THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

(Court Office, San Fernando)

Claim No. CV 2015-02943

PRIMNATH GEELAL

AND DHANRAJIE GEELAL

Applicants/Claimants

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent/Defendant

BEFORE THE HONOURABLE MR. JUSTICE ROBIN MOHAMMED

Appearances:

Mr Anand Ramlogan S.C., Mr. Kelvin Ramkissoon and Mr. Kent Samlal instructed by Mr. Douglas Bayley for the Claimants

Mr. Douglas Mendes S.C., Mr. Randall Hector and Mr. Roshan Harracksingh instructed by Ms. Amrita Ramsook for the Defendant

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DECISION ON APPLICANTS'/CLAIMANTS' NOTICE OF APPLICATION FOR DISCLOSURE

APPLICATION

1. Before this Court is the Applicants'/Claimants' Notice of Application filed on the 11th November, 2015 pursuant to Part 28.5 of the Civil Proceedings Rules 1998 ("the CPR) seeking disclosure of: (i) the notes of evidence referred to in paragraph 5 of the affidavit of Her Worship Chief Magistrate Marcia Ayers-Caesar filed on the 23rd October, 2015; and (ii) the notes of evidence from a hearing held on the 4th November, 2015 at the Port-of-Spain Magistrates' Court in relation to an application for an order of continued detention of the cash seized from the Claimants at which said application was granted pursuant to **section 38(3)** of the **Proceeds of Crime Act, Chap. 11:27 ("POCA")**. The Claimants further sought to have the said Application dealt with without a hearing pursuant to **Rule 11.13** of the **CPR** and an Order that the Respondent/Defendant be ordered to pay the Applicants'/Claimants' costs of the Application. However, upon the Attorneys-at-law for the Defendant intimating to the Court that the Defendant would be objecting to the said Application, the Court directed that there be a hearing and fixed the 27th November, 2015 for the hearing of the said Application *inter partes*.

2. The Claimants set out the following as grounds of the said Application:

    (i) This is a claim for, inter alia, constitutional redress pursuant to section 14 of the Constitution for the violation of the Applicants'/Claimants' constitutional rights under **section 4(a)** and/or **4(b)** and/or **5(2)(h)** of the **Constitution**.
    (ii) Whilst the Applicants/Claimants are given a right to apply for the release of their cash which was seized and detained under the **POCA**, they must prove that the grounds for detention are no longer applicable.
    (iii) The Applicants/Claimants are unable to apply for the release of their money because they have not been notified of the grounds for the detention.
    (iv) The oral evidence which justified the granting of the detention order and continued detention order against the Applicants/Claimants is likely to contain the grounds for same.
    (v) To date, there has been no disclosure of the evidence led before the Court in support of the successful application for the detention and continued detention of the cash.
    (vi) By letter dated October 26th, 2015 the Applicants/Claimants requested disclosure of the notes of evidence for the hearing on the 4th August, 2015. There has been no response to this letter.
    (vii) Subsequent to this, a further hearing was held on November 4th 2015, pursuant to which the cash detention order was continued. Again, the claimant is desirous of obtaining the notes of evidence.

(viii) The disclosure of the notes of evidence is necessary for the fair and just determination of this claim as it is contrary to natural justice and due process for an order to be made to authorize the detention of a citizen's property without disclosing the basis for same.

BACKGROUND

3. The Claimants are business owners, operating a wholesale supermarket at El Socorro, San Juan. On the 31st July, 2015 a party of police officers executing a search warrant seized a large quantity of cash from the Claimants. On that date, the Claimants were detained at police stations and then released. On the 4th August, 2015 the Claimants were served by the police with a copy of an Order made by the Chief Magistrate under the **POCA** authorizing the further detention of the said money for a period of three months ending November 4th, 2015. The Order did not contain any grounds or reasons as to the basis for the continued detention. On the 4th November, 2015, a further application for renewal of the detention order was made and granted by the Magistrate.

4. By letter dated the 3rd August, 2015 the Claimants' attorneys-at-law wrote to Senior Superintendent Dookie calling on him to justify the detention of the monies seized and to provide a detailed documentary basis for the continued detention of the said monies and further requested that the said monies be returned. No reply to same was received. By pre-action letter dated the 20th August, 2015 the Claimants' attorneys-at-law wrote to the Attorney General of Trinidad and Tobago indicating their intention to seek legal redress and further, requesting further information in relation to the detention order. Having received no response, the Claimants authorized their attorneys to issue a follow-up letter dated the 26th August, 2015 to which no response was forthcoming.

5. On the 1st September, 2015 the Claimants filed an ex-parte application for leave to apply for judicial review to quash the detention order issued by the Chief Magistrate on the 4th August, 2015 under the **POCA** in respect of cash seized from the Claimants' home. They further stated that they claim in judicial review for a further order deeming the matter fit for urgent and early hearing; a declaration that the detention order made by the Chief Magistrate on the 4th August, 2015 against the Claimants is unconstitutional, null and void and of no effect; an order directing the Defendant to return the Claimants' cash detained pursuant to the said order forthwith; and a declaration that the Claimants were treated unfairly and in breach of the principles of natural justice.

6. In the said Application of the 1st September, 2015 the Claimants further stated that they seek the following redress under **section 14** of the **Constitution**:

(i) A declaration that the Claimants' right to use and enjoy their property and not to be deprived thereof except by due process of law under **section 4(a)** of the **Constitution of Trinidad and Tobago** was violated and breached;

(ii) A declaration that the Claimants' right to protection of the law under **section 4 (b)** of the **Constitution of Trinidad and Tobago** has been breached by virtue of the continuing failure of and/or refusal by the State to make Regulations to prescribe the necessary forms under **section 38(4C)** and/or **(7A)** of the **POCA**;

(iii) A declaration that the continuing failure of and/or refusal by the State to make Regulations to prescribe the necessary forms under **section 38(4C)** and/or **(7A)** of the **POCA** has deprived the Claimants of their right to such procedural provisions as are necessary for the purpose of giving effect and protection to their enshrined fundamental rights and freedoms;

(iv) Damages including vindicatory damages;

(v) Costs; and

(vi) Such further relief, orders and directions or writs as the Court might consider just and/or appropriate as the circumstances of the case warrants.

7. In the said ex-parte application for leave, the Claimants set out the grounds upon which the claim for relief is based. At the heart of the grounds stated is their claim that Regulations have not been made to prescribe a form under **section 38(4C)** of the **POCA** to enable a Magistrate to make an ex-parte detention order in the form intended and mandatorily prescribed in Parliament. The Claimants allege that there is therefore no prescribed form for the ex-parte order authorizing the detention of a citizen's cash seized by the police under the **POCA**.

8. At the time of making the ex-parte application, the Claimants stated that to-date, Regulations had not been made to prescribe a form under **Section 38(7A)**. There was therefore no form by which the Claimants, whose cash had been seized and purportedly detained in accordance with **section 38,** could make an application under **section 38(7)** to challenge the initial detention and/ or further subsequent detention of their cash. (That application could have been made to the Magistrate).

9. As grounds for the relief sought, the Claimants further contended that the ex-parte order made by the Chief Magistrate on the 4th August, 2015 authorizing the detention of the Claimants' cash did not contain the grounds for the detention or any reasons for the

making of the order. The Claimants therefore in any event are unable to exercise their right to apply for the release of the cash as they are not aware of the basis for the detention of same.

10. The Claimants further stated that by **section 38(7)** they are required to prove that *"there are no or no longer any grounds for its detention as are mentioned in subsection (2)"*. They said that they are unable to discharge this burden of proof because the present procedure under the **POCA** does not allow them to know the basis and/or reasons and/or justification and/or grounds for the detention order. Thus, even if there was a prescribed form under **section 38(7A)**, the Claimants say that they may not be in a position to make a meaningful application to have their cash released. The Claimants contend that in the absence of Regulations prescribing the form and content of the detention order under **section 38(2)** and **(3)** the Magistrate has no jurisdiction to make a detention order. The Claimants also contend that the Magistrate is a creature of statute and may only exercise jurisdiction found in **section 6** of the **Summary Courts Act** or in relation to the powers conferred by **section 38**, she derives her powers in this regard under the **POCA**.

11. It is the Claimants' contention that the Magistrate cannot lawfully devise and fashion an order of her own in the face of an express provision whereby Parliament reserved the right to prescribe the form such an order must take and what it should contain. The prescribed forms under the **POCA** are subject to the negative resolution of Parliament and by **section 56**, are to be made by the relevant Minister. Therefore, the Claimants say that the detention order is null and void and of no legal effect in consequence of which it cannot be renewed and the Claimants' cash must be returned forthwith.

12. Alternatively, the Claimants contend that the detention order is invalid because, in its present form it is defective in that it does not contain the grounds of the detention thereby defeating the constitutional procedural safeguard given to the Claimants by Parliament to be able to apply to have the order discharged and his cash released. In the circumstances, the Claimants contend that the right given to them under **section 38(7)** is meaningless as the failure of the State to prescribe a form for making the relevant application and/or the failure to disclose the reasons and/or grounds and/or basis for the detention order effectively compromises and/or undermines their ability to satisfy the statutory preconditions that would enable the court to make an order for the release of their cash. The Claimants are unable to mount a challenge to the grounds for the detention of their cash, as they are not aware of the said grounds upon which the said detention order was granted.

13. According to the Claimants, the failure to balance the right of the State to seize the Claimants' cash pursuant to an ex -parte order with their right to apply to have the cash

released is illegal and unconstitutional. The Claimants say that there is in fact no balance because while the police can apply for a detention order, the Claimants cannot apply for a discharge to have their cash returned.

14. In the circumstances, the Claimants contend that their constitutional rights have been violated as follows:

    (i) The right not to be deprived of the enjoyment of their property except by due process of law (**section 4(a)** of the **Constitution of Trinidad and Tobago**);

    (ii) The right to protection of the law (**section 4(b)** of the **Constitution of Trinidad and Tobago**);

    (iii) The right to a fair hearing in accordance with the principles of fundamental justice for the determination of their rights and obligations **(section 5(2)(e)** of (the Constitution) of Trinidad and Tobago;

    (iv) The rights to such procedural provisions as are necessary for the purpose of giving effect and protection to the fundamental rights and freedoms (**section 5(2)(h) of the Constitution of Trinidad and Tobago**).

    In the said ex-parte application, the Claimants set out their grounds for judicial review under **section 5(3)** of the **Judicial Review Act**. They challenge the decision of the Chief Magistrate to make a detention order in a form not authorized and/or prescribed by Parliament as contemplated by the **POCA** pursuant to **section 5(3)** of the **Judicial Review Act 2000** on the following grounds:

    (i) The decision was unauthorized and contrary to law;

    (ii) The Magistrate had no jurisdiction to make such an Order in the absence of Regulations prescribing the form and content of the order;

    (iii) Failure to satisfy or observe conditions or procedures required by law to wit, the need for a prescribed form for the detention order;

    (iv) Breach of the principles of natural justice as the Claimants were never informed about the reason(s) for the detention order and are being deprived of their statutory and constitutional right to challenge the ex parte detention order in accordance with the **POCA**;

    (v) Conflict with the policy of an Act;

(vi) Deprivation of a legitimate expectation that the aggrieved citizen would have meaningful and effective right to make an application to have the detention order discharged so that his cash can be released and returned.

15. On the 2nd September, 2015 Rampersad J. considered the Claimants' ex-parte application for judicial review together with the Claimant, Primnath Geelal's, affidavit in support and granted leave for to the Applicants/Claimants to apply for judicial review for the following reliefs:

> (1) An order seeking leave to apply for judicial review pursuant to **section 6** of the **Judicial Review Act 2000** to quash the detention order issued by Her Worship the Chief Magistrate on August 4th, 2015 under **section 38** of the **Proceeds of Crime Act, Chap. 11:27 (as amended) (POCA)** in respect of cash seized from the Claimants' home.
> (2) A further order deeming this matter fit for urgent and early hearing.
> (3) A declaration that the detention order made by the Chief Magistrate on the 4th August, 2015 against the Claimants is unconstitutional, null, void and of no legal effect.
> (4) An order directing the Defendant to return the Claimants' cash detained pursuant to the said order forthwith.
> (5) A declaration that the Claimants were treated unfairly and in breach of the principles of natural justice.
> (6) Such further other orders, directions or writs as the court considers just as the circumstances of this case warrant pursuant to **section 8(1)(d)** of the **Judicial Review Act 2000.**

16. On the 2nd September, 2015, the Claimants filed their Fixed Date Claim Form seeking redress under **section 14** of the Constitution. The redress sought was the constitutional redress set out in the ex-parte application of the 1st September, 2015. An affidavit in support of even date was filed.

17. On the 23rd October, 2015 the Defendant filed the affidavits of Chief Magistrate Marcia Ayers-Caesar and Acting Sergeant of Police, Marvin Francis ("Sergeant Francis"). On the 26th October, 2015 the Claimants filed an affidavit in Reply to those affidavits. Therein, the Claimant, Primnath Geelal, stated that it was not true as deposed at paragraph 9 of the affidavit of Her Worship Chief Magistrate Ayers-Caesar that it was open to him to make an application for the release of the cash seized pursuant to **section 38** of the **POCA**. He stated that he was unable to make such an application as it was not possible for him to do so in the absence of the necessary prescribed form. At the time of

the seizure of his cash or when the detention order was granted on August 4th, 2015, there was no prescribed form as required by law. Further, the Claimant deposed that he was not privy to the grounds upon which the application for the detention order was made as he was never served with the application made by Sergeant Francis referred to in paragraph 28 of his affidavit in response. The Claimant also deposed that to date, he has not been provided with a transcript or notes of the oral evidence heard ex-parte on the 4th August, 2015 by the Chief Magistrate or the Magistrate's reasons for the grant of the Order. He stated that without having the knowledge of the aforesaid grounds and reasons, he was unable to comply with the requirements of **section 38(7)(i)** or **(ii)** of the **POCA** and was therefore unable to make any such application. He deposed that he has since instructed his attorneys to write to the Defendant seeking disclosure of the transcript or oral notes of evidence from the ex-parte hearing which took place on the 4th August, 2015 before the Chief Magistrate.

18. On the 11th November, 2015 the Claimants filed their Notice of Application for disclosure which forms the subject matter of this decision, that is, their Application for an order pursuant to **Part 28.5** of the **CPR** that the Defendant be ordered to disclose the notes of evidence set out in further detail at paragraph (1) of this decision. The affidavit of even date of the Defendant's attorney, Kent Samlal, was filed in support of said Notice of Application. Therein, Mr. Samlal deposed that by letter dated the 26th October, 2015 he requested disclosure of the notes of evidence referred to in the affidavits filed on behalf of the Defendant by Her Worship Chief Magistrate and Acting Sergeant Marvin Francis. He deposed that there was no response to the said letter and on November 4th 2015, he attended the Port of Spain Magistrates' Court together with the Claimants where he objected to the application for an order of continued detention but was unsuccessful. Mr. Samlal further deposed that the Court, after hearing the evidence from Acting Sergeant Marvin Francis, granted the order of continued detention pursuant to **section 38(3)** of the **POCA**.

19. Mr. Samlal deposed that his clients have a right to apply for the release of their money which has been detained but they are required to prove that the grounds for the detention of same are no longer applicable. He said that he is unable to properly advise the Claimants as there has been no disclosure of the evidence led by the State (the Police) in support of the original detention order which was referred to and relied on further at the hearing of the application for the order of continued detention. He stated that whilst he attended the hearing of the application for the order of continued detention, he was unable to take a complete and accurate verbatim record of the oral testimony and cross-examination of Acting Sergeant Francis.

20. Mr. Samlal further deposed that notes of evidence are critical to the issues raised in this Claim and should be disclosed to enable the Court to do justice between the parties. He deposed that the disclosure of that evidence is necessary to determine whether the Claimants can mount a viable challenge to the detention order and secure the release of their money.

21. Written submissions in relation to the Claimants' Application for disclosure were filed by the respective parties on the 11th November, 2015 and the 26th November, 2015. On the 27th November, 2015 Attorneys for the parties made oral submissions on the issue.

SUBMISSIONS BY CLAIMANTS IN SUPPORT OF THE APPLICATION FOR DISCLOSURE

22. In written submissions filed on the Claimants' behalf on the 11th November, 2015, Counsel for the Claimants submits, inter alia, that the Claimants were deprived of their property without due process in violation of **section 4(a)** of the Constitution. It is submitted that the lack of due process manifested itself in different ways such as:

    a. the ex-parte nature of the proceedings;

    b. the prescribing of forms enabling the state to apply for detention orders but failing and/or refusing to make forms for the aggrieved citizen to apply for the release of his cash;

    c. the failure to prescribe the form of the detention order;

    d. the failure of the Court to specify the grounds for the detention of the cash;

    e. the failure of the State to notify the Claimant of the said grounds of the detention by any other means including service and/or disclosure of the application and/or the evidence led in support thereof.

    f. the failure of the State to bring to the Court's attention facts and matters that would militate against the grant of the ex parte detention orders.

23. Counsel for the Claimants submits that cogent evidence was required to justify the grant of an ex-parte detention order. Mere possession of cash (especially by a businessman involved in wholesale trade) is neither suspicious nor illegal. Counsel further submitted that the police would have had to provide evidence to show some relationship or link between the cash seized and the suspected offence of credit card fraud which they were investigating. Counsel submitted that unfortunately, the Claimants are not in a position to

know whether this minimum evidential threshold was met, as there has been no disclosure of the evidence led before the Chief Magistrate.

24. Counsel for the Claimants refers to various authorities treating with the due process requirement. He states that due process embraces and embodies rules of natural justice and the breaches of natural justice complained of in this case strike at the very heart of the constitutional concept of due process.

25. Counsel for the Claimants further submits that the Claimants were deprived of their right to protection of the law because:

    a. there was no prescribed form for them to make the necessary application to secure the release of their cash;

    b. even if the form was prescribed, they were never informed of the grounds for the detention and this rendered valueless their right to make such an application; and

    c. the failure and/or refusal to prescribe the necessary forms and/or the failure to disclose the grounds for detention violated their right to protection of the law because these were critical requirements without which the judicial process which was used to deprive them of their property was rendered " undue".

SUBMISSIONS BY THE DEFENDANT IN OPPOSITION TO APPLICATION FOR DISCLOSURE

26. Counsel for the Defendant submits that the Application for disclosure ("the Application") is said to be made pursuant to **Civil Proceedings Rules 1998 (as amended) ("CPR") Part 28.5**, sub-clause 5 of which provides as follows:

    "An order for specific disclosure of documents may only require disclosure of documents which are directly relevant to one or more matters in issue in the proceedings".

    Counsel for the Defendant further submits that **CPR 28.6(1)** provides that:

    "*When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or save costs".*

27. Counsel for the Defendant thus submits that the first question to be resolved is whether the notes of the ex-parte hearing of the 4th August, 2015 and of the hearing on the 4th November, 2015 *"are directly relevant to one or more matters in issue in the proceedings"*. If not, specific disclosure must be refused. Counsel submits that this necessarily requires an examination of pleadings to identify the matters in issue. It is only if the court is satisfied that the notes *"are directly relevant to one or more matters in issue in the proceedings"* that it would need to ask whether the notes are *"necessary in order to dispose fairly of the claim or to save costs"*.

28. It is the contention of Counsel for the Defendant that the notes are not directly relevant to any matter in issue and are not necessary to dispose fairly of the claim or to save costs.

29. Counsel for the Defendant says that the Claimants' case is that as at the date they filed their claim, their rights had been infringed because of: (i) the absence of any prescribed form for the detention order; (ii) the absence of any prescribed form for the application to release the cash (iii) the failure to state the grounds on which the cash was detained in the detention order; and (iv) the failure of the Chief Magistrate to provide any reasons for issuing the detention order.

30. Counsel for the Defendant submits that it is not in dispute in these proceedings that, as a matter of fact, when the detention order was issued the forms for the detention order and the application had not been prescribed. He submitted further that it is also not in dispute that the detention order does not contain the grounds or reasons for its issue or that the Chief Magistrate has not given reasons for her decision to issue the detention order.

31. Counsel Defendant submits that it will contend that the absence of the forms does not affect the validity of the detention order and that there is no legal obligation to include the grounds for the detention order in the order or for the Chief Magistrate to give reasons.

32. Counsel for the Defendant further submits that it is plain from the identification of the issues in this claim that the notes of the hearing on the 4th August, 2015 are not relevant at all to the matters in issue in the proceedings. He submits that they are obviously not relevant to the "prescribed forms" issues and the Claimants do not so allege in their application. Counsel further contends that they are also not relevant to the "absence of grounds in the order" issue or "the failure to give reasons" issue. He submits that their disclosure will make no difference to the admitted facts that grounds are not contained in the order and the Chief Magistrate has not given reasons. He submits that the sole question for the Court is: what is the effect of this in law? He stressed that the notes will not assist the Court in this exercise either.

33. Counsel for the Defendant further submits that the notes of the hearing on the 4th November, 2015 are even more irrelevant, as the Claimants have not challenged the order continuing the detention of the cash and in any event these notes cannot assist the Court in resolving the pure issues of law which are in dispute. Counsel for the Defendant submits that the Claimants have not challenged the detention order on the ground that the Chief Magistrate acted irrationally in issuing the order or took into account irrelevant considerations. He submits that had that been the basis of the challenge, the evidence tendered before the Chief Magistrate on the 4th August, 2015 would have been eminently relevant and the Chief Magistrate would already have disclosed same on the ***Huddleston*** principles.

34. Counsel for the Defendant submits that for these reasons as well, the notes are not necessary to dispose fairly of the claim or to save costs. He submits that the provision of the notes will in fact increase costs because they will force the parties to give consideration to documents which will not assist in the resolution of any matter in issue and will accordingly waste time.

35. Counsel for the Defendant contends that disclosure in judicial review proceedings is not granted as a matter of course and relies in support on the dicta of Lord Brown in **Tweed v. Parades Commission for Northern Ireland [2007] 1 AC 650.**

36. Counsel for the Defendant further submits that the Defendant wishes to make clear that it is his position that in the proceedings before the Chief Magistrate the Claimants are entitled to the notes of proceedings heard ex-parte or any hearing which they did not attend and that all that they need to do is ask the Chief Magistrate for it. However, they (the Claimants) have taken the position that the absence of prescribed forms prevents them from appearing before the Chief Magistrate. Having said that, ***Counsel for the Defendant states that the Defendant is prepared to facilitate the provision of the notes to the Claimants, but not as a part of these proceedings*** [Emphasis added]. Counsel submits that the Claimants must be kept to their pleadings and must not be provided with a platform to extend the issues in dispute in these proceedings under the guise of an application for discovery.

ISSUE

37. **As I see it, the main issue which falls to be determined is whether the notes of evidence requested by the Claimants are directly relevant to one or more matters in issue in the proceedings**.

LAW AND ANALYSIS

38. **Rule 28.5** of the **CPR s**erves as the starting point for consideration of the Application for disclosure given that the Claimants have stated in the said Application that same was made pursuant to the said Rule.

39. **Rule 28.5** of the **CPR** concerns specific disclosure. More particularly, **Rule 28.5(1)** of the **CPR** states that an order for specific disclosure is an order that a party must do one or more of the following things:

> ***(a) disclose documents or classes of documents specified in the order; or***
>
> ***(b) carry out a search for documents to the extent stated in the order; and***
>
> ***(c) disclose any document located as a result of that search.***

40. Of particular relevance is **Rule 28.5(5)** which delimits the circumstances in which an order for specific disclosure of requested documents may be made. That rule provides that-

> "***An order for specific disclosure may only require disclosure of documents which are directly relevant to one or more matters in issue in the proceedings." [Emphasis mine]***

41. In **Oswald Alleyne and Others v. The Attorney General of Trinidad and Tobago H.C.A. 3133 of 2003** Tiwary-Reddy J. stated as follows[1]:

> *"In Civil Appeal No. 58 of 1991Crane v. Bernard and Ors. Davis J.A. stated at page 11:*
> *"Further it is now the clear duty of a public authority to assist the Court by bringing forward in judicial review proceedings, and I would think in constitutional matters also, all facts and matters which are relevant to the determination of the issues. It is not that the Appellant has a right to have disclosed to him all information relevant to the decision of a public authority which he is seeking to impugn, but rather that the Court is entitled to have this information divulged to it so that it may do justice between the parties.*
> *This doctrine has been affirmed by Sir John Donaldson MR in **R v. Lancashire County Council ex.p Huddleston 1986** 2 AER 941 at 945, letter b, where he says-*

[1] See page 12 and 13 of the judgment.

> *'...in my judgment...if and when the applicant can satisfy a judge of the public law court that the facts disclosed... to the applicant are sufficient to entitle the applicant to apply for judicial review of the decision...it becomes the duty of the respondent to make full and fair disclosure."*

42. Thus, from the passages quoted in the judgment of Tiwary-Reddy J. it appears that the requirements encapsulated in **Rule 28.5(5)** of the **CPR** echo the sentiments of Davis J.A in **Crane**. It is worth noting that **Oswald Alleyne** was a constitutional motion case which went all the way to the Privy Council, with the Privy Council overturning the Court of Appeal's ruling and affirming the decision of Tiwary-Reddy J...

43. The Defendant submits that the notes of evidence requested are not directly relevant to matters in issue in the proceedings as it is not in issue that the detention order does not contain the grounds or reasons for its issue or that the Chief Magistrate has not given reasons for her decision to issue the detention order. It is also not in issue that at the time when the detention order was issued the forms for the detention order and the application had not been prescribed.

44. **Rule 1.1(1) of the CPR** states that the overriding objective of the Rules is to enable the Court to deal with cases justly. **Rule 1.2(2)** of the **CPR** requires the Court to give effect to overriding objective when it interprets the meaning of any rule. Bearing this in mind, I am of the view that the Defendant has sought to view **Rule 28.5(5)** through too narrow a lens and that such a restricted view of the facts when applied to the provision ought not to be taken.

45. The Defendant contends that it is not in dispute that the detention order does not contain grounds for its issue and that the Chief Magistrate has not given reasons for her decision to issue the detention order. The Defendant also contends that it is not in issue that at the time when the detention order was issued, the forms for the detention order and application had not been prescribed. Viewing the issues narrowly, that may be so. However, viewed more broadly, what cannot be denied is that what is in issue between the parties is the Claimants' claim to have had their constitutional rights infringed by reason of being deprived of due process. This is the crux of the constitutional motion. Insofar as the Claimants allege in relation to judicial review that there has been a breach of the principles of natural justice as they were never informed of the reasons for the detention order and are deprived of their right to challenge the ex parte detention order and further allege a deprivation of a legitimate expectation that they would have a meaningful and effective right to make an application to have the detention order discharged so that their cash can be released and returned, the notes of evidence requested are directly relevant to matters in issue in the proceedings.

46. Indeed, one has to look no further than the affidavits of the Chief Magistrate and Acting Police Sergeant Francis to arrive at such a conclusion. The Claimants claim to have been deprived of their right to due process of the law, one of the reasons for same being that the detention order did not contain the grounds for its issue and so they did not know why the Chief Magistrate decided as she did. The Claimants are in effect alleging that the Chief Magistrate made an order ex-parte against them and that the process by which the order was made was unfair and that the procedural safeguard that the law gave to them to be able to apply to have their property released and returned was compromised by not stating what the grounds of the detention were.

47. The absence of such knowledge rendered their ability to seek to recover their cash under the **POCA** virtually useless as they would in all likelihood be unable to satisfactorily show that there were no grounds or no longer any grounds for the detention of the cash. In their affidavits, both Sergeant Francis and the Chief Magistrate refer to the evidence given by Sergeant Francis, with the Chief Magistrate stating at paragraph 5 that having read his application and affidavit and having heard him orally under oath she was of the view that the continued detention (of the Claimants' cash) was justified while its origin or derivation was further investigated. What the Sergeant said under oath would be available in the Notes of Evidence of the 4th August, 2015. However these were not annexed.

48. Similarly, Sergeant Francis in his affidavit stated that on Monday 4th August, 2015 he prepared and filed proceeds of crime cash detention forms and subsequently gave oral evidence before the Chief Magistrate. Again, the transcripts would reveal what was said under oath. The notes of evidence were also not annexed here, though relied upon. Thus, through the statements of their witnesses made in their affidavits, the Defendant places reliance on what was said before the Magistrate in seeking to show that the Magistrate was satisfied that the continuing detention order should be issued. These statements form part of the Defendant's case in answer to the Claimants' claim for judicial review and constitutional redress. What was said before the Magistrate would be contained in the notes of evidence.

49. The dicta of Sir Paul Girvan in the Privy Council judicial review case of **Peerless Ltd v. Gambling Regulatory Authority and Others [2015] UKPC** offers some guidance. He stated that-

> *"It is now clear that fairness may require that reasons be given for a decision in a wide range of circumstances. As stated in R v. Civil Service Appeal Board, ex parte Cunningham... the form of a determination is part of the procedure of a hearing and is no less subject to the requirements of procedural fairness than any other part. The very importance of the*

decision in question to the individual may be such that the individual cannot be left to receive an unreasoned decision as if "the distant oracle had spoken" (per Lord Mustill in R v. Secretary of State for the Home Department , ex parte Doody...)"

50. By placing reliance upon the grounds (likely to be found in the notes of evidence) in their affidavit evidence in answer to the Claimants' claim in these proceedings when seeking to establish in essence, reasonable grounds for issuing the continuing detention order, yet failing to annex the said notes of evidence and moreover, denying the provision of same in these proceedings by claiming their irrelevance, the Defendant is embodying the *"distant oracle that has spoken"* and such cannot be said to be just. Such an outcome could not have been the intended result of the interpretation of **Rule 28.5(5)** of the **CPR** in light of the overriding objective.

51. In **R v. Civil Service Appeal Board, Ex. p. Cunningham (1991) 4 All E.R. 310** , Lord Donaldson of Lymington MR stated that-

*"In **R v. Lancashire C.C. Ex. p. Huddleston (1986**) 2 All ER 941 at p. 945 I expressed the view that we had now reached the position in the development of judicial review at which public law bodies and the Courts should be regarded as being in partnership in a common endeavour to maintain the highest standards of public administration including, I would add, the administration of justice. It followed from this that, if leave to apply for judicial review was granted by the court, the court was entitled to expect that the respondent would give the court sufficient information to enable it to do justice and that in some cases this would involve giving reasons or fuller reasons for a decision than the complainant himself would have been entitled to."*

52. I am of the view that contrary to the Defendant's assertion, grounds for the detention order are a live issue in these proceedings as they are directly relevant to the Claimants' submission that there was a lack of due process, as the omission to give reasons hinders their ability to seek to recover their money in accordance with statute, and the Chief Magistrate has alleged in her affidavit that it is open to them to make the relevant application. Applying the dicta of Lord Donaldson, ensuring the highest standards of administration of justice would entail disclosing the notes of evidence requested to ascertain the grounds for the decision. This is particularly so where the party from whom the information is sought is not only merely the party likely to possess same, since it represents those who put forth the application for continued detention in the first place,

but Counsel here is attached to the Office of Attorney General and more than anyone else, would be expected to assist the Court in achieving justice between the parties. In this regard, I note the words of Sir John Donaldson MR in **R v. Lancashire County Council ex.p. Huddleston [1986] 2 ALL E.R. 941** at 945 where he stated that-

> *"In proceedings for judicial review, the applicant no doubt has an axe to grind.* ***This should not be true of the authority.***
> *The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why."* [Emphasis mine]

Applying the gist of the passage above, as representatives of the State, Counsel for the Defendant, presumably having no axe to grind, ought to supply the notes of evidence, given the circumstances of this case.

53. In opposition to the Application for disclosure, the Defendant submits that the Claimants have not challenged the detention order on the ground that the Magistrate acted irrationally in issuing the order or took into account irrelevant considerations. This argument is cyclical in nature as the reality is that the Claimants were not made aware of the grounds for Chief Magistrate's decision to issue the order and could not thus realistically challenge the detention order on the ground that the Chief Magistrate acted irrationally or that she took into account irrelevant considerations. This very argument raised by the Defendant throws into stark view the direct relevance to these proceedings of the notes of evidence in issue (given the Claimants' allegation that they have been deprived of due process and the protection of the law). The very documentation which the Defendant is relying upon in the affidavits to justify the orders made is the very documentation that the Claimants are alleging the absence of which prevents any meaningful attempt at recovery of the seized cash and thus results in a violation of their constitutional rights. The overriding objective of the **CPR** requires the Court to deal with matters justly and dealing with matters justly includes ensuring, so far as is practicable, that the parties are on an equal footing. To permit the Defendant to so narrowly construe the provisions of **Rule 28.5(5)** while at the same time relying on the documentation which the Claimant alleges was so important that the failure to have been exposed to same violated their constitutional rights would offend **Rule 1.2(2) of the CPR**.

54. The Defendant submits that specific disclosure in judicial review proceedings are not granted as a matter of course and in support, refers to the House of Lords case of **Tweed**

v. Parades Commission for Northern Ireland [2007] 1 AC 650. That case concerned judicial review proceedings where the claimant challenged a determination of the Parades Commission for Northern Ireland, made under **section 8 of the Public Processions (Northern Ireland) Act 1998,** permitting, on conditions, a proposed procession by a local Orange lodge to take place in a predominantly Catholic Town on Easter Day 2004. The claimant asserted that the conditions were unlawful since they constituted a disproportionate interference with his rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled in the Human Rights Act 1998. The chairman of the commission swore to an affidavit summarising the effect of specific documents, including police reports, an internal memorandum of the commission and two situation reports, which were material to the determination. The Claimant sought specific disclosure of the documents necessary for fairly disposing of the proportionality issues and the judge made the order sought. On the commission's appeal the Court of Appeal in Northern Ireland reversed the judge's order. The Claimant then appealed to the House of Lords which allowed the appeal.

55. The Claimant relies on the dicta of Lord Brown who states:

> *"…it is important too, to recognise that even in proportionality cases judicial review still remains a very different process from the sort of litigation in which disclosure orders are ordinarily made. The challenge by definition goes to the legality of the decision impugned. Generally no fact finding will be necessary unless perhaps in procedural challenges where it may be necessary to establish what happened in the course of the decision making process rather than what material was before the decision maker.* ***And it is a well-established principle that once permission to bring a claim for judicial review has been given public authorities are under a duty of candour to lay before the court all the relevant facts and reasoning for the decision under challenge…***
>
> ***In my judgment disclosure orders are likely to remain exceptional in judicial review proceedings, even in proportionality cases, and the court should continue to guard against what appear to be merely "fishing expeditions" for adventitious further grounds of challenge. It is not helpful, and is often both expensive and time consuming, to flood the courts with needless paper.****"[Emphasis added]*

56. However, **Tweed** must be viewed in context. I agree with Mr. Ramlogan insofar as he claims that the factual backdrop of **Tweed**, against which the dicta of their Lordships dicta therein rests, differs from the case at hand. As may be gleaned from Lord Carswell's judgment (at paragraph 18) in **Tweed** the facts were such that there was the risk of protests and a potential threat of public disorder. This is not the case in this matter

and indeed there has been no suggestion of such by the Defendant. Of even greater note, is the fact that in **Tweed**, the Commission summarized the evidence in the affidavit and the Applicant was saying that that was insufficient in all the circumstances.

57. In the case at bar, there is not even such a summary of the notes of evidence. The Chief Magistrate deposed that she partially relied on Sergeant Francis' oral submissions to make the order. However, those submissions are simply not stated, neither is the nature of those submissions. Further, it is apparent from the facts in **Tweed** that disclosure was resisted on the ground of confidentiality. There is no such claim on the Defendant's part here. In fact, what the Defendant is saying is that it is willing to provide the notes sought by the Claimants, but not as part of these proceedings as the Claimants must be kept to their pleadings. However, as I indicated earlier, the Claimants' pleadings themselves support the provision of the notes as they have pleaded an infringement of the right to due process on the very basis that they were not given the grounds, which are likely to be found in the notes of evidence requested.

58. In **Tweed**, the Court found that the summaries, however faithfully compiled, might not give the full flavour of the original documents and since the court in making the difficult assessment should have access so far as possible to the original documents before the commission, disclosure should be ordered to the judge who would consider whether and in what form disclosure should be made in the substantive proceedings. Again, the facts in **Tweed** differ and issues of confidentiality and potential unrest are not prevailing circumstances here. Moreover, the Claimants here did not even have the benefit of a summary of the grounds relied upon to make the detention order. The dicta of Lord Bingham of Cornhill in **Tweed** are worth noting. He stated (at paragraph 3) that orders for disclosure should not be automatic and that ***the test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly*.** [Emphasis mine]. This suggests that the circumstances of the case will of course be relevant to making that determination. In my view, applying that test in light of the circumstances of this case, namely –

    (i) where an ex-parte detention order was made and the relevant Act allowed for a process for the citizen to seek to have the seized property released; but

    (ii) that such release was permissible where the applicant could show that no grounds existed or existed any longer for the detention; and

    (iii) the applicant was not made aware of the grounds on which the order was issued in the first place; with

    (iv) such grounds likely being found in the very notes of evidence, which the Defendant itself relies upon in affidavits in answer to the Claimants' claim,

fair and just resolution of the matter requires the disclosure of the notes sought.

59. I note that in written submissions, the Defendant alleges that the notes of evidence sought are not necessary to dispose fairly of the claim or to save costs. It alleges that in fact, since the issues of fact relevant to the issues of law which the court must determine are not in dispute, the provision of the notes will increase costs as they will force the parties to give consideration to documents which will not assist in the resolution of any matter in issue and will accordingly waste time.

60. I have already stated that I have found the notes of evidence sought to be directly relevant to a matter in issue - that is, whether the Claimants' right to not be deprived of their property except by due process of the law and their right to protection of the law were infringed. That being said, I find it less than fair that the Defendant, who failed to respond to the Claimants various pre-action letters issued in accordance with the Practice Direction in relation to pre-action protocols for Administrative Claims, seeking the grounds on which the detention order was issued, would seek now to claim that the provision of the information would be costly. The Claimants sent 3 pre-action protocol letters to the Defendant seeking to ascertain the grounds for the issuing of the detention order. Counsel for the Claimants contends that had they been provided with same, they would be able to ascertain whether or not they ought to have proceeded with their action, thereby potentially saving costs.

61. Apart from the notes of evidence referred to in paragraph 5 of the affidavit of Her Worship Chief Magistrate Marcia Ayers-Caesar filed on the 23rd October 2015, I am of the view that the Claimants are also entitled to the notes of evidence in relation to the proceedings of the 4th November, 2015. The issues which flow in relation to the November 2015 continued detention order are corollary to those in relation to the August 4th 2015 detention order and the illegality or constitutionality of the first in light of the facts alleged, would similarly affect the latter order. As such, it cannot be considered in isolation.

CONCLUSION

62. Having regard to all of the foregoing, I am of the view that specific disclosure of the notes of evidence sought ought to be granted as the said documents directly relate to matters in issue in the proceedings.

63. Consequently, the order of the Court is as follows:

ORDER:

(1) The Defendant shall disclose to the Claimants the notes of evidence referred to in paragraph 5 of the affidavit of Her Worship the Chief Magistrate Marcia Ayers-Caesar filed on the 23rd October, 2015 and the notes of evidence from a hearing held on the 4th November, 2015 at the Port-of-Spain Magistrates' Court in relation to an application for an order of continued detention of the cash seized from the Claimants on or before the 23rd day of December, 2015.

(2) The Defendant shall pay the Claimants' costs of this Application to be assessed in accordance with CPR 1998 Part 56.14(5), in default of agreement.

(3) In the event there is no agreement, the Claimants to file and serve a Statement of Costs on or before the 6th January, 2016.

(4) The Defendant to file and serve Objections, if any, on or before 29th January, 2016.

Dated this 21st day of December, 2015

_____

Robin N. Mohammed
Judge