrate that the trial judge erred in holding that the excessive and unreasonable search and seizure was unconstitutional might have helped the appellants in their appeal against the order awarding damages. Granting relief in a claim under the Constitution is discretionary, and in particular, for an award of damages to be made, the claimant must prove pecuniary loss. ***Maya Leaders Alliance [2015] CCJ 15 (AJ)***, and ***James v Attorney General of Trinidad and Tobago [2010] UKPC 23***, are the authorities. The respondent did not prove any damages. This Court should hold that, Abel J erred in awarding any damages to the respondent when no loss has been proved.

[5] Besides urging this Court to uphold the award of damages, learned counsel Mr. E Courtenay SC, argued that, vindicatory damages were available to the respondent. Yes, in my view, this would be a case where an award of vindicatory damages of a small sum

would be a suitable relief. But it was not claimed or raised in a submission in the court below. It was also not included in the respondent's notice to vary judgement. This Court, an appellate court, cannot simply seize on it at this stage.

[6] The trial judge also held that s. 18 of the Mutual Legal Assistance and International Cooperation Act was not inconsistent with ss. 9 and 14 of the Constitution. I agree, I would confirm his declaration.

AWICH JA

HAFIZ BERTRAM JA

Introduction

[7] This is an appeal which was heard on 20 and 23 March 2017, against the judgment of Abel J dated 21 January 2016, granting several declarations that Titan International Securities Inc. ("Titan") constitutional rights had been violated by the Government of Belize ("GOB") in the execution of a search warrant and seizure of property. The trial judge awarded Titan US\$4,460,000.00 in damages. The Court having heard the appeal reserved its decision.

[8] Titan in a cross appeal sought additional declarations and an increase in the award of damages to US\$22.3 million.

[9] The main issue on appeal was whether Titan was entitled to damages for the breach of its constitutional rights. GOB appealed against both the finding of breach of constitutional rights and the award of damages. However, they made no oral submissions on the breach but, focused primarily on the award of damages. Titan on the other hand, despite an appeal against the award of damages, during oral arguments submitted that the award of damages by the trial judge should be upheld.

The parties

[10] The appellants and respondents in the cross appeal are the Attorney General (“AG”) representing the Government of Belize and the Financial Intelligence Unit (“the FIU”). The FIU was established to carry out statutory responsibilities which include the fight against international crime.

[11] Titan, the respondent and cross appellant is an international business company which was licenced in Belize as a securities broker/dealer. Titan no longer has a licence to carry on business in Belize.

The factual background

[12] The Mutual Legal Assistance and International Co-operation Act, No. 8 of 2014, Laws of Belize (“the Act”) provides for “measures to ensure compliance with international standards and obligations, including the Vienna Convention, in relation to mutual legal assistance and international cooperation ...”

[13] The Mutual Legal Assistance in Criminal Matters between Belize and the US (“the treaty”) provides for the investigation and prosecution of crime. The Central Authority in Belize under the treaty is the Attorney General (“AG”).

[14] On 8 September 2014, an indictment was unsealed in the United States of America (“USA”) charging Titan, Mr. Kelvin Leach the President of Titan, Robert Banfield and nine others (including International Business Companies registered in Belize in which Banfield has an interest) with securities fraud, evasion of taxes, money laundering and conspiracy to commit those offences.

[15] On 9 September 2014, the US Department of Justice in Washington, Criminal Division, Office of International Affairs, urgently requested (“the request”) the assistance of the Government of Belize pursuant to the treaty, in relation to an investigation by the US Attorney for the Eastern District of New York (the prosecutor) of several targets which includes Titan, Mr. Leach and Banfield. They are suspected of money laundering, securities fraud, tax evasion and conspiracy to commit those offences.

[16] The request for assistance was very detailed and included: (a) time constraints since Banfield was arrested on the same day in the US and target offices in Belize had to be searched as quickly as possible to prevent the destruction of evidence; (b) confidentiality of the request to prevent the destruction of evidence held in hard copy files and on computers; (c) a summary of the scheme, information of the targets, detailed information of the US criminal investigations(including an undercover operation in Belize) (d) the offences for which the targets were charged; (e) documents needed to be seized which is stated as “*Any and all documents or other evidence (in copy or original) seized during the execution of search warrants at the following locations together with documents relating to the execution of the search warrants..... any documents (in hard or electronic form..*”; (f) Procedure to be followed in relation to the seized items as provided by the treaty.

[17] The AG reviewed the request and concluded that it was proper to provide the assistance requested. The AG thereafter 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 Act. The AG also requested assistance from the FIU in order to carry out the search and seizure.

[18] On 9 September 2014, upon an application made by the Police Department, a Magistrate in the Belize Judicial District granted a search and seizure warrant to Superintendent Hilberto Romero and to all and every Police Constable and Peace Officers of Belize and to the Officers of the Financial Intelligence Unit of Belize to enter several premises, including Titan, and to search for and seize documents which may be used as evidence in a prosecution for the offences listed in the warrant. The search and seizure was executed on the same day.

[19] On 9 September 2014, Titan was informed via electronic mail by the International Financial Services Commission (“the Commission”), that its licence had been suspended. Titan was not aware of the mail on that day. By a letter dated 17 September 2014, from the Commission, Titan’s suspension was confirmed. The suspension had never been lifted and the licence has since expired. The licence was required by law to be renewed annually – *section 7(7) of the International Financial Services Commission Act.*

[20] On 15 September 2014, the Commission issued a warning to the public that the licence granted to Titan was suspended until further notice. Investors were advised to take note and exercise caution.

[21] 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.

[22] On 20 January 2015, almost all items taken during the search and seizure were returned. There is evidence of the items not returned.

Titan's claims in the Supreme Court

[23] Titan sought the following reliefs in the court below:

1. A declaration that section 18 of the Mutual Legal Assistance and International Cooperation Act is inconsistent with Titan's fundamental rights guaranteed by sections 9 and 14 of the Constitution;
2. A declaration that the search of the office premises, records and computers of Titan conducted on 9 September 2014, was in breach of their constitutional right guaranteed by section 9 of the Constitution not to be subjected to the search of its property or entry on the premises except in accordance with section 9(2) of the Constitution;
3. A declaration that the search, seizure, retention and use of correspondence between Titan and its clients contained in records and computers which were seized by the AG, was in breach of its constitutional rights guaranteed by section 14 of the Constitution not to be subjected to arbitrary or unlawful interference with its privacy except in accordance with section 9(2) of the Constitution;
4. A declaration that the records, correspondence and computers of Titan, concerning clients who are not citizens or residents of the USA or who are not in any way related to Robert Banfield or IPC Corporate Services LLC, does not constitute evidence of the offences alleged because they are entirely unrelated to matters covered by the request;

5. A declaration that the indiscriminate removal of the files, records and computers and the effective shut down of Titan's offices in Belize was contrary to sections 3, 6, 9 and 14 of the Constitution and is unlawful as being disproportionate and in excess of statutory authority to search and seize evidence in aid of foreign court proceedings in the US;
6. An injunction restraining the AG and FIU from retaining, transmitting, sharing or making any use of the records, computers, computer servers, electronically stored information and correspondences of Titan unlawfully removed from its premises on 9 September 2014;
7. An order that the AG and FIU disclose the location of the properties seized;
8. Damages for breach of Titan's constitutional rights and costs.

The Belize Constitution – relevant sections

Section 9 – Protection from arbitrary search or entry

[24] Section 9 of the Belize Constitution provides:

“ 9. (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 morality..”

Section 14 - Protection of right of privacy

[25] Section 14 of the Belize Constitution provides:

14. (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. The private and family life, the home and the personal correspondence of every person shall be respected.

(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.

Section 20 – Enforcement of protective provisions

[26] Section 20 provides:

20. (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 then, without prejudice to any other action with respect to the same matter which is lawfully available, that 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.

(emphasis added)

The judgment of the trial judge

[27] The trial judge granted several reliefs but not in the terms as claimed since he found that the entire warrant was not unlawful and the entire search and seizure was not unlawful. The declarations and orders granted were:

(a) Part of warrant bad

The warrant of search and seizure issued by the Magistrate on 8 September 2014, to enter Titans premises to search and seize documents and information relating to it, was bad and in excess of the powers of the Magistrate, in so far as it authorized officers of the FIU to be present and to take part in the search and seizure. The trial judge however, found that the bad part of the warrant may be severed from and not invalidate the rest of the warrant and any action done under the good part is not unlawful;

(b) Records of non-US persons not evidence of offences

Some of the records, including correspondences 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.

(c) Search executed in an unreasonable and excessive manner

The search was executed in an unreasonable and excessive manner, though not in an oppressive manner, and this was in breach of Titan's *constitutional rights against arbitrary or unlawful interference with its privacy.*

(d) Indiscriminate removal of all files - Seizure

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) Disclosure of property seized

An order was granted for the AG and FIU to disclose the location of any and all records, correspondences and computers, and any copies of same, and deliver them to Titan on or before the 20 February 2016.

(f) Undertaking – not to use property of non US citizen

The court did not grant the injunction to Titan since counsel for AG and FIU gave an undertaking not to use or permit the use of any property of Titan concerning persons who are not citizens of the USA.

(g) Damages for breach of constitutional rights – assessed at US\$4,460,000.00

“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, which I have assessed taking all the relevant facts and circumstances into consideration, at US\$4,460,000.00, which sum the Defendants shall pay to the claimant as compensatory damages.”

(h) Cost – 80% of prescribed costs

A order was granted for AG and FIU to pay Titan’s costs, certified fit for two senior counsel and one junior counsel, which the trial judge 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.*

The grounds of appeal by GOB and FIU

[28] GOB and FIU appealed part of the decision of the trial judge that the search of Titan’s premises was carried out in an indiscriminate, unreasonable and excessive manner and that Titan should be awarded damages for breach of its constitutional rights. The grounds of appeal were:

- (a) The trial judge misdirected himself and erred in law in failing to give any proper consideration of the evidence of the extent to which Titan’s entire business was fraudulent, criminal or wrongful and therefore justified the search and seizure that was carried out;

- (b) The trial judge misdirected himself, erred in law and acted on a wrong principle in awarding damages for a business that was wholly incapable of earning any future income and had no value at the date of the alleged breach;
- (c) The trial judge erred in law, acted arbitrarily and on a wrong principle in selecting a figure for the quantum of damages having decided that Titan had failed to prove its loss;

[29] The relief sought by the AG and FIU from this Court was an order that the award of damages and costs by the court below be set aside and costs be awarded to them in this Court and the court below.

Was a remedy in trespass available to Titan?

[30] Learned senior counsel, Mr. Barrow contended that even if there was a breach of Titan's constitutional rights against arbitrary or unlawful interference with its privacy as found by the trial judge, this should have been a simple case of trespass. Mr. Courtenay for Titan disagreed with that position.

[31] The trial judge found that the search was executed in an unreasonable and excessive manner, though not in an oppressive manner, and this was in breach of Titan's *constitutional rights against arbitrary or unlawful interference with its privacy*. At paragraph 123 of his judgment, he listed the things that ought to have been done by the AG and FIU. This includes that the police and officers of the GOB and the FIU ought to have taken some measures not to remove Titan's files, records, computers, computer servers and electronically stored information which were unrelated to the warrant. The trial judge made a finding that some of these records were incapable of constituting evidence of the offences alleged in the request since they were related to clients who were not US citizens.

[32] The counsel for the FIU in the court below had argued that if police officers executed the warrant in an unreasonable or unlawful manner, they would be personally liable to Titan in a private claim in tort not in a public law claim which was filed by Titan.

[33] I am unable to say whether the trial judge considered the proviso to section 20 of the Belize Constitution which gives him the discretion to decline to exercise his powers

under the said section, that is, if he is satisfied that adequate means of redress for the contravention alleged are available to Titan under any other law. The trial judge had considered the case of **AG of Jamaica v Williams [1997] 3 WLR 399**, where there was seizing of items unrelated to the indictment issued by USA. In that case, there was discussion on the alternative remedy of trespass. The distinction however with that authority is that the proviso to section 25(2) of the Jamaica Constitution is mandatory as it provides that *“the Supreme Court shall not 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, ”* and section 20 of the Belize Constitution is discretionary.

[34] In any event, even if the trial judge had considered the proviso to section 20, that exercise of his discretion had not been challenged. I will therefore, refrain from making a determination on that issue of the alternative remedy of trespass. This is especially in light of the position taken during oral arguments before the Court, to focus on the issue of damages. The main issue to be resolved by this Court is whether Titan should have been awarded damages and if so, the amount of damages.

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

[35] GOB and FIU have appealed against the finding of the trial judge that the search of Titan’s premises was carried out in an unreasonable and excessive manner and that Titan should be awarded damages for breach of its constitutional rights. The declaration granted by the trial judge in this regard was:

*“(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 event 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.”*

Causation

[36] Mr. Barrow SC contended that the trial judge gave no real consideration to the issue of causation, and his decision to award damages naturally flowed from that approach. It was further submitted that the closest the trial judge came to consider the nexus between breach of constitutional rights and the damage alleged to have been caused by the breach, was in the process of arriving at a quantification of damages. The judge at paragraphs 129 and 145 of his judgment said:

“[129] I will also order damages, to be assessed, for breaches which I have found but bearing in mind, in assessing such damages that Titan has not had a licence to carry on business of securities broker/dealer since 9th September 2014, and that there has been no claim in the present proceedings in relation to the suspension of such licence.”

“[145] ...

(g) The future profitability and viability of the company was greatly compromised (because of the indictment, and other bad publicity about its activities in Belize and elsewhere) and illustrated that it is likely that the company’s credibility had been largely eroded which would affect its future marketability and profitability and therefore would not have been able to attract much future business.

(h) Titan’s trading licence has been suspended since the 15th day of September, 2014 which affects its status to trade.”

[37] Senior counsel further argued that the above shows that the judge was engaged with the quantum of damages. He argued that this was the wrong approach as Titan had to firstly prove that the breach of its constitutional rights by GOB and FIU caused the shutting down of its business since that was the loss alleged. He referred to the evidence of Kevin Leach on behalf of Titan where he said that he was unable to provide to the court an estimate of the loss and damages suffered since GOB and FIU had retained all the records and papers. Mr. Barrow contended that it was the suspension of the licence and not the seizure of the property that caused Titan’s business to shut down.

[38] Learned senior counsel, Mr. Courtenay in response to the issue of causation, argued that the shutting down of Titan’s business was as a result of the search and seizure of its property.

[39] In my opinion, the suspension of Titan's licence ultimately led to the shutting down of its business. The search and seizure of Titan's property, though excessive did not cause the shutting down of the business. Titan cannot operate even though its property had been returned.

[40] Regardless of the cause of the shutting down, the search in my opinion, as found by the trial judge, 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. I would therefore, propose 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. Learned senior counsel, Mr. Barrow did not pursue this breach in oral arguments and he must be commended for taking that position. The focus of senior counsel was on the damages awarded to Titan.

Whether Titan was entitled to damages for breach of its constitutional rights

[41] As a result of the finding of breach of Titan's constitutional rights by the trial judge, he made an order for GOB and FIU to pay Titan US\$4,460,000.00 as compensatory damages.

[42] Learned senior counsel, Mr. Barrow contended that if the Court proceeds on the basis that the breaches of constitutional rights caused damage, such damage was negligible. The reason being is that the breaches disrupted a business that had no value. There was the unsealing of the indictment the day before the search and seizure and on the day of the search Titan's licence was suspended.

[43] Mr. Courtenay submitted that while the court is to be guided by the common law measure of damages when assessing damages for breach of constitutional rights the court is not strictly confined to the principles of common law such as causation. Counsel argued that if it is to be applied, it is done in a relaxed manner. He relied on the case **Attorney General v Tunoa [2006] 2 NZLR 457** in which Hammond J expressed great caution in confining damages in constitutional claims to the principles of private law. At paragraphs 300 to 301 he said:

[300] ...To move to a “tort-based” approach raises its own kinds of conceptual and practical difficulties. Damages in tort are generally recoverable **as of right**, whereas public law remedies are traditionally “**discretionary**”. Common law principles such as causation, remoteness, and mitigation may not fit well with cases where fundamental rights have been breached; neither do the old common law distinctions between compensatory, aggravated and exemplary damages. As I put it in *Attorney General v Udompun* [2005] 3 NZLR 204 at para [206], “the private law tail should not be permitted to wag the public law dog.” I consider that if damages under the BORA are regarded as a form of public law remedy the court can be more flexible: common law distinctions could be applied where suitable or by analogy but a different approach could be taken where cases require it. To take two simple illustrations, a claimant should not recover for loss which could have been avoided; and a claimant’s own “wrongdoing” or provocative conduct (see *Lane v Holloway* [1968] 1 QB 379) could be taken into account – although as I cautioned in *Udompun* at para [215] there is danger in pressing these “contributory” or “personal factor” concerns too far.

[301] In short, this is preeminently an area in which the compensation should be tailored to the particular interest protected; in the particular contextual setting – including giving “*full and proper recognition .. to the ‘public’ dimensions of the breach of rights*” (*Udompun* at para [214]). The heavy hand of the older common law principles should not operate restrictively; but neither should the sort of guidance hard won over centuries of adjudication in those cases lightly be put to one side.”

[44] The trial judge in the instant case, correctly stated the law, under the heading of “*The Law in relation to Damages*”, that an award of damages may be awarded for a contravention of constitutional rights, but such award is discretionary. Also, that damages must be proven.

[45] Section 20 of the Belize Constitution confers a wide discretion on the Supreme Court to grant relief to an aggrieved party and this includes an award of monetary damages.

[46] In **Maya Leaders Alliance et al v The Attorney General of Belize** [2015] CCJ 15 (AJ), (an authority relied upon by the trial judge), the CCJ at para 7, stated three requirements which a litigant has to satisfy to obtain a monetary award under section 20 of the Belize Constitution, that is: *“(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 the appropriate remedy or redress for the contravention.”*

[47] In **Maharaj v Attorney General of Trinidad and Tobago (no. 2)** [1978] 2 All ER 670, the appellant who had been imprisoned for seven days for contempt of court had applied to the High Court for redress for the contravention of his constitutional rights not to be deprived of his liberty except by due process of law. Lord Diplock explained the meaning of redress at paragraph 679 of the judgment as thus:

“What then was the nature of the ‘redress’ to which the appellant was entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning, which in the Shorter Oxford Dictionary is given as: ‘Reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this.’

[48] As a result of that definition, the Privy Council for the first time made an award of damages by way of constitutional relief. However, this is not the only form of redress. The CCJ in the **Maya Leaders Alliance** case at paragraph 61 discussed this issue and relied on the case of **James v Attorney General of Trinidad and Tobago** [2010] UKPC 23. The CCJ said that the Privy Council in the latter case *“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. In that case the Board stopped at the award of a declaration and did not award monetary compensation because the applicant had suffered no material disadvantage from the violation.”*

[49] The first two requirements in the **Maya Leaders Alliance** case had been satisfied in the instant case. There was a contravention of Titan’s constitutional rights against arbitrary or unlawful interference with its privacy pursuant to section 14 of the Belize Constitution. The question to be answered is whether Titan had satisfied the court that

a monetary award for pecuniary damages was an appropriate remedy or redress for the contravention. The trial judge at paragraph 148 of his judgment came to the conclusion that Titan was entitled to be granted redress for breach of its constitutional rights and that he should exercise his discretion to make an award of substantial damages.

Pecuniary damages awarded by trial judge

[50] The trial judge awarded Titan US\$4,460,000.00 as compensatory damages for breach of its constitutional rights. In my view, the judge erred when he awarded pecuniary damages to Titan for breach of its constitutional rights. 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 basis that Titan did not have a licence to carry on business of securities broker/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.

[51] Furthermore, the evidence shows that Titan had received most of its records and computers from the AG, but could not continue to operate its business because the licence to do so was suspended on the day of the search and seizure, and it had never been renewed. That licence has since expired as Titan had to renew its licence annually. It is obvious it could not renew the licence because the suspension remained in effect. As such, it was not only the indictment by the US which prevented Titan from operating its business. Titan could not lawfully operate its business without a valid trade licence. (Section 7(2) of the *International Financial Services Commission Act*).

[52] In relation to documents and other properties that were not returned as ordered by the trial court, there is no evidence that Titan has sought any remedy in the court below for non-compliance of that order.

Would the outcome have been different if the contravention had not occurred?

[53] The simple question is whether Titan had established the causal link between the harm for which it sought damages and the breach of its constitutional rights. Titan had to prove that the shutting down of its business for which it sought US\$22.3 (as the value of the business) was caused by the breach of its constitutional rights. In my view, the taking of its property was not the cause of the shutting down of its business. There was an independent intervening factor. Although GOB returned most of Titan's property, it could not continue business because of the suspension of its licence by the Commission. Titan did not have a trade licence to continue its business pursuant to *section 7(2) of the International Financial Services Commission Act, Chapter 172*. Titan therefore, could not prove that its business would have been up and running if the breach of its constitutional rights had not occurred. As such, there was no basis for the trial judge to award pecuniary damages for the shutting down of Titan's business.

[54] Kevin Leach in his affidavit filed on behalf of Titan was unable to prove any pecuniary losses suffered by Titan. At paragraph 27 of his affidavit Mr. Leach deposed that:

"27. The Claimant (Titan) carried on a successful business. It made profits on an annual basis. The effect of the search and seizure and continued retention of the property of the Claimant has completely shut down its business. As a direct result, Titan has suffered and continues to suffer substantial loss and damage to its reputation and business. Unfortunately, I am not able to provide the court with an estimate of the said loss and damages since the Defendants have retained all the records and papers of the Claimant. Once Titan has access to its records and papers it will present a full estimate of its losses."

[55] Titan did not address the suspension of its licence which has since expired and was never renewed. It could not trade and carry on business without a licence as this would have been illegal. In fact, the suspension of the licence was not challenged as acknowledged by the trial judge in his judgment.

Difficulty encountered by the trial judge in relation to pecuniary damages

[56] The trial judge at paragraph 149 of his judgment said that, "*... the parties have not been able to assist the court by arriving at an agreed or even a ball-park figures which*

this court could work from. I will therefore have to do the best I could based on the evidence which has been presented to me.”

[57] The evidence he considered is that of Titan’s expert, Mr. Reynaldo Magana, who provided and estimate of Titan’s business using the “fair market value” and concluded that the value was US\$22,273,700.00. He also considered GOB’s expert report from Jose Bautista. (I do not find it necessary to look at the details of the report based on my opinion that Titan was not entitled to pecuniary damages). The trial judge had fundamental difficulties with both experts, Mr. Magana and Mr. Bautista. I find it necessary to quote paragraphs 150 to 155 of the trial judge’s judgment, which shows the difficult task he faced and erroneously arrived at an approximate figure without any evidence of such pecuniary loss. The trial judge stated:

“[150] I must say that despite the excellent cross-examination of Mr. Bautista by Counsel for Titan, for many of the reasons which was outlined in the expert report and testimony of Mr. Bautista, I am 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. This has also been complicated by the indication given that the conclusion arrived at was in effect tentative or provisional.

[151] On the other hand, the expert evidence of Mr. Bautista did not provide an independent calculation of the possible damages in the manner in which Titan’s expert did; but simply attempted to criticize or poke holes, as it were, in the evidence of Titan’s expert testimony. This court would have instead benefited from having a single expert or an assessor assist the court by providing a report to advise me with regard to the evidence of the expert witnesses.

[152] In the final analysis, this court has determined that the **estimate of pecuniary value of Titan’s business** which was impacted by breaches of its constitutional rights has been significantly overestimated by as much as 80%.

[153] In particular, even assuming that Titan's expert report was correctly estimated then a large part of the estimate attributable to the future profitability and viability of the company was greatly compromised because of the Indictment and other bad publicity about its activities in Belize and elsewhere.

[154] I have also come to the conclusion that it is likely that the company's credibility had been largely eroded which would have affected its future marketability and profitability and therefore would not have been able to attract much future business. Finally and most importantly that its trading license has been suspended since the 15th day of September, 2014 (in relation to which there is no claim in the present proceedings) which affects its status to trade and has nothing to do with the constitutional breaches.

[155] The total effect of the 80% reduction from the calculated loss would result in the sum of approximately US\$4,460,000.00, which sum this court will order the Defendants to pay to the Claimant as compensatory damages.

[156] No order will be made for vindicatory damages.”

(emphasis added)

[58] The trial judge, as shown from the above awarded pecuniary damages to Titan, being the value of its business. It is without a doubt that he was faced with a very difficult task since there were many factors before him which he had to consider. In the end, it is my view, that he erred in awarding pecuniary damages since the business could no longer lawfully continue its operation.

Was Titan entitled to non-pecuniary damages

[59] Damages under this heading was not awarded by the trial judge and this was not sought by Titan. However, I will briefly discuss it, since the issue of damages for emotional stress was raised during the hearing of the appeal.

[60] The police officers had a lawful warrant but conducted the search and seizure on Titan's premises excessively. They acted in a very high-handed manner during the operation. The officers of Titan were not given a copy of the warrant and no list of the

properties that were seized had been provided to them. It is obvious that Titan's employees must have suffered some emotional distress during the search and seizure. The question is whether Titan, a company, was entitled to damages for emotional distress. The authorities show that damages for emotional distress are available only to individuals (natural persons) but not legal persons.

[61] At the hearing of the appeal, two cases from this jurisdiction were mentioned in relation to awards for emotional distress. These cases are in relation to individuals and not companies - **Brian Brown v Attorney General**, Belize Supreme Court Action No. 202 of 2003 and Jitendra **Chawla (aka) Jack Charles** v Attorney General, Belize Supreme Court Action No. 2008 of 2002.

[62] In the case of **Brian Brown**, the police and a city council employee, entered on the premises of Mr. Brown in Belize City and demolished his fence and dirt box. Conteh CJ as he was then, found that the entry on Mr. Brown's premises constituted a wrongful entry thereon within the contemplation of section 9(1) of the Constitution and constituted as well an arbitrary and unlawful interference with Mr. Brown's privacy and home within the contemplation of section 14(1) of the Constitution. The court awarded to Mr. Brown, by way of consequential relief, the sum of \$20,000.00 for the emotional distress suffered as he watched haplessly as his property was being destroyed.

[63] In the **Chawla case**, the applicant complained that his constitutional rights as provided for in sections 9, 14 and 17 of the Constitution of Belize had been contravened by officers of the Customs Department who wrongfully entered and searched his premises and illegally seized 12 computers and 33 bags of rice for which customs duties had already been paid and which were lawfully in the custody of the applicant. The court found and declared that pursuant to sections 9 and 14 of the Belize Constitution, the applicant's rights were violated by agents of the Customs Department when they unlawfully searched his premises and removed the twelve computers and thirty-three sacks of rice. An order was made by the court for the said property to be returned to the applicant. The court did not award damages for loss of business but awarded damages for embarrassment, humiliation and distress.

[64] I am not aware of any authorities in this jurisdiction or other jurisdictions in which companies had been awarded compensation for emotional distress. An award of aggravated damages is designed to compensate a successful claimant for distress and injury to feelings caused by the conduct of a defendant. In the case of a company there is no possibility in making such an award. As such, I am unable to propose any award of damages under this heading.

Titan's notice to vary judgment

[65] Titan filed a notice to vary the judgment of the trial judge to add the following;

1. 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 Constitution;
2. A declaration that the Minister acted unlawfully, unreasonably and disproportionate in deciding to comply with the US request;
3. A declaration that the search and seizure warrant issued by the Magistrate pursuant to the Act was invalid and unlawful;
4. 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;
5. An Order for damages in the sum of US\$22.3 Million; (This ground was later amended. Titan argued that the award of the trial judge of US\$4,460,000 Million should not be interfered with by this Court).
6. An order for costs in the sum of 100% of the value of the claim;

[66] In my view, there is no merit in the arguments made for Titan under the cross-appeal. I am in agreement with the findings of the trial judge and as such I would propose that the cross-appeal be dismissed. For clarity, I will briefly address the findings of the trial judge.

[67] Titan sought to vary the trial judge's decision to add that section 18 of the Mutual Legal Assistance and International Cooperation Act, ("the Act") is inconsistent with the fundamental rights guaranteed by sections 9 and 14 of the Constitution. The judge found

that section 18 of the Act is constitutional and as such he was unable to grant the declaration sought that the section is inconsistent with the fundamental rights guaranteed by the Belize Constitution. He was also unable to grant the declaration that the search was in breach Titan's constitutional rights (as being disproportionate and in excess of statutory authority). He did not grant these declarations because of his finding that section 18 of the Act ought to be read as consistent with sections 9 and 14 of the Belize Constitution.

[68] Section 18(1) and (2) of the Act makes provisions for limitations and safeguards which require that the power to search is "*only a power to search to the extent that is reasonably required*" for the purpose of discovering such evidence if and only where there may be existing proceedings, such as a filed indictment, or an arrest, in a foreign state." The trial judge correctly interpreted section 18 which 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) 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 authority 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....”

[69] As noted by the trial judge in his judgment, though the Act provides for rules to be made, to date no such rules had been made to assist with the interpretation of the terms of the Act. It is suggested that the Minister with such responsibility should seek to put these rules in place. Abel J was put into a position to seek guidance in the interpretation of section 18, from other provisions under the Act, namely section 26, which is set out at paragraph 62 of his judgment. Section 26 applies where there is a criminal matter in a foreign state and there are reasonable grounds for believing that there are items in Belize which is relevant to the criminal matter. The judge in my view, did not read in words into the legislation as argued for Titan. At paragraph 68 he said:

“These provisions, together with the limitations and reasonable safeguards outlined above, make any search and seizure carried out under a Warrant issued under Section 18 of the Act, both reasonable and proportionate (*S v Makwanyane 1995 (3) SA 391 (CC) at para 104*) in a democratic society; and provides, in my view, adequate legal safeguards to protect and safeguard the public interest from the risk of any excessiveness or arbitrariness (in any search); as well as against the unlawful invasion of privacy. All of these limitations and reasonable safeguards would thus preserve the constitutionality of this section, even without resort to the presumption of constitutionality which exists in relation to any constitutional challenge of provisions in any legislation (see *Attorney-General of St. Christopher and Nevis v Lawrence (1983) 31 WIR 176; Gulf Rental Ltd v Evelyn et al Suit No 538/1982 (Barbados); King v the Attorney General 44 WIR 52 p 66; Ramesh Dipraj Kumar Mootoo v Attorney-General of Trinidad and Tobago [1976] 28 WIR 304*).”

[70] 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.

[71] In my opinion, there is no basis in varying the decision of the trial judge as he did not imply and impose safeguards into section 18. The finding by him that section 18 ought to be read as consistent with the fundamental rights guaranteed by sections 9 and 14 of the Belize Constitution should be upheld. It follows that the trial judge correctly found that section 18 of the Act does not authorize the conduct of unlawful and unconstitutional search and seizure and this finding ought to be confirmed also.

[72] Further, the trial judge had not erred when he found that the AG was correct to provide assistance pursuant to the request. The request disclosed evidence implicating Titan and others in the alleged offences on the unsealed US Indictment. As such, the Minister could not have been acting unlawfully, unreasonably and disproportionate in deciding to comply with the US request.

[73] Furthermore, the declaration sought to vary the decision of Abel J to add that the search and seizure warrant issued by the Magistrate pursuant to the Act was invalid and unlawful is without merit. I agree with the judge that the said warrant “was bad and in

excess of the powers of the Magistrate, in so far as it authorized officers of the FIU to be present” and to take part in the search and seizure. He correctly found that the bad part of the warrant may be severed from and not invalidate the rest of the warrant and any action done under the good part is not unlawful.

[74] The issue of damages was adequately addressed under the appeal.

[75] Accordingly, I would propose that the cross-appeal should be dismissed.

Costs on appeal and cross-appeal

[76] FIU, a statutory body, had not made a challenge in the court below as to whether it was a proper party to the constitutional claim brought by Titan. As such, FIU will be treated by this Court as a proper party.

[77] The AG and FIU have succeeded in this appeal in relation to damages. Titan has also succeeded on the basis that the search of its premises was carried out in an indiscriminate, unreasonable and excessive manner. As such, it is my opinion, that each party should bear its own costs in this Court and in the court below.

Disposition

[78] The orders that I propose to make would be the following:

1. The appeal is partly allowed. The order by the trial judge awarding damages to Titan in the sum of US\$4,460,000.00 as compensatory damages is set aside.
2. The declaratory order of the trial judge 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,*” should be upheld.
3. The cross-appeal to vary the decision of the trial judge is dismissed.

4. Each party to this appeal shall bear its own costs of the appeal and cross-appeal. This order for costs is provisional, to be made final after seven days unless either party will have applied for a different order for costs, which will be dealt with according to the practice of this Court.

HAFIZ-BERTRAM JA