In The Supreme Court of Bermuda

CIVIL JURISDICTION

2016 No: 284

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF A CLAIM FOR DAMAGES FOR UNLAWFUL ARREST AND TRESPASS

BETWEEN:

MAHESH SANNAPAREDDY

Applicant

-v-

THE COMMISSIONER OF THE BERMUDA POLICE SERVICE

Respondent

-and-

THE ATTORNEY-GENERAL

Interested Party

JUDGMENT

(in Court)

Judicial review- early morning arrest of medical practitioner at home accompanied by a search of his private residence-lawfulness of arrest and search- Police and Criminal Evidence Act 2006 sections 18 and 23(6)-identification of the legal requirements for validly exercising the summary power of arrest and ancillary search powers-discretion to use summary power of arrest where other preconditions are satisfied

Date of hearing: May 29-30, 2017

Date of Judgment: June 23, 2017

Lord Peter Goldsmith QC of counsel and Mr Delroy Duncan, Trott & Duncan Limited, for the Applicant
Mr Mark Diel and Mr Dantae Williams, Marshall Diel & Myers Limited, for the Respondent
Mr Norman MacDonald and Mr Brian Myrie for the Interested Party

Background

1. The Applicant is a medical practitioner who has been on the King Edward VII Memorial Hospital Staff since 2001 and Treasurer of the Bermuda Medical Doctors Association since 2014. He has been employed by Bermuda Health Care Services ("BHCS") since 2000 and has been its Medical Director since 2011. His present application centres on a dispute as to whether his arrest on May 19, 2016 under section 23(6) of the Police and Criminal Evidence Act 2006 ("PACE") and the subsequent search of his home without a warrant under section 18 of PACE was lawful. His case is advanced in circumstances where the Applicant did not challenge the Respondent's assertion that (1) the arresting officers had reasonable grounds for suspecting that the Applicant had committed an arrestable offence, and (2) that those suspicions were based on objectively reasonable grounds.

2. Controversy centred on whether the legality of the arrest depended on a third precondition for a valid arrest: validly exercising the discretion to deploy the summary arrest power, accepting that the first two preconditions for a lawful arrest had been met. Or, to put it more practically, was it necessary for a Police Officer to consider alternative options to an arrest where the first two preconditions for effecting an arrest were satisfied? This aspect of the power of arrest has never seemingly been formally considered before by a Bermudian court.

3. The Applicant applied for judicial review of the Respondent's decision to arrest him (and search his residence) without a warrant on May 19, 2016, by Notice of Application dated July 26, 2016. The Applicant filed his Notice of Originating Application on August 5, 2016 and it was issued returnable for August 18, 2016. On the morning of August 18, 2016, the Respondent filed a Summons seeking to strike out or stay the Applicant's Notice ("the Strike-out Summons"). I gave directions for the hearing of the Strike-out Summons on August 18, 2016. On September 20, 2016 the Respondent filed a Summons which was issued on October 4, 2016 seeking to set aside the grant of leave ("the Set Aside Summons").

4. The Strike-out Summons and the Set Aside Summons were both heard on January 24, 2017 when I dismissed both Summonses with costs. I subsequently gave reasons for that decision[1]. No directions were sought for leave to cross-examine any of the

[1] [2017] SC (Bda) 12 Civ (6 February 2017).

deponents. Accordingly, the substantive determination of the present application primarily depends upon an analysis of the law and an application of the principles which are found to govern the relevant arrest to substantially uncontroversial facts.

The Applicant's legal complaint in outline

5. The Applicant's grounds in support of his Notice of Application for Leave span more than 30 pages. It being comparatively easy to meet the minimum express requirements of section 23 (6) of the Police and Criminal Evidence Act 2006 ("PACE") for arresting a suspect without a warrant thus triggering the right to search the premises they are in without a warrant, the Applicant contended that the law imposes, by necessary implication, further layers of protection for the liberty of the citizen. The essence of the legal argument upon which the Applicant relies can best be taken from the following grounds (which are replicated in his Notice of Originating Motion):

> "*55. It follows from the fundamental right to individual liberty that an individual can in principle only be deprived of her/his liberty by judicial order, and that exceptions to that principle are only allowed on compelling grounds. The rules setting out the circumstances in which the police can arrest an individual represent the direct application of the constitutional principles protecting individual liberty and they therefore must be interpreted consistent with them.*
>
> *56. Applied to the issue at hand, it is submitted that the Constitution of Bermuda, supported by the common law principle of legality, requires that an arrest by warrant under section 3 of the CJPA*[2]*be the standard procedure the police must follow unless they have compelling grounds for proceeding summarily pursuant to section 23(6) of PACE. It necessarily follows that not only must the police subjectively believe there are compelling grounds for proceeding with a summary arrest, but that belief must also be based on objectively justifiable reasons.*
>
> *57. Further, if the police were able to use section 23(6) of PACE without having to justify it, court supervision of deprivation of liberty would be otiose except for offences where the maximum sentence is less than twelve months. That would lead to an absurd and unjust result of a kind contemplated in Nothman.*
>
> *58. The conclusion that the statutory scheme requires that recourse to summary arrest be justified as an exception is even clearer when*

[2] Criminal Jurisdiction and Procedure Act 2015.

considering the fact that pursuant to section 31 of PACE, summary arrest opens the door to infringements (albeit potentially justified) of the right to privacy, enshrined in section 7 of the Constitution of Bermuda and Article 8 of the ECHR….

67. In applying ….section 24 of UK PACE [in its original form upon which the Bermudian section 23 is based. The current UK version now contains express fetters on the summary arrest power], *the courts nevertheless confirmed that the section contained implicit limits on the power of summary arrest based on principles of public law 'reasonableness'…*

79. Given that the police did not interview the Applicant and immediately released him on bail, the clear inference is that the only reason for his arrest was to give the Respondent legal cover to enter and search his home. The material seized as a result of this search includes excluded and/or special procedure material, in particular confidential and sensitive information on some of the Applicant's patients. The Respondent's recourse to summary arrest allowed the Respondent to avoid having to justify this proposed serious violation of Dr. Reddy's privacy, as well as his patient's legitimate interests, to a judge on an application under section 8 and Schedule 2 of PACE. "

The factual matrix in outline

6. The factual matrix may be divided into three strands:

   (a) unchallenged and largely uncontroversial evidence about the Applicant's arrest and the search of his premises;

   (b) unchallenged and largely uncontroversial evidence about the Applicant's contacts with law enforcement officers in Bermuda and in the United States before and after the arrest;

   (c) controversial evidence about the arrest, search and the Applicant's interactions with the Bermuda Police Service before the arrest.

<u>Uncontroversial evidence about the arrest and search</u>

7. The First Affidavit of Senior Investigator John Briggs stated that the Bermuda Police Service ("BPS") believed based on protracted investigations that the Applicant was involved in administering unnecessary diagnostic tests for financial gain based on, *inter alia*, the following information:

- data suggesting that the Applicant had ordered more CT and MRI scans than any other doctor on the Island;

- witnesses who stated that some tests were "*blatantly unnecessary*".

8. Shortly after 7.00am on Thursday May 19, 2016, the Applicant responded to forceful knocks on his door in his dressing gown. He found what he believed was as many as 8 (but which the Respondent asserts were six) Police Officers at his door. The Officers were led by Senior Investigator Briggs and DS Hoyte. The Applicant was arrested on suspicion of fraud and money laundering. His home was searched, his female friend's purse and his own wallet were searched and five patient files, other medical documents from a BHCS binder and two iPads were seized.

9. At approximately 9.00am he was taken to Hamilton Police Station. He was permitted to call his lawyer, Mr Duncan, who arrived approximately 1.5 hours later. The Applicant's friend brought his passport to the Station and handed it in. The Applicant was released on Police bail without being formally questioned because no time for such questioning on the day of the Applicant's arrest was convenient to Mr Duncan. He has to date never been formally questioned about the suspected offences which formed the basis for his arrest on May 19, 2016.

Unchallenged and largely uncontroversial evidence about pre-arrest and post-arrest events

10. According to the First Affidavit of Deputy Commissioner Wright, the Applicant's arrest arose out of "*a large-scale fraud and corruption inquiry, which commenced in 2012*".

11. The Applicant deposed in his First Affidavit that on September 25, 2013, the day after a Nursing Associate had been terminated by BHCS for gross misconduct, she filed a complaint (supported by three other former employees) with the Bermuda Medical Council against the Applicant in relation to, *inter alia*, conducting an unnecessary MRI test in relation to a patient. Following an investigation in which the Applicant responded to the allegations made, the Bermuda Medical Council wrote the Applicant on May 16, 2014 advising him the Professional Conduct Committee had recommended "*that no further action be taken*".

12. The Applicant in his First Affidavit also stated that he had been subjected to two embarrassing interactions with the BPS before the search. Firstly on July 31, 2014, he was questioned by a Police Officer at LF Wade International Airport at passport control about his travel arrangements in front of a queue of other passengers. He was invited to contact Detective Sergeant Hoyte on his return to Bermuda.

13. His lawyer wrote to the Respondent to complain about this incident on August 5, 2014. The Applicant himself called DS Hoyte on August 14, 2014 and offered to submit to questioning, an offer which was never taken up. His lawyers wrote the Respondent again on August 20, 2014 to complain that the Applicant as a result of the July 31, 2014 incident was experiencing difficulties in obtaining a US visa. By letter of August 20, 2014, Deputy Commissioner Wright forwarded to the Applicant's lawyer a copy of a letter to the US Consul General confirming that the BPS "*has no concerns of regarding Dr. Reddy's travel to any country*". The Applicant also made a complaint to the Police Complaints Authority.

14. On May 8, 2015, the Applicant was again questioned by Police at passport control when departing Bermuda for the United States. The Respondent replied to a further letter of complaint from the Applicant's lawyer by apologizing for a mistake caused by the failure to delete an "*old enquiry*" that was closed.

15. The Applicant also deposed to a third incident which involved the US Department of Homeland Security and the Department of Justice. On January 3, 2016 at JFK Airport when he was travelling back to Bermuda, he was paged and then questioned about healthcare fraud at BHCS by a Federal Agent near the Departure Gate in sight of friends, colleagues and other passengers. The agent suggested that Dr Ewart Brown (founder of BHCS and Premier of Bermuda between 2006 and 2010) had:

> "*orchestrated the alleged fraud and instructed me to order unneeded diagnostic tests…the agent told me that I should provide testimony against Dr Brown and that if I refused and returned to Bermuda, I would be arrested, jailed and prosecuted there, and then be deported back to my native country of India. The agent also told me that there might be adverse consequences for my family in the US if I did not provide testimony against Dr Brown.*"

16. The Applicant engaged US counsel who, after initially contacting the Federal Agent who questioned the Applicant in New York, met US Department of Justice prosecutors on February 25 and April 8, 2016. Questions were raised about potential over-utilisation of MRI and CT scans at BHCS and the Brown-Darrell clinics, as well as the Applicant's medical training and qualifications. The Applicant's counsel supplied the prosecutors with documentation including documents relating to the Applicant's medical qualifications. Since the second April 8, 2016 meeting, no further information was requested of the Applicant or his US counsel by the Department of Justice. The averment as to the Applicant's belief that the BPS "*enlisted the aid of the US and this Homeland Security agent*" (First Affidavit, paragraph 33) was not challenged in the Respondent's evidence.

17. After the arrest, an interview of the Applicant was arranged at a time convenient to his lawyer but the Applicant declined to answer any questions. The Respondent did not publicize the Applicant's arrest. Dr Ewart Brown first formally publicised the arrest at

a press conference in which a lawyer participated and complaints were made that the arrest and search were unlawful.

Summary of unchallenged or uncontroversial facts

18. The most important facts which the Court can accept as having been proved, directly or inferentially, are the following:

- the Applicant was or ought to have been aware by the date of the arrest and search on May 19, 2016 as a result of a combination of (1) the complaint to the Bermuda Medical Society in 2013-2014 (which was dismissed in May 2014), (2) his being questioned by the BPS when leaving Bermuda in July 2014 and May 2015, and (3) his interactions with US law enforcement officials between January and April 2016, that he was suspected by the BPS of involvement in a fraudulent scheme of administering unneeded MRI and CT scans;

- accordingly it was unlikely that the Applicant, appreciating he was under investigation, would keep incriminating evidence in his home;

- the suspected fraud offences were not straightforward to establish, as (absent direct evidence of deliberate over-testing) whether or not tests were necessary or unnecessary would presumably be dependent on medical opinion analysing factors such as patient history and comparative international testing practices and/or standards. One complaint of unnecessary testing made by a former employee of the Applicant had been investigated and found not to have been proved by the Bermuda Medical Society in 2014;

- the BPS enlisted the assistance of US law enforcement agents[3];

- a Department of Homeland Security agent in New York in January 2016 invited the Applicant, in terms which he viewed as "*aggressive and overly confrontational*", to pursue the option of assisting the Respondent as a witness against Dr Brown as an alternative to the Applicant himself being charged and potentially convicted and deported from Bermuda. The Applicant was warned of potential negative consequences for his US-based relatives if he did not cooperate;

- the BPS investigators were or ought to have been aware by May 19, 2016 as a result of a combination of their interactions with the Applicant in August 2014

[3] First Tomkins states in paragraph 3 that he has read the Applicant's Form 86 and his skeleton argument for the January 27, 2017 hearing. It does not respond at all to First Sannapareddy.

and in May 2015 and their enlistment of the support of the Homeland Security agent who questioned the Applicant in January 2016 in New York, that the Applicant (1) was inclined to respond to even minor encounters with the BPS with a legal response utilising lawyers, (2) was (purportedly at least) willing to cooperate with the BPS to clear his name, and (3) that a heavy-handed response might provoke a hostile legal response from the Applicant rather than encourage him to voluntarily assist the investigation;

- the arrest and search took place, for reasons which were never explained, on the morning of a working day which meant that the Applicant's working schedule would inevitably be interrupted placing his patients' welfare at risk and increasing the likelihood that the fact of his arrest would enter the public domain and prompt gossip and speculation. This could have been avoided (or mitigated) by an arrest and interview at the Police Station by appointment at a mutually agreed time; and

- the Applicant's arrest was not part of a series of related arrests triggering a need to adopt a uniform approach to all suspects to avoid complaints of preferential treatment.

Controversial facts

19. I make no findings on a number of controversial matters, notably:

- the Applicant's disputed belief that he was questioned at the airport in Bermuda in July 2014 and May 2015, and arrested and his residence searched in May 2016, solely or primarily with a view to pressuring him to implicate Dr Brown. Oral evidence and cross-examination would be required to resolve this controversy about the motivations of the investigating officers;

- the Applicant's disputed assertion that he was asked humiliating questions during the search. Oral evidence and cross-examination would be required to resolve this controversy; and

- the Applicant's disputed assertion (only explicitly advanced in argument) that he was threatened in New York at the instigation of the BPS. In my judgment it would be unfair to infer that the threats the Applicant says were made to him at JFK Airport were made at the instigation of the BPS merely based on the tacit admission that the BPS "*enlisted the aid of*" the agent. Oral evidence and cross-examination would be required to justify making a finding on this issue. There is no evidence before the Court as to the actual content of the

communications which obviously took place between the BPS and the US agent.

20. The Respondent initially filed no evidence to address why the decision to arrest was made. Mr Diel has persuaded me that at least part of the reason why this issue was not initially addressed was that the position adopted at the strike-out stage was that it would be prejudicial to the ongoing investigation for evidence justifying the arrest to be filed. This contention was rejected in an interlocutory ruling which was not appealed. However, the prejudice argument would have had greater force if the Applicant had positively challenged whether or not reasonable grounds for suspecting the Applicant had committed offences. This would have involved an assessment of the 'fruits' of the investigation. The Respondent was merely required to explain why it was considered more appropriate to arrest a practising doctor (who had previously offered to answer any questions the BPS might have) with a large team of officers at his home early on the morning of a working day. The arrest was more intrusive because it was accompanied by an extensive search of the Applicant's home. Offering an explanation for why the decision to arrest was made rather than arranging a consensual interview at a Police Station did not appear likely to require the disclosure of obviously sensitive information.

21. In the event, Senior Investigator Briggs deposed:

    - that the decision to arrest was very carefully considered, without particularising what form the consideration took (e.g. one or more meetings) and which officers were involved and with no suggestion that legal advice was sought and/or obtained;

    - that there were "compelling reasons" for the arrest, without identifying what was compelling;

    - that one purpose of the arrest was to interview the Applicant, but that it was felt that an interview under caution would be more effective without offering any explanation (apart from wholly irrelevant post-arrest events) as to why an interview under caution after an arrest at a Police Station following voluntary attendance there was not a viable alternative; and

    - that it was desired to gain control over the Applicant's movements by placing him on Police bail, without identifying any or any clear basis for fearing that the Applicant was a flight risk (apart from a reference to the fact that a substantial part of the benefit from the alleged scheme had been invested outside Bermuda).

22. I find that there is no or no credible evidence that the Respondent consciously evaluated whether or not an early morning arrest at the Applicant's home on a working day was appropriate as opposed to less intrusive means of achieving the underlying objectives of the search. There is no suggestion that an arrest and search of the Applicant's home was necessary to search for vital evidence which might have been disposed of had an application for a search warrant been obtained. The search was not said to be the rationale for the arrest at all. In my judgment it was quite predictable, based on the way the Applicant had responded to far milder interactions with BPS, that the Applicant would decline to assist the Police in an interview under caution after such a heavy-handed early morning search and arrest.

23. I accept entirely that careful consideration was given as to whether the first two of the three arrest conditions, reasonable subjective suspicion that the Applicant had committed offences and objectively reasonable suspicion, were made out. Those two conditions were the only conditions which appeared on the face of the statutory arresting power. Those two conditions were the only two conditions which the Respondent's attorneys prior to the final hearing contended had to be met. There is no evidence that legal advice was sought about the legal implications of arresting the Applicant and searching his home against a background of his having (1) deployed lawyers to complain about the far less intrusive interactions he had had with the BPS at the Bermuda International Airport, and (2) volunteered to answer any questions the BPS might have. If the Respondent had sought legal advice and obtained a view of the law corresponding to Mr Diel's submissions at the end of the present case, either (a) a far more extensive analysis of the arrest decision would have been carried out before the arrest and would have been carefully documented and clearly explained in evidence, or (b) the arrest would have been effected by arrangement at a Police Station so that the Applicant could be interviewed under caution, or (c) no arrest would have been carried out at all. Further if, which was not conceded, the main object of the arrest was to effect the search, the search would have been undertaken pursuant to a warrant.

24. Under the heading "*Reasons for decision to arrest the applicant and search his home*" in the First Tomkins Affidavit sworn on January 20, 2017, the Senior Investigating Officer deposed:

> "*8…The BPS wanted to interview the Applicant about some of the information that was gathered and about his medical practice in MRI and CT scans so he could assist the investigation as he had previously stated he would. The interview was not carried out because the Applicant's lawyer stated that he wished to be present during the interview. The BPS respected this request and did not interview the Applicant.*"

25. This Affidavit gives no explanation as to why the Applicant's offer of assistance, which is acknowledged, was not taken up so that a dawn raid would not have been necessary. Nor is any explanation proffered as to why a search was considered to be necessary as an incident to the summary arrest. First Briggs explains that at later date an interview was arranged but the Applicant declined to answer a single question. As for the search, all that was offered in First Tomkins was the following by way of mitigation rather than by way of defence:

> "*10. As it relates to the search of the Applicant's home…it was not anticipated that the Applicant would possess confidential medical files at his home. As such, it was not expected that special procedure material would be found.*"

26. The First Briggs Affidavit makes no attempt at all to explain, let alone justify, the search of the Applicant's home, his personal effects and those of his guest nor does it explain why various items (including medical files) were seized. What evidence relevant to a fraudulent over-testing scheme was believed likely to be found in the wallet of the Applicant or his guest? This Affidavit may be viewed as the third opportunity for the Respondent to explain the search. The first attempt was made by letter dated June 30, 2016 in response to the Applicant's letter before action which complained that, *inter alia*, the reason for the summary arrest was to avoid having to apply to court for a search warrant. It was asserted by the Respondent in answer that:

> "*In the circumstances the CoP is satisfied that this search was lawful under both sections 18 and 31*[4] *of PACE…The CoP is satisfied that the officers were lawfully entitled to seize the items which they removed from the premises under both sections 18(2) and 19(3) of PACE. So far as the five patient files you mention are concerned, the very fact that these items were found at Dr Reddy's home address gives cause for concern, especially since one of the patients in question appears to have died as long ago as December 2014. We reject your contention that any of the items seized was irrelevant to the investigation.*"

[4] No evidential support was provided for the bald assertion that section 31 was a valid legal basis for the arrest. Section 31 of PACE provides:

"*(1) A police officer may search an arrested person in any case where the person to be searched has been arrested at a place other than a police station, if a police officer has reasonable grounds for believing that the arrested person may present a danger to himself or to others."*

27. The fact that the Applicant was placed on Police bail does lend some credence to the assertion (belatedly made in the First Briggs Affidavit sworn on March 6, 2017) that one purpose of the arrest was to ensure that the Applicant would attend his trial and not flee the jurisdiction. However, I find that this was very tenuous ground for carrying out the arrest in the way it was carried out. The same result could have been achieved by arranging for the Applicant to attend to be arrested at a Police Station. The most pertinent point is that there is no credible evidence before the Court that the Applicant was reasonably viewed as a flight risk in any event. In none of his previous interactions with the BPS (and the US agent whose aid the BPS enlisted) had he indicated anything other than a desire to meet any allegations against him. He had not been confronted with overwhelming evidence of his having committed a crime which was easy to prove (e.g. a crime of passion supported by DNA evidence). On the contrary, complex criminal fraud cases not involving obvious dishonesty (such as cases based on false invoices) are notoriously difficult to prove in all parts of the world where jury trial is the mode of trial for such cases

28. In addition, if the Applicant was indeed generating more income than legitimate medical practice would yield, which was an implicit assumption underpinning the alleged offences, the Applicant would have a strong commercial incentive to remain in Bermuda. Again, the Applicant's unchallenged account of what he was told by the Homeland Security agent was based on the premise that the Applicant wanted to remain in Bermuda, not to leave the jurisdiction. If the Applicant was, as he consistently insisted entirely innocent, it would equally be inherently improbable that the Applicant as a respectable medical doctor with an established practice would "cut and run" because of an investigation which he knew would go nowhere as well. In carrying out any flight risk analysis, it would always have to be borne in mind that the proof of any secondary money laundering offences would be entirely parasitic on proof of the primary fraud allegations. Bermuda has a free enterprise economy and making what may appear to Police Officers to be eye-watering amounts of money through professional activities and investing it overseas is not a crime[5].

29. After the Applicant's arrest and release the BPS, apparently following up initial queries about the Applicant's medical queries which were initially raised by the US Department of Justice and apparently responded to by the Applicant, sought access to original copies of the Applicant's medical certificates. His attorneys supplied these documents to the Bermuda Medical Society, whom the Police also contacted and advised that the Applicant's qualifications were being investigated. The Bermuda Medical Society was satisfied as to the *bona fides* of his qualifications. The Applicant was understandably upset by these enquiries which had no obvious relevance to an

[5] The investigating officers appear to have viewed the fact that the Applicant had invested in properties in his wife's name as efforts to conceal the proceeds of crime. It has for many years been common practice for professionals to take various protective steps to shield their hard-earned assets from potential judgment creditors. So this conduct in and of itself did not to my mind justify viewing the Applicant as planning to flee Bermuda.

enquiry of fraudulent over-testing (as opposed to gross medical negligence) and were seemingly being unreasonably pursued by the Respondent after the Applicant's professional body had dealt with the issue. Spelling errors in one or more of the English language certificates issued by Indian medical institutions, which Mr Diel pointed out in the course of argument, did not to my mind explain why the certificates were of interest to the Police in the first place. I am nevertheless unable to accept on the basis of the written evidence alone that checking the Applicant's credentials was solely intended to humiliate him.

30. That said it is difficult to make sense of the substantially agreed evidence as to the interactions, both direct and indirect, between the BPS and the Applicant before and after his arrest without acknowledging the distinct impression that those interactions were primarily motivated by a desire to encourage him to confess to the alleged crimes and 'save his own skin' by implicating the primary target of the investigation. In the absence of affording the Respondent's witnesses an opportunity of explaining their disputed motivations through oral evidence, however, the presumption of regularity in respect of official acts comes into play. I am bound to find that even if the Respondent was seeking to put pressure on the Applicant as he believes, the arresting officers in all respects acted in good faith carrying out the arrest and search. There is no reason to doubt that the arresting officers genuinely believed that the Applicant was implicated in the commission of offences and that he could supply valuable incriminating information against the man they perceived to be primarily culpable: Dr Ewart Brown[6].

Legal findings: whether a power of arrest by warrant exists at the investigative stage

31. A preliminary issue which informs how one analyses the statutory power which was deployed in the present case can conveniently be dealt with first. The Applicant's counsel, apparently as an afterthought, advanced the ambitious argument that an alternative more conservative arrest option was available to the investigating officers. Lord Goldsmith QC referred the Court to the following provision in the Criminal Jurisdiction and Procedure Act 2015 ("CJPA"):

> "***Issue of summons to accused person***
> *3. (1) On an information being laid before the magistrates' court that a person has, or is suspected of having, committed an offence, the court may issue—*
>
> *(a) a summons directed to that person requiring him to appear before the magistrates' court to answer the information; or*

[6] It is important to note that no evidence of any wrongdoing on Dr Brown's part was placed before this Court in the present proceeding.

(b) subject to subsection (3), a warrant to arrest that person and bring him before the magistrates' court.

(2) No warrant shall be issued under this section upon an information being laid unless the information is in writing.

(3)No warrant shall be issued under this section for the arrest of any person unless—

(a) the offence to which the warrant relates is an indictable offence or is punishable with imprisonment; or

(b) the person's address is not sufficiently established for a summons to be served on him.

(4) Where the offence charged is an indictable offence, a warrant under this section may be issued at any time notwithstanding that a summons has previously been issued.

(5) This section is without prejudice to section 49(1) of the Police and Criminal Evidence Act 2006, and any reference to a trial on an information under this Act is deemed to include a trial on a written charge issued against an individual pursuant to that Act." [Emphasis added]

32. The Applicant's counsel argued that this section provided a less intrusive means of arresting the Applicant, entailing Court supervision, which the Respondent ought to have used instead of the summary arrest power. Mr Diel had little difficulty in persuading me that section 3 of CJPA applies solely after an information charging an accused person has been laid in the Magistrates' Court. Section 3 has no application where the Police wish to arrest a suspect who has not yet been charged in Court. PACE provides the only statutory basis for a pre-charge arrest. This view is confirmed by the very broad definition of "arrestable offence" in section 23(1) of PACE, which is considered below.

33. There are in my judgment essentially four main ways for an accused person to make a first appearance in Court:

- where a person in Police custody following a summary arrest is brought to Court in custody to be charged;

- where a person on Police bail following a summary arrest is bailed to appear in Court;

- where a person is summoned to appear in Court under section 3(1)(a) of CJPA;

- where a person is arrested pursuant to a warrant issued under section 3(1) (b) of CJPA (typically where they have failed to answer a summons under section 3(1) (a)).

Legal findings: the scope of the summary power of arrest under PACE section 23(6)

Overview

34. It was common ground that the arrest was purportedly made pursuant to the Bermudian equivalent of section 24(6) of the Police and Criminal Evidence Act 1984 ("UKPACE"). Section 23 of PACE provides as follows:

> "*(6) Where a police officer has reasonable grounds for suspecting that an arrestable offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds for suspecting to have committed the offence.*"

35. The primary meaning of "*arrestable offence*" which is assigned by section 23(1) of PACE is "*offences for which a person may be sentenced under any provision of law to imprisonment for a term of three months or more whether or not a fine is also payable*". The power of "*summary arrest*" which section 23 confers on the Police may potentially be utilised in relation to almost all offences, great or small. Construed narrowly, it confers powers which are breathtakingly broad. The central issue in the present case was whether or not and, if so, to what extent section 23(6) embodied, by necessary implication, the third of the following three preconditions for the exercise of the power of arrest:

> (1) the subjective belief by the arresting officers that reasonable grounds exist for suspecting that:
>
> (a) an arrestable offence has been committed, and
>
> (b) that the person it is proposed to arrest has committed the offence;
>
> (2) the arresting officer's subjective belief must be based on objectively reasonable grounds;
>
> (3) notwithstanding the fact that conditions (1) and (2) have been met, the discretion to make an arrest may only be exercised if the arresting officer has also determined that is necessary at most or appropriate at least, having regard to other options involving less intrusion with the liberty of the citizen.

36. Since section 24(6) of UKPACE was first enacted in terms which are mirrored by our own section 23(6), the third precondition for a summary arrest has been re-enacted in express terms[7]. Section 24(2) of UKPACE is still expressed in the same terms from our own section 23(6) is derived. However, section 24 now further provides:

> "*(4) But the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question.*
>
> *(5)The reasons are—*
>
> *(a)to enable the name of the person in question to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person's name, or has reasonable grounds for doubting whether a name given by the person as his name is his real name);*
>
> *(b) correspondingly as regards the person's address;*
>
> *(c) to prevent the person in question—*
>
> *(i) causing physical injury to himself or any other person;*
>
> *(ii) suffering physical injury;*
>
> *(iii) causing loss of or damage to property;*
>
> *(iv) committing an offence against public decency (subject to subsection (6)); or*
>
> *(v) causing an unlawful obstruction of the highway;*
>
> *(d) to protect a child or other vulnerable person from the person in question;*
>
> *(e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;*
>
> *(f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.*"

37. Lord Goldsmith's case at its highest was that all that the quoted amendments did was to make explicit what was already implicit in English decided cases based on the original section 24(6). I found this submission to be an overreaching one which is not convincingly supported by any post-amendment case law. Mr Diel rightly argued that the most persuasive English case law on the implied limits on the power of summary arrest are to be found in cases considering the provisions which are identical to our own current section 23(6) of PACE. This proposition was unambiguously supported

[7] The amendments were introduced by the Serious Organised Crime and Police Act 2005.

by the following observations of Hughes LJ (as he then was) on the effect of the new summary arrest conditions in *Hayes-v- Chief Constable of Merseyside* [2012] 1 WLR 517 at 512 (CA):

> "*15. The effect of this is, in one sense, to tighten up the accountability of police officers, at least in the case of arrest for serious offences, because those arrests now become subject to the criterion of necessity, whereas previously only non-arrestable offences were. As Toulson LJ pointed out in this court in Shields v Chief Constable of Merseyside Police [2010] EWCA Civ 1281, the new formulation also (a) creates a single code for all offences, (b) ensures conformity with Article 5 ECHR and (c) incorporates the Wednesbury principle of review via the concept of reasonable grounds, brought forward from the previous law and extended to the new general requirement of necessity.*"

38. This passage strongly implies that restrictions on the exercise of the discretion to arrest are required to ensure compliance with article 5 of ECHR. Accordingly, I also accept the Applicant's ultimately uncontroversial submission that sections 5 and 7 of the Bermuda Constitution and articles 5 and 8 of the European Convention on Human Rights ("ECHR") are engaged by the present application as an aid to interpretation. In other words, in construing section 23(6), the presumption of constitutionality and the presumption that Parliament does not intend to legislate inconsistently with Her Majesty's international obligations in respect of Bermuda come into play.

39. Because the Respondent abandoned its initial apparently absolutist position that no third precondition for exercising the summary arrest power existed at all, the Applicant did not need to pursue the alternative prayer for a declaration that section 23(6) was unconstitutional on its face and should be read as including such additional safeguards for the liberty of the subject as were now found in the amended UKPACE. I would not likely have been inclined to accede to that argument, in full-blown form at least. The Attorney-General's Submissions aptly relied, in response, on the following *dictum* of Lord Hoffman in *Boyce-v-The Queen* [2005] 1 AC 400 which emphasised the need to remember that there are limits to how broadly one can construe fundamental rights and freedoms provisions:

> "*59. The "living instrument" principle has its reasons, its logic and its limitations. It is not a magic ingredient which can be stirred into a jurisprudential pot together with "international obligations", "generous construction" and other such phrases, sprinkled with a cherished aphorism or two and brewed up into a potion which will make the Constitution mean something which it obviously does not. If that provokes accusations of literalism, originalism and similar heresies, their Lordships must bear them as best they can.*

40. Two important points about the scope of the third precondition for a lawful arrest require determination. Most significantly, can the exercise of the discretion only be challenged on *Wednesbury* unreasonableness, as the Respondent contended, or can the discretion be challenged more broadly for failing to take into account relevant matters or taking into account irrelevant matters as the Applicant contended? Secondly, did the Applicant bear the burden of proving a failure to comply with the third precondition or does the Respondent have to prove the lawfulness of the arrest?

The nature of the statutory discretion

41. The most significant early English case to consider the nature of the power of summary arrest under the substantially similar statutory provision which preceded UKPACE was *Holgate-Mohammed-v-Duke* [1984] 1 A.C. 437. This case was followed in various post-UKPACE Court of Appeal decisions. It is clear on a straightforward reading of the speech of Lord Diplock in this case, that the legality of the exercise of the discretion to prosecute falls to be determined with reference to all of the principles established in *Associated Provincial Picture Houses Ltd.-v-Wednesbury Corporation* [1948] 1 A.C. 437, not simply the unreasonableness or irrationality principle that case is most famous for. The same speech also illuminates the fact that the notion that the power of arrest can only be exercised for some good reason has deep historical legal roots.

42. The facts in *Holgate-Mohammed* were essentially these. The plaintiff sued for wrongful arrest after she was arrested and questioned at a Police Station on suspicion of stealing jewellery from a house she formerly resided at. She was released without being charged. Jewellery had clearly been stolen and reasonable grounds for suspecting the plaintiff clearly existed. The question was whether it was appropriate to arrest the plaintiff. The arresting officer explained that the arrest was carried out because the only evidence likely to be probative of the plaintiff's guilt was her own confession and that questioning her at the Police Station was most likely to bear fruit. Lord Diplock described the legal question before the House of Lords as follows (at 444H-445A):

> "*So, applying Wednesbury principles, the question of law to be decided by your Lordships may be identified as this: 'Was it a matter that Detective Offin should have excluded from his consideration as irrelevant to the exercise of his statutory power of arrest, that there was a greater likelihood (as he believed) that Mrs. Holgate-Mohammed would respond truthfully to questions about her connection with or knowledge of the burglary, if she were questioned under arrest at the police station, than if, without arresting her, questions were put to her by Detective Constable Offin at her own home from which she could peremptorily order him to depart at any moment, since his right of entry under section 2(6) of the Criminal Law Act 1967, was dependent on his intention to arrest her?"*"

43. He then explained (at page 445 B-F) the parameters of and rationale for the statutory powers of arrest as follows:

"*My Lords, there is inevitably the potentiality of conflict between the public interest in preserving the liberty of the individual and the public interest in the detection of crime and the bringing to justice of those who commit it. The members of the organised police forces of the country have, since the mid-nineteenth century, been charged with the duty of taking the first steps to promote the latter public interest by inquiring into suspected offences with a view to identifying the perpetrators of them and of obtaining sufficient evidence admissible in a court of law against the persons they suspect of being the perpetrators as would justify charging them with the relevant offence before a magistrates' court with a view to their committal for trial for it.*

The compromise which English common and statutory law has evolved for the accommodation of the two rival public interests while these first steps are being taken by the police is two-fold:

(1) no person may be arrested without warrant (i.e. without the intervention of a judicial process) unless the constable arresting him has reasonable cause to suspect him to be guilty of an arrestable offence; and arrest, as is emphasised in the Judges' Rules themselves, is the only means by which a person can be compelled against his will to come to or remain in any police station.

(2) a suspect so arrested and detained in custody must be brought before a magistrates' court as soon as practicable, generally within 24 hours, otherwise, save in a serious case, he must be released on bail (Magistrates' Courts Act 1980, section 43(1) and (4)).

That arrest for the purpose of using the period of detention to dispel or confirm the reasonable suspicion by questioning the suspect or seeking further evidence with his assistance was said by the Royal Commission on Criminal Procedure in England and Wales in 1981 (Cmnd. 8092) at paragraph 3.66 "to be well established as one of the primary purposes of detention upon arrest." That is a fact that will be within the knowledge of those of your Lordships with judicial experience of trying criminal cases; even as long ago as I last did so, more than twenty years before the Royal Commission's Report. It is a practice which has been given implicit recognition in Rule 1 of successive editions of the Judges' Rules, since they were first issued in 1912."

44. Lord Diplock concluded the leading judgment in a unanimous decision of the House of Lords (at page 446B-D) as follows:

"*In my opinion the error of law made by the county court judge in the instant case was that, having found that Detective Constable Offin had reasonable cause for suspecting Mrs. Holgate-Mohammed to be guilty of the burglary committed in December 1979 to which he rightly applied an objective test of reasonableness, the judge failed to recognise that lawfulness of the arrest and detention based on that suspicion did not depend upon the judge's own view as to whether the arrest was reasonable or not, but upon whether Detective Constable Offin's action in arresting her was an exercise of discretion that was ultra vires under Wednesbury principles because he took into*

consideration an irrelevant matter. For the reasons that I have given and in agreement with the Court of Appeal, I do not think that in the circumstances Detective Constable Offin or any other police officers of the Hampshire Police acted unlawfully in the way in which they exercised their discretion."

45. In other words, the legality of the decision to arrest could only be challenged on the grounds that the arresting officers took into account irrelevant matters, failed to take into account relevant matters, or exercised their discretion in a way which no reasonable officer would. As in all judicial review applications, it is not for the Court to substitute its own views as to the merits of an administrative law decision. This reading of *Holgate-Mohammed* finds support in Lord Woolf's much-quoted judgment in *Castorina-v-Chief Constable of Surrey* (1988) LGRR 241 at 248-249 (where the third question was not in dispute):

> "*There is, however, one case which I regard as important and that is Holgate-Mohammed v. Duke (1984) 1 Q.C. 437 because in that case in a speech with which the other members of the House agreed Lord Diplock analysed the structure of section 2(4) of the Criminal Law Act 1967. Basing myself on Lord Diplock's speech at pages 442 and 443 I suggest that, in a case where it is alleged there has been an unlawful arrest, there are three questions to be answered:*
>
> *1. Did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.*
>
> 2. *Assuming the officer had the necessary suspicion, was there reasonable cause for that suspicion? This is a purely objective requirement to be determined by the judge if necessary on facts found by a jury.*
>
> 3. *If the answer to the two previous questions is in the affirmative, then the officer has a discretion which entitles him to make an arrest and in relation to that discretion has* [it] *been exercised in accordance with the principles laid down by Lord Greene M.R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [?]" [Emphasis added]

46. I find that Lord Diplock and Lord Woolf's statements as to the legal test for challenging the exercise of the third summary arrest pre-condition are the most authoritative and clear statements of the legal approach this Court should adopt. In a case concerning a similar arrest power to our own and in which Lord Woolf's third question did not directly arise for consideration at all, the Judicial Committee of the Privy Council (Lord Clarke) has in general terms approved Lord Diplock's "*well known*" statement in *Holgate-Mohammed: Ramsingh-v-Attorney-General (Trinidad and Tobago)*[2013] 3 LRC 461 at 465e. To the extent that Mr Diel, who placed heavy reliance on the later Court of Appeal decision in *Al Fayed and Others-v-*

Commissioner of Police of the Metropolis [2004] EWCA Civ 1579, sought to establish that a narrower legal test applies, I firmly reject that proposition.

47. The *Al Fayed* case is most instructive not for its confirmation that the summary power of arrest has the same three limbs identified by Lord Diplock in *Holgate-Mohammed-v-Duke* [1984] 1 A.C. 437 in the pre-UKPACE era and confirmed by Lord Woolf in *Castorina-v-Chief Constable of Surrey* (1988) LGRR 241. It is more instructive for its facts. These serve as a useful guide for how Police Officers, proposing to arrest a well-resourced and hithertofore respectable citizen who is likely to legally pounce on any missteps the arresting officers make, can effectively immunize themselves from successful legal challenge. The relevant facts in *Al Fayed* were as follows:

    - a prominent businessman, Tiny Rowland, complained to the Police about theft from and criminal damage to a safety deposit box he was renting from Harrods Department Store, which was owned the equally prominent Mohamed Al Fayed. The Police suspected Al Fayed and others and wished to interview the suspects under caution. They were arrested and sued for wrongful arrest;

    - prior to the arrest, the Police sought legal advice in relation to the reasons for the proposed advice and whether the discretion to arrest for the purposes of an interview under caution could validly be exercised;

    - the pros and cons of interviewing without an arrest and after an arrest were discussed by the investigating team with an inspector playing the role of devil's advocate;

    - consideration was given to the importance of treating the prominent Al Fayed in a manner consistent with the less privileged other suspects;

    - the suspects attended the Police Station by agreement after negotiations with their lawyers and were arrested, cautioned and interviewed there.

48. Against this factual background, the trial judge (Cresswell J) concluded in a finding which was upheld by the Court of Appeal:

> "*The discretion was exercised in accordance with Wednesbury principles. The decisions in each case to arrest were not perverse. The arresting officers exercised their discretion in each case. They did not fail to take*

account of the relevant. They did not take account of the irrelevant." (paragraph 70) [Emphasis added]

49. On appeal, the appellants advanced two arguments. The first was the obviously hopeless argument that the discretion to arrest had not been exercised at all. The alternative argument was that the decision to arrest was on the facts perverse or *Wednesbury* unreasonable because the arrest had not been shown to have been "necessary". In my judgment it is impossible to fairly read the judgment of Auld LJ, which describes (at paragraph 83(1)) the third *Castorina* question as being "*whether he exercised his discretionary power reasonably in the Wednesbury sense*", in isolation from the factual matrix of the *Al Fayed* case. Indeed, Auld LJ in his discussion of the third summary arrest requirement approved a passage from *Cumming & Others-v-Chief Constable of Northumbria Police* [2003]EWCA Civ 1844 upon which Lord Goldsmith QC relied. According Auld LJ (at paragraph 83):

> "*4) The requirement of Wednesbury reasonableness, given the burden on the claimant to establish that the arresting officer's exercise or non-exercise of discretion to arrest him was unlawful, may, depending on the circumstances of each case, be modified where appropriate by the human rights jurisprudence to some of which I have referred, so as to narrow, where appropriate, the traditionally generous ambit of Wednesbury discretion—Cumming, per Latham LJ at para 26. It is not, as a norm, to be equated with necessity; neither Article 5 nor section 24(6) so provide. The extent, if at all, of that narrowing of the ambit or lightening of the burden on the claimant will depend on the nature of the human right in play – in this context one of the most fundamental, the Article 5 right to liberty. In my view, it will also depend on how substantial an interference with that right, in all or any of the senses mentioned in paragraph 82 above, an arrest in any particular circumstances constitutes. The more substantial the interference, the narrower the otherwise generous Wednesbury ambit of reasonableness becomes. See the principles laid down by the House of Lords in R v. SSHD, ex p Bugdaycay [1987] AC 514 , and in R v SSHD, ex p Brind [1991] 1 AC 696 , see e.g. per Lord Bridge of Harwich, at 748F-747B. Latham LJ had also to consider this aspect in Cumming, where, following Lord Diplock in Mohammed-Holgate, at 444G-445C, he said at paragraphs 43 and 44:*
>
> *'43. ... it seems to me that it is necessary to bear in mind that the right to*

liberty under Article 5 was engaged and that any decision to arrest had to take into account the importance of this right even though the Human Rights Act was not in force at the time. The court must consider with care whether or not the decision to arrest was one which no police officer, applying his mind to the matter could reasonably take bearing in mind the effect on the appellants' right to liberty.

44. It has to be remembered that the protection provided by Article 5 is against arbitrary arrest. The European Court of Human Rights in Fox, Campbell and Hartley held that the protection required by the article was met by the requirement that there must be 'reasonable grounds' for the arrest. I do not therefore consider that Article 5 required the court to evaluate the exercise of discretion in any different way from the exercise of any other executive discretion, although it must do so in the light of the important right to liberty which was at stake." [Emphasis added]

50. I find that it is both consistent with principle and a proper understanding of the above persuasive authorities that whether or not the discretion to effect an arrest has been lawfully exercised must be determined by reference to all of the *Wednesbury* principles. The decision to arrest where the first two arrest preconditions have been met can be impugned on the grounds that the arresting officers, assuming of course that the arrest powers were exercised in good faith, either (1) failed to have regard to a materially relevant consideration, (2) took into account materially irrelevant considerations, or (3) made a decision which was unreasonable in the perversity sense, i.e. made a decision which no reasonable public officer, properly directing themselves, would make. The need to apply the reasonableness or perversity test (which is merely one of the *Wednesbury* principles for challenging the legality of a public law decision) may or may not arise depending on the factual and legal way in which individual cases are argued.

51. In *Al Fayed* it was on the facts impossible to convincingly argue that the Police had failed to exercise their discretion at all, let alone taken into account irrelevant considerations or failed to take into account relevant considerations. The main argument advanced on appeal was that the judgments which were made were unreasonable. Auld LJ's substantive findings applying the law to the facts were stated in the following way:

"*84. On my reading of Cresswell J's judgment and of the evidence before him,*

he correctly applied those principles to his determination of this question and adequately reasoned that determination. First, in his review and analysis of the evidence, he had to determine on a wealth of police evidence variously expressing how Mr Rees and the arresting officers regarded and applied in this case the normal practice or 'the preferred operational strategy' of arrest before interview. It is plain from a reading of the evidence that each of the officers, while acknowledging some such normal practice or approach to the exercise of the power, insisted that its application depended in each case on its particular circumstances and did so in the arrest of each of these appellants, evidence that Cresswell J expressly accepted. It is plain that Mr Rees and his fellow officers were exercised by the effect on their decision that the appellants had offered to attend voluntarily at the police for interview and to provide finger prints etc. And it is a testament to their concern as to what they should do in the light of those offers that they debated it among themselves and that Mr Rees sought the advice of Senior Treasury Counsel. And it is plain from their evidence, read as a whole, that their concerns in the public interest, which Counsel had endorsed, were: 1) a legitimate interest in getting the most out of the interviews, which they felt would be the case if they took place under arrest at a police station; 2) the wish to avoid any difficulties that could have resulted from arrest of an un-arrested appellant who attempted to walk out of an interview, and 3) given the public persona of Mr Al Fayed, the fact that it would have been invidious to treat him or any of the appellants differently in this respect. In my view, all of those evidenced concerns, when put alongside the officers' insistence that they only applied the so-called normal policy after considering whether it was appropriate on the facts of each case, fell well within the ambit of Wednesbury reasonableness, however rigorous a scrutiny it should now attract. In my view also, Cresswell J was entitled, as he did, to accept that evidence and, on a Wednesbury basis the reasonableness of the concerns that led each of the arresting officers to exercise his power of arrest."

The burden of proof

52. I accept Mr Diel's submission that the Applicant bears the ultimate persuasive burden of establishing that his arrest was unlawful once the first two arrest preconditions

have been satisfied (in the present case they were not challenged). The English Court of Appeal in *Al Fayed* held:

> "*2) It is for the police to establish the first two Castorina requirements, namely that an arresting officer suspected that the claimant had committed an arrestable offence and that he had reasonable grounds for his submission – Holgate Mohammed, per Lord Diplock at 441F-H, and Plange, per Parker LJ.*
>
> *3) If the police establish those requirements, the arrest is lawful unless the claimant can establish on Wednesbury principles that the arresting officer's exercise or non-exercise of his power of arrest was unreasonable…*"

53. Despite this abstract legal finding, the Police in that case adduced an abundance of evidence to demonstrate that the decision to arrest and interview under caution rather than to interview without a prior arrest was a lawful one. In many cases the facts would speak for themselves. For instance, Police Officers arresting a man they witnessed perpetrate an assault, or suspected to be fleeing from the scene of a robbery, would hardly need to explain why they decided make an arrest. In more ambiguous circumstances, such as in the *Al Fayed* case, where the opportunity to make a considered decision exists and the appropriateness of arresting a suspect for interviewing who is willing to be interviewed voluntarily is not free from doubt, it will usually be relatively straightforward for the arrested person to raise a case to answer.

Legal findings: related constitutional and statutory provisions

Section 5 of the Bermuda Constitution

54. Section 5 provides so far as is material for present purposes:

> "***Protection from arbitrary arrest or detention***
>
> *5 (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases:*
>
> *…*
>
> *(e) upon reasonable suspicion that he has committed, is committing, or is about to commit, a criminal offence…*
>
> *(2) Any person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.*

(3) Any person who is arrested or detained in such a case as is mentioned in subsection (1)(d) or (e) of this section and who is not released shall be brought without undue delay before a court; and if any person arrested or detained in such a case as is mentioned in the said paragraph (e) is not tried within a reasonable time he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person. (5) Any person who is arrested shall be entitled to be informed, as soon as he is brought to a police station or other place of custody, of his rights as defined by a law enacted by the Legislature to remain silent, to seek legal advice, and to have one person informed by telephone of his arrest and of his whereabouts." [Emphasis added]

55. Section 5 contains four relevant constitutional principles in the context of the present case:

(1) personal liberty is explicitly constitutionally protected and arrests which do not comply with the law are explicitly constitutionally prohibited;

(2) a person may explicitly be arrested prior to being charged on suspicion of having committed an offence, and implicitly such arrest may be for the purposes of bringing him before a court within a reasonable time and/or interviewing him and bringing him before a court within a reasonable time;

(3) a person may explicitly be arrested prior to being charged on suspicion of having committed an offence, and implicitly such arrest may be for the purposes of releasing him on conditions designed to ensure his attendance in court at some uncertain future date and/or interviewing him and then releasing him on conditions designed to ensure his attendance in court at some future uncertain date, assuming that it is decided that he should actually be charged;

(4) implicitly, a person cannot be arrested simply because they are suspected of having committed an offence. The standard of reasonable grounds for suspicion is a comparatively low threshold which may in many cases (such as the present case where a lengthy investigation had not yet been concluded) fall far short of possessing sufficient evidence to support a charging decision. Deploying the power of arrest and infringing the

suspect's personal liberty is only constitutionally permissible if it achieves a legally authorised and constitutionally proportionate purpose.

56. By way of analogy, the constitutional right of freedom of movement under section 11 may be interfered with in relation to a person "*for the purpose of ensuring that he appears before a court at a later date for trial of…a criminal offence or for proceedings preliminary to trial*" (section 11(2)(e)) or, more broadly, by any "*lawful detention*" (section 11(4)).

57. These provisions provide compelling general support for the important proposition that, as Lord Goldsmith QC forcefully argued, how the discretion to effect an arrest conferred by section 23(6) of PACE may lawfully be exercised can only properly be assessed taking into account the fact that personal liberty and freedom from arbitrary arrest are constitutionally protected rights. Context is everything. Section 23(6) may clearly be used more liberally where it is proposed to arrest and charge somebody who is actually believed to have committed an offence. Greater restraint is required where the result of the arrest might be to prove the suspect's innocence rather than his guilt.

Section 7 of the Bermuda Constitution

58. Section 7 of the Constitution is engaged because the summary power of arrest was utilised to carry out an extensive search of the Applicant's home and to search the Applicant and a guest who happened to be there. Section 7 provides:

> "*(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—*
>
> *(a) that is reasonably required—*
>
> *(i) in the interests 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 purpose of protecting the rights and freedoms of other persons;*
>
> *(b) to enable an officer or agent of the Government, a local government authority or a body corporate established by law for a public purpose 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 the Government or that authority or body corporate, 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,

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."

59. Section 5 contains four relevant constitutional principles in the context of the present case:

(1) freedom from non-consensual search of the person or one's property is constitutionally protected;

(2) interference with the protected freedoms is only permitted to the extent that it is authorised by proportionate laws;

(3) the potentially relevant objects of laws authorising a search of private property in relation to a criminal investigation or criminal proceedings are limited to laws designed to advance the interests of:

(a) public safety, public order and/or public morality; and/or

(b) protecting the rights and freedoms of others.

Section 18 of the Police and Criminal Evidence Act 2006

60. The power of search which was purportedly deployed in the present case is found in the following provisions of PACE:

"***Entry and search after arrest***
18. (1)Subject to the following provisions of this section, a police officer may enter and search any premises occupied or controlled by a person who is under arrest for an arrestable offence, if he has reasonable grounds for suspecting that there is on the premises evidence, other than items subject to legal privilege, that relates—

(a) to that offence; or

(b) to some other arrestable offence which is connected with or similar to that offence.

(2) A police officer may seize and retain anything for which he may search under subsection (1).

(3)The power to search conferred by subsection (1) is only a power to search to the extent that it is reasonably required for the purpose of discovering such evidence.

(4)Subject to subsection (5), the powers conferred by this section shall not be exercised unless an officer of the rank of inspector or above has authorized them in writing.

(5)A police officer may conduct a search under subsection (1)—

(a) before taking the person to a police station; and

(b) without obtaining an authorization under subsection (4),

if the presence of that person at a place other than a police station is necessary for the effective investigation of the offence…." [Emphasis added]

61. This is a very limited search power and it is noteworthy that section 18(3) mirrors the language of section 7(2) of the Constitution by limiting its exercise "*to the extent that it is reasonably required*". Part III of PACE contains an elaborate code for obtaining search warrants with Court supervision which is replete with protections for private property rights. Special protections are enacted for "*excluded material*", "*personal property*", "*journalistic material*" and "*special procedure material*".

62. It is accordingly self-evident, taking a high-level view of the scheme of PACE in light of section 7 of the Constitution, that the power to search premises when a person is under arrest (section 18) is intended to be subservient to the dominant power of summary arrest (section 24(6)). Where the primary aim of the Police is to carry out a search of private premises, a summary arrest may not be used to sidestep the elaborate protections for private property which PACE provides under the umbrella of the search warrant regime.

Findings: legality of arrest and search

63. The central legal question is whether the Applicant's arrest and the related search of his home and seizure of his personal property were unlawful because the discretion to arrest was improperly exercised. The undisputed evidence raised a case to answer for two main reasons. First because the Applicant's evidence that he had previously

offered to voluntarily assist the BPS was not disputed. Second because the use of six Police Officers to make an early morning arrest and search the home of a man of previous good character suspected of involvement in a medical office-based fraud following a long-running investigation of which the suspect was already aware was on its face incongruous and, absent some rational explanation, an excessively intrusive deployment of executive power.

64. Applying the legal standard contended for by the Respondent's counsel which entails applying English persuasive case law to the interpretation of a Bermudian statutory provision based on an English statutory precedent , the discretion to arrest in a case as significant as the present one (involving an investigation running over 4 years in which a former Premier was a target) should not have been exercised without:

- legal advice being sought as to the scope of the powers of summary arrest and search it was proposed to exercise (optionally);
- a conscious evaluation of the appropriateness of making an arrest as opposed to less intrusive means of achieving the investigative objectives (mandatorily);
- a rational explanation as to why a summary arrest was considered preferable to a voluntary interview and/or an arrest by appointment at a Police Station (mandatorily);
- a clear explanation of why the search and seizure of the Applicant's property without a warrant was "reasonably required".

65. I am bound to find that the summary arrest and related search and seizure of property which occurred on May 19, 2016 at just after 7.00am at the Applicant's home was unlawful in light of the factual and legal findings set out above because:

- the Respondent has adduced no or no credible evidence that the discretion to utilize the summary arrest power (where the other conditions for its exercise were met) was exercised at all in the legally requisite sense. It is quite obvious based on the evidence before the Court that the investigating officers did not evaluate the appropriateness of exercising the power of arrest in the way it was exercised as against other less intrusive options. This was a fatal failure to consider crucially relevant matters. It is impossible to believe that such an evaluative exercise would have been omitted if the Respondent had received advice along the lines of his own counsel's final submissions before this Court about the legal requirements for a valid arrest;

- alternatively, the arrest was unlawful because, in the absence of any or any coherent explanation for why the intrusive arrest was preferred over less intrusive alternative, obvious and apparently viable options, the decision to arrest was unreasonable and/or irrational;

- the Respondent adduced no evidence to explain why the search of the Applicant's home and wallet and seizure of certain property was "reasonably required". It is not self-evident why it was appropriate to side-step the elaborate protections of the PACE search warrant regime in the Applicant's case. The decision to use the exceptional power to search as an incident to an arrest may require little explanation in some circumstances. In every case it ought to be easy to explain why the search was undertaken, using generic terms where it is desired to avoid revealing sensitive information which forms part of an ongoing investigation. In the absence of any explanation the decision to search and seize was unreasonable and/or irrational and accordingly unlawful.

66. Lord Goldsmith QC referred the Court to the famous English case of *Entick-v-Carrington* (1765) 95 ER 808, 817-818 to emphasise the common law propensity for protecting the sanctity of private property. The Bermudian historical connections with English law's respect for civil liberties are deeper still. King James I's 1615 Letters Patent granted to his subjects who settled in Bermuda "*all libertyes franchesies and immunities of free denizens and naturall subjectes within any of our dominions to all intents and purposes, as if they had been abiding and borne within this our Kingdome of England or in any other of our Dominions*". Civil liberties under the Bermuda Constitution are no longer available only for the chosen few. Section 1, which is essentially declaratory in nature, now provides :

> "***Fundamental rights and freedoms of the individual***
>
> *1 Whereas every person in Bermuda is entitled to the fundamental rights and 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) ...;*
>
> (c) *protection for the privacy of his home and other property...*"
>
> [Emphasis added]

67. The Applicant is entitled to the protections of the fundamental rights and freedoms of our Constitution, whatever his national origins or local political affiliations may be. Without even directly applying these high level principles, it is clear that his rights under PACE, conservatively construed, were infringed by being subjected to an unlawful arrest and search on May 19, 2016. In my judgment this most likely occurred because of a genuine misunderstanding as to the terms and effect of the summary power of arrest as applied to a factually exceptional investigation which raised legal issues which have not previously been judicially considered as matter of Bermudian law. The present case has served to demonstrate that the Police and Criminal Evidence Act 2006, properly understood, confers suitably flexible powers of arrest and search on the Police which are counterbalanced by important safeguards for the fundamental rights and freedoms of the individual.

Conclusion

68. Subject to hearing counsel on the terms of the final Order to be drawn up to give effect to the present Judgment and as to costs (the starting assumption of course being that costs should follow the event), the Applicant is entitled to the following relief sought in his Notice of Originating Motion:

    (1) an Order quashing the decision summarily arrest the Applicant and subject him to bail conditions;

    (2) a declaration that the search of the Applicant's home was unlawful;

    (3) an Order directing the Respondent to return to the Applicant any retained items seized during the unlawful search;

    (4) the application for damages is adjourned to a date to be fixed by the Registrar, initially for directions only.

Dated this 23rd day of June, 2017 _____

IAN RC KAWALEY CJ