In The Supreme Court of Bermuda

CIVIL JURISDICTION
2017 No: 479

BETWEEN:

A LAW FIRM

1st Applicant

And

THE ESTATE OF THE DECEASED

2nd Applicant

v

THE COMMISSIONER OF POLICE

Respondent

RULING

Dates of Application:	Monday 5 March 2018
Date of Ruling:	Tuesday 20 March 2018
Counsel for the Applicants:	Mr. Jerome Lynch QC (Trott & Duncan Limited)
Counsel for the Respondent:	Mr. Ben Adamson (Conyers Dill & Pearman Limited)

Application for Judicial Review- Legal Professional Privilege
Seizure of documents and materials by the Bermuda Police Service
Police and Criminal Evidence Act 2006 Part III

RULING of Shade Subair Williams A/J

Introduction and Summary of Facts:

1. This matter first came before the Court on an urgent ex parte application for injunctive relief against the retention by the Bermuda Police Service (BPS) of various electronic devices which were originally seized from the residence of the Deceased to whom the 2nd Applicant relates.

2. Two of the three electronic items which were seized, namely a cell phone and a laptop computer, belonged to the 1st Applicant, a law firm where the Deceased was employed as a practicing attorney immediately prior to his death. The third item seized was another laptop computer which belonged to the Deceased personally.

3. No real issue of contention arises out of the original seizure of the items from the residence ("the original seizure") which was controlled by the BPS unit referred to as the Criminal Investigation Department (CID). It is common ground that the original seizures were made in furtherance of the CID investigation ("the CID investigation").

4. Once the CID investigation was confirmed as closed, instead of returning the items to the Applicants, another unit of the BPS, namely the Organised and Economic Crime Department of the Crime Division (OECD), sought to retain police control over the seized articles under section 19 of the Police and Criminal Evidence Act 2006 (PACE). By affidavit evidence filed on behalf of the Respondent, the Court was made aware that the OECD had been investigating the Deceased in relation to offence(s) unrelated to the CID investigation. The head of the OECD is the same officer who attended the residence of the Deceased as an on-call Senior Officer during the original seizure arising out of the CID investigation. Hereinafter, I refer to that officer as "the DCI".

5. The 1st Applicant opposed police retention of the seized devices on the basis that the data stored on such items contained information subject to legal professional privilege. Having learned of BPS' intention to retain the exhibits, the 1st Applicant initiated Court proceedings which eventually resulted in an order of directions for the examination of the seized data by an independent Counsel, subject to the approval of the Court. (Although Counsel for the 1st Applicant initially appeared on behalf of both Applicants, a procedural issue has arisen as to whether the 2nd Applicant has been properly joined to these proceedings. This point was not argued by Counsel and need not be determined at this juncture.)

6. The matter is now before the Court for the determination of the suitability of the process proposed in aid of the independent Counsel's review.

Background on Court Proceedings:

7. On 27 June 2017 before the learned Justice Stephen Hellman, the first Court appearance in this matter was heard on an urgent ex parte application. The application was heard absent the filing of any formal Court documents. In lieu of supporting affidavit evidence, the Court heard *vive voce* evidence from the Director of the 1st Applicant ("the Director" or "the 1st Applicant") in pursuit of relief in the following terms:

   (i) The quashing of the second seizure by the Respondent of a telephone and two laptop computers (electronic property) belonging to the 1st and 2nd Applicants from the home of the deceased; and

   (ii) Delivery of the electronic property to the Court.

8. Having found that there was a strong probability that the seized material included items containing information subject to legal professional privilege and that there was a real risk that the Respondent might inadvertently read such information upon the review of the seized material, an order and direction of the Court was made for the appointment of an independent lawyer to review the seized material by a procedural means acceptable to the Court.

9. A return date for an *inter partes* hearing was fixed for Friday 30 June 2017, before which time the Applicants were to file a Form 86A at the direction of the Court, together with an ex parte summons and a short affidavit attaching a transcript note of the live evidence heard. (The ex parte summons, described on its face to be filed in the matter of an application for judicial review, was filed on 4 July 2017 and formalized by the Acting Registrar who issued the return date for the hearing previously held before Hellman J on 26 June 2017.) Notwithstanding the Court's direction for the filing of a short affidavit prior to the 30 June 2017 hearing, the Applicants filed no further evidence at this stage of the proceedings.

10. The 30 June 2017 fixture resulted in an order by Hellman J waiving the requirement for the Applicant to file and serve the Form 86A and supporting affidavit. The waiver is likely explained by the application for judicial review also being adjourned *sine die* with liberty to restore.

11. By summons dated 17 November 2017 the Respondent sought further directions which were subsequently agreed by Consent Order dated 24 November 2017 providing for the exchange of further affidavit evidence and a fixture for the hearing of the arguments with which I am presently concerned.

The Evidence

12. The first affidavit filed in these proceedings was that of the DCI which was sworn on 6 November 2017 and filed on behalf of the Respondent. This affidavit was filed in support of the Respondent's summons for directions and seemingly in reply to the 26 June 2017 *vive voce* evidence heard *ex parte* by the Court.

13. It was not until 12 January 2018 that the 1st Applicant filed affidavit evidence. On 25 January 2018, the Respondent filed the second affidavit from the DCI, sworn on 24 January 2018. The DCI's affidavit is accompanied by an exhibit of a transcript note of the first Court appearance on 26 June 2017.

14. There were some divergences in the evidence between the parties' accounts of the verbal exchanges which transpired between the DCI and the Director. At the 26 June 2017 hearing, the 1st Applicant stated the following:

    "....My Lord at that point um I had indicated to (the DCI) to the best of my recollection that the phone and his computer and indeed his office, his home office may contain files, information and communications that related to the law firm's practice." In describing the DCI's response, the 1st Applicant said, "*Yeah he indicated that they would be held as they were sensitive to that umm and that you know the investigation was about related to the cause of his death and information around the circumstances and the background to his death*."

15. Counsel for the Applicants, asked the 1st Applicant about the case matters for which the Deceased had responsibility. He replied: "*…there are a number of them…probably individually and jointly as a firm he was working on various matters maybe 40*." The 1st Applicant told the Court that the Deceased relied on electronic devices in addition to handwritten and hardcopy methods in carrying out his case preparation from his home: "*a lot of emails, a lot of text, a lot of apps and a lot of longhand stuff as well, we both did… we all worked from home, we all have home offices, so direct to call us at home, work from home…I learnt later that there were a few (legal files) he had in his home office….there were a number of criminal cases which are before the criminal court which just as a matter of principle of privilege could be a concern without various instructions on it.*" When asked by the learned judge if he was referring to case files that would have been seized, the 1st Applicant replied, "*There would have been electronic communications and electronic attachments and files My Lord that would have been on his devices, yes. At this stage, most, at (least) one client of his actually resides overseas so there is a lot of communications backwards and forwards and we print things off as you do or review them on the screen, we did all that…*"

16. The 1st Applicant also specified in his live evidence that the Deceased had also been working on some files of particular sensitivity which included the provision of legal services to a medical patient. In his evidence before the Court the 1st Applicant further stated:

"…well My Lord I had indicated to them that the computer and the phone so on were the property of (the law firm) and that when they were done with them we would like to get them back and they indicated to me that it wasn't going to be a problem, they just had to download some of the videos and things…Well those officers actually came to see me today on request and two came to see me, … today and indicated that (the DCI) had seized from them the computer and telephone…"

17. At paragraphs 3-5 of the 1st Applicant's 12 January 2018 affidavit he stated:

"*3…During this conversation, (the DCI) gave me an undertaking that BPS seizure of (the) telephone would only be used to investigate the circumstances surrounding (the) death.*

4. Based on the undertaking (the DCI) gave me, I was comfortable (the law firm) did not need to seek a protective court order to safeguard the privileged and confidential information belonging to its clients. Had I known (the DCI) seized papers belonging to (the deceased) at the scene in connection with the Organised and Economic Crime Department Investigation ("the OECD Investigation), and that despite the undertaking, an attempt would be made to review all of the information on the phone, I would have made an application to the Supreme Court of Bermuda for a protective order. Such an order would not only protect clients of the firm but also protect the reputation of (the law firm).

5. There are a number of issues which arise from the circumstances surrounding breach of the undertaking:

i. The mere fact the undertaking has been breached should result in the BPS turning the cellphone and laptop computers over to the court and then making a formal application for the items. This is the position the BPS would have found itself in had (the DCI) not breached the undertaking. I respectfully ask the court to accept that the consequences of breach of the undertaking has placed BPS in a wholly different position than it would have been in if there had been an incidental review of information seized under the auspices of another investigation. The consequences of the breach of the undertaking now means the BPS cannot rely upon section 22 of the Police And Criminal Evidence Act as suggested by (the DCI).

ii. In an application to the court, the BPS would be forced to disclose details of what they are seeking to seize, which is precisely what they refuse to do now since they have the advantage of possession of the items. Alternatively, the BPS can apply to the Supreme Court for Public Interest Immunity. The protocol for such an application would be sanctioned by the court. In either case, the clients of (the law firm) would benefit from greater protection that they now have in the proposal suggested by the BPS.

iii. I refer to paragraph 11 of the affidavit of (the DCI). It appears that at the scene of (the) death, (the DCI) was unlawfully seizing without a warrant, material for the OECD Investigation despite the undertaking he gave me. (The DCI) has not explained why (the law firm) was not told this Information was seized before he swore his affidavit and why (the law firm) was not given an opportunity to protect itself and its clients by reviewing the material before the BPS reviewed the documents."

18. On the version provided by (the DCI) in his second affidavit at paragraph 3, no such undertaking was offered: "*I have read (the 1st Applicant)'s affidavit. I disagree with a number of points in his affidavit. In particular, I disagree with his account of our conversation at the scene and his suggestion that I gave an undertaking*."

19. In referring to the highlights of an email from (the DCI), the 1st Applicant informed the Court, "*...he said that (b) that I raised the issue of legal professional privilege about the phone- the fact that I raised it about computers as well and they needed to meet with the DPP on this. He confirmed that the Organised Economic Crime Department had seized the cell phone and 2 laptops from the officers investigating the death …. In both letters ((a) and (b)) invoked section 19 of the Police and Criminal Evidence Act…and he said that he believed as the items he believed contained evidence of criminal effects…*"

20. The DCI explained the police retention of the seized electronic devices at paragraphs 9 – 14 of his affidavit:

"*9. In the usual course of events, CID would have returned the phone and any other items taken from (the deceased)'s home over the following days or weeks.*

10. As I have explained, my primary function is as head of the OECD. For reasons which I cannot go into, the OECD had been conducting an investigation into (the deceased)'s activities (which were said to be unrelated to his capacity as a practicing attorney).

11. I believed and believe that the phone likely contains information relevant to this investigation. I am advised that I do not need to provide reasons for my belief. In order to assist the Court, I can explain that among the papers found on (the deceased)'s desk were various documents relevant to the OECD inquiry.

12. Section 22 gives the police the power to retain anything which has previously been seized. While the retention was not necessary to investigate the cause of (the deceased)'s death, it was and is necessary as part of the ongoing OECD investigation referred to above.

13. On 12 June, I informed CID that it wished to take possession of the phone for the purposes of the OECD investigation. I did inform them that this was pursuant to section 19. I agree that section 19 was not the relevant section. The police cannot seize something which they already hold.

14. As regards legal privilege, I was aware of the fact that the phone likely contained documents subject to legal privilege. (the 1st Applicant) himself had emphasised this fact to me. On 22nd and 23rd June, I met with Crown Counsel to take advice on how best to deal with this issue. Without waiving privilege, our position has been and has always been that the phone should be reviewed by independent counsel."

21. In his second affidavit the DCI stated that police were unable to access the encrypted data on the phone. At paragraphs 13-15 he stated:

"*13. The non-encrypted content, namely the video and photographic content and WhatsApp messages, were downloaded and placed on the CID's MEMEX system. As I have explained, these are not and have never been accessible by OECD. I have therefore never seen any of this material. I believe that DC Richardson has since wiped the materials from the MEMEX system as a further precaution.*
14. The email data was not accessed because it is and was encrypted and our forensic lab does not have ability to access encrypted material. When the forensic lab is given encrypted material, it sends that material to an outside company called Cellebrite, an Israeli company which specializes in cellular phone access.
15. In light of the injunction, nothing was done without agreement. We instructed Jeffrey Elkinson to negotiate with Delroy Duncan and they agree that the phone would be sent to Cellebrite to produce a copy of the phone data on a readable hard drive. The agreement was that neither the phone nor the hard drive (nor any of the other materials such as the laptops) would however be made available to the police. Accordingly, the hard drive, the lap tops and the phone are by agreement in Mr. Elkinson's possession where they remain on the basis that they will not be released without agreement or court order.

The Proposed Procedure for the Examination by an Independent Counsel

22. The DCI stated in his first affidavit of 6 November 2017 at paragraphs 16-17:

"*16. The lawyers have, I believe, since the hearing attempted to agree a protocol for having the phone reviewed by independent counsel. The parties have I believe agreed the identity of that independent counsel, a barrister in London. She is standing by to review the phone.*
17. I am advised and believe that the parties have not been able to agree the appropriate instructions for the independent reviewer and this is why the matter needs to come back (to) this honourable Court."

23. The 1st Applicant, however, expressed objection to the appointment of an independent Counsel at paragraph 19 of his affidavit sworn on 12 January 2018:

"*19. I am simply not in a position to waive the privilege of the Firm's clients by having an Independent Counsel review all their emails, telephone or text communications, or indeed files which were likely on the telephone and computer devices seized. Nor, do I possibly see, how such "Independent Counsel(") could ascertain what is privileged and what is not. The privilege being discussed belongs to the clients of (the law firm), not (the law firm itself). We are therefore not permitted to waive or consent to the BPS or an Independent Barrister reviewing this material*."

24. Subsequently, by agreement between the parties, the electronic items in question were secured in the offices of Counsel for the Respondent. In his second affidavit, the DCI set out the proposal for the sifting of the privileged information as follows:

16. We wish for the hard drive to be sent by Mr. Elkinson to an independent barrister to review. We have instructed Rebecca Chalkley of Red Lion Chambers in London to carry out the review. We intend to send Ms Chalkley a confidential brief (setting out the current parameters of our investigation) and keyword strings. Her function will be to act as independent counsel and remove all materials covered by privilege.
17. I appreciate that the Applicants may wish to see or understand the details of our investigations. However I believe this will prejudice those investigations which continue to develop and which remain at an early stage. I am of course happy to undertake to the Court that the instructions to Ms Chalkley will be for her to exclude all materials covered by privilege. This is of course the very point of instructing an independent reviewer such as Ms Chalkley.
18. Accordingly there is no risk in the police accessing materials which are covered by privilege. I also confirm that, to date, and as I have already explained, the police have not had access to materials subject to privilege. My department has not had access to anything and CID has only had the limited access which I have already described and has had no access to any emails."

25. Although the 1st Applicant initially caviled against the use of an independent attorney to assist in classifying the privileged material in aid of its return, his learned Counsel at the 5 March 2018 hearing put forth a written list of procedural '*safeguards*' for the use of the overseas independent attorney. The numerated sub-paragraphs under paragraph 5 of the Applicants' written arguments states as follows:

"*i. Is it proper for (the DCI) to simply assert "I am not willing to share details of the investigation with the applicants or anyone else outside the OECD" including their own counsel and the court. [my words]*

ii. Is it proper for no parameters to be set by the court at all such as a time scale, i.e. over what period are they examining. We already know the inquiry relates to when SC was a

minister and therefore before he joined the firm. One might have thought it was possible to narrow down the period without prejudicing the inquiry.

iii. That if by virtue of this disclosure LPP is breached, albeit only to the "independent counsel", the firm…is not to disclose that fact to <u>any</u> of its client for fear of the commission of a tipping-off offence.

iv. That the independent counsel identification of material to be categorized as follows:

- *a. Legal Professional Privilege Material: not to be disclosed to the respondents.*
- *b. Potential LPP Material: not to be disclosed to the respondents without leave of the court.*
- *c. Irrelevant Material: not to be disclosed to the respondents without leave of the court*
- *d. Relevant Material not subject to LPP: to be disclosed to OECD and to the applicants when there is no longer an issue of prejudice to the investigation in the applicants knowing.*

v. That a clone of the computers and the telephone be made available to the applicants.

vi. That the matter remain confidential and out of the general court list."

26. Apart from an agreed position on items iii and vi, the Respondent was opposed to the additional safeguards proposed by the 1st Applicant.

The Law

27. Part III of the Police and Criminal Evidence Act 2006 covers the powers of a police officer in respect of entry search and seizure.

28. Section 8(1) sets out a criterion for a magistrate's consideration in authorizing a police officer to enter and search premises. Mr. Lynch QC argued that the approach for obtaining a warrant was relevant to the extent that had the original seizure not occurred, the Respondent would have required a warrant to seize the items taken. He submitted that against this background, extra safeguards in separating the privileged material should be employed.

29. Section 8(1) provides:

"*8(1) If on an application made by a police officer a magistrate is satisfied that there are reasonable grounds for suspecting-*
(a) that an indictable offence has been committed;

(b) that there is material on premises mentioned in subsection (1A) which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence;
(c) that the material is likely to be relevant evidence;
(d) that it does not consist of or include items subject to legal privilege, excluded material or special procedure material; and
(e) that any of the conditions specified in subsection (3) applies in relation to each set of premises specified in the application,

he may issue a warrant authorizing a police officer to enter and search the premises.

(1A) The premises referred to in subsection (1)(b) are-
(a) one or more sets of premises specified in the application (in which case the application is for a "specific premises warrant"); or
(b) any premises occupied or controlled by a person specified in the application, including such sets of premises as are so specified (in which case the application is for an "all premises warrant").
(1B) If the application is for an all premises warrant, the Magistrate must also be satisfied-
(a) that, because of the particulars of the offence referred to in subsection (1)(a), there are reasonable grounds for suspecting that it is necessary to search premises occupied or controlled by the person in question which are not specified in the application in order to find the material referred to in paragraph (b) of that subsection; and
(b) that it is not reasonably practicable to specify in the application all the premises which he occupies or controls and which might need to be searched
(1C) The warrant may authorize entry to and search of premises on more than one occasion if, on the application, the Magistrate is satisfied that it is necessary to authorize multiple entries in order to achieve the purpose for which he issues the warrant.
(1D) If it authorizes multiple entries, the number of entries authorised may be unlimited, or limited to a maximum.
(2) A police officer may seize and detain anything for which a search has been authorized under subsection (1).
(3) The conditions mentioned in subsection (1)(e) are-
(a) that it is not practicable to communicate with any person entitled to grant entry to the premises;
(b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the evidence;
(c) that entry to the premises will not be granted unless a warrant is produced;
(d) that the purposes of a search may be frustrated or seriously prejudiced unless a police officer at the premises can secure immediate entry to them.

(4) In this Act "relevant evidence", in relation to an offence, means anything that would be admissible in evidence at a trial for the offence.
(5) The power to issue a warrant conferred by this section is in addition to any such power otherwise conferred."

30. There are safeguards outlined in section 15 of PACE which apply to circumstances where a warrant is to be issued to police. Section 15(2) specifies that a police officer shall state the ground on which he makes the application for a warrant and the enactment under which the warrant would be issued.

Meaning of "items subject to legal privilege"

31. Section 10 provides a statutory definition of items subject to legal privilege as it applies to Part III of PACE :

"10(1) *Subject to subsection (2), in this Part "items subject to legal privilege" means-*
(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
(b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
(c) items enclosed with or referred to in such communications and made-
(i) In connection with the giving of legal advice; or
(ii) In connection with or in contemplation of legal proceedings and for the purposes of such proceedings,
when they are in the possession of a person who is entitled to possession of them.
(2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege.

Special Provisions to access "excluded material" or "special procedure material"

32. Section 9(1):

"9(1) *A police officer may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 2 and in accordance with that Schedule.*
(1A) Notwithstanding subsection (1), where a police officer applies for an order to obtain access to excluded material or special procedure material under section 37 or 41 of the Proceeds of Crime Act 1997, the application procedure under Schedule 2 shall not apply.

(2) Subject to subsection (3), any Act passed before this Act under which a search of premises for the purposes of a criminal investigation could be authorized by the issue of a warrant to a police officer shall cease to have effect so far as it relates to the authorization of searches-

(a) for items subject to legal privilege; or

(b) for excluded material; or

(c) for special procedure material consisting of documents or records other than documents

(3) Nothing in subsection (2) applies to search warrants issued under-

(a) section 39 of the Proceeds of Crime Act 1997; or

(b) section 20 of the Anti-Terrorism (Financial and Other Measures) Act 2004."

33. The meaning of the term "**excluded material**" is provided in section 11 of PACE:

"*Meaning of "excluded material"*

11 (1) Subject to the following provisions of this section, in this Act "excluded material" means-

(a) personal records which a person has acquired or created in the course of any trade, business, profession or other occupation or for the purposes of any paid or unpaid office and which he holds in confidence;

(b) human tissue or tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence;

(c) journalistic material which a person holds in confidence and which consists-

(i) of documents; or

(ii) of records other than documents.

(2) A person holds material other than journalistic material in confidence for the purposes of this section if….

(3)…"

34. The term "**special procedure material**" is defined by section 14:

"*Meaning of "special procedure material"*

14 (1) In this Act "special procedure material" means-

(a) material to which subsection (2) applies; and

(b) journalistic material, other than excluded material.

(2) Subject to the following provisions of this section, this subsection applies to material other than items subject to legal privilege and excluded material, in the possession of a person who-

(a) Acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office; and

(b) holds it subject-

(i) to an express or implied undertaking to hold it in confidence; or

(ii) to a restriction or obligation such as is mentioned in section 11(2)(b)

(3) Where material is acquired-

(a) by an employee from his employer and in the course of his employment; or

(b) by a company from an associated company,

it is only special procedure material if it was special procedure material immediately before the acquisition;

(4) Where material is created by an employee in the course of his employment, it is only special procedure material if it would have been special procedure material had his employer created it.

(5) Where material is created by a company on behalf of an associated company, it is only special procedure material if it would have been special procedure material had the associated company created it.

(6) ...

35. Section 9(1) of PACE requires the special procedure application under Schedule 2 of PACE to be made in respect of '*excluded material*' and '*special procedure material*' in order for police to obtain an order for its production or access.

36. Schedule 2 provides two alternative sets of access conditions to be fulfilled before a Magistrate may make an order for the production of the requested material.

A Police Officer's Power to Search without a Warrant and in the absence of an Arrest

37. Section 19 is the provision which covers the general power of seizure:

"*19(1) The powers conferred by subsections (2), (3) and (4) are exercisable by a police officer who is lawfully on any premises.*

(2) The police officer may seize anything which is on the premises if he has reasonable grounds for suspecting-

(a) that it has been obtained in consequence of the commission of an offence; and

(b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed.

(3)The police officer may seize anything which is on the premises if he has reasonable grounds for suspecting-

(a) that it is evidence in relation to an offence which he is investigating or any other offence; and

(b) that it is necessary to seize it in order to prevent it being concealed, lost, altered or destroyed[1].

(4)The police officer may require any information which is contained in a computer and is accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible if he has reasonable grounds for suspecting-

(a) that

(i) it is evidence in relation to an offence which is investigating or any other offence; or

(ii) it has been obtained in consequence of the commission of an offence; and

(b) that it is necessary to do so in order to prevent it being concealed, lost, tampered with or destroyed.

(5) The powers conferred by this section are in addition to any power otherwise conferred.

(6) No power or seizure conferred on a police officer under any enactment (including an enactment contained in an Act passed after this Act) is to be taken to authorize the seizure of an item which the police officer exercising the power has reasonable grounds for suspecting to be subject to legal privilege

(Section 20 of PACE extends general powers of seizure to computerized information).

38. The Respondent also stands on section 22 which empowers a police officer to retain items lawfully seized under section 19(4).

The Issues for Determination and Analysis

39. The 1st Applicant's list of proposed safeguards for the procedure to be used by an independent Counsel implicitly raises issues relating to excluded material and special procedure material. The Applicant has further put in issue whether there is a duty of the Commissioner of Police to disclose information at the stage of a police investigation arising out of a section 19 seizure. If so, to what extent?

Whether to safeguard against Excluded Material and Special Procedure Material

40. There is a notable variation between the conditions for obtaining a warrant under section 8 of PACE and the conditions requisite for a police officer to seize items under section 19. Section 8(1)(d) requires a magistrate to be satisfied that the material for seizure does not consist of or include items subject to legal professional privilege, excluded material or special procedure material. However, under section 19(6) the prohibition is confined to items subject to legal professional privilege. Section 19 is silent on the subject of excluded material and special procedure material.

[1] The word 'damaged' does not appear in this subsection as it does in subsection (2).

41. One obvious basis for differentiating the levels of safeguarding between the section 8 warrant procedure and the section 19 seizure requirements is that the former necessarily serves to protect private persons from the unlawful entry of a police officer on to their premises. The latter is merely concerned with seizure of material. Notwithstanding, it is unclear how the restriction of access to excluded material or special procedure material under section 8(1)(d) can be regarded as an additional safety measure against unlawful entry on premises. It is clear that section 8 is designed to protect against unlawful entry by the involvement of an application process before a magistrate. It then begs the question why section 19 is silent of the additional categories of protected material.

42. In my judgment, a comprehensive outlook on Part III supports a conservative approach to allowing a police officer to access excluded material and special procedure material which has been seized under section 19. There is general recognition shown in the Act that such categories of material are to be treated with a special level of care. This is the very purpose of the Schedule 2 special procedure application process.

43. For these reasons, I find it necessary, in the exercise of my discretion, for measures to be employed for the separation of excluded material as defined by section 11.

44. In the context of this case, excluded material would apply to any '*personal records which a person has acquired or created in the course of any trade, business, profession or other occupation or for the purposes of any paid or unpaid office and which he holds in confidence*'. (See section 11(1)(a)).

45. The meaning of personal records is stated at section 12. It means '*documentary and other records concerning an individual (whether living or dead) who can be identified from them*'. Such personal records relate to
    - physical or mental health;
    - to spiritual counselling or assistance given or to be given; or
    - to counselling or assistance given or to be given, for the purposes of personal welfare by any voluntary organization or any individual who
        (i) by reason of his office or occupation has responsibilities for his personal welfare; or
        (ii) by reason of an order of a court has responsibilities for his supervision.

46. Having received evidence that there was a particular concern in relation to a client of the firm in his or her capacity as a medical patient, I think it appropriate to include a safeguard against this category of information.

47. I now turn to the special procedure material as defined by section 14 of PACE. During the hearing before me, I paired excluded material with special procedure material in ventilating my provisional views for the likely need to safeguard against these classes of material. Having reserved and further considered the meaning of "special procedure material" in the context of this case, I find that it would serve more to confuse than to assist if this class of material were to be added to the list of safeguards for application by the independent Counsel in respect of the 1st Applicant.

48. Special procedure material applies to items other than those subject to legal professional privilege which are in the possession of a person who acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office which are held subject to an undertaking to hold it in confidence. In my view, an application from a profession or business other than a law firm would be more suitable for this form of a safeguard. However, as the 1st Applicant is indeed a law firm, such like items would be protected by the law against access to material subject to legal professional privilege.

Whether Commissioner of Police has a Duty to Disclose Information During an Investigation

49. A prosecutor's statutory (Disclosure and Criminal Reform Act 2015) and common law duty to disclose is well known to the Courts and regulated through the Court's case management process. However, there is no parallel duty placed on the police in PACE.

50. A duty of disclosure by a police officer in obtaining a warrant at the investigation stage is to the Magistrate, in making the ex parte application, not to the subjects of the investigation or even a third party connected to the person under investigation. Of course, the warrant and the information upon which the warrant is based would become disclosable at a later stage by a prosecutor to a person who has been charged with a criminal offence.

51. In executing a warrant in circumstances where the occupier of the premises for entry is present, the police have a duty under section 16(7) of PACE to properly identify him or herself to the occupier and to properly produce a copy of the warrant. Section 21 further imposes a duty on the police to provide an occupier of the premises (or other such person showing custody and control immediately prior to the seizure) with a record of what has been seized. Section 21 also allows for an application to be made to an officer in charge of the investigation for access or a copy of the seized information. Under section 21(8) an officer may refuse access or provision of a copy of the information if he has reason to believe that in doing so it would prejudice the investigation. This is the extent of disclosure owed by the Commissioner of Police at the stage of a police investigation (pre-charge).

52. For these reasons, I find that the Commissioner of Police, having no duty to obtain a warrant in respect of the s.19(4) seizure, has no duty to disclose any information to the Court or to any other person in respect of the investigation in question. It then follows that the Court cannot properly or lawfully impose a timeline or other form of limitation or restriction on the scope of this ongoing police investigation.

Conclusion

Case Anonymity

53. This matter is to be assigned a case number and name on an anonymous basis. All publications in relation to this matter including entries in the Cause Book shall be performed in preservation of such anonymity.

The 2nd Applicant

54. The 2nd Applicant is not to be considered or treated as party to these proceedings without further Order of this Court.

Originating Summons to be filed by the 1st Applicant

55. The requirement to file an originating document was previously waived by Hellman J on 30 June 2017 when the matter was adjourned *sine die*. Given the resurrection of this matter, the need for an originating document is restored. The application before me to approve a procedure for the review of the seized material by an independent Counsel is an interlocutory one, the clarity of which is blurred by the absence of an originating document.

56. Mr. Lynch QC informed the Court that the 1st Applicant was no longer challenging the attempts by BPS to retain the seized material pursuant to section 22 of PACE. However, the matter did not commence on that footing. In fact, the 1st Applicant first appeared before the Court effectively seeking an injunction against the police for the retention of the seized material.

57. While this ruling may very well draw an end to these proceedings, it is entirely plausible that it may not. For that reason, an Originating Summons to a Judge in Chambers must be filed by the 1st Applicant under RSC Order 53/5(2) on the basis that leave is hereby formally granted (without the need for a Form 86A to be filed) to the 1st Applicant to apply for judicial review. The Originating Summons must be drafted in terms consistent with the relief sought at the 26 June 2017 hearing.

Procedure for Independent Counsel's Review

58. The approved procedural terms for the review of the seized electronic devices by an Independent Counsel are as follows:

(i) The Court approved independent Counsel, Rebecca Chalkley of Red Lion Chambers in London, England shall carry out the review of all data and information contained/stored in the seized electronic devices;

(ii) The approved independent Counsel shall identify and isolate all data and information subject to legal professional privilege as defined by section 10 of PACE;

(iii) The approved independent Counsel shall identify and isolate all data and information falling under the class of excluded material as defined by section 12 of PACE. Such information pertains to any and all personal records concerning an individual (whether living or dead) who can be identified from them and such personal records relate to:

- physical or mental health;
- to spiritual counselling or assistance given or to be given; or
- to counselling or assistance given or to be given, for the purposes of personal welfare by any voluntary organization or any individual who
  by reason of his office or occupation has responsibilities for his personal welfare; or
  by reason of an order of a court has responsibilities for his supervision.

(iv) Neither the Defendant nor any agent, associate or affiliate of the Defendant shall access or review any part of the identified and isolated data and/or information subject to legal professional privilege and/or excluded material;

(v) All identified and isolated data and/or information subject to legal professional privilege shall be returned to the possession and custody of the 1st Applicant.

(vi) All identified and isolated excluded material extracted from either one or both of the two electronic devices which belong to the 1st Applicant shall be returned to the possession and custody of the 1st Applicant.

(vii) All identified and isolated excluded material extracted from the electronic device which belonged to the Deceased personally are to remain in the custody of the Court approved independent Counsel until further order of the Court.

59. The parties should make reasonable attempts to agree on a specified timeframe for the return to the 1st Applicant of any returnable data or information subject to legal professional privilege or which qualifies as excluded material. Where such efforts prove to be unsuccessful, a Form 31D may be filed for a hearing before the Court to determine a suitable timeframe for its return.

Costs

60. This Court is known to refrain from making costs orders against unsuccessful litigants in matters involving a pursuit of their constitutional rights against public authorities. While this is not strictly a constitutional action, it is arguable that this action is consistent with a litigant defending his rights against a public authority under section 7 of the Constitution of Bermuda which reads:

"*7(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 held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision…"

61. Police retention of material or information subject to legal professional privilege is arguably akin or sufficiently similar to an unlawful search of property contrary to section 7. Without pre-judging a submission grounded on these points, I take the provisional view that an application for costs to follow the event is without strong merits on its face.

62. In my previous security for costs ruling delivered in *Ayo Kimathi et al v the AG et al [2017] SC (Bda) 87 Civ*, I outlined the leading authorities and costs principles applicable to non-frivolous constitutional applications involving unsuccessful private citizens. These principles were initially stated in the costs ruling of the learned Hon. Chief Justice, Ian Kawaley, in the same case matter and again in *Mahesh Sannapareddy v The Commissioner of the Bermuda Police Service and The Attorney General [2017] SC (Bda) 54 Civ (5 July 2017)* which outlines the expected approach of the Crown in the rare circumstances when it intends to recover its costs from a constitutional application.

63. At paragraph 21 in *Sannapareddy* the learned Chief Justice stated:

"It is impossible to overstate the significance of the Court of Appeal for Bermuda's decision in Barbosa in terms of promoting access to the Court by litigants wishing to seek constitutional relief. Implicit in the new costs regime is the notion that the State should be willing to bear its own costs in assisting the Court to construe the Constitution in the context of adjudicating a citizen's non-frivolous complaint that his or her fundamental rights have been contravened."

64. In *The Minister of Home Affairs and The Attorney General v Michael Barbosa Civil Appeal No. 3 & 3A of 2016* the Bermuda Court of Appeal upheld this general rule which was first stated by the learned Justice Stephen Hellman at first instance. Also see Justice Hellman's

ruling in *Holman [2015] SC (Bda) 70 Civ (13 October 2015)* where he followed the approach of the South African Constitutional Court in *Biowatch Trust v Registrar: Genetic Resources and Others [2009] ZACC 4* and the Eastern Caribbean Court of Appeal decision in *Chief of Police et al v Calvin Nias (2008) 73 WIR 201*.

65. It was perfectly reasonable, on my broad-brush assessment of this matter in this context, for the 1st Applicant to have prosecuted this action as a measure to protect his clients from falling victim to a breach of legal professional privilege. For those reasons, I am not minded to make an order for costs without first hearing submissions from Counsel. If either side wishes to be heard on costs a Form 31D is to be filed within the next 14 days.

Dated this 20th day of March 2018

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SHADE SUBAIR WILLIAMS
ACTING PUISNE JUDGE OF THE SUPREME COURT