COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law Side No. 232 of 2001

IN THE MATTER OF ARTICLES 15, 20, 21 & 27 OF THE CONSTITUTION OF THE BAHAMAS

AND

IN THE MATTER OF THE FINANCIAL INTELLIGENCE UNIT ACT, 2000

BETWEEN

FINANCIAL CLEARING CORPORATION

Applicant

AND

THE ATTORNEY GENERAL

Respondent

APPEARANCES:

Mr. Alfred Sears with Messers Arnold Forbes & Clyde Newton for the Applicant.
Mr. Bernard Turner with Mrs. Cheryl Bethel & Mr. Garvin Gaskin for the Respondent.

RULING:

ALLEN. J.:

The applicant sought a number of declarations in its amended Notice of Motion filed herein on February 28, 2001, many of which were overlapping and were, in the course of the hearing, condensed to the following:-

(1) A declaration that the restraining and subsequent freezing of the Applicant's accounts at Barclays Bank on the 26th January, 2001 by the Financial Intelligence Unit, purportedly pursuant to Section 4 of the Financial Intelligence Act, 2000, was ultra vires the Constitution, as these actions violated the Applicant's *right* to the protection of the law under Article 20 of the Constitution and the Applicant's right to protection from the deprivation of property without compensation under Articles 15 and 27 of the Constitution.

(2) A declaration that any provision of the Financial Intelligence Act which purports to empower the Director of the Financial Intelligence Act, 2000 to freeze the accounts of the Applicant is ultra vires the Constitution as it places a jurisdiction, characteristic of the jurisdiction formerly exercised exclusively by and reserved in the Supreme Court, in the Financial Intelligence Unit, an executive body whose members are not ensured by the Constitution the kind of protection of tenure, procedure for removal, salary and other conditions of service given the Judiciary by the Constitution.

(3) A declaration that the Applicant, to the extent that it was subjected to pain, penalties, deprivations and being adversely affected by having its bank accounts frozen by the Financial intelligence Unit, was entitled to be told the case made out against it and be afforded a fair opportunity of answering the case consistent with the Constitution and the Rules of Natural Justice.

(4) A declaration that the Applicant, pursuant to Articles 15 and 21 of the Constitution, and the confidential relationship between the Applicant and Barclays Bank, inter alia, had a reasonable expectation of privacy in its personal financial records obtained from Barclays Bank, as they constituted part of the biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state.

(5) A declaration that, given the Applicant's reasonable expectation of privacy in its banking records, the intrusion by the Financial Intelligence Unit into the banking records of the Applicant created an obligation on the Financial Intelligence Unit to seek judicial pre-authorisation for its intrusion into the confidential banking records of the Applicant.

(6) A declaration that the issuance of the restraining and freezing orders by the Financial Intelligence Unit on the Applicant's accounts at Barclays Bank on the 26th and 29th January, 2001 respectively before the promulgation and publication of any regulations, rules and guidelines are conditions precedent to the proper exercise of the statutory powers under the Financial Intelligence Act, 2000.

(7) Such Orders, Writs, or Directions, pursuant to Article 28 of the Constitution as may to this Honourable Court seem appropriate for the purpose of enforcing of any right or freedom to the protection of which the Applicant is entitled.

And that the costs of and occasioned by this Motion may be provided for."

In support of its application, the applicant relied on the affidavits of Vandalyn McKenzie filed 7 and 21 February, 2001, and that of Valentino Fernandez filed on 6 February, 2001.

The respondent did not file any affidavits in response.

The factual matrix against which the application is made is that the Financial Clearing Corporation is an international business company incorporated in the British Virgin islands and has its registered business office located at Ansbacher (BVI) Limited in the British Virgin Islands. By order of the Financial Intelligence Unit dated 26 January, 2001, made pursuant to section 4(2)(b) of the Financial Intelligence Unit Act, 2000

(hereinafter "the Act"), the applicant was ordered to **"refrain from any existing transactions"** on its account at Barclay's Bank for a period of three days. This was followed by a freezing order on 29 January, 2001, made pursuant to section 4(2)(c) of the Act which had the effect of freezing the assets In that account for five days.

The freezing order was not served on the applicant and its principals by the Financial Intelligence Unit, and it learned of Its existence from Barclays. The freezing order was discharged by this Court on 5 February, 2001, and replaced by a restraint order made pursuant to section 26 of the Proceeds of Crime Act, 2000. The restraint order was unsuccessfully challenged by the applicant, and remains in effect.

The Act establishes the Financial Intelligence Unit as the agency responsible for receiving, analyzing, obtaining and disseminating information which relates to, or may relate to, proceeds derived from offences under the Prevention of Bribery Act, drug trafficking offences, money laundering offences and the other offences stipulated In the Proceeds of Crime Act, 2000. Section 4(2) of the Act gives the Unit certain powers to effect these purposes. including the power to restrain transactions on accounts, to freeze accounts, and to provide information which may relate to the commission of the aforementioned offences to the Commissioner of Police and to foreign intelligence units.

Counsel for the applicant challenged the constitutionality of paragraphs (b) and (c) of section 4(2), firstly, on the ground that those provisions are in breach of Article 27 of the

Constitution in that they provide for an Illegal taking of property.

Counsel for the respondent argued that the burden of proving the unconstitutionality of the provisions rests on the applicant. He submitted further that without conceding that the restraining of a financial transaction or the freezing of a bank account is a deprivation of property, that they are investigative tools to prevent dissipation of the proceeds of crime pending an Investigation and excepted by sub-paragraph (j) of Article 27(2).

Section 4(2) of the Act, so far as it is relevant to these proceedings; provides:

"(2) Without limiting the foregoing and notwithstanding any other law to the contrary, the Financial Intelligence Unit:

(a) shall receive all disclosures of information such as are required to be made pursuant to the Proceeds of Crime Act, 2000 which are relevant to its functions, including information from any foreign Financial Intelligence;

(b) may upon receipt of such disclosures as are referred to in paragraph (a), order in writing any person to refrain from completing any transaction for a period not exceeding seventy-two hours;

(c) may upon receipt of a request from a foreign Financial Intelligence Unit or law enforcement authority including the Commissioner of Police of The Bahamas order any persons to freeze a person's bank account for a

period not exceeding five days if satisfied that the request relates to the proceeds of any of the offences specified in the second schedule: Provided that an aggrieved person may apply to a judge in chambers to discharge the order of the Financial Intelligence Unit and shall salve notice on the Financial Intelligence Unit to join the proceedings but such order shall remain in full force and effect until the judge determines otherwise;

(d) may require the production of such information excluding information subject to legal professional privilege that the Financial Intelligence Unit considers relevant to fulfil it's functions;..."

And Article 27 of the Constitution, so far as it is relevant, provides:-

"(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say:

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit or the economic well-being of the community; and

(b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition —

(i) for the making of prompt and adequate compensation in the circumstances; and

(ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation; and

(d) any party to proceedings in the Supreme Court relating to such a claim is given by the law the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a Court of original jurisdiction.

(2) Nothing in this Article shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property —

(j) for so long as may be necessary for the purposes of any examination, investigation, trial or inquiry."

It is not disputed that the applicant was the owner of the bank account restrained and subsequently frozen by the Financial Intelligence Unit and that the account contained a substantial amount of money. As I understand the law relating to a current bank account, the proceeds in such an account are borrowed by the bank, which undertakes to pay them back to the customer on demand. The relationship between the customer and the bank then is creditor and debtor and the promise to repay includes a promise to repay any part of the amount due against the written order of the customer and such written orders as may be outstanding In the ordinary course of business. See **Joachimison v Swiss Bank Corp.** [1921] 3 KB 110.

Is the applicant's contractual right to have its money repaid on demand, **'property'** within the meaning of Article 27? I would answer that affirmatively, for it has a right to receive from its bank on demand, money deposited in that bank account and if it is not paid, it can sue for it. Lord Diplock, in the **Attorney General of the Gambia v Momodou Jobe** [1985] LRC 556 at page 565 construing section 15(1) of the Constitution of the Gambia, which includes the exact words as Article 27 said **"'property' in section 18 (1) is to be read in a wide sense, it includes chases in action such as a debt owed by a banker to his customer. The customer's contractual right against his banker to draw on his account (i.e. to claim payment of the debt or any part of it on demand) is embraced in the expression "right over or interest in" the debt…."**

In my judgment, the expression **"Interest in or right over property of any description"** in Article 27, includes money in a bank account.

Was the applicant's property compulsorily acquired by the actions of the Financial Intelligence Unit? **"Compulsory acquisition",** in my view, means the kind of acquisition which amounts to deprivation. I have no doubt that the actions of the Financial Intelligence Unit In stopping the completion of transactions on the account for seventy-two hours and the subsequent freezing of the account, deprived the person owning that account from the enjoyment which normally accompanies rights to, or interest in the money in an account, including the freedom to withdraw, transfer, spend, or invest it, and is a compulsory acquisition.

I am fortified in that view by the view expressed by Lord Diplock in the **Attorney General of the Gambia v Momodou Jobe** (cited above) at page 565 where he also said: **"... compulsory acquisition of any right over or interest in property includes (as is evident from section 18(2)(a)(vii)) temporary as well as permanent requisition".**

But do these provisions fall within any of the exceptions in paragraph (2) of Article 27 of the Constitution? Orders which restrain particular transactions and freezing orders are useful tools for investigative purposes and are commonly used in many democracies to assist in the investigation of criminal offences particularly drug trafficking and money laundering offences. They buy time for law enforcement agencies and prevent the spiriting away of

suspected proceeds before the nefarious activities can be investigated and prosecutions commenced. I am satisfied that these powers are for such purposes and that the duration of the orders in the Act, is limited to such time as may be necessary for such investigations. I find therefore that the provisions certainly fail within the exception in paragraph 2(j) of Article 27.

But Counsel for the applicant further submitted that in order for such a law to be constitutional, there must be prior judicial authorisation. He argued that the power must be vested in a person acting In a judicial capacity and not in a member of the public service exercising executive functions.

For that proposition, he relied heavily on the case of **Attorney General of the Gambia v Momodou Jobe** (above), in which the Privy Council considered, inter alia, the constitutionality of sections 8(1) and 10 of the Special Criminal Court Act 1979, the relevant provisions of which are set out below

"8. (1) Where a complaint is lodged to the Police to investigate any person suspected of having committed an offence in respect of which public funds or public property is affected, the police shall immediately apply to a magistrate for an order to be made freezing any accounts operated in the name of the person being investigated or in any other name or an account of which he is a signatory.

10. (1) Where any account is frozen under this section, no bank shall pay out any moneys from that account unless the Inspector General of Police by writing under his hand approves any such payment."

The Privy Council found that section 10 conferred upon the Inspector General of Police, an executive discretion to decide what payments should be permitted out of a frozen bank account, and was a contravention of section 18 of the Constitution.

Lord DipIock at page 565 expressed the view **"To confer upon a member of the public service, in the exercise of the executive powers of the State, a power at his own executive discretion to prevent the bank's customer from exercising his contractual right against the bank to draw on his account on demand would, in their Lordships' view, amount to a compulsory acquisition of a right over or interest in the customer's property in the debt payable to him by the banker, and a law which provided for the exercise of such an executive discretion would contravene section 18 of the Constitution. It would be ultra vires and void".**

Lord Diplock did not give reasons for the above view and as it turned out, the Privy Council did not declare section 10 ultra vires, but saved the section by the application of the maxim **"magis est ut res valeat quam pereat"**, by which ambiguity in legislation may be resolved and words incorporated to give effect to the inferred Intention of parliament.

Their Lordships determined that section 10 could not be read in isolation. but as if It were an integral part of section 8(1). In that way the magistrate, when making a freezing order, would direct what payments out of the account, if any, were to be authorised by the Inspector General of Police under section 10. The exercise of the power was thereby subject to judicial pre-authorisation. Counsel for the applicant also commended for my

consideration, the case of **Hinds V The Attorney General** [1977] AC. 195, which was a decision of the Privy Council on appeal from the Jamaican Court of Appeal. The Board observed in that case, that all constitutions on the Westminster model deal under separate Chapter headings with the legislative, the executive and the judicature and that there was implicit In such constitutions, the basic principle of the separation of powers which applies to the exercise of the respective functions by the three organs of government.

Lord Diplock commented at page 225-6 **"In the field of punishment for criminal offences, the application of the basic principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminster model makes it necessary to consider how the power to determine the length and character of a sentence which imposes restrictions on the personal liberty of the offender is distributed under these three heads of power ... in the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence……What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an Individual member of a class of offenders."**

The Bahamas has a similar type constitution as Jamaica, and the principle of the separation of powers is also implicit in its Constitution. Freedom from deprivation of property is a fundamental right provided for in the Constitution and Article 28 provides for the enforcement of such rights by the Supreme Court. There is no doubt that Parliament is competent to enact a provision to freeze bank accounts for a limited period for the purposes of investigation, however, because such a power is an intrusion on the right of a person not to be deprived of his property without compensation, the question is whether it can lawfully put such a power in the hands of the executive. Is such a power, like the power to select punishment in **Hinds**, essentially a judicial function?

In **J. Astaphan &Co. (1970) Ltd. V Dominica (Comptroller of Customs)** [1996] E.C.SC.J.I No. 28 Civil Appeal No. 8 of 1994 of the Eastern Caribbean Supreme Court (Court of Appeal), Justices of Appeal Byron and Singh found that a provision which allowed a customs officer to exact a sum from an importer In excess of the estimated duties on goods as a penalty, was **"inconsistent with the basic principle of separation of powers and contravenes the appellant's fundamental right .. .against compulsory acquisition of property..."**

In **Noordally v Attorney General** [1987] L.R.C. (Const.) 599, the Supreme Court of Mauritius concluded that a statutory prohibition of bail was unconstitutional. Moolan C.J. observed at page 603:

"The whole of our Constitution clearly rests on two fundamental tenets, the rule of law and the juxtaposition (or separation as it is more often called) of powers... We conclude therefore that it is not in accord with the letter or

spirit of the Constitution, as it presently stands, to legislate so as to enable the Executive to overstep or bypass the Judiciary in its essential roles, namely those of affording to the citizen the protection of the law and, as guardian of the Constitution, to ensure that no person's human rights or fundamental freedoms are placed in jeopardy."

At the other end of the spectrum, in **Grape Bay Ltd v Bermuda (Attorney General)** [1999] J.C.J No. 46, Privy Council Appeal No. 69 of 1998, the Prohibited Restaurant Act, 1997, purported to prohibit the operation of a restaurant which **was "operated in any manner, whether through distinctive name, design, uniforms, packaging, decoration or otherwise, which reasonably suggests a relationship with any restaurant or group of restaurants operating outside Bermuda."** This law was challenged by the McDonald Restaurant chain.

The Privy Council in that judgment noted: **"Their Lordships would accept that Bermudians are in the best position to know what the public interest of Bermuda requires. But the Constitution lays down a separation of powers between the executive, legislature and judiciary. On a matter such as the desirability or otherwise of franchise restaurants, which is a pure question of policy, raising no issue of human rights or fundamental principle, the decision making power has been entrusted to those Bermudians who constitute the legislative branch of government and not to the judges."**

These dicta underscore the different roles of the three branches of government, the essential role of the court being the protection of fundamental rights and freedoms and the administration of justice. They support my view that the power to stop transactions on a bank account and the power to freeze a bank account, ought properly to be vested in the judiciary.

But Counsel for the respondent argued that the power to freeze an account for a limited period was analogous to the power to arrest and detain a person for a limited period without judicial pre-authorization pursuant to Article 19 (1)(d) of the Constitution. I do not accept that analogy can be used to weaken the principle of the separation of powers and excuse the infringement of the Constitution. The power of a police officer to arrest and detain a person without a warrant on reasonable suspicion, is an old common law power which is recognized by the Constitution as an exception to the right not to be deprived of one's liberty. Freezing orders are of recent vintage and the power to grant them has always been vested in the courts and is essentially a judicial power. See **Jobe** (above).

It was further argued for the respondent that the proviso to section 4 (2)(c), which gives an aggrieved person an opportunity to apply to a judge In chambers to discharge a freezing order, subjects the continuance of a freezing order to Judicial process, cures the defect and saves section 4 (2)(c). I do not agree. If the initial vesting of the power in the executive is unconstitutional, it cannot be made constitutional by providing for the review of the exercise of that power by the judiciary.

I am aware of the presumption of constitutionality, which was described by the Privy Council in **Mootoo v The Attorney General for Trinidad and Tobago [1979] 30 WIR 411**, as an insuperable object to an applicant seeking to have a provision declared unconstitutional. But Lord Diplock in **Attorney General of the Gambia V Momodou Jobe** (above), said the presumption was **"but a particular application of the canon of construction embodied In the Latin maxim mag[s est ut res valeat quam pereat which is an aid to the resolution of any ambiguities or obscurities in the actual words used in any document that is manifestly intended by it's makers to create legal rights or obligations."**

Article 2 of the Constitution, which declares the Constitution to be the supreme law of The Bahamas, also imposes an obligation on the court to strive to save legislation if it can fairly read into the legislation. precise implications, so as to make it conform to the Constitution.

I am unable to read any words into these provisions which would subject the exercise of the power to control by the judiciary before the exercise of the power and save the provisions from being unconstitutional.

In my judgment then, and to the extent that paragraphs (b) and (c) of section 4(2) of the Act vest the powers to restrain transactions and to freeze accounts in the director of the Financial Intelligence Unit and not in the court$_1$ they contravene the doctrine of the separation of powers and are unconstitutional.

Having identified the element of unconstitutionality in paragraphs (b) and (C), it follows that all that is required to make the provisions comply with the Constitution, is to vest the power to grant the orders in the judiciary and not in the director of the Financial Intelligence Unit.

The applicant further challenged section 4(2)(c) on the ground that the rules of natural justice required the account holder to be served with notice of a freezing order, for which the section did not provide.

The enactment of the proviso is an acknowledgment by Parliament of the principles of natural justice which entitle a party affected by the grant of an ex parte order, to apply to have it set aside on the ground that he was not heard at the time of the preliminary hearing. It seems to me, that if a person is given the opportunity to challenge the making of such an order, as well he should be, he must be able to avail himself of the opportunity, and can only do so if he knows of It's existence. In my Judgment, the law must provide for notice of the order to be served on the aggrieved person and for the application for discharge to be made at short notice to the other side.

On the particular facts of this case, however, the applicant was immediately notified by his bank and was able to apply for the discharge of the order. In those circumstances, although the principles of natural justice were not followed, the applicant was not adversely or unfairly affected.

The applicant also challenged the constitutionality of section 4 (2) (d) on the ground that to the extent it gave the Financial Intelligence Unit power to order a bank to produce

a client's personal banking information without his consent, it breached Articles 15 and 21 of the Constitution.

Counsel for the respondent argued that Article 21 did not give protection for privacy of bank records and financial information, but that bank secrecy was a creature of the Banks and Trusts Registration Act, 1965, and now the Banks and Trust Companies Regulation Act, 2000. He further argued that if there was such a right guaranteed by the Constitution, the applicant had to show that the violation of that right is not reasonably justifiable in a democratic society.

Articles 15 and 21 provide:

"15. Whereas every person in The Bahamas is entitled to the fundamental rights of freedoms of the individual, that is to say, has the right whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure

that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

21. (1) Except with his consent, no person shall 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 inconsistent with or in contravention of this Article to the extent that the law in question makes provision —

(a) which is reasonably required —

(i) In the interest of defence, public safety, public order, public morality, public health, town and country planning, the development of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit; or

(ii) for the purposes of protecting the rights and freedoms of other persons;

(b) to enable an officer or agent of the Government of The Bahamas, a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government,

authority or body as the case may be; or

(c) to authorise, for the purpose of enforcing the Judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or the entry upon any premises by such order,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

In **NeilI Wells v the Attorney General** (1791/1991), HaIl, J., as he then was, held that Article 15 was both a preamble as welt as an enacting section, In as much as it was accorded, by Article 54(3), the same degree of entrenchment as the other fundamental rights provisions.

But he held that there was a difference between Article 15 and Articles 16 through 27. He said at page 12**: "Instead, the effect of Article 2, Article *15* through 27 and Article 54(3) is that the Constitution declares and clothes with it's protection the rights enumerated In Articles 16 through 27 and other unenumerated rights. The difference between the enumerated and unenumerated rights is that, by Article 28, only the former are justiciable by the broad procedure created by that Article which specifies it's limit to Articles '16 to 27'."**

With this I concur, and since the applicant can only litigate in the Supreme Court those rights enumerated in Articles 16 through 27. it must show that the right to privacy of personal banking information is protected by Article 21.

It is significant that although Article 15(c) refers to **"protection for the privacy of his home and other property.. ."**, the word **"privacy"** does not appear in the body of Article 21, but only in the marginal note. The general rule of law relating to marginal notes is that although some help may be derived from them in that they show what a particular section is dealing with, they are not a part of the Act.

"Privacy" was described by one constitutional writer as a perplexing concept, no nearer to being understood after twenty-five years of study. And Tribe in American Constitutional Law, second edition, observed: **"Much judicial and scholarly ink has been spilt in the task of expounding this paradoxical right"**. Indeed, I fear yet more is to be spilt in the present exercise.

The right to privacy was characterized by Ackerman J. in **Bernstein and others V Bester NNO 1996 (4) B.C.LR 449 (CC)** as lying along a continuum where the more a person interacts with the world, the more the right to privacy becomes attenuated. He stated: **"A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of it's basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed.**

This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and a right of privacy in this context becomes subject to limitation."

In this jurisdiction, Hall J in **Wells v the Attorney General** at page 20, characterized the right to privacy protected by Article 21, as follows: **"Having found a constitutionally justiciable right to privacy — which applies to a person as well as his property — it means that the way that right crystallizes depends on the nature of the property and, while, I have indicated, the right is at it's fullest when a person is inside his home, it is probably never more qualified than when he ventures out in a motor vehicle."**

The learned judge's characterization also, I think, recognized the difficulty in defining the extent of the right of privacy protected by Article 21. While I agree that the protection afforded by Article 21 is not limited to the right not to have one's person or home searched and the entry by others on one's premises, and may extend to other property, yet I do not believe it extends to the protection of the privacy of personal banking information. I do not believe that the disclosure of personal banking information **"intrudes on the inner sanctum"** or **"violates the most intimate core of privacy"**, of persons. The relationship of banker and customer is, in my view, outside the closest intimate sphere of which Ackerman spoke.

In my judgment, Article 21 does not include a right not to have one's personal banking information disclosed. Accordingly, the applicant has not shown that section

4 (2) (d)of the Act violates any constitutionally guaranteed right under Article 21.

That disposes of the most important part of the argument, however, the applicant also contended that the power could not be validly exercised without a court order.

Section 15 of the Banks and Trust Companies Regulation Act, 2000, preserves the confidentiality of banking information and prohibits its disclosure without the consent of the customer except in the circumstances therein specified. That section, so far as it is relevant, provides:-

"15. (1) No person who has acquired information in his capacity as-

(a) director, officer, employee or agent of any licensee or former licensee;

shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions or accounts of a customer of a licensee or relating to any application by any person under the provisions of this Act, as the case may be, except —

……..

(iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within The Bahamas, or under the provisions of any law of The Bahamas; ."

Under section 15 then, information relating to a customer's identity, assets, liabilities, transactions or accounts may be disclosed by a licensee, if lawfully required to do so by a court of competent jurisdiction, or under any law of The Bahamas. Section 4(2)(d) does not specifically require licensees to produce banking information to the Financial Intelligence Unit on request, and section 14(1) of the Financial Transactions Reporting Act, 2000, only requires the disclosure of information from licensees to the Financial intelligence Unit where the licensees reasonably suspect the matters specified therein. Section 14 (1) reads:

"14. (1) Notwithstanding any other written law or any rule of law, but subject to section 17, where-

(a) any person conducts or seeks to conduct any transaction by, through or with a financial institution (whether or not the transaction or proposed transaction involves funds; and

(b) the financial institution knows, suspects or has reasonable grounds to suspect that the transaction or proposed transaction involves proceeds of criminal conduct as defined in the Proceeds of Crime Act, 2000 or any offence under the Proceeds of Crime Act, 2000, or an attempt to avoid the enforcement of any provision of the Proceeds of Crime Act, 2000,

the financial institution shall, as soon as practicable after forming that suspicion, report that transaction or proposed transaction to the Financial Intelligence Unit.".

In the premises, and as section 4 (2)(d) is presently worded, the Financial Intelligence Unit cannot request the production of banking information from a licensee unless by a court order.

The applicant complained that it's banker was in breach of the law in disclosing information to the Financial Intelligence Unit without a court order. There was no evidence before me that there was any such disclosure and in any event, Barclays Bank was not a party to this action. That question is therefore reserved for further argument, if necessary.

With respect to the objection that the making of regulations was a condition precedent to the proper exercise of the powers under the Act, the Financial Intelligence (Transactions Reporting) Regulations, 2001 came into effect on the 31 January$_1$ 2001. I make no comment on their adequacy.

In the premises and for the reasons hereinbefore expressed, the applicant should have a declaration that paragraphs (b) and (c) of section 4(2) of the Act are unconstitutional. The applicant should also have a declaration that the Financial Intelligence Unit cannot require the disclosure of banking information from a banker, without a court order. All other applications save for that which is reserved for further argument, are dismissed.

The costs of the Motion are the applicant's, to be taxed if not agreed.

DATED this 27th day of November, 2001.

Sgd.
Anita Allen,

J.