In the Matter of an Order for Production of Special Material
Royal Court
19th January, 2015

JUDGMENT 03/2015

Application made in the context of an ongoing investigation into possible offences of attempting to pervert the course of justice and perjury.

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IN THE MATTER OF AN ORDER FOR PRODUCTION OF SPECIAL MATERIAL

Dates of hearings: 20th and 27th November and 4th December 2014

Reasons handed down: 19th January 2015

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Applicant: Crown Advocate C G Dunford
The Respondent Advocate appeared in person at the first hearing but was excused attendance subsequently

Cases, Texts & Legislation referred to:

The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003
The Police and Criminal Evidence Act 1984
Blackstone's Criminal Practice 2014
R v Cox and Railton (1884) 14 QBD 153
The Deputy Bailiff (Guernsey) Law, 1969
The Royal Court (Reform) (Guernsey) Law, 2008
R (on the application of Bright) v Central Criminal Court [2001] 2 All ER 244
R (on the application of Hallinan, Blackburn-Gittings & Nott (a firm) v Middlesex Guildhall Crown Court [2005] 1 WLR 766
R v Minchin [2013] EWCA Crim 2412
R v Central Criminal Court, ex parte Francis and Francis [1989] 1 AC 346
Three Rivers District Council v Governor and Company of the Bank of England (No. 6) [2005] 1 AC 610
R (on the application of S, F and L) v Chief Constable of the British Transport Police [2013] EWHC 2189 (Admin)
R (on the application of Tchenguiz) v Serious Fraud Office [2012] EWHC 2254 (Admin)

Introduction

1. On 4 December 2014, I made an order pursuant to paragraph 4 of schedule 1 to the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003 in respect of material held by an Advocate. I did so on the basis of two Informations sworn before me by a Police Inspector. The first was sworn at the initial hearing on 27 November 2014 and the second at the third hearing on 4 December 2014, at the conclusion of which I made the order sought. I was greatly assisted by written arguments provided by Crown Advocate Dunford, who appeared on behalf of the police officer and also the Skeleton Argument of the Advocate in question, who attended the initial hearing but was excused from attending the two hearings that followed.

2. Because the police officer's application touched on matters about which there appears to be no Guernsey jurisprudence, and the applicable provisions in the 2003 Law are not identical to those in the Police and Criminal Evidence Act 1984, I indicated that I would give more detailed reasons for my decision in writing when I could. This judgment contains those reasons.

Background

3. The application was made in the context of an ongoing investigation into possible offences of attempting to pervert the course of justice and perjury. It is suspected that a client of the Advocate holding the material sought instructed that Advocate to make an application in the context of family proceedings before the Magistrate's Court based on evidence that the client had concocted. That evidence was in the form of a signed witness statement lodged in support of the client's application, which had been signed by the Advocate. Ultimately, leave to withdraw the application before the Magistrate's Court was given. That Court also gave leave to the parties to disclose to the Guernsey Police information filed in the proceedings that had been withdrawn. Subsequently, information has been provided to the Police by the Safeguarder, which gives rise to the belief that the Advocate possesses material that can assist in the investigation of suspected offences.

4. Crown Advocate Dunford accordingly wrote a letter to the Advocate who had signed the application before the Magistrate's Court requesting copies of documentation created around the time of the application understood to be in the Advocate's possession. In doing so, he drew attention to his understanding that legal professional privilege could not vest in those documents because of principles set out in para. F9.65 of *Blackstone's Criminal Practice 2014* and *R v Cox and Railton* (1884) 14 QBD 153.

5. The Advocate responded by stating that the Advocate's duty of confidentiality to the Advocate's client needed to prevail unless and until the Court made an order or the client gave his informed consent to disclosure. The latter could not be forthcoming as the Advocate's retainer by the client had been terminated. The Advocate's position has been developed in a detailed Skeleton Argument put before me. Before the Court, the Advocate has, very properly, maintained a neutral stance and confirmed that the obligations pursuant to para. 11 of schedule 1 to the 2003 Law following service of notice of the police officer's application were understood and had been complied with. I wish to thank the Advocate for not being at all obstructive.

Legal framework for the application

6. The police officer's application was made in respect of special material, which is a defined term to which I will return shortly. Section 9(1) of the 2003 Law provides that:

> "*A police officer may obtain access to special material for the purposes of a criminal investigation by making an application under Schedule 1 and in accordance with that Schedule.*"

7. The application was made under para. 4 of schedule 1 to the 2003 Law, which provides:

> "*An order under this paragraph is an order that the person who appears to the Bailiff to be in possession of the material to which the application relates shall –*
>
> *(a) produce it to a police officer for him to take away; or*
>
> *(b) give a police officer access to it,*
>
> *not later than the end of the period of seven days from the date of the order or the end of such longer period as the order may specify.*"

8. As required by para. 7 of schedule 1 to the 2003 Law, the application was made *inter partes* and the hearings were conducted in private.

9. Before making an order under para. 4, the Bailiff is required by para. 1 of the schedule to be "*satisfied that the access conditions are fulfilled*". If they are, use of the word "*may*" in para. 1 indicates that the Bailiff retains a discretion as to whether to make the order for production sought. By virtue of the Deputy Bailiff (Guernsey) Law, 1969, the Royal Court (Reform) (Guernsey) Law, 2008 and the functions of the office of Lieutenant-Bailiff, references to "*the Bailiff*" in the 2003 Law encompass the holders of those other judicial offices. Although the decision to which these reasons relates was, of course, taken by me rather than the Bailiff, for ease of reference I will continue to refer to "*the Bailiff*" as covering any judicial officer faced with an application pursuant to para. 4 of the schedule.

10. Para. 2 of schedule 1 provides:

> "*The access conditions are fulfilled if –*
>
> *(a) there are reasonable grounds for believing –*
>
> *(i) that a serious arrestable offence has been committed;*
>
> *(ii) that there is material which consists of special material or includes special 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 have been tried without success or have not been tried because it appeared that they were bound to fail; and*
>
> *(c) it is in the public interest, having regard –*

> *(i) to the benefit likely to accrue to the investigation if the material is obtained; and*
>
> *(ii) to the circumstances under which the person in possession of the material holds it,*
>
> *that the material should be produced or that access to it should be given.*"

11. There are, therefore, six distinct elements to the access conditions, in respect of each of which the Bailiff has to be satisfied. In relation to the sixth of those elements (in sub-paragraph (c)), para. 3 of the schedule provides:

> "*In assessing whether it is in the public interest that the material should be produced or that access to it should be given, regard shall be had to the duty of confidentiality (as construed in accordance with section 25(2)) under which the material is held.*"

12. In relation to the first four elements set out in sub-paragraph (a), they are covered by the opening words that "*there are reasonable grounds for believing*". In *R (on the application of Bright) v Central Criminal Court* [2001] 2 All ER 244, Judge LJ noted that "*it is clear that the judge personally must be satisfied that the statutory requirements have been established. He is not simply asking himself whether the decision of the constable making the application was reasonable, nor whether it would be susceptible to judicial review on Wednesbury grounds.*" Accordingly, whilst the police officer's Information in support of the application will set out why the police officer holds those reasonable grounds for believing, the Bailiff must also consider on the evidence given whether he similarly can have reasonable grounds for so believing.

13. There are a number of terms used in para. 2 of the schedule for which definitions are provided in the 2003 Law and to which reference is necessary to understand fully the task facing the Bailiff.

14. A "*serious arrestable offence*" is dealt with in section 90 of the 2003 Law (although in the index of defined expressions in section 92, the cross-reference is said to be section 88). Accordingly, when considering para. 2(a)(i) of schedule 1 to the Law, the Bailiff must reasonably believe that at least one offence of the following types has already been committed:

> *"(2) The following arrestable offences are always serious –*
>
> *(a) an offence (whether at common law or under any enactment) specified in Part 1 of Schedule 4 to the Law;*
>
> *(b) an offence under an enactment specified in Part II of that Schedule, and*
>
> *(c) any of the offences mentioned in paragraphs (a) to (f) of section 1(3) of the Drug Trafficking (Bailiwick of Guernsey) Law, 2000.*
>
> *(3) Subject to subsection (4), any other arrestable offence is serious only if its commission –*
>
> *(a) has led to any of the consequences specified in subsection (5); or*

(b) is intended or is likely to lead to any of those consequences.

(4) An arrestable offence which consists of making a threat is serious if carrying out the threat would be likely to lead to any of the consequences specified in subsection (5).

(5) The consequences mentioned in subsections (3) and (4) are

(a) serious harm to the security of the Bailiwick or to public order;

(b) serious interference with the administration of justice or with the investigation of offences or of a particular offence;

(c) the death of any person;

(d) serious injury to any person;

(e) substantial financial gain to any person; and

(f) serious financial loss to any person.

(6) Loss is serious for the purposes of this section if, having regard to all the circumstances, it is serious for the person who suffers it.

(7) In this section "injury" includes any disease and any impairment of a person's physical or mental condition."

15. The offences under consideration by the Police in the present case are arrestable offences within the meaning of section 28 of the 2003 Law where the consequence described in section 91(5)(b) is engaged ("*serious interference with the administration of justice or with the investigation of offences or of a particular offence*"), particularly the first part. The suggestion that an application to the Court has been founded on concocted evidence is, on any analysis, a serious matter. The first element of the access conditions was, therefore, clearly satisfied.

16. The second of the elements involves looking at the definition of "*special material*" contained in section 25 of the 2003 Law. Subsection (1) provides:

"*Subject to the following provisions of this section, in this Law "special material" means –*

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

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

(c) journalistic material, including such material held in confidence, which consists of documents, or of records other than documents."

Some of the terms used in section 25 are also defined in the 2003 Law, eg, section 26 defines "*personal records*" and section 27 defines "*journalistic material*", but neither is of relevance to the present case.

17. Section 25(2) deals with when material is held in confidence:

> "*Subject to the provisions of subsection (3), a person holds material in confidence for the purposes of this Law if he holds it subject –*
>
> *(a) to an express or implied undertaking to hold it in confidence; or*
>
> *(b) to a restriction on disclosure or an obligation of secrecy contained in any enactment, including an enactment coming into force after the date of commencement of this Law.*"

Subsection (3) concerns only journalistic material and so is of no relevance to the present case. Subsections (4) to (7) elaborate on how these principles affect employees and companies. Again, they have no relevance to the present case. Accordingly, through a combination of subsections (1) and (2), it is quite clear that, in principle, the material contained in an Advocate's file created in the course of an Advocate's profession falls within the definition of "*special material*".

18. The position adopted by the Advocate in the present case was to invoke legal professional privilege as the reason why the material requested by Crown Advocate Dunford could not be provided voluntarily. Section 24 of the 2003 Law defines that term as follows:

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

19. Because of the circumstances of the investigation by the Police, Crown Advocate Dunford submitted that the terms of section 24(2) of the 2003 Law meant that no legal professional privilege could attach to the material held by the Advocate in question. He suggested the position was governed by statute in the same way that it had been held to be so governed in England and Wales by virtue of decisions under the Police and Criminal Evidence Act 1984 (see, eg, *R (on the application of Hallinan, Blackburn-Gittings & Nott (a firm) v Middlesex Guildhall Crown Court* [2005] 1 WLR 766).

20. The potential difficulty with that submission, as identified during the hearing, is that the provisions in the 1984 Act have not been transposed exactly into our 2003 Law. Whilst the definition of "*items subject to legal privilege*" contained in section 10 of the 1984 Act is the same in substance as the definition of "*items subject to legal professional privilege*" in section 24 of the 2003 Law, including, most relevantly, the exception set out in subsection (2) of each section, the definition of "*special procedure material*" in section 14 of the Act, which is needed to make sense of the comparable provisions for obtaining a production order pursuant to section 9 of, and schedule 1 to, the 1984 Act, differs from section 25 of the 2003 Law. Section 14 provides:

> "*(1) In this Act "special procedure material" means-*
>
> *(a) material to which subsection (2) below applies; and*
>
> *(b) journalistic material, other than excluded material.*
>
> *(2) Subject to the following provisions of this section, this subsection applies to material, other than items subject to legal privilege and excluded material, in the possession of a person who-*
>
> *(a) acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office; and*
>
> *(b) holds it subject-*
>
> *(i) to an express or implied undertaking to hold it in confidence; or*
>
> *(ii) to a restriction or obligation such as is mentioned in section 11(2)(b) above.*"

21. By the inclusion in section 14(2) of the 1984 Act of the words "*other than items subject to legal privilege*", the legislature has directed that any item which is subject to legal privilege is not "*special procedure material*". Because of section 10(2) of the Act, if it is shown to the satisfaction of the judge that any item to which access is sought is held with the intention of furthering a criminal purpose, its potential legal privilege is lost and it falls into the category of "*special procedure material*" and so can be the subject of an order under section 9 of, and schedule 1 to, the 1984 Act (see, eg, *R v Minchin* [2013] EWCA Crim 2412, at para. 30). However, the omission of any words relating to "*items subject to legal professional privilege*" in the definition of "*special material*" in section 25 led me to conclude that I could not apply the English cases relying on the terms of the statute directly. For the purposes of construing the 2003 Law, section 24 is of no direct assistance as to how to approach whether the material sought is "*special material*" or not. Instead, in my judgment, recourse must be had to common law principles. However, because it has been recognised that section 10(2) of the

1984 Act is founded in common law origins (see, eg, *R v Central Criminal Court, ex parte Francis and Francis* [1989] 1 AC 346), the outcome will almost certainly be the same.

22. The Skeleton Argument of the Advocate in question includes an extensive analysis of the reasons why legal professional privilege exists and how the principle has been developed in recent times, including the distinction between legal advice privilege and litigation privilege. For present purposes, I can draw assistance about the relevance of privilege from para. 28 of the speech of Lord Scott of Foscote in *Three Rivers District Council v Governor and Company of the Bank of England (No. 6)* [2005] 1 AC 610:

> "*So I must now come to policy. Why is it that the law has afforded this special privilege to communications between lawyers and their clients that it has denied to other confidential communications? In relation to all other confidential communications, whether between doctor and patient, accountant and client, husband and wife, parent and child, priest and penitent, the common law recognises the confidentiality of the communication, will protect the confidentiality up to a point, but declines to allow the communication the absolute protection allowed to communications between lawyer and client giving or seeking legal advice. In relation to all these other confidential communications the law requires the public interest of the preservation of confidences and the private interest of the parties in maintaining the confidentiality of their communications to be balanced against the administration of justice reasons for requiring disclosure of the confidential material. There is a strong public interest that in criminal cases the innocent should be acquitted and the guilty convicted, that in civil cases the claimant should succeed if he is entitled to do so and should fail if he is not, that every trial should be a fair trial and that to provide the best chance of these desiderata being achieved all relevant material should be available to be taken into account. These are the administration of justice reasons to be placed in the balance. They will usually prevail.*"

23. A recognised exception to legal privilege, which has been codified into section 10(2) of the 1984 Act and section 24(2) of the 2003 Law, derives from *R v Cox and Railton* (*supra*). (The application of the principles is further elaborated upon in para. F9.65 of *Blackstone's Criminal Practice 2014*.) In his judgment in *Cox*, Stephen J first posed the question for determination (at page 165):

> "*The question, therefore is, whether, if a client applies to a legal adviser for advice intended to facilitate or to guide the client in the commission of a crime or fraud, the legal adviser being ignorant of the purpose for which his advice is wanted, the communication between the two is privileged?*"

His Lordship explained that (at page 168):

> "*In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him.*"

Accordingly, where the client has that criminal object in view, the communications with the lawyer do not even attract legal privilege. The guidance offered about how to approach such questions is (at page 175) "*that in each particular case the Court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped in committing it.*"

24. I take the view that this principle operates as a matter of Guernsey law in the same way that it forms part of English common law. Legal professional privilege is an important aspect of the administration of justice domestically and must, when it operates, be respected. However, there may be circumstances where the privilege does not attach to communications between an Advocate and the Advocate's client, for example, where the client is abusing the otherwise professional relationship by seeking advice on how to commit an offence or giving instructions to be acted upon where the Advocate will unwittingly assist in the potential commission of an offence. Such circumstances need to be investigated fully and it would, in my judgment, be quite inappropriate for the proper investigation of a potential offence to be thwarted by reference to privilege applying. In those circumstances, no such privilege exists to be invoked to protect the communications from disclosure.

25. As has been made clear in other cases (eg, the ***Hallinan*** and ***Minchin*** cases to which reference has already been made), the question for the Bailiff is whether there is freestanding and independent evidence supporting the assertion that there was an underlying intent to further a criminal purpose. If there is, the legal professional privilege that might otherwise be recognised as defeating an application for the production of special material simply does not exist.

26. The consequence, however, is that the material in question still needs to be sought through the route of section 9 of, and schedule 1 to, the 2003 Law because it remains "*special material*". Support for that outcome is found in the summary in para. F9.63 of *Blackstone's Criminal Practice 2014*:

> "*In Guildhall Magistrates' Court, ex parte Primlaks Holdings Co. (Panama) Inc. [1990] 1 QB 261, it was held that loss of privilege by virtue of s. 10(2) does not mean that no express or implied undertaking to hold in confidence can exist. A solicitor's correspondence with his client (and its enclosures) will, if not privileged, fall squarely within s. 14. ... if the police are aware that what they seek includes items which are, prima facie, the subject of legal privilege, they should proceed under s. 9.*"

27. I take the view that a similar principle applies even without reference to section 24(2) of the 2003 Law (ie, the equivalent provision to section 10(2) of the 1984 Act) because the definition of "*special material*" in section 25 of the Law refers to the Advocate's undertaking to hold the material in confidence. In those circumstances, the Police should make use of section 9 of, and schedule 1 to, the Law when wishing to obtain access to anything that falls within the definition of "*special material*". If an Advocate wishes to advance legal professional privilege as a reason for such a production order not being made, that option remains to the Advocate. However, where the evidence in support of the application for production establishes satisfactorily that the material held in confidence is not subject to legal professional privilege, eg, there was an underlying intent to further a criminal purpose where the offence is yet to be committed, it will fall within the definition of "*special material*". (The principle also applies where legal privilege is lost in respect of communications after the commission of an offence where there is evidence of specific agreement to pervert the course of justice, as was the situation in the ***Hallinan*** case (*supra*), but that is not directly applicable to the facts of the present case.)

28. As a result of this analysis, I reached the conclusion that, even though legal professional privilege could not be invoked in relation to the material in the Advocate's file relating to the matters under investigation by the Police because that material fell outside the ambit of such privilege under the common law principle derived from the ***Cox*** case and others that have applied it, that material did fall within the definition of "*special material*" in section 25 of the 2003 Law. Accordingly, I was satisfied that the second element of the access conditions in para. 2 of schedule 1 to the Law had been met.

29. The police officer's application was originally put extremely broadly. It sought an order in respect of "*all documentation and other material*" held by the Advocate in relation to the application made to the Magistrate's Court, albeit that some examples of the type of material really being sought were also given, but specifically without limiting the generality of the opening words. The date range of the material sought was also not specified at the time, although it was implicit that it would have run from a date when the Advocate was instructed in relation to the application to be made by the Advocate's client. Because of the breadth of the material referred to, at the first hearing I indicated that, whilst being open to persuasion to reach a different conclusion, I might struggle to be satisfied about the third of the access conditions ("*that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation*"). It is apparent from *R (on the application of Bright) v Central Criminal Court* (*supra*) that the scope of any production order made in the discretion of the judge must be considered carefully.

30. The concerns were addressed adequately by the third hearing and the swearing of a supplemental Information by the police officer. In this way, the application was amended so that what was sought was limited to a series of specified items, all of which were circumscribed by reference to a short period of time. The desirability of proceeding in this way is clear by reference to comments made in the English Administrative Court decision in *R (on the application of S, F and L) v Chief Constable of the British Transport Police* [2013] EWHC 2189 (Admin). At para. 43, it was stated that:

> "*The Information must … be drafted with scrupulous care to ensure that it contains all relevant matters, because although the Circuit Judge who must consider it will have to do so carefully and in detail, he will be relying on it to make his decision*".

31. Although that case concerned an application for a warrant rather than the first stage of seeking a production order, I take the view that this comment is of equal application to the procedure to be followed in respect of that earlier stage. The Information contains the application and all the material in support of it. As was pointed out in para. 45(e) of the same judgment, "*If further information is supplied to the circuit judge during the hearing of the application, whether as a result of judicial questioning or otherwise, the Information should be supplemented by a witness statement or a further Information setting out such further information.*" Therefore, having been subjected to some judicial questioning at the first hearing, the swearing by the police officer of a supplemental Information at the final hearing, both providing the additional information given in written form and clarifying the ambit of the application actually being made, was an appropriate course of action to follow.

32. In proceeding this way, the more targeted application was such that I was able to be satisfied that the third element of the access conditions had been met and that the possibility of the material to be produced pursuant to an order covering material that should not be produced, at least at this stage of the investigation, had been minimised so far as possible.

33. The fourth element of the access conditions is that "*the material is likely to be relevant evidence*". Section 8(4) of the 2003 Law assists here because:

> "*In this Law "**relevant evidence**", in relation to an offence, means anything that would be admissible in evidence at a trial for the offence.*"

34. Accordingly, this element offers a further check and balance against making an order that would extend to anything that could not be used in this way. There is a degree of overlap with the assessment of whether something is properly covered by legal professional privilege and so could not be used in evidence at a trial because it should not have come into the hands of the prosecutor. By modifying the application to refer to physical items, all of which would

be likely to be admissible in evidence at a trial, I was satisfied that the police officer's Informations satisfied this element as well.

35. The fifth element was perhaps the easiest to determine. This was because Crown Advocate Dunford had previously written a letter requesting voluntary disclosure. The Advocate's response was to raise legal professional privilege and to decline that request. Accordingly, another method of obtaining the material referred to in the police officer's application had been tried without success. I was, therefore, satisfied that this fifth element of the access conditions had been met.

36. The sixth and final element is for the Bailiff to assess whether it is in the public interest that the material should be produced or that access should be given to it. In considering this element, para. 3 of schedule 1 to the 2003 Law requires regard to be had to the duty of confidentiality under which the material is held and cross-refers to section 25(2). Again, there is inevitably a degree of overlap in a case where the material sought loses the protection of legal professional privilege, but continues to be held subject to that duty of confidentiality. That said, the public interest arguments in favour of overriding that duty of confidentiality are likely to be strong, as they were in the present case, when the investigation being conducted goes to the heart of the fair administration of justice. Ultimately, consideration of this element involves a balancing exercise in which the more serious the nature of the allegation being investigated, the greater the likelihood that the public interest will be demonstrated.

37. I took into account the fact that what was sought by the application for a production order was original material supplied by the client to the Advocate and documents created by the Advocate as a result of the client's instructions. Those were the circumstances under which the person in possession of the material holds it, to which para. 2(c)(ii) of schedule 1 indicates regard must be had. Providing access to that material for the Police investigation would, in my opinion, provide benefits either supporting the allegations being investigated or possibly even pointing away from any criminality. Either way, the material sought would allow the investigation to progress. Accordingly, I was satisfied that this sixth element was also met.

38. In reaching these conclusions, as well as when proceeding to consider whether or not to exercise my discretion to make the order sought, I had regard to the passages in *Blackstone's Criminal Practice 2014* (paras. D1.155 *et seq.*), which explain the process as a matter of English law. Because of the similarities between the two legislative regimes, I consider that this guidance is equally applicable to an application under the 2003 Law. It is apparent that, when such an application is made, the Bailiff should proceed with great care and caution, which is precisely why it took several hearings to reach the stage when the access conditions could fully be demonstrated.

Procedural safeguards

39. As Crown Advocate Dunford recognised, because the special material sought will involve an assessment of whether anything in some of the categories of items to which access is sought does still have the protection of legal professional privilege, some form of safeguard should be built into the order to preserve that material from coming into the hands of the Police. He fully appreciated that such an inadvertent slip in this regard would potentially have an impact on any subsequent prosecution, which would not be desirable from the perspective of the public interest in bringing criminals to justice.

40. It is apparently commonplace in England and Wales for such questions of what might or might not be covered by legal privilege to be resolved through the appointment of an independent lawyer to be present at the time of the handing over of material under a production order or, if matters reach that stage, at the execution of a search warrant. Examples of cases in which this safeguard was explained are ***R (on the application of***

Tchenguiz) v Serious Fraud Office [2012] EWHC 2254 (Admin) and the *S, F and L* case (*supra*). As it was said in the first of those cases (at para. 258), "*The importance attached to legal professional privilege and the need to ensure that it is safeguarded during a search is too well known to require citation of the numerous authorities*". Accordingly, it was understood that "*careful planning was required*" (para. 259).

41. By the time of the final hearing, the police officer was able to state in the supplemental Information that steps had been taken to secure the services of an Advocate from an unrelated legal practice to conduct a review of the material to be produced by virtue of an order under section 9 of, and schedule 1 to, the 2003 Law before that material was handed over to the Police, so as to remove from it any items that the reviewing Advocate considered benefited from legal professional privilege. I was satisfied that this procedural safeguard was an appropriate one to include and so expressly referred to it on the face of the order made. Further, where a reviewing Advocate acts in this way, it does not affect the right of the person holding the special material subject to the order for production (and the same would apply in respect of the execution of a search warrant, should that stage be reached) to seek relief from the Court if that Advocate considered that something attracting legal professional privilege had not been removed through the process involving the reviewing Advocate. The Court is available as the final arbiter in cases where such disputes arise.

Conclusion

42. It is quite clear that the greatest care must be taken when considering an application for a production order under section 9 of, and para. 4 of schedule 1 to, the 2003 Law in respect of special material. This is because the order, if made, represents an incursion into what is otherwise a relationship founded on confidentiality. Accordingly, the Bailiff is charged by the legislature with having to consider a number of steps before such an order could even be made in his discretion. The onus is on the police officer making the application, and swearing the Information in support, to set out in sufficient detail how each of the access conditions is said to be met. As explained in *Blackstone's Criminal Practice 2014* (at para. D1.158), the judge:

> "*must be shown such material as is necessary to enable him to be satisfied before making the order, and he should be told anything which, to the knowledge of the applicant, might weigh against his making such an order (Leeds Crown Court, ex parte Hill [1991] COD 197; Acton Crown Court, ex parte Layton [1993] Crim LR 458). He should not allow the police to engage in a fishing expedition. Any order he makes must be specific as to the material sought.*"

43. In the present case, having worked my way through each element of the access conditions, in the light of the material contained in the combination of the police officer's two Informations, I was satisfied that the application had become sufficiently precisely directed so that it could not be regarded as a fishing expedition, and that each of those elements had been satisfied. Further, because appropriate procedural safeguards had been arranged so as to ensure that no item to which legal professional privilege attaches would be produced under the order sought, I was in a position to exercise my discretion in favour of granting the application and so made the order in the terms sought for the material to be produced no later than seven days from the date of the order.

