Neutral Citation Number: [2017] EWHC 70 (Admin)

Case No: CO/3518/2016 & CO/3539/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/01/2017

Before :

LORD JUSTICE GROSS
MR JUSTICE OUSELEY

- -

Between :

CO/3518/2016	**The Queen on the application of (1) A**	
	(2) B	**Claimants**
	- and -	
	THE CENTRAL CRIMINAL COURT	**First Defendant**
	-and-	
	THE CHIEF CONSTABLE OF WEST MIDLANDS POLICE	**Second Defendant**
CO/3539/2016	**(1) C**	
	(2) D	
	(3) E	**Claimants**
	- and -	
	(1) SAME	
	(2) SAME	**Defendants**

- -
- -

Mr Alun Jones QC (instructed by **Kennedys Law**) for the Claimant A
Mr Simon McKay (instructed by **Petherbridge Bassra Solicitors**) for the Claimant B
Mr Rupert Bowers QC (instructed by **Charter Solicitors (C and D) and Chambers Solicitors (E)**) for the Claimants C, D, and E
Mr Dijen Basu QC and Ms Cicely Hayward (instructed by **The Force Solicitor**) for the **Second Defendant** in both claims

Hearing dates: 18th - 19th October 2016

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Approved Judgment

Lord Justice Gross:

INTRODUCTION

1. This is another case concerning search warrants.

2. On the 20th May, 2016, The Chief Constable of West Midlands Police ("WMP"), represented by leading counsel, applied for and obtained search warrants ("the warrants") pursuant to s.9 and para. 12 of Schedule 1 of the Police and Criminal Evidence Act ("PACE"), from HHJ Gordon, sitting at the Central Criminal Court ("CCC").

3. Two alleged offences formed the subject of the investigation underlying the warrants:

   i) First, conspiracy to pervert the course of justice – essentially going to efforts (allegedly) made by telephone calls and text messages, including with a prisoner remanded in custody, designed to procure a change in a witness' evidence in a trial for conspiracy to murder ("conspiracy 1").

   ii) Secondly, conspiracy to transmit or cause to be transmitted any image, sound or information from inside a prison by electronic communications for simultaneous reception outside the prison, contrary to s.40D of the Prison Act 1952 ("s.40D" and "the 1952 Act") – essentially going to telephone calls and text messages (allegedly) exchanged with a prisoner, remanded in custody, illegally using a mobile telephone in a prison ("conspiracy 2").

4. The warrants authorise any constable of the WMP or, as the case may be, the West Yorkshire Police ("WYP", for convenience, both forces are generally referred to as "WMP" hereafter) to enter and search the premises of a number of the Claimants in these conjoined rolled up proceedings, at the addresses set out therein, and to:

   > " seize and retain material (which does not consist of items subject to legal privilege) which is likely to be of substantial value to the investigation. "

   The material sought was said to consist "…only of the Mobile Phone and Sim card which relates to…" the mobile phones of which the numbers were given, registered to the Claimants in question ("the phones" and "the SIM cards", or for convenience, simply "the phones").

5. On the 21st May, 2016, officers of the WMP obtained entry – to put the matter deliberately neutrally – to each of the premises in question. The Claimants were each arrested. In every case, the Claimant in question handed over the phones sought by the Police and specified in the warrants. The phones were then seized by the Police.

6. Subsequently, on the 13th July, 2016, an injunction was granted by Dingemans J, prohibiting the WMP from "…examination or download of the devices [i.e., the phones]…" until the final determination of the claims now before this Court, including any appeal, or until further order.

7. By these proceedings for judicial review, the Claimants seek orders quashing the warrants, declarations that the entries, searches and seizures at the Claimants' premises were unlawful and orders for the return of the phones seized.

8. We grant the Claimants permission to bring these judicial review proceedings.

THE GROUNDS OF CHALLENGE AND THE ISSUES

36. In summary, the Claimants submit that the warrants should be quashed and that the entry, search and seizure operation was unlawful, because:

    i) There were no reasonable grounds for believing, as required by Schedule 1 of PACE:

        a) That indictable offences had been committed;

        b) That legally privileged material and excluded material would not be found in the property to be seized;

        c) That the material was likely to be of substantial value to the investigation and was likely to be relevant evidence.

    ii) They were obtained in breach of the WMP's duty to make full disclosure of all relevant facts.

    iii) They failed to specify so far as practicable the articles to be seized.

    iv) There were no reasonable grounds under para. 12 of Schedule 1 for believing that the service of a notice to produce under para. 4 thereof would seriously prejudice the investigation.

    v) There was a failure to comply with s.16(5) of PACE.

37. As it seems to me, with respect to the array of arguments advanced by all counsel, the matter falls conveniently to be dealt with under the following broad headings:

    i) Issue I: Reasonable grounds for believing that indictable offences had been committed.

    ii) Issue II: Reasonable grounds for believing that service of a notice to produce would seriously prejudice the investigation.

    iii) Issue III: LPP, excluded material and their ramifications.

    iv) Issue IV: Entry, search and seizure at the Claimants' premises.

    v) Issue V: The use of s.32, PACE.

    vi) Issue VI: Non-disclosure (apart from s.32).

THE LEGAL FRAMEWORK

38. Before turning to the Issues, it is necessary to set out "the unfortunate jumble of legislative provisions" (*Gittins v Central Criminal Court* [2011] EWHC 131 (Admin), at [36]) comprising the legal framework, contained in PACE, Schedule 1 thereto ("Schedule 1") and the CJPA.

39. *(1) PACE:* Part II of PACE deals with "Powers of Entry, Search and Seizure", including "Search Warrants". S.9 provides that a constable may obtain access to "excluded material" or "special procedure material" by making an application under and in accordance with Schedule 1 – the procedure followed here.

40. "Excluded material" is defined in s.11 as "personal records" which a person has acquired or created in the course of (*inter alia*) any profession "and which he holds in confidence". In turn, s.12 defines "personal records" as documentary and other records concerning an individual's physical or mental health, amongst other things.

41. S.14(2) defines "special procedure material" as follows:

> " …..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 …profession…; and
>
> (b) holds it subject –
>
> (i) to an express or implied undertaking to hold it in confidence;…."

42. As is apparent from s.14, SPM does not include "items subject to legal privilege" (i.e., LPP material). The meaning of LPP material is furnished by s.10:

> " (1) Subject to subsection (2) below, in this Act '*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; …..
>
> (2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege."

As provided by s.10(2), there is of course no privilege in items held with the intention of furthering a criminal purpose.

43. S.15 together with s.16 furnish safeguards. Thus, s.15(1) provides that "…an entry on or search of premises under a warrant is unlawful unless it complies with this section and section 16 below". Where a constable applies for a warrant, s.15(2) specifies a number of duties with which the applicant must comply. Amongst those, s.15(2)(c) requires the applicant "to identify, so far as practicable, the articles or persons to be sought". The warrant itself must do likewise: s.15(6)(b).

44. S.16 deals with the execution of warrants. S.16(5) applies when the occupier of the premises to be entered and searched is present at the time when a constable seeks to execute a warrant to enter and search them. Ss.16(5)(b) and (c) require the constable to produce the warrant to the occupier and supply him with a copy of it. S.16(8) provides that a search under a warrant "…may only be a search to the extent required for the purpose for which the warrant was issued."

45. While still within Part II, s.17 falls under the heading "Entry and search without search warrant". The margin note of the section itself is "Entry for purpose of arrest etc." So far as said to be material, s.17 provides as follows:

> " (1) Subject to the following provisions of this section, and without prejudice to any other enactment a constable may enter and search any premises for the purpose –
>
> (b) of arresting a person for an indictable offence; "

The power to search contained in s.17(1)(b) is thus a power to search for a person, not a power to search the premises for items of evidential value. As set out in s.17(4), the power to search conferred by this section "…is only a power to search to the extent that is reasonably required for the purpose for which the power of entry is exercised." S.17(5) is in these terms:

> " Subject to subsection (6) below, all the rules of common law under which a constable has power to enter premises without a warrant are hereby abolished."

For present purposes, s.17(6) is irrelevant, dealing as it does with a power of entry to deal with or prevent a breach of the peace.

46. S.18 is likewise found under the heading, "Entry and search without search warrant" and the margin note is "Entry and search after arrest". As is clear, this section deals with a search of premises:

> " (1) Subject to the following provisions of this section, a constable may enter and search any premises occupied or controlled by a person who is under arrest for an indictable 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 indictable offence which is connected with or similar to that offence.
>
> (2) A constable may seize and retain anything for which he may search under subsection (1) above.
>
> (3) The power to search conferred by subsection (1) is only a power to search to the extent that is reasonably required for the purpose of discovering such evidence."

47. S.19 deals with "seizure". The powers conferred by s-ss. (2), (3) and (4) are exercisable by "a constable who is lawfully on any premises". The constable may seize anything on the premises if he has reasonable grounds for believing that it is evidence in relation to an offence which he is investigating or any other offence (s.19(3)(a)) - and that it is "necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed": s.19(3)(b). S.19(4) deals with items stored in "any electronic form" and is in these terms:

> " (4) The constable may require any information which is stored in any electronic form 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 or from which it can readily be produced in a visible and legible form if he has reasonable grounds for believing –
>
> (a) that
>
> (i) it is evidence in relation to an offence which he his investigating or any other offence; ….and
>
> (b) that it is necessary to do so in order to prevent it being concealed, lost, tampered with or destroyed."

Interposing here, s.20 provides more generally for the extension of powers of seizure to computerised information and is in materially the same terms as s.19(4). S.19(5) provides that the powers conferred by this section are additional to any other powers conferred. S.19(6), in terms provides that "no power of seizure" conferred on a constable under any enactment "is to be taken to authorise the seizure of an items which the constable exercising the power has reasonable grounds for believing to be subject to legal privilege". As will be apparent, the exercise of the power of seizure conferred by s.19 is subject to two important limitations: first, the constable must be lawfully on the premises in question (s.19(1)); secondly, the power cannot be exercised in respect of items which the constable has reasonable grounds for believing to be subject to LPP (s.19(6)). S.22, it may be noted, confers a power of retention "so long as is necessary in all the circumstances" in respect of items seized pursuant to ss. 19 and 20.

48. S.32 is found in Part III of PACE, headed "Arrest" with a margin note "Search upon arrest". S.32(1) provides that a constable 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….". In such a case and if the offence for which the person has been arrested is

an indictable offence, a constable also has the power to "…enter and search any premises in which he was when arrested or immediately before he was arrested for evidence relating to the offence". S.32(9) goes on to deal with seizure, retention and LPP, as follows:

> " A constable searching a person in the exercise of the power conferred by subsection (2)(a) above may seize and retain anything he finds, other than an item subject to legal privilege, if he has reasonable grounds for believing –
>
> (b) that it is evidence of an offence …. "

49. *(2) Schedule 1 to PACE:* Schedule 1, to which s.9 refers, provides by para. 12 that if on an application made by a constable, a *Judge* (not a magistrate) is satisfied that one or other of the sets of "access conditions" is fulfilled and that any of the further conditions set out in para. 14 is also fulfilled, he may:

> "issue a warrant authorising a constable to enter and search the premises…"

50. In this case we are concerned with the first set of access conditions; as provided by para. 2, these are fulfilled if:

> " (a) there are reasonable grounds for believing –
>
> (i) that an indictable offence has been committed;
>
> (ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application….
>
> (iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and
>
> (iv) that the material is likely to be relevant evidence;
>
> (b) other methods of obtaining the material –
>
> (i) have been tried without success; or
>
> (ii) have not been tried because it appeared that they were bound to fail…."

51. Insofar as relevant, para. 14 is in these terms:

> " The further conditions mentioned in paragraph 12(a)(ii) above are –

> (a) that it is not practicable to communicate with any person entitled to grant entry to the premises…
>
> (d) that service of notice of an application for an order under paragraph 4 above [in essence, a notice to produce] may seriously prejudice the investigation."

52. *(3) The CJPA:* Ss. 50 and following of the CJPA furnish additional powers of seizure. They address the problem which arises when "seizable property" contains or is comprised in something else that the searcher is not otherwise entitled to seize and it is not reasonably practicable to separate the items there and then. These sections, introduced in consequence of a decision of this Court to which I shall come, have obvious applicability to computerised material and the situation which arises when LPP material is intermixed with other seizable material. For this reason, s.19(6), PACE (set out above) is disapplied.

53. S.50 furnishes additional powers of seizure *from premises*:

> " (1) Where –
>
> (a) a person who is lawfully on any premises finds anything on those premises that he has reasonable grounds for believing may be or may contain something for which he is authorised to search on those premises,
>
> (b) a power of seizure to which this section applies or the power conferred by subsection (2) would entitle him, if he found it, to seize whatever it is that he has grounds for believing that thing to be or to contain, and
>
> (c) in all the circumstances, it is not reasonably practicable for it to be determined, on those premises –
>
> (i) whether what he has found is something that he is entitled to seize, or
>
> (ii) the extent to which what he has found contains something that he is entitled to seize,
>
> that person's powers of seizure shall include power under this section to seize so much of what he has found as it is necessary to remove from the premises to enable that to be determined.
>
> (2) Where –
>
> (a) a person who is lawfully on any premises finds anything on those premises ('the seizable property') which he would be entitled to seize but for its being comprised in something else that he has (apart from this subsection) no power to seize,

> (b) the power under which that person would have power to seize the seizable property is a power to which this section applies, and
>
> (c) in all the circumstances it is not reasonably practicable for the seizable property to be separated, on those premises, from that in which it is comprised,
>
> that person's powers of seizure shall include power under this section to seize both the seizable property and that from which it is not reasonably practicable to separate it.
>
> (4) Section 19(6) ….[of PACE] …shall not apply to the power of seizure conferred by subsection (2)."

54. S.51 deals, *mutatis mutandis*, with additional powers of seizure from the person.

55. S.52 imposes a duty on a person exercising a power of seizure conferred by s.50 to give written notice to the occupier of premises, in accordance with the detailed provisions there set out.

56. Ss. 53 and 54 make provision for the examination and return of property seized under ss. 50 or 51. Amongst other things, a duty is imposed on the person for the time being in possession of the seized property to make arrangements for an initial examination of the property as soon as reasonably practicable after the seizure: s.53(2)(a). In determining the earliest practicable time for that initial examination, "due regard" is to be had to the desirability of allowing the person from whom the property was seized an opportunity of being present: s.53(4). S.54 imposes the obligation to return items subject to LPP, *inter alia,* where such items are contained within property seized pursuant to ss. 50 and 51 – unless it is not reasonably practicable to separate out such items (s.54(2)) without prejudicing the lawful retention and use of the other property seized.

57. Finally, ss. 59 and following deal with remedies and safeguards. Thus, where anything has been "seized in exercise, or purported exercise of a relevant power of seizure" any person with a "relevant interest in the property" may apply to the "appropriate judicial authority" for the return of the whole or a part of the seized property: ss. 59(1) and (2). The grounds on which such an application can be made include (s.59(3)):

> " (a) that there was no power to make the seizure;
>
> (b) that the seized property is or contains an item subject to legal privilege that is not comprised in property falling within section 54(2)…"

On such an application, the Judge may give such directions as he thinks fit as to the examination, retention, separation or return of the whole or any part of the seized property: s.59(5). The Judge may authorise the retention of the seized property on the ground that if the property was returned to the person from whom it was seized it

would immediately become appropriate to issue a warrant providing for it to be seized again: ss 59(6) and (7).

ISSUE III: LPP, EXCLUDED MATERIAL AND THEIR RAMIFICATIONS

69. *(1) The nature of the problem:* The constitutional importance of search warrants is well-known. As summarised by this Court in *R (S) v Chief Constable of British Transport Police* [2013] EWHC 2189 (Admin); [2014] 1 WLR 1647, at [37] – [47], in the course of, with respect, a most helpful general outline, PACE seeks to reconcile two very important and contrasting public interests: first, the effective investigation and prosecution of crime; secondly, protecting the personal and property rights of citizens against infringement and invasion. The Court went on to observe:

> "Courts have always had a vital role in ensuring that any necessary invasion in the privacy of citizens is properly controlled. The power of the judiciary to scrutinise independently the requests of officers of the executive to enter a person's premises, search his belongings and seize his goods is a vital part of this role. Thus Lord Hoffmann explained in *Attorney General of Jamaica v Williams* [1998] AC 351, 358:
>
> 'The purpose of the requirement that a warrant be issued by a justice is to interpose the protection of a judicial decision between the citizen and the power of the state. If the legislature has decided in the public interest that in particular circumstances it is right to authorise a policeman or other executive officer of the state to enter on a person's premises, search his belongings and seize his goods, the function of the justice is to satisfy himself that the prescribed circumstances exist. This is a duty of high constitutional importance. The law relies on the *independent scrutiny of the judiciary* to protect the citizen against the excesses which would inevitably flow from allowing an executive officer to decide for himself whether the conditions under which he is permitted to enter on private property have been met.'…."

The grant of a search warrant is, the Court remarked, in many ways "a more serious step" than the grant of a search order (i.e., an *Anton Piller* order) in civil proceedings.

70. For immediate purposes, a tension can be seen between the effective investigation and prosecution of crime and the protection of LPP material. What is to be done when an investigation legitimately targets material contained on a mobile phone or computer but there are reasonable grounds for believing that LPP material is also to be found on that phone or computer? In such circumstances, how are search warrants to be drafted, both with a view to satisfying Schedule 1 and to compliance with s.15(6), PACE? What is the practical and just solution?

71. In the present context, this debate gives rise to four questions, including for completeness and convenience dealt with under the same heading, one relating to excluded material. These four questions ("the Questions") are as follows:

    i) *Question (1)*: Must the warrants be quashed as not complying with Schedule 1, because there were not reasonable grounds for believing that LPP material would *not* be found on the phones? The Claimants submit that the WMP should have sought identified target material found on the phones rather than the phones themselves.

    ii) *Question (2)*: Must the warrants be quashed because they were drawn too widely in breach of s.15(6)(b) of PACE? Effectively, this is the same complaint as that set out in Question (1), put a different way.

    iii) *Question (3):* What is the position as to excluded material?

    iv) *Question (4):* How should LPP material and excluded material (if any), found on the phones, be sifted and dealt with?

72. It will be recollected that the topic of LPP material was canvassed in terms at the hearing before HHJ Gordon. The proposed arrangements for the searches were designed to exclude or minimise the risk of police officers viewing LPP material. In the particular case of A, these arrangements extended to the presence of Independent Counsel. Finally, the warrants were drafted in terms so as expressly to exclude items subject to LPP.

73. *(2) The state of the law:* As it seems to me a number of propositions can be extracted from or are consistent with the authorities to which we were referred. For these purposes, I am content to treat the phones as in the same position as computers and hard disks – and, certainly, no argument to the contrary was addressed to us.

74. *Proposition one:* First, when no question of LPP arises, a phone (such as the phones in this case) is a single object or single thing. It can properly be the subject of a warrant under s.9, PACE and Schedule 1. Moreover, specifying the phone as the item sought, rather than the material found in it, is capable of satisfying s.15(6)(b), PACE.

75. This conclusion emerges clearly from *R (H) v Inland Revenue Commissioners* [2002] EWHC 2164 (Admin), dealing with provisions of the Taxes Management Act 1970 ("the TMA", rather than PACE). At [37], Stanley Burnton J (as he then was), said this:

> "….the comparison of a hard disk with a filing cabinet is inexact and may be misleading. For some purposes no doubt the files on a hard disk may be regarded as separate documents. But a hard disk cannot be regarded a simply a container of the files visible to the computer's operating system. It is a single object: a single thing…..If there is incriminating ….material on the hard disk and if it is assumed that the hard disk is not copied, the computer itself may be used, and may be required, as evidence in order to prove the existence of the incriminating material on the defendant's computer. The fact that there is

> also on the hard disk material that is irrelevant, and not evidence of anything, does not make the computer any less of a thing that may be required as evidence for the purposes of criminal proceedings. "

76. In *R (Faisaltex Ltd) v Crown Court at Preston* [2008] EWHC 2832 (Admin); [2009] 1 WLR 1687, this Court followed *H*, seeing no reason to adopt a different approach under s.8, PACE (with which the Court was concerned) to that adopted by Stanley Burnton J under the TMA. In particular, there was no justification for construing the word "material" in s.8, PACE more narrowly than the word "thing" in the TMA: [76] – [78]. Keene LJ, giving the judgment of the Court, therefore concluded (at [79]):

> " …that, once the Judge was satisfied on the issue of legally privileged material, there was no reason why the section 8 warrants should not specify computers and similar items amongst the material to be seized if there were reasonable grounds for believing that they contained relevant evidence, albeit that they might also contain irrelevant material. This conclusion and the reasoning which has led us to it also has an obvious bearing on the issues arising in respect of the execution of the warrants."

The Court distinguished the position pertaining to a single "item" or "thing" such as a computer from that relating to container of a number of things, such as a filing cabinet: [76]. In the latter case, plainly only the files containing the relevant evidence could be searched for and seized.

77. In *R (Glenn & Co) v R & C Commrs* [2010] EWHC 1469 (Admin); [2010] 4 All ER 998, Lloyd Jones J (as he then was) followed *H* and *Faisaltex* and applied the same reasoning. In passing, the Judge (at [25]) applied this reasoning to a mobile telephone.

78. In *R (Cabot Global Ltd) v Barkingside Magistrates' Court* [2015] EWHC 1458 (Admin); [2015] 2 Cr App R 26, this Court was again concerned with warrants under s.8, PACE. The issue was whether the warrants complied with s.15(6)(b), PACE or whether they authorised the seizure of material which was not "relevant evidence" (as required by s.8). The complaint went, amongst other things, to the warrants authorising searching for computer equipment and mobile telephones. The claimants' submission was that the warrants ought to have specified the items within the computers and mobile telephones which were sought; the police, having identified those items, could have removed them in paper form or on a memory stick, pursuant to s.20, PACE or ss. 50 and following, CJPA. The claimants' submissions were rejected.

79. Fulford LJ (giving the substantive judgment of this Court), drew on the reasoning in *Faisaltex* (at [34] and following). At [38], Fulford LJ expressed the effect of *Faisaltex* in these terms:

> " The fact that there may also be material that is irrelevant does not make the computer any less 'material' which is likely to be

> of substantial value to the investigation, as well as likely to be relevant evidence."

At [40], Fulford LJ referred to the further consideration that the computers (and mobile telephones) would themselves be relevant evidence; investigators would have been interested not only in any records relating to the transactions in question but would "….equally have been concerned to establish the timings, the pattern and the content of any communications between the suspects."

80. The suggested recourse to ss. 19(4) and 20 of PACE was "unrealistic" and ignored the "very considerable practical problems" that would have confronted officers conducting the searches in question: at [42]. The additional power of seizure contained in s.50, CJPA did not "…invalidate the act of taking devices of this kind under a warrant issued under s.8 if there are reasonable grounds for believing that they may contain relevant evidence, albeit they might also contain irrelevant evidence…": at [43]. The case involved a "wide-ranging and broad investigation" and it was not easy to see how the search warrant could have been satisfactorily narrowed "…by reference to specific documents, types of documents or other detailed description of the material that was sought…": at [46].

81. *Proposition two:* Secondly, by analogous reasoning and once it is accepted that a phone is a single "item" not a filing cabinet, a phone can properly be the subject of a warrant under s.9, PACE and Schedule 1 thereto, even where LPP material may be found on the phone, *provided* the wording of the warrant clearly excludes any such LPP material from that which can be sought or seized. Here too, specifying the phone as the item sought, rather than the material found on it, is capable of satisfying s.15(6)(b), PACE.

82. The starting point, in my judgment, is that the difference between the wording of ss. 8 and 9, PACE does not tell against this proposition. There is no reason why a phone (or computer) is any less of a single "item" or "thing" under s.9 than it is under s.8. Put another way, a phone is no more a filing cabinet under s.9 than it is under s.8. The difference in wording between the two sections, reflects the need for a Judge, rather than a magistrate, to approve a warrant under s.9 and Schedule 1 where SPM is sought; the higher level of Judicial scrutiny is commensurate with the increased sensitivity of the material sought. That said, neither s.8 nor s.9 authorises the search for or seizure of LPP material; it does not follow under s.9 and Schedule 1 that merely because some LPP material may likely be found on the phone, that the phone itself cannot be searched for or seized.

83. The view just expressed enjoys the support of this Court in another s.8 and s.15(6)(b) case, *R (Glenn (Essex) Ltd) v HMRC* [2011] EWHC 2998 (Admin); [2012] 1 Cr App r 291. Simon J (as he then was) and with whom Laws LJ agreed, said this (at [57]):

> " The fact that there may be legally privileged or irrelevant material on a computer does not mean that the warrants should not specify computers among the material to be seized, if there were reasonable grounds for believing that they contained relevant material, see *Faisaltex* (above). "

The objections of the claimants in *Glenn*, under both ss. 8 and 15(6)(b) of PACE, to the effect that the material sought should be more specifically described, were rejected. In turn, Simon J's judgment was referred to with approval by Fulford LJ in *Cabot (supra)*, at [44] and following. Plainly, Simon J saw no conflict between his decision and that in *Faisaltex* (itself based on *H, supra*) - and nor do I.

84. As already observed, it is crucial that there is a clear exclusion taking LPP material outside that which may be seized. While I hesitate to say that such an exclusion *must* or *can only* be in express terms (see *Gittins,* below), an express exclusion is to be preferred. This requirement of clarity is essential to ensure compliance with the threshold requirements of s.9 and Schedule 1. Such an exclusion is likewise crucial in respect of the identification requirement contained in s.15(6)(b). In this latter regard, it is as well to keep in mind, with respect, the wise guidance of Kennedy LJ in *R (Energy Financing Ltd) v Bow Street Court (DC)* [2005] EWHC 1626; [2006] 1 WLR 1316, at [24(5)]:

> "…the warrant needs to be drafted with sufficient precision to enable both those who execute it and those whose property is affected by it to know whether any individual document or class of documents falls within it…."

Suitable arrangements of course will need to be made to ensure that the LPP exclusion is enforced in the conduct of the search and in dealing with the material seized. Such arrangements may extend to the presence of Independent Counsel during the search; they are also likely to require suitable and specific provision for the opening and downloading of the phones thereafter, together with a suitable independent review of its contents, prior to any police viewing. Further and in my judgment, ss. 50 and following, CJPA, may come into play (see below).

85. For my part, while it is difficult to generalise, there are significant advantages to the warrants – if suitably drafted, as discussed above - identifying the computers or phones sought under s.9 and Schedule 1, rather than a necessarily much lengthier list of the contents or classes of contents. I do not disparage the attractive attempt of Mr Bowers QC (for C, D and E), at para. 48 of his skeleton argument, to produce a list of the materials sought in this case - but I am not swayed by that list either to prefer it to a specification of the phones themselves or, still less, to regard the specification of the phones themselves as failing to satisfy the requirements of Schedule 1 or s.15(6)(b), PACE. Given its constitutional and practical importance, it is imperative that a warrant is capable of simple and practical execution (*Energy Financing, supra*) and is clear on its face. Having regard to the realities of a search, seeking specified *items, things or articles* rather than a list of electronic *contents* is potentially much quicker, more practical and less intrusive. It is also much less prone to misunderstandings on the day. The better place for the explanation and description of the contents or classes of contents sought is the application for the warrant before the Judge, where the applicant is in any event under a duty to give appropriate disclosure (see below).

86. It remains to refer to three authorities, said to tell against the view which I favour in this and the previous proposition.

87. The first is *R v Chesterfield Justices, Ex p. Bramley* [2000] QB 576. So far as relevant, the question which arose there went to the power of an officer in the course

of executing a search warrant to remove documents in order to sift through them and determine whether they came within the scope of the warrant or whether they included privileged documents. By a majority, the Court held that there was no such power; officers were only empowered to seize documents within the scope of the warrant or within s.19 of PACE. Thus understood, it is difficult to see that *Bramley* assists the Claimants in the present case. Furthermore:

i) At p. 583, Kennedy LJ spoke with approval of redefining the "targeted material" so as to exclude LPP material. That approach accords with the views expressed above.

ii) As to LPP at the time of execution of the warrants, Kennedy LJ discussed the position pertaining to computers at p. 585. In the light of s.19(6), PACE, Kennedy LJ expressed the view that if a constable had reasonable grounds for believing that some material on the computer was subject to LPP, then the constable could not seize the computer or the hard disk. He could require all other relevant information to be produced in a form in which it could be taken away and in which it was visible and legible. Proceeding on the assumption that this observation formed part of the *ratio*, it can no longer avail the Claimants. The legislative response to *Bramley* was the enactment of ss. 50 and following of the CJPA (discussed below), so that even if *Bramley* had otherwise assisted the Claimants (as to the absence of a power to sift) it has since been superseded by the CJPA.

88. The second is *Gittins (supra),* where both the Claimants and the WMP referred us to my judgment; the Claimants placed reliance on [36], whereas the WMP emphasised [37]. I have anxiously reviewed what I said there but, with respect to the Claimants, I can find nothing in conflict with the views expressed above.

i) The complaint in *Gittins*, as appears from [33], was that the warrants lacked an express exception for LPP material. In the event, the decision was that despite the absence of an express exception, the warrant, construed as a whole, did exclude LPP material and did not require quashing

ii) At [36 1) and 2)], I said this:

> " 1) As is plain, even – dare I say so – from the unfortunate jumble of legislative provisions, no warrant can authorise the *seizing* of items subject to LPP.
>
> 2) If on its true construction, a warrant extends to material for which there are not reasonable grounds for believing that it does not consist of or include items subject to LPP then the warrant will be quashed, at least unless the offending passages can be severed. Such a warrant cannot be saved by precautions governing its execution on the day, such as, for example, the engagement of independent counsel."

The observation in [36 1)] seemed and seems self-evident. The proposition in [36 2)] went to the scope of the warrant on its true construction and flowed from [36 1)]. It is of no assistance to the Claimants in a case where a warrant

is appropriately drafted to exclude LPP material from its scope, *a fortiori*, if such exclusion is in express terms. As I went on to say, at [36 3) and 4)]:

> " 3) The mere fact that on the premises to be searched there will or may be items subject to LPP does not mean that a warrant for the search of those premises will need to be quashed….
>
> 4) There can be no general still less universal rule, but, in a case such as the present where a search is to be conducted of the premises of a professional man where items subject to LPP may be encountered, no harm would be done by an express exclusion for such items. Indeed, it might be better if the warrants in this case had included such wording…."

iii) The judgment in *Gittins,* at [37 3)], plainly contemplated that computers containing LPP material might properly be the subject of a search warrant:

> " So far as concerns computers, because on the day it was feared that privileged material could not be separated from non-privileged material, notices were issued under s.50 of the …. [CJPA]… By reason of s.50(4) of that Act, s.19(6) of PACE is effectively disapplied. No complaint could properly be made in this regard."

I shall shortly turn to ss. 50 and following of the CJPA.

89. The third is *S (supra)*. The items sought were a mobile phone and a laptop computer belonging to a solicitor. At the outset of the hearing, counsel for the Chief Constable conceded that the warrant must be quashed because the first set of access conditions (para. 2 of Schedule 1) could not have been satisfied (so far as here relevant, on two grounds): at [56]. First, because there were no reasonable grounds for believing that the material sought did not include excluded material; secondly, that the warrant should have been more tightly drafted. At [57], Aikens LJ and Silber J, giving the judgment of the Court, stated that the concessions were correctly made. The observations of the Court are plainly entitled to considerable weight. Nonetheless, with respect, they neither require nor persuade me to alter the views expressed above.

90. First, the decision (in these respects) was founded on concessions made by counsel. Secondly, the concessions and the Court's acceptance of them are, with respect, unsurprising against the backdrop of the errors made in that case: see, at [60] and following. The Court's observations at [57] on excluded material must be read in that context. Thirdly and with great respect, the observation (at [57]) that the material stored on the mobile phone and computer "could *possibly* comprise 'excluded material'" (italics added) does not accurately state the statutory test at para. 2 of Schedule 1 and imposes a higher test. Fourthly, I would not quibble as such with the Court's observations on LPP material (at [58]) but, unlike the present case, it does not appear that the Chief Constable in that case had grappled at all with the likelihood of phone and laptop containing LPP material. It is further noteworthy (see, at [69]) that no provision had been made for Independent Counsel to scrutinise the material and check that it did not contain LPP material before it was passed to the police.

91. *Proposition three:* Thirdly, there is no reason to confine the operation of ss. 50 and following of the CJPA to problems concerning LPP material encountered unexpectedly on the day of the search. Instead, s.50(1) meshes with a well-drafted warrant and furnishes a power of seizure (and sift) to enable the removal of a phone or computer, where the sift for material which might be subject to LPP cannot reasonably be conducted on the premises searched.

92. The language of s.50(1) dovetails with the seizure of a phone or computer, authorised by a warrant - but containing LPP material outside the scope of the warrant. As already noted, s.50(4) disapplies s.19(6), PACE. Where the additional power of seizure under s.50 is invoked, a notice must be given to the occupier of the premises under and in accordance with s.52 – but (as was not in dispute before us) a failure to give such notice does not invalidate the exercise of the power under s.50. Thereafter, the provisions and safeguards, found in ss. 53 – 61, CJPA, apply as appropriate to the facts. It may be noted that ss. 54(4)(c) and 59(10)(c) plainly apply to the various powers of seizure contained in PACE. Questions as to the practicability of separating LPP material from the phone or computer (lawfully) seized would fall to be considered under these provisions – see especially s.54(2) and the subsequent references to this sub-section.

93. The application of these provisions of the CJPA does not "exempt" an applicant for a warrant from carefully drafting its terms so as to comply with ss. 9 and 15, PACE and Schedule 1. Instead, these provisions permit a sifting exercise after seizure, so doing practical justice by both facilitating the investigation and prosecution of crime and safeguarding the important public interest in protecting LPP material.

94. In reaching this conclusion, I reject the submission of Mr Basu QC for WMP that ss. 50 and following of the CJPA do not apply to warrants. With respect, that would be a surprising construction, resulting in an unprincipled differentiation between the position of those executing warrants in accordance with their terms and those unexpectedly encountering computers or phones which might contain LPP material in the course of a search. Unless driven to such a conclusion by the language of the sections - which I do not think I am - I would not accede to it. It would also reflect a very partial legislative response to the problem highlighted by *Bramley*. I also reject the submission, so far as advanced on behalf of the Claimants, that the reason for the difficulty is the identification of phones (or computers) as the material sought in the warrants. I do not think that is so at all.

95. *(3) Discussion:* It is now time to apply these propositions to the Questions, framed earlier. They can be shortly answered.

96. *Question (1): Must the warrants be quashed as not complying with s.9 of PACE and Schedule 1, because there were not reasonable grounds for believing that LPP material would not be found on the phones?* The answer to this Question is "no". The warrants, in terms (as already set out), excluded LPP material from their scope. For completeness, whatever is ultimately found on the phones, I am amply satisfied that there were reasonable grounds for believing that the material on the phones included SPM.

97. *Question (2): Must the warrants be quashed because they were drawn too widely in breach of s.15(6)(b) of PACE?* The answer to this Question is, again, "no". By identifying the phones, the warrants sufficiently identified the articles sought.

98. *Question (3): What is the position as to excluded material?* It is fair to say, as the Claimants do, that the warrants did not contain an express exclusion for "excluded material" (as defined) as they did for LPP. It is fair to WMP to say that it is plain from all the material before HHJ Gordon that excluded material was not being sought. That was not, however, clear on the face of the warrants, unless the wording "material…which is likely to be of substantial value to the investigation" is properly to be read as excluding excluded material (an argument I would not discount). As already indicated, express exclusions are preferable to implied exclusions and it would have been better if the warrants here had included such an express exclusion. That said, implied exclusions are in some circumstances capable of sufficing, as seen from *Gittins (supra)*. In the event, it is unnecessary to express a concluded view on this point.

100. *Question (4): How should LPP material and excluded material (if any), found on the phones, be sifted and dealt with?* The answer in respect of both LPP material and excluded material (if any), as earlier foreshadowed, lies with ss. 50 and following, CJPA. These provisions authorised the seizure of the phones and furnish the regime for subsequent sifting. Although, except in the case of D, the WMP failed to give the requisite notices under s.52, it was not contended before us (as already recorded) that a failure to give such notices invalidated the exercise of the power under s.50.

117. I am also not persuaded as to the second line of attack. In the course of argument and in accordance with the presentation to HHJ Gordon, Mr Basu clarified that the "target materials" sought on the phones were as follows:

i) Voicemails;

ii) Contact lists, so as to assist in the attribution of the materials;

iii) Text based messages – such as e-mails, texts (SMS messages), WhatsApp, Skype and so on.

CONCLUSIONS AND NEXT STEPS

127. *Conclusions:* It is convenient to summarise the conclusions to which I have come:

i) There were reasonable grounds for believing that conspiracies 1 and 2 (both indictable offences) had been committed.

ii) There were reasonable grounds for believing that service of a notice to produce would have seriously prejudiced the investigation.

iii) The warrants do not fail the first set of access conditions (para. 2, Schedule 1), either on account of LPP materials (which were expressly excluded from their scope) or excluded material (there being reasonable grounds for believing that the phones did not contain excluded material). Further, by specifying the phones as the articles sought, the warrants complied with s.15(6)(b), PACE.

iv) Entry into the Claimants' premises was effected pursuant to the warrants. Such entry was lawful in the case of A and B. In the case of D and E, WMP/WYP failed to comply with s.16(5)(b), PACE, in that the warrants were not produced to them prior to seizure of their phones. D and E are entitled to a declaration that there was a breach of s.16(5)(b) in the execution of the warrants.

v) WMP ought to have disclosed but failed to disclose to HHJ Gordon their strategy of arresting the Claimants on both conspiracy 1 and conspiracy 2, if they encountered them in the course of the raids and, thereafter, conducting searches pursuant to s.32, PACE in addition to the warrants. This non-disclosure was not, however, material because I am unable to accept that it might well have resulted in HHJ Gordon refusing to issue the warrants.

vi) There is nothing in the suggested non-disclosure/s (apart from the s.32 point).

128. Accordingly, I would refuse the Claimants the relief sought, subject only to D and E's entitlement to declaratory relief in respect of WMP's non-compliance with s.16(5)(b), PACE, as set out above.

129. *Next Steps:* Some unfinished business remains. In the course of argument, it became clear that the phones were likely to contain the following categories of materials:

i) Target materials (as clarified by Mr Basu);

ii) Materials subject to LPP;

iii) Residue materials – neither forming part of the target materials nor subject to LPP but of concern to the Claimants in terms of privacy.

130. For practical purposes, I would add to these categories excluded material, if, in the event, such materials are encountered on any of the phones, contrary to the reasonable belief that they would not be so found.

131. I would be grateful for the assistance of counsel in now framing an order, encapsulating the next steps and reflecting the conclusions expressed in this judgment. The need is for practical solutions, in accordance with the provisions of ss. 50 – 61, CJPA. A likely outline of those steps can be discerned, both from the arrangements proposed by WMP through Mr Basu to HHJ Gordon and the basis upon which Mr Jones submitted that this entire matter could have been resolved without the need for these proceedings; once the smoke of argument has cleared, the gap between these proposals is anything but unbridgeable. So far as any bridging is needed, this judgment contains the necessary framework for doing so, distinguishing, as appropriate, between the various categories of materials outlined immediately above and involving Independent Counsel where necessary.

132. I accordingly direct that within 14 days of the hand-down of this judgment, counsel should exchange and deliver to the Court brief written submissions, including proposals for a draft order. Ideally, the draft order should be capable of agreement but if no such agreement is reached, then the proposals for a draft order should clearly indicate the differences between the parties. The Court anticipates dealing with any

outstanding matters by way of a short written ruling, unless (contrary to expectations) it should emerge that a further oral hearing becomes unavoidable.

Mr Justice Ouseley

134. I agree